THE DIGEST

OF

ONTARIO CASE LAW

BEING

THE REPORTED CASES

DETERMINED IN THE COURTS OF THE NOW

PROVINCE OF ONTARIO

FROM

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

TOGETHER WITH

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

COMPILED BY ORDER OF
THE LAW SOCIETY OF UPPER CANADA

BY

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

VOL. II.

CONTAINING THE TITLES

EVIDENCE TO MUTUAL FIRE INSURANCE.

TORONTO:

THE CARSWELL COMPANY, LIMITED
1903

KA67
05
D4
v.2

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

TABLE OF ABBREVIATIONS

OF THE PRINCIPAL CANADIAN REFERENCES.

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

TABLE OF ABBREVIATIONS.

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

The Digest

OF

ONTARIO CASE LAW.

EVIDENCE.

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I. Admissibility.

1. *Competency of Witnesses and Evidence.*

(a) *In General.*

Action Arising out of Criminal Prosecution.]—Gambling instruments and certain moneys were seized in a gaming-house under a warrant issued under s. 575 of the Criminal Code and confiscated by the judgment of a police magistrate sitting in the city of Montreal. An action was brought against the attorney-general of Canada for the recovery of the moneys so seized and confiscated:—Held, that in an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the Province would apply, and the plaintiff could not invoke the Canada Evidence Act, 1893, so as to be a competent witness in his own behalf. *O'Neil* v. *Attorney-General of Canada*, 26 S. C. R. 122.

Affidavits under Imperial Act.]—The statute 5 Geo. II. c. 7, s. 1, respecting affidavits to be made in England for proof of debts sued for in this Province, is not repealed by the Provincial statutes regulating the introduction of the law of England, or of evidence. Quære, if such affidavit made before a suit is commenced, can be read at a trial subsequently had; or if such affidavit must be intituled in the cause. *Gordon* v. *Fuller*, 5 O. S. 174.

Arbitrator.]—An arbitrator may be examined as a witness upon a motion to set aside an award or in an action upon an award, but such examination must be limited to matters of fact arising in connection with the reference and award, and cannot be pressed to the length of asking the grounds and reasons for making the award. *In re Christie and Toronto Junction*, 22 A. R. 21.

Counsel.]—An attorney cannot, at the trial of a cause, act both as an advocate and a witness. *Benedict* v. *Boulton*, 4 U. C. R. 96.

Counsel.]—When a counsel upon stating to the jury the facts he himself could prove, was reminded by the Judge that he could not act both as an advocate and a witness, and then immediately sat down, ceased to act as counsel, and gave evidence in the cause, the court refused to set aside the verdict. *Cameron* v. *Forsyth*, 4 U. C. R. 189.

See Davis v. *Canada Farmers Mutual Insurance Co.*, 39 U. C. R. 452.

Death of Witness before Cross-examination.]—Held, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him. *Randall* v. *Atkinson*, 30 O. R. 242.

Evidence Subject to Objection.]—Where at the hearing the competency of a witness was objected to, and the court received the evidence subject to the objection, but afterwards held the witness incompetent, a reference was directed as to the material points to which his evidence applied, and further directions were reserved. *Lindsay* v. *Bank of Montreal*, 13 Gr. 63.

Extracts from Letter.]—Extracts from a letter embodied in an affidavit cannot be noticed; either the whole letter or a copy should be before the court, or at least it should be sworn that the letter contains nothing more relating to the action. *Vaughan* v. *Ross*, 8 U. C. R. 506.

Indian.]—On a trial for murder an Indian witness was offered, and on his examination by the Judge it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way:—Held, that his evidence was admissible. *Regina* v. *Pah-Mah-Gay*, 20 U. C. R. 195.

Informal Evidence.]—The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which in the opinion of the board merits such a course may be expelled,"

are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with because they have admitted as part of the evidence in proof of the charge the informally sworn statement of one of the persons concerned in the transaction. Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation; a general statement is sufficient. *Guinane* v. *Sunnyside Boating Co.*, 21 A. R. 49.

See, also, *Gravel* v. *L'Union St. Thomas*, 24 O. R. 1.

Solicitor's Letter before Action.]—*See McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

Unstamped Note.]—As to a note insufficiently stamped being admissible as evidence of a debt. *See Canahill* v. *Clarke*, 3 O. R. 269.

Witness under Death Sentence.]—A person under sentence of death is not a competent witness. Regina v. Webb, 11 Cox 133, followed. *Grame* v. *Globe Printing Co.*, 10 C. L. T. Occ. N. 367.

(b) *Husband and Wife.*

See Lindsay v. *Bank of Montreal*, 13 Gr. 63; *Peterborough* v. *Conger*, 1 Ch. Ch. 35; *VanNorman* v. *Hamilton*, 25 U. C. R. 149; *Storey* v. *Veach*, *Anderson* v. *Walker*, *Thackeray* v. *Askin*, 22 C. P. 164; *Toms* v. *Township of Whitby*, 32 U. C. R. 249; *Cudman* v. *Strong*, 10 U. C. R. 591; *McCaudy* v. *Tuer*, 24 C. P. 101.

(c) *Parties Interested.*

Before 12 Viet. c. 70.

See Moffatt v. *Loucks*, Tay. 305; *Bank of Upper Canada* v. *Widmer*, 2 O. S. 222; *Boyce* v. *Park*, 5 O. S. 508; *Doe d. Springsted* v. *Hopkins*, 5 O. S. 579; *Wilson* v. *Stevens*, 5 O. S. 321; *Hall* v. *Shannon*, E. T. 2 Vict. R. & H. Dig. p. 452; *Buffalo Bank* v. *Truscott*, M. T. 2 Vict. R. & H. Dig. p. 452; *Roy* v. *Hamilton*, 6 O. S. 285; *Bank of British North America* v. *Holman*, 1 U. C. R. 309; *Bank of Michigan* v. *Gray*, 1 U. C. R. 422; *Robinson* v. *Rapelje*, 4 U. C. R. 280; *Doe d. Park* v. *Henderson*, 7 U. C. R. 182.

If a witness be objected to as interested, and on voir dire denies any interest, other witnesses may be called to prove that he is incompetent. *Thrasher* v. *Tulloch*, 5 O. S. 326.

If a witness be called for the plaintiff who is incompetent from interest, and he afterwards called for the defendant, the incompetency is cured. *Hall* v. *Shannon*, E. T. 2 Vict.

Under 12 Viet. c. 70, and 16 Viet. c. 19, (C. S. U. C. c. 32).

See Doe d. McDonell v. *Rattray*, 7 U. C. R. 321; *White* v. *Wycott*, 1 C. P. 320; *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29; *Hitchcock* v. *Crookite*, 15 U. C. R. 157; *Bonner* v. *Moderwell*, 9 C. P. 504; *Municipality of King* v. *Hughes*, 17 U. C. R. 253; *McMullin* v. *Murdoff*, 19 U. C. R. 506; *Regina ex rel. McGregor* v. *Ker*, 7 L. J. 67; *Johnstone* v. *Smith*, 10 C. P. 220; *Hutcheson* v. *Allen*, 9 L. J. 24; *Phelps* v. *Wilson*, 13 C. P. 38; *Northern R. W. Co. of Canada* v. *Patton*, 15 C. P. 332; *German* v. *Elliott*, 2 C. L. J. 207; *Lalor* v. *Burrows*, 18 C. P. 321; *Corporation of Burleigh* v. *Hales*, 27 U. C. R. 72; *Coates* v. *Kelly*, 27 U. C. R. 284; *Gould* v. *Smith*, 19 C. P. 427; *McDonald* v. *Jarvis*, 5 Gr. 568; *Proctor* v. *Grant*, 9 Gr. 26; *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Gr. 59; *City Bank* v. *McConkey*, 12 Gr. 385; *Vannatto* v. *Mitchell*, 13 Gr. 605; *Scott* v. *Hunter*, 14 Gr. 376; *Hancock* v. *Mellroy*, 18 Gr. 209; *Sanderson* v. *Burdett*, 18 Gr. 417.

Other Cases.

As to competency of witnesses in ejectment, *see Doe d. Mason* v. *Ballard*, 1 U. C. R. 22; *Doe d. Vernon* v. *Wetherall*, 5 U. C. R. 312; *Doe d. McDonell* v. *Rattray*, 7 U. C. R. 321; *Dundas* v. *Johnston*, 24 U. C. R. 547; *Heaney* v. *Parker*, 27 U. C. R. 509; *Bannerman* v. *Dewson*, 17 C. P. 257.

In an action on a bond the attorney for the plaintiff, who was the subscribing witness to the bond, was called to prove its execution. His evidence was objected to by the defendant on the ground that he had become answerable for costs. To obviate this difficulty the defendant paid into court a sufficient sum to cover the costs, and was then allowed to be examined:—Held, that the evidence of the attorney after paying the money into court was properly received. *Cuvillier* v. *Thibodo*, 5 U. C. R. 328.

Under the Imperial Act, 8 & 9 Viet. c. 93, s. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty. He, therefore, cannot be rejected as an incompetent witness upon a case of information for a penalty, for harbouring smuggled goods. *Attorney-General* v. *Warner*, 5 U. C. R. 485.

It is too late to object to the competency of a witness as being interested after his examination, upon grounds known before he entered the box. *Powell* v. *Jarvis*, 5 U. C. R. 489.

(d) *Parties to Suits or Proceedings.*

Before 12 Viet. c. 70.

See Cummings v. *Glassow*, 1 U. C. R. 364; *Simpson* v. *Smyth*, 1 E. & A. 9.

Under 14 & 15 Viet. c. 66.

See Brennan v. *Prentiss*, 9 U. C. R. 372; *Fuller* v. *Richmond*, 2 Gr. 509.

Under 16 Viet. c. 19 (C. S. U. C. c. 32).

See Regina ex rel. Acheson v. *Donoghue* 15 U. C. R. 454; *Regina ex rel. McGregor* v. *Ker*,

7 L. J. 67; *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278; *Municipality of East Nissouri* v. *Horseman*, 18 U. C. R. 31; *Kerr* v. *Hereford*, 17 U. C. R. 158; *Mutual Fire Ins. Co. of Prescott* v. *Palmer*, 20 U. C. R. 441.

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2. *Declarations, Certificates, Official Documents, and Entries in Books.*

Abstract of Title.]—Held, that an abstract of the registries upon a lot, shewing a patent, was clearly not sufficient evidence of the patent without an exemplification. Quære, is an abstract receivable in evidence at all, if objected to? *Reed* v. *Ranks*, 10 C. P. 202.

Attorney's Memo. of Instructions.]—In an action against attorneys for negligence, the defendant W., having made an entry or memorandum of his instructions in presence of the plaintiff, but not, so far as appeared, with the plaintiff's knowledge, offered it as evidence of the transaction:—Held, not admissible. *Phelps* v. *Wilson*, 13 C. P. 38.

Books of Purchasers of Goods.]—McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared on the trial that the goods were ordered by McK. and shipped to the place of business of McK. & M., but were charged in plaintiff's books to C. McK. & Co., which he said was done at McK.'s request. McK., called as a witness for plaintiff, corroborated this, and on cross-examination he produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm:—Held, that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK., and that the rule for a new trial should be discharged. *Miller* v. *White*, 16 S. C. R. 445.

Boundary—*Surveyor's Affidavits.*]—The question in dispute at the trial being the boundary line between lots 11 and 12 in the 5th concession of Saltfleet, affidavits were offered in evidence as to the line between lots 4 and 5, and 14 and 15, in the same concession, taken by the surveyor employed by defendants to run this line in 1860, and filed with the registrar under C. S. U. C. c. 93, s. 51:—Held, that such affidavits were properly rejected. *Manary* v. *Dash*, 23 U. C. R. 580.

Quære, as to the effect of the words in that section, "subject to be produced thereafter in evidence in any court of law or equity within Upper Canada." One of these affidavits tended to shew that none of the side lines in this concession had been run in the original survey, owing to a large swamp:—Held, not an affidavit within the statute, for evidence "concerning any boundary" does not mean evidence that no such boundary ever existed; and on this ground, also, such affidavit was rightly rejected. *Ib.*

Clergyman's Return.]—Held, that upon a question of the age of a voter, the written return of the clergyman who married his father and mother, made under 4 Geo. IV. c. 36, was better evidence than the memory of individuals unaccompanied by any memoranda. *Regina ex rel. Forward* v. *Bartels*, 7 C. P. 533.

Commissioner's Certificate.]—The certificate of a commissioner for administering the oath of allegiance, is evidence (after his death and that of the party taking the oath) that such oath was administered. *Doe d. McFarlane* v. *Lindsay*, Dra. 123.

Continuance Roll.]—A continuance roll found in the proper office and entered and filed there by the proper officer, is a record of the court, although not compared with the papers filed in the cause. Parol testimony cannot be received to contradict the roll. *Prentice* v. *Hamilton*, Dra. 398.

Crown Lands Map.]—Defendant put in a sworn and examined copy of the original map from the Crown lands department of recent date, containing defendant's name as entitled to certain timber limits, to prove that a creek was within such limits:—Held, that this, coupled with the fact that he had been for many years in possession of the timber limits, cutting timber thereon and improving the same, was some evidence to go to the jury that he was not a mere intruder on the rights of the Crown. *Whelan* v. *McLachlan*, 16 C. P. 102.

Culler's Measurements.]—Held, that a copied specification of the entry of a culler's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. C. c. 46, s. 19, is receivable as evidence of such measurements. *Dobell* v. *Ontario Bank*, 9 A. R. 484.

Declarations before Scotch Justice.]—In support of a claim for work and labour, plaintiffs produced declarations of witnesses, taken under the Imperial Act 5 & 6 Wm. IV. c. 62, purporting to be taken before a justice of the peace in Glasgow, but not properly authenticated or transmitted:—Held, that such evidence could not be received. The court remarked upon the great want of caution apparent in the provisions of the statute. *Smith* v. *McGowan*, 12 U. C. R. 270.

See, also, *S. C.*, 11 U. C. R. 399, and *Gordon* v. *Fuller*, 5 O. S. 174.

Declaration by Person beyond the Seas.]—A declaration under 5 Geo. II. c. 7, by a person residing in parts beyond the sea, who would not be allowed to state on oath at the trial the facts therein contained, is inadmissible. *Gabriel* v. *Derbishire*, 1 C. P. 422.

Declarations of Testator as to his Age.]—The declarations of a deceased testator respecting his age at the execution of his will are not admissible. *Doe d. Stephen* v. *Ford*, 3 U. C. R. 352.

Division Court Books.]—In an action against the clerk of the division court for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provisions of an Act for that purpose:—Held, evidence against the sureties. *Middlefield* v. *Gould*, 10 C. P. 9.

Entry against Interest.]—In an action by the executors of A., the father, against the executrix of B., the son, on an agreement said to be lost, to recover £300 alleged to have been lent by A. to B., the defence was that the money was a gift, on condition that the son should pay the father an annuity at the rate of four per cent. during his life. It was clearly proved that the £300 was advanced by A. to B., and that B. gave a note or writing of some kind for it; and it appeared that A.,

during his lifetime, had, in October, 1861, sued B.'s executrix for the money. B. died on the 15th June, 1861. The plaintiff gave in evidence the following receipt, signed by A., dated April 28th, 1861, which had been found among A.'s papers, attached to a memorandum book kept by him: "Received from my son Stephen Ganton" (above referred to as B.) "the sum of forty-eight dollars for interest of £300 at four per cent., due the 1st May next, according to agreement, which I cannot find, so I have put the receipt on this paper." There was no evidence to shew at what time this was made. Defendant put in the following receipt, also signed by A., dated 3rd May, 1858: "Received from my son Stephen Ganton the sum of twelve pounds, being one year's annuity due to me according to agreement bearing date 1st May, 1858:"—Held, that the first mentioned receipt was inadmissible for the plaintiff as an entry against interest, for though it admitted the receipt of £48, yet it supported a claim for £300 by stating the existence and loss of the agreement, and describing the payment as interest instead of an annuity, as in the previous receipt; and the whole entry therefore was much more for the declarant's interest than against it. *Ganton* v. *Size*, 22 U. C. R. 473, 2 E. & A. 368.

Executor's Books.] — A claim by the next of kin of a deceased legatee cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship of debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

Informal Certificate of Clerk.] — A certificate of a deputy clerk of the Crown of the date of the filing a paper, in the shape of a postal card, is no evidence. *Johnson* v. *Loney*, 6 P. R. 70.

Insurance.] — Declaration of person for whose benefit the action was brought admitted in evidence. *Ross* v. *Commercial Union Assurance Co.*, 26 U. C. R. 559.

Letters Probate.]—Where a probate is used as evidence, under C. S. U. C. c. 16, it is evidence of the testator's death, as well as of the will. *Davis* v. *Van Norman*, 30 U. C. R. 437.

Log of Ship.]—Where the official log of a ship arrested under The Seal Fishery (North Pacific) Act, 1893, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was offered in evidence to prove such facts:—Held, not admissible. *The Queen* v. *The Ship Ainoko*, 4 Ex. C. R. 195.

Mortgage — *Mortgagor's Books — Mortgagee's Books.*]—Two partners in business (T. & R. O'Neill) executed two mortgages in favour of W. W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead. On the reference, H. claimed so much of the amount due on the original mortgages as would satisfy his derivative mortgage, and P. & P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H., and the other against P. & P. In support of his surcharges the plaintiff offered in evidence: 1. the books of the firm of T. & R. O'Neill; 2. the books of W.:—Held, that the books of T. & R. O'Neill could not be used against either W.'s assignees or H. That the entries in the books of W. were evidence as admissions against his assignees, and as to transactions before the 21st March, 1877, against H., to shew the state of the account at the date of the assignment. *Court* v. *Holland, Ex parte Holland and Walsh*, 8 P. R. 219.

Notarial Copy of Assignment.]—Held, that a notarial copy of an assignment in insolvency may be received as evidence of such assignment under C. S. C. c. 80, s. 2. *Prescott Election (Ont.), McKenzie* v. *Hamilton*, 11 E. C. 1.

Partnership — *Registered Declarations.*] —See *Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 265.

Payment of Premium.]—In an action on a policy of life insurance which was not countersigned according to the terms of a memorandum on its margin the defence was that the premium was never paid and the policy was never delivered. On the trial the Judge admitted in evidence an entry in the books of his father made by the deceased holder of the policy, shewing the payment to an agent of the company of an amount equal to the premium which the evidence shewed was paid by money given to deceased by his father. He also admitted the evidence of the agent who had since died, taken at a former trial of the cause, to the effect that the premium was not paid and that he would not countersign the policy until it was paid, that the policy was only given to the deceased to enable him to examine it and not as a duly executed policy:—Held, that the evidence of the entry in the books of the deceased was improperly admitted. *Confederation Life Association of Canada* v. *O'Donnell*, 13 S. C. R. 218.

Plan.]—Certain maps of the city of Toronto, made by city surveyors in 1857 and 1858, shewing thereon a square marked "Bellevue square," were offered in evidence to shew the boundaries of the square. It was shewn that the defendant knew of these maps, but they were not prepared under his instructions:—Held, that the maps could not be received in evidence to shew the boundaries of the square. *VanKoughnet* v. *Denison*, 11 A. R. 699.

Plan.]—The question being as to the limits of defendants' road, which ran from Sandwich to Windsor:—Held, that as no limits had been assigned to the town of Windsor when the defendants were incorporated, the court would look to what the proprietor of the land on which a part of what was commonly called Windsor stood, had designated Windsor on a plan which he had filed in the registry office, and referred to

in giving deeds: and to the popular understanding as to what constituted Windsor; and that, taking these facts as guides, it was quite clear that the road had been extended into the town, and a toll-gate placed within the limits. *Donnell v. Sandwich and Windsor Plank and Gravel Road Co.*, 12 U. C. R. 59.

Possession—*Receipts of Rent.*]—In ejectment for a cottage, defendant claimed by length of possession, which she proved. The widow of one T., deceased, who had owned the property, stated that defendant's husband came to live in the cottage, which was on T.'s farm, as T.'s servant, paying no rent; that defendant, on her husband's death in 1866, remained in the house, and in 1870 agreed with T. to pay him $1 a month rent, which she paid every three months until the fall of 1873. T. died in January, 1873:—Held, that the following and similar entries in T.'s cash book, in his handwriting, relating to defendant:—"1871, February, Mrs. Dewan (defendant) 83; May, Mrs. Dewan, 83; August 1st, Mrs. Dewan, 83," &c., were admissible, as entries against interest; and that taking them in connection with Mrs. T.'s evidence, which they confirmed, the plaintiff was entitled to succeed. *Turner v. Dewan*, 41 U. C. R. 361.

Registrar's Book.]—The production of the registrar's book in which a memorial is recorded, is good evidence of the title being a registered title. And semble, that the registrar producing an examined copy from his book, without either his book or the memorial, would be good evidence. *Doe d. Prince v. Girty*, 9 U. C. R. 41.

Registrar's Certificate.]—Semble, that a certificate of a registrar of the discharge of a mortgage indorsed on the mortgage, is sufficient evidence of a reconveyance, without proof of the execution of the discharge itself. *Doe d. Cookshawk v. Humberstone*, 6 O. S. 103.

Registrar's Certificate.]—A certificate purporting to shew the registered conveyances of land, from the county registrar's office, under the hand of the deputy registrar:—Held, not admissible evidence of the title, under 13 & 14 Vict. c. 19, s. 4, so as to shew an incumbrance on the land. *Gamble v. McKay*, 7 C. P. 319.

Repairs Book of Railway Company.]—After the occurrence of the fire which caused the destruction of the plaintiff's lumber, B., an engine-driver of the defendants, who was in charge of the locomotive on the day the fire occurred, made an entry in what was termed the repairs book, kept in the defendants' shops: "Bottom rim of bonnet in stack wants making tight * * Screen wanted in front of ash pan." At the trial B. was called as a witness on the part of the plaintiff, and proved his having made such an entry in the usual course of his duties. Per Spragge, C.J.O., and Hagarty, C.J., such entry was properly produced and read to the jury. Per Burton and Patterson, JJ.A., such entry or report was merely a narrative of a past occurrence, or something in the opinion of B. requiring attention, and in any view could only be receivable as evidence against the company, if at all, upon the proof of B.'s death. *Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

Held, that certain books of the company containing statements of repairs required on the engines connected with the train, one of which was in a defective condition and likely to throw dangerous sparks, were properly admitted in evidence without calling the persons by whom the entries were made. *Canada Atlantic R. W. Co. v. Moxley*, 5 S. C. R. 145; 14 A. R. 369.

School Sections—*Map.*]—Upon a question as to the boundaries of a school section:—Held, that the map prepared by the township clerk, under s. 49 of the School Act, C. S. U. C. c. 64, shewing the division of the township into sections, was admissible as evidence. *Re Shorey and Thrasher*, 30 U. C. R. 504.

As evidence of the formation of school sections in a township by the municipal council thereof a rough sketch or map designated "school section map township of B.," but without signature, seal, or date, having the appearance of being very old and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, &c.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—Held, that the map must be assumed to be drawn in pursuance of s. 11 of the "Public Schools Act," and therefore afforded evidence of the original division of the township into school sections by the township council. *Burford School Trustees v. Township of Burford*, 18 O. R. 546.

Settlement of Certificate.]—No certificate by a judicial officer of proceedings before him can properly be settled where it is intended to be used as evidence, unless in the presence of, or at least on notice to, all the parties concerned. *Re Ryan v. Simonton*, 13 P. R. 269.

Sheriff's Entry.] — A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced. *Wardrope v. Canadian Pacific R. W. Co.*, 7 O. R. 321.

Shorthand Notes.] — The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him:—Held, that the notes of evidence could not be objected to. *Megantic Election, Cote v. Goulet*, 9 S. C. R. 279.

Sureties—*Admissions by Principal.*]—An admission by a debtor on the limits that he had gone beyond them, is not admissible to charge his sureties. *Freeland v. Jones*, 6 O. S. 44.

In an action against principal and sureties as co-obligors on a collector's bond:—Held, that the admissions of the principal were clearly evidence against himself; and it might

be strongly argued that whatever is evidence against the principal will also be receivable against his co-defendant in an action on their joint obligation. *Municipal Council of Easthope* v. *Helmer*, 7 C. P. 506.

Sureties—*Entries by Principal.*] — Held, that the books of the agent or clerk of a public company during his lifetime are not good evidence against his surety, when sued on his bond for a deficiency in the agent's accounts. *Ferrie* v. *Jones*, 8 U. C. R. 192.

A loan and savings society appointed G. their treasurer; and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. G. made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society:—Held, that in such a case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G. *Murray* v. *Gibson*, 28 Gr. 12.

The cases deciding that entries in the books of an officer are evidence in his lifetime against sureties questioned. See *Victoria Mutual Fire Ins. Co.* v. *Davidson*, 3 O. R. 378.

In an action against sureties for a town collector for his default in paying over the sum collected by him:—Held, that entries made by the collector on his roll, in the discharge of the duties of his office, of taxes paid to him were evidence against the sureties. *Town of Welland* v. *Brown*, 4 O. R. 217.

Surveyor's Notes.] — Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters, private and professional, were tendered in evidence to prove the boundary between lots 3 and 4. The entry of the survey was as follows: "8th June, 1827.—Got Mr. Ashbridge to shew the stake between Nos. 3 and 4, &c." And in another part of the book the following entry appeared: "15th June, 1827.—D. Bolton, Esq. £2 16s. 3d., At D. Bolton's house for fence, £0 4s. 0d., £3 0s. 3d. pd." There was no evidence that at or about the time of the survey Bolton had any interest in either lot 3 or 4; but it was shewn that he obtained a conveyance of lot 2 two months afterwards, and of lot 3 in 1830. Surveyors were not at that time under any obligation to make notes of surveys; and it was not proved that the entry was made contemporaneously with the transaction:—Held, reversing 39 U. C. R. 597, that the entry was not admissible as one made in the course of business, or in the performance of a quasi public duty. Held, also, that the notes of the survey were not sufficiently connected with the entry of payment to be read with it as an entry against interest. *O'Connor* v. *Dunn*, 2 A. R. 247.

Surveyor's Notes.]—To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor:—Held, that the objection was good, and the evidence inadmissible. *McGregor* v. *Keiller*, 9 O. R. 677.

Surveyor-General's Book.] — A book was produced, dated 24th June, 1820, signed by the surveyor-general, containing a list of grantees and the lots granted, with the number of acres in each lot, in which this lot appeared, with the name of E. H. opposite to it, and the letter D. opposite her name; and it was shewn that the lot was granted to her in 1817:—Held, sufficient evidence that the lot had been returned as described for patent, though there was no heading to the book describing its subject or object. *Jones* v. *Cowden*, 34 U. C. R. 345, 36 U. C. R. 495.

Surveyor-General's Plan.] — Land marked out in the original plan of a township as an allowance for a road, does not lose that character because it has never been used as a road for forty years; and a copy of the plan certified by the surveyor-general is admissible to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled. *Badgley* v. *Bender*, 3 O. S. 221.

Tax Collector's Note of Demand.]—In replevin for goods sold for taxes, the plaintiff having succeeded for want of evidence of any demand by the collector, defendants moved for a new trial on affidavits shewing the discovery, since the trial, in the collector's blank receipt book, opposite to the receipt intended to have been given for these taxes, of a minute made by the collector, "Wrote January 21st, 1864." The death of the collector was shewn, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry:—Held, that it would be insufficient to establish a demand; and a new trial was therefore refused. *Barton* v. *Town of Dundas*, 24 U. C. R. 273.

Tax Deed—*Invalid Certificate.*]—In ejectment the plaintiff claimed under a tax deed, which he did not produce, giving evidence that it had been burnt after registration by him, but giving no evidence of its contents, except the production of the certificate registered under 16 Vict. c. 182, s. 65, which did not state the date or cause of the sale:—Held, that there was no proof of the deed, for the certificate for the reasons stated, shewed it to be invalid. *Kempt* v. *Parkyn*, 28 C. P. 123.

Writ of Ca. Re.]—The commencement of an action may be proved by the writ of ca. re. The minutes of the clerk of the Crown or his deputy on the writ, marking the time of issuing, is primâ facie proof of the fact. *Upper* v. *McFarland*, 5 U. C. R. 101.

See sub-heads 2, 7 and 8; see also sub-titles XIV. 4, 5; XV. 5, 6.

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3. *Evidence in Other Actions and Proceedings.*

Action for Wages—*Judgments Recovered by other Employees.*]—In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent; the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that it was allowable to prove by persons working with the plaintiff,

that they had been paid by the defendant on application to him, and that in suits brought by them against him he had paid money into court; and that the judgments in such suits were also admissible, though unnecessary. *Stewart* v. *Scott*, 27 U. C. R. 27.

Agency—*Affidavit in Previous Actions.*]—In an action for goods sold, the question was the authority of one McA. to bind defendants, as their agent:—Held, that an affidavit made by McA. describing the nature of his agency, and filed by defendants on a motion for a new trial in another suit, brought by this plaintiff against them, was clearly admissible against defendants. *Thayer* v. *Street*, 23 U. C. R. 189.

Dismissal of Former Action on Technical Ground]—A former suit had been instituted by the plaintiff which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed:—Held, that under such circumstances the question was not res judicata, and that the evidence taken in the former suit and the examination of defendant by the plaintiff therein were admissible in the present one, the issue being practically the same. *Adamson* v. *Adamson*, 28 Gr. 221.

Evidence before Committee of House of Commons—*Hearing before Magistrate.*]—At the hearing of a criminal charge before a county Judge sitting as police magistrate evidence given before a special committee of the House of Commons, and taken by stenographers, was tendered before the magistrate and refused by him:—Held, that the court had no power to grant a mandamus to the county Judge directing him to receive such evidence. Rose, J., while concurring in the decision that a mandamus should not issue, was of opinion that, Parliament having ordered the prosecution, the evidence should have been received by the magistrate. Subsequent resolution of the House of Commons authorizing the evidence to be given. *Regina* v. *Connolly*, 22 O. R. 220.

Examination in Another Action.]—The only evidence of defendant's (a married woman) ownership of real estate was her admission signed by her when under examination in another suit:—Held, clearly admissible. *Brown* v. *Winning*, 43 U. C. R. 327.

Indemnity.]—Action by a stakeholder, alleging that he had paid over the wager to defendant, one of the parties, on his agreeing to indemnify him; and that R., the other party to the wager, sued and recovered judgment against the plaintiff, but that defendant did not indemnify. Defendant pleaded that the plaintiff falsely represented to him that R. had not demanded the wager from him, and that on the faith of such statement he promised to indemnify. The plaintiff produced an exemplification of the judgment recovered against him by R., the pleadings and issues in which shewed that the jury must have found a demand by R. This, it was contended, was evidence of such demand in this action; but, Held, that at all events it would not prove defendant's plea, which was not supported by the other evidence. *Maybee* v. *Turley*, 27 U. C. R. 444.

Indictment.]—In an action for money had and received:—Held, that an indictment upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact. *Macdonald* v. *Ketchum*, 7 C. P. 484.

Negligence—*Death of Plaintiff*—*Action by Widow.*]—Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore, when an action is commenced by a person so injured in which his evidence is taken de bene esse and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act. The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. *Town of Walkerton* v. *Erdman*, 23 S. C. R. 352, affirming *S. C.*, 20 A. R. 444; 22 O. R. 693.

Order for Use of Evidence in Future Action—*Bill to Perpetuate Testimony.*]—The court has no power to make an order authorizing the use in a future action of evidence taken in a pending action. *Erdman* v. *Town of Walkerton*, 14 P. R. 467.

Redemption—*Previous Action at Law.*]—Two partners in business (T. & R. O'Neill) executed two mortgages in favour of W. W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neills became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead. On the reference, H. claimed so much of the amount due on the original mortgages, as would satisfy his derivative mortgage, and P. & P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H. and the other against P. & P. In support of his surcharges, the plaintiff offered the following evidence: 1. A certified copy of the evidence taken in an action at law brought by the plaintiff against W., in which he recovered judgment, in the spring of 1879, for a considerable sum as the unpaid purchase money for goods sold by the O'Neills to W. A certified copy of the judgment of the court of common pleas, a rule for a new trial, and an exemplification of the judgment roll. 2. A certified copy of the depositions of W. taken in this suit before the master at Cobourg, prior to the making of the decree:—Held, 1. That the evidence in the common law action could not be read as against either H. or P. & P., but that the evidence of W. himself might possibly be received against his assignees P. & P., as admissions made by him, and that the exemplification of the judgment might be used against his assignees to shew an indebtedness from W. to the plaintiff as assignee of the O'Neills on a particular account. 2. That the depositions of

W. before the master at Cobourg, like his answer to the suit, could be read against himself, and under the later authorities against H. also. *Court* v. *Holland, Ex parte Holland and Walsh*, 8 P. R. 219.

Sale in Mortgage Action—*Subsequent Application to Distribute Surplus.*]—In a mortgage action there was a reference to a master for sale, &c. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in court, which R. G. applied to the master to have paid out to her. Upon such application R. G. was examined before the master, who refused the application. An order was afterwards made by a Judge referring to the master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the master ruled that the depositions of R. G. taken upon the former application could be read:—Held, that the depositions could be read subject to the right of A., an opposing claimant of the fund, to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by A. Held, also, that A. was estopped from appealing from the master's ruling by reason of his not having objected to the evidence being referred to at a certain stage of the proceedings. *Maclennan* v. *Gray*, 12 P. R. 431.

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4. *Expert Evidence.*

Adopting Experts' Opinion.]—An action for damages caused by collision between two vessels was tried without a jury, and after the evidence had been taken the trial Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony, as to the responsibility for the collision:—Held, that this was a delegation of the judicial functions; and a new trial was ordered. The scope of Con. Rule 207, as to calling in the assistance of experts, considered. *Wright* v. *Collier*, 19 A. R. 298.

Boundary.]—A person not being a licensed surveyor is a competent witness on a question of boundary. *Potter* v. *Campbell*, 16 U. C. R. 109.

Costs of Surveys.]—As to costs incurred for expenses of surveys and other special work of that nature in order to qualify surveyors to give evidence. See *McGannon* v. *Clarke*, 9 P. R. 555.

Draughtsman.]—The evidence of professional draughtsmen was in this case held to have been properly admitted to shew what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plans were intended to indicate. *Attrill* v. *Platt*, 10 S. C. R. 425.

Engineer.]—The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The court appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained. *Hawkins* v. *Mahaffy*, 29 Gr. 326.

Expert Appointed by the Court—*Examination — Quebec Law.*]—See *Hardy* v. *Filiatrault*, 17 S. C. R. 292.

Foreign Law.]—A president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country as to what is money there. *Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

Foreign Law.]—Where the opinions of experts on foreign law are conflicting, the court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion. *Rice* v. *Gunn*, 4 O. R. 579.

Medical Testimony—*Books.*]—It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion. *Brown* v. *Sheppard*, 13 U. C. R. 178.

Mental Capacity.]—On the trial of an issue directed by the surrogate Judge before a jury, evidence was given as to the mental capacity of the testator by persons acquainted with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The Judge at the trial being of opinion that the witnesses examined were not of a class qualified to give scientific evidence as experts, withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside. On appeal a new trial was directed, and the costs of appeal ordered to be paid by the plaintiffs, it being held that the case should have gone to the jury, and that the opinions of such witnesses were clearly admissible, being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury. *Kegan* v. *Waters*, 10 A. R. 85.

Opinion Evidence.]—In an action where the defendants counterclaimed damages caused by the defective construction of a boiler for their steamer, which had collapsed:—Held, that conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse, who were not present at the time of the accident; whose evidence was not founded upon knowledge but was mere matter of opinion, who gave no reasons and stated no facts to shew upon what their opinion was based and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern which the evidence shewed were in general use. *William Hamilton Manufacturing Co.* v. *Victoria Lumbering and Manufacturing Co.*, 26 S. C. R. 96.

Partition.]—In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared:—Held, that the course adopted by the master was a reasonable one; that he had the power under G. O. Chy. 240 to take such course; and that the fees paid to the skilled persons by the defendant should be taxed to him. *McKay* v. *Keefer*, 12 P. R. 256.

Surveyor.] — Remarks upon the impropriety of receiving the opinions of surveyors as experts as to the proper mode of making a survey under a statute. *Township of Stafford* v. *Bell*, 6 A. R. 275.

Weight to be Given.]—The weight attached by the court to the evidence given by professional witnesses is diminished by efforts to sustain the views of the party who may call them; it should be given free from bias. *Stock* v. *Ward*, 7 C. P. 127.

Weight to be Given.]—Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra judicial statements and municipal reports. *Crawford* v. *City of Montreal*, 30 S. C. R. 406.

Written Evidence.] — As a rule the courts discountenance professional or quasi-expert evidence from being brought before them in writing. *Attorney-General* v. *Goodeham*, 10 P. R. 259.

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5. Hearsay Evidence.

Death.] — Ejectment. At the trial the plaintiff put in an exemplification of a patent dated 10th March, 1797, granting certain lots in fee to A. It was then proved that A. married in this Province in 1794, and had two daughters; that one of the lessors was one of those daughters; that the other lessor was the son of the other daughter; that he, A., left for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and was at the time and when heard from at New York, in a very precarious state of health, on which account he had gone away; and it was heard in the following spring that he died in the West Indies; and it was so understood and believed in his family ever since. The defence was, that he died before the 10th March, 1797, and that therefore the patent to him dated on that day was void, and that a second patent issued in consequence thereof; and a patent issued in 1801, granting these same lands to B. in fee, was put in. Defendant next offered to prove a petition from the widow of A. to the court of probate, praying for letters of administration, and stating the day of his death as evidence of his death on that day. This was rejected. The letters of administration were put in. It was next proposed to put in a petition, signed by some members of the family of A., to the executive government, praying that a new patent might issue, in consequence of A.'s death before 10 March, 1797, as a declaration of that fact by relatives of the family. It did not appear who the parties were that signed the petition. This was rejected also. Defendant then offered the memorial of B., praying that a new patent might issue to him, alleging that the patent of the 10th March, 1797, was issued subsequently to the death of A., and asking the grant for the benefit of A.'s creditors, of whom B. was one, with consent of A.'s administratrix. This was also rejected. Defendant then called a surviving brother of A., who proved that the latter left this Province in the fall of 1796 in very bad health, being in fact considered in a desperate condition; that he wrote from New York, stating that he was better, and intended proceeding to the West Indies; and that in the following spring the witness was informed of his death. The learned Judge refused evidence of the day on which (as the witness heard) his death took place, or of the family reputation of the day of his death, or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been the servant of A., or to prove the contents of certain papers (since lost) which the witness received from the servant, alleged to have been an inventory of A.'s effects at the time of his death, and an account of the sale of his effects after his death. And upon the evidence admitted the jury found that A. died after the 10th March, 1797:—Held, that the evidence rejected at the trial was inadmissible; but as the nature and character of some parts of the evidence rejected were not known with sufficient certainty, a new trial was granted on payment of costs. *Doe d. Arnold* v. *Auldjo*, 5 U. C. R. 171.

Marriage—*Declarations of Deceased Husband—Legitimacy of Children.*]—In proof of the celebration of a marriage evidence was given that the husband, who had gone from this Province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying $20 to her father; and that after the marriage they cohabited and lived together as man and wife, and were recognized by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents and cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter and another child who died. About 1879, the husband returned to this Province bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, and that the daughter was his legitimate child; and that he had brought her up as such:—Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir." *Robb* v. *Robb*, 20 O. R. 591.

Pedigree.]—In ejectment, between a person claiming as heir and a stranger, slight evidence of pedigree is allowed to go to the jury. *Doe d. Magher* v. *Chisholm*, Dra. 227.

In ejectment by co-heiresses it was proved that the party in possession had acknowledged the ancestor's title, and it was also shewn that the lessors of the plaintiff were his children; but the jury found for the defendant. On motion for a new trial, the court would not entertain the objection that it had not been proved that the lessors were the legitimate children of the alleged ancestor, as that point had not been raised at the trial. *Doe d. Morrough* v. *Mayhee*, 2 U. C. R. 389.

When a plaintiff in ejectment capable of inheriting and primâ facie entitled to inherit, makes out a reasonable case, the court will throw upon the defendant, especially if he be a stranger to the title, the onus of shewing a nearer heir. Where, for instance, the plaintiff claiming by descent as the brother of an

elder brother dying without issue, proved by persons connected with the family, "that they had heard of the elder brother's marriage many years ago, but knew nothing of his having any issue," the court held this evidence sufficient, in the absence of any proof to the contrary, to entitle the lessor of the plaintiff to recover. *Doe d. Place* v. *Skae*, 4 U. C. R. 369.

Before a stranger can give evidence of declarations as to the pedigree, made by a relation of the family, there must be shewn, 1. The death of that relation; and, 2. The fact of his relationship to the family, which fact cannot be proved by his own assertion. *Doe d. Dunlop* v. *Servos*, 5 U. C. R. 284.

In ejectment, the plaintiff claimed under one D. L. C., whom he alleged to be eldest son and heir-at-law of L. C., assignee of the grantee of the Crown. The patent from the Crown was to F. Weis, and the deed to L. C. was signed by F. Weast as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of the defendant, who claimed under the will of L. C., which he produced, and had been with the patent in the possession of the C. family since 1816. It was not shewn there was any other F. Weis except the person who conveyed as F. Weast. The only evidence of the heirship of D. L. C. was his own. He shewed a general knowledge of the affairs and members of the family, was brought up in the neighbourhood of a number of relatives, and had been informed of his heirship by his mother and his father's mother. Several uncles and other relatives were called, but no other witness was examined as to his heirship. The defendant claimed as devisee under the will of the same L. C. under whom the plaintiff claimed:—Held, that the identity of Weis and Weast who made the deed to L. C. was sufficiently proved. Held, also, that D. L. C.'s statements, under the circumstances, sufficiently proved his heirship; and that it was not necessary to prove the marriage of his father and mother unless it was disputed. *Wallbridge* v. *Jones*, 33 U. C. R. 613.

In ejectment, the plaintiff claimed title through the heirs-at-law of P. A witness testified that in 1871 he called at the house of P., who was a retired merchant, in London, England, but did not see him, as he was unwell; that afterwards, in 1872, he was told by members of the family there, representing themselves to be P.'s only brothers and sisters, that P. had died on the 20th May, 1872, intestate, and without children; and that he received from one of them the deeds of the lot, which were produced, four in number, including the patent. A deed to the plaintiff's grantor was put in, executed by all these parties in presence of this witness, who stated that he was satisfied they were P.'s heirs-at-law, and that he had searched at Doctor's Commons for P.'s will, but found none. It was objected that there was no sufficient evidence of heirship, but the learned Judge who tried the cause without a jury, found a verdict for the plaintiff: and the defendant shewing no pretence to title, the court refused to interfere on this ground. *Gallivan* v. *O'Donnell*, 36 U. C. R. 250.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree. *Walker* v. *Murray*, 5 O. R. 638.

In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune:—Held, sufficient evidence of illegitimacy to disolace the claim of heirship. *In re Staveley, Attorney-General* v. *Brunsden*, 24 O. R. 324.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad:—Held, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father died before him: and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed; and the action should be dismissed. *May* v. *Logie*, 27 S. C. R. 443.

Position of Public Square.]—The locality and extent of a square being in question:—Semble, that this being a matter of a quasi public nature in which a class of the people in the neighbourhood would be concerned, evidence of reputation was admissible; and under the circumstances set out in the report, it was:—Held, that the square was sufficiently defined by such evidence. *Vankoughnet* v. *Denison*, 1 O. R. 349; 11 A. R. 699.

See sub-title XV.

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6. *Privilege.*

(a) *Letters and Admissions "Without Prejudice."*

In trespass for an assault, the act was proved, but not that defendant committed it. To supply this, letters were put in which had passed between the attorneys on either side with a view of settlement, the first written expressly "without prejudice." The plaintiff's attorney, who produced the letters, also swore that defendant admitted it was he who struck the plaintiff. The jury found for the plaintiff:—Semble, that the letters should not have been received, even for the purpose of proving the identity; but as the other testimony was sufficient to warrant the verdict, the court refused to interfere. *Burns* v. *Kerr*, 13 U. C. R. 468.

Where defendant had rendered an account to plaintiff with a letter stating that the letter and account were sent "without prejudice," in case certain proposals therein contained were not accepted:—Held, not admissible for the plaintiff. *Ritchey* v. *Howard*, 6 C. P. 437.

After one trial, at which the jury failed to agree, defendants' solicitor wrote to the plaintiff to make them a proposition, "of course without prejudice, further than I will state in this letter." The defendants, he said, believed that the plaintiff was not injured at all; but if he would put himself under the care of three medical men named, at Montreal, for six months, of which they would pay all expenses, and if these gentlemen, or any two of them, would say they believed he was hurt, defendants would waive every other defence, although they thought they had good grounds for further defence, and would settle with him on such terms as might be agreed on, or as the three medical men would name. This offer, he added, was made by defendants intending to use it if refused, to shew their sincerity and the plaintiff's reluctance to submit to a fair test. This was declined, but a few days after, and after a jury had been sworn in the case, an agreement was entered into of substantially the same character. By it the plaintiff, at defendants' expense, was to be placed for six months at Toronto under four medical men, and the defendants agreed that if they, or a majority of them, should agree that the plaintiff was injured at the time, by the means, and in the manner alleged by him, they would pay damages to be estimated as provided for. The medical men, however, failed to agree, and the case was again brought to trial. The defence was that the injury was either simulated or caused by the plaintiff's own negligence. The letter and agreement were admitted in evidence for the plaintiff, and the jury were told, that if in doubt as to the plaintiff having contributed to his own injury, they might consider the letter as evidence against defendants on that point. They found for the plaintiff, saying that they did not think him guilty of any neglect:—Held, that the letter and agreement were admissible, to shew, on the plaintiff's part, that he was claiming in good faith as he had proved by submitting to the test proposed; and that the defendants might have used them to shew under what circumstances and at whose expense the plaintiff had been under treatment:—Held, also, that it was no objection to their admission that they were matters arising since the action:—Held, also, that though the letter was expressed in the beginning to be without prejudice, yet as the defendants afterwards declared in it their intention to use it as evidence to shew the plaintiff's want of good faith, the plaintiff was entitled to shew it and the subsequent agreement to repel any such imputation:—Held, also, that the direction as to the effect of the letter was wrong, and was equivalent to admitting it as evidence of defendants' negligence; and that the verdict must therefore be set aside. *Clark* v. *Grand Trunk R. W. Co.*, 29 U. C. R. 136.

Although a letter written without prejudice" by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs, in order to shew that he had made such an offer as rendered the further prosecution of the suit unnecessary. *Boyd* v. *Simpson*, 26 Gr. 278.

Overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made "without prejudice," are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at. *County of York* v. *Toronto Gravel Road and Concrete Co.*, 3 O. R. 584.

Where negotiations with a view to settlement are carried on between the parties and a settlement of a suit concluded by means of letters marked "without prejudice" the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words. *Vardon* v. *Vardon*, 6 O. R. 719.

A letter containing an offer written without prejudice," means "I make you an offer, if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed. *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182.

All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, which are not made with some other object in view and wrong motives, are not admissible in evidence. Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial, the court not being able to say that defendant was not prejudiced thereby, a new trial was directed. *Pirie* v. *Wyld*, 11 O. R. 422.

In answer to plaintiff's letter enclosing statement of his loss under a policy of insurance, defendants replied that they thought the loss in place of $13,005, the amount claimed by plaintiff, should be $11,734; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of, any condition of the policy." Some further correspondence took place, but no arrangement was arrived at, and an action was brought:—Held, that the letter was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view. *Hartney* v. *North British Fire Insurance Co.*, 13 O. R. 581.

See, also, *McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

(b) *Solicitor and Client.*

Client Directing Line of Action.]—Where a defendant desired her attorney to adopt a certain course in reference to a writ in the hands of the sheriff, which course was accordingly pursued:—Held, that this was not a privileged communication. *Walton* v. *Bernard*, 2 Gr. 344.

Compromise with Creditors.] — The communications from a debtor to his solicitor as to a compromise, which the debtor desired his solicitor to effect with his creditors, and on which communications the solicitor acted, and at length effected the compromise, are not privileged, and the solicitor's evidence of them is admissible. *Fraser* v. *Sutherland*, 2 Gr. 442.

Contents of Deeds.]—An attorney is not obliged to answer as to the contents of deeds, &c., placed in his hands by a defendant for the purposes of his defence. *Lynch* v. *O'Hara*, 6 C. P. 259.

Correspondence.] — As to admissibility of solicitors' correspondence and requisitions of title in an action for specific performance. See *McClung* v. *McCracken*, 3 O. R. 596.

Duty to Decline to Answer.]—A solicitor, when questioned as a witness with regard to matters involving his client's interests, should decline to answer unless directed or at least permitted by the court; and where a different course was taken:—Held, on motion for a new trial, that it might be deemed a surprise upon the client, and a new trial was granted, with costs to abide the event. *Livingstone* v. *Gartshore*, 23 U. C. R. 166.

No Suit Pending.]—A communication made to an attorney in his professional character is privileged, although no suit concerning the subject matter be pending or contemplated. *Battersby* v. *Haycock*, E. T. 2 Vict.

Professional Capacity.]—In an action by the devisee of R. to recover possession from the defendant of land conveyed by him to R., of which the defendant remained in possession, the defence was that the conveyance to R., though in form absolute, was intended to operate as a mortgage. The evidence of E. and P., two solicitors, as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection. The evidence of E. shewed that R.'s statement to him was made in E.'s office in the presence of P. and of another person who was a friend of R.'s, but not a professional man. E. thought R. made the statement as a preliminary of instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, and there was nothing to shew that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time, but he made no charge for professional services. P.'s evidence was that he had spoken to R. about the affairs of F. as the solicitor and a friend of the F. family, and had advised R. to try to save the property in question for the F. family. It also appeared that R. was an occasional client of E. and P., but that in the transactions in question he had employed other solicitors:—Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged, and were properly receivable in evidence. *Rudd* v. *Frank*, 17 O. R. 758.

Proving by Whom Employed.]—An attorney is an admissible witness to prove by whom he was employed to sue out a bailable writ. *Beamer* v. *Darling*, 4 U. C. R. 249.

Statements of Client as to Note Sued on.]—The defendant's counsel at the trial desired to ask the plaintiff's attorney what his client told him about the note sued upon when he gave instructions for the suit:—Held, that such evidence was rightly rejected. *Harris* v. *McLeod*, 14 U. C. R. 164.

Witness to Client's Deed.]—Where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties he ceases, in respect of the execution of the instrument, to be clothed with the character of a solicitor or counsel and is bound to disclose all that passed at the time relating to such execution. Robson v. Kemp, 5 Esp. 52, and Crawcour v. Salter, 18 Ch. D. 30, followed. *Magee* v. *The Queen*, 3 Ex. C. R. 304.

See also, sub-titles XII., XIV.

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7. *Relevancy.*

Act of Parliament—*Speech of Minister.*]—Quære, as to the admissibility, with a view to the construction of a statute, of the language used by the secretary of state for the colonies in introducing it in Parliament. *Smiles* v. *Belford*, 1 A. R. 436.

Action against Company — *Value of Shares.*]—By 60 Vict. c. 24, s. 370 (N. B.), "a new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against an electric street railway company for damages on account of personal injuries, the vice-president of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal exchange, and proved that shares sold at about 50 per cent. premium. The Judge in charging the jury directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages:—Held, that on cross-examination of the witness by defendants' counsel the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages. The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W. who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conver-amputation, when Dr. W. stated that if he first consultation, and three days before the amputation, when Dr. W. stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury he might consider more fully the question of amputation. The Judge in his charge referred to this conversation and told the jury that it

seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible:—Held, that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict. To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. *Hesse* v. *St. John R. W. Co.*, 30 S. C. R. 218.

Action against Sheriff for Rent—*Tenant's Statements.*]—In an action against a sheriff for the sale of goods under a fi. fa. without paying the rent due to the landlord:—Held, that the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was not evidence in the cause. *Galbraith* v. *Fortune*, 10 C. P. 109.

Advancement—*Res Gestæ.*]—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction, or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. *Birdsall* v. *Johnson*, 24 Gr. 202.

Affidavit of Execution of Memorial.]—The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the res gestæ, and as shewing that P. had sworn to the execution. *Rose* v. *Cuyler*, 27 U. C. R. 270.

Agreement as to Form of Notes.]—Evidence of a general agreement with the plaintiffs that all notes made by the defendants should be drawn payable in a particular form, is admissible to support a plea of such an agreement as to the notes sued on. *Bank of Montreal* v. *Reynolds*, 25 U. C. R. 352.

Agreement to Use Highways—*Mode of User.*]—Where the right of a company to use a traction engine on certain highways under an agreement with a municipality was disputed:—Held, that the fact that the company for several years after the agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties. *County of York* v. *Toronto Gravel Road and Concrete Co.*, 3 O. R. 584.

Assault—*Evidence of Other Fights.*]—A number of people, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going forward towards the combatants, was assaulted by defendant, who got into a fight with him and hit his hand severely. Defendant's counsel proposed to ask the plaintiff, on cross-examination, as to a number of fights in which he was said to have been concerned, but the learned Judge refused to allow this, the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to the defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrong-doer:—Held, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld. The erroneous exercise of discretion in refusing to allow questions on cross-examination, which are irrelevant to the issue, is no ground for a new trial. *Hickey* v. *Fitzgerald*, 41 U. C. R. 303.

Assignee for Creditors—*Judgment against Assignor after Assignment.*]—S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H. E. Before the assignments J. was a creditor of E. H. E. for money lent and as holder of certain notes. After the assignment S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for the payment of the judgment:—Held, that the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party was not even primâ facie evidence against G. Eccles v. Lowry, 23 Gr. 107, considered. *Stewart* v. *Gage*, 13 O. R. 458.

Attachment of Debts—*Salary of Municipal Officer—Advances.*]—An order having been made attaching all debts due to a judgment debtor by a city corporation, a person describing himself as "paying teller" of the corporation made an affidavit in answer to the judgment creditor's application for a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit, the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination:—Held, that the affiant should be compelled to answer all questions put to him bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion:—Held, also, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made:—Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof. *Wilson* v. *Fleming*, 19 P. R. 263.

Bond to Secure Notes—*Evidence as to Notes being Genuine.*]—To an action on a bond the defendants pleaded that it was given in settlement of promissory notes made by a brother of defendant, the indorsements to which were forged to the knowledge of plaintiffs, which settlement was the only consideration for the execution of the bond. On the trial a verdict was given for plaintiffs, which was set aside by the full court and a new trial ordered on the ground of improper admission of evidence, as follows: 1st, evidence by a solicitor of what one of the officers of the plaintiff bank had told him relative to an admission by the alleged forger that the notes were genuine; part of the conversation, which related to a different matter, had been given in evidence by the same witness on direct examination, but the court below held that the other part could not be given on cross-examination, as it was not connected with what had been already proved. Secondly, evidence by counsel for plaintiffs in the proceedings on the notes which had led to the making of the bond of his belief in their genuineness, which the court below held was not good evidence:—Held, that the evidence objected to was properly admitted and that the judgment should be reversed. *Halifax Banking Co.* v. *Smith*, 18 S. C. R. 710.

Carriers—*Loss of Trunk—Discrediting Possession of Alleged Contents.*]—Plaintiff sued a railway company for the loss of his trunk, which he alleged contained several valuable papers, and among them the lease of a farm from his father to himself. Defendants resisted the claim as fraudulent, denying that they ever received the trunk, and gave strong evidence to support their defence. They then offered to prove (as tending further to shew the dishonesty of the claim) that this farm had been the subject of a suit in chancery, in which it was decreed that the plaintiff's father held the land only as agent for another, and should convey to him; and that the plaintiff was aware of the fact, having been examined as a witness in the case:—Held, that such evidence was rightly received. *Thomas* v. *Great Western R. W. Co.*, 14 U. C. R. 389.

Claim for Wages—*Payments by Defendant to other Workmen.*]—In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent; the defendant pleaded a set-off, and at the trial, attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that it was allowable to prove by persons working with the plaintiff, that they had been paid by the defendant on application to him; and that in suits brought by them against him, he had paid money into court; and that the judgments in such suits were also admissible though unnecessary. Held, also, that the statements made by persons working with plaintiff, under the circumstances set out in this case, were properly received. Held, also, that a memorandum in defendant's writing, unsigned, and attached to a bill of sale relating to the lumber, was admissible. *Stewart* v. *Scott*, 27 U. C. R. 27.

Claimant's Letter as to Property in Dispute.]—M. by letter admitted that the property in dispute was in the hands of a third party, and afterwards sued defendant for it:—Held, that such letter was evidence, and the jury having found upon it for defendant, the court would not interfere. *Macdonald* v. *Wood*, 8 C. P. 426.

Collision—*Declarations as to Cause.*]—Held, in an action for collision, that evidence of declarations made by the captain of defendants' vessel, as to the cause of the accident, on the day after it had happened, were inadmissible for the plaintiff; but that the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident. *Shaw* v. *Desjalberry Navigation Co.*, 18 U. C. R. 541.

Confirmatory Deed—*Alleged Grantor not Called—Facts Tending to Prove Execution.*]—Dower. Defendant pleaded that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1850, the demandant by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd of April, was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: See Clark v. Stevenson, 22 U. C. R. 575. The defendant therefore proved the execution of the deed of the 21st of August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was indorsed, dated 2nd of March, 1850, that the demandant had appeared before them, and duly barred her dower; and one of them proved that she was examined, executed the deed, and received $40. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release of the 23rd of April, 1850, prepared, and sent it to her by defendant, with a note for $40, which he held against her husband, to be kept if the release was executed, otherwise returned; and that defendant brought back to him the release apparently executed, but not the note. The evidence was received, (though objected to) as tending to strengthen the probability that the release was really executed; it being also sworn in confirmation, that the demandant's name to the release was written by her husband; that in May following, the demandant told witness that defendant had been to her to sign a paper for T. C., which she had signed; and that the next day she told the defendant she had no right there. The jury found for defendant:—Held, that defendant being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside. *Clark* v. *Stevenson*, 24 U. C. R. 200.

Co-Plaintiffs.]—There may, in a proper case, be an appeal from the master's ruling as to the inadmissibility of evidence, before the master makes his report. A bill was filed by A. and B. to enforce certain registered judgments. B.'s interest was as assignee of A. The assignment was for the benefit of creditors, but it did not appear that any creditor was party or privy to the assignment; and the assignee had sworn in one of the affidavits filed that his only interest was

as trustee for A.:—Held, that any evidence against A. was admissible against both plaintiffs. *McDonald* v. *Wright*, 12 Gr. 552.

Defamation—*Previous Writings—Provocation—Mitigation of Damages—Meaning of Words.*]—In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—Held, that an article in another newspaper, published before the first of the alleged libels purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof —not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages. Percy v. Glasco, 22 C. P. 521, followed. Held, also, per Rose, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were also admissible as furnishing provocation for the second of the alleged libels; Meredith, C.J., contra. In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump":—Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up." *Stirton* v. *Gammer*, 31 O. R. 227.

Execution Debtor's Letter to Claimant.]—In trespass for seizing plaintiff's goods under an execution against A., it was held that a letter written by A. to the plaintiff before any third party had an interest in questioning the right to the goods, was evidence to shew the footing on which the plaintiff and A. then stood with respect to the goods. *Robinson* v. *Rapelje*, 4 U. C. R. 289.

Execution Debtor's Statement as to Seized Property.]—On the 9th January plaintiff's attorney sent a fi. fa., in Robinson v. Banks, to the sheriff, with a letter saying that they wished to get at two shares of certain building society stock standing in the name of B. and his wife, which, though standing in their name in a representative capacity, were nevertheless the property of the wife, and therefore of the defendant. In an action against the sheriff for false return of nulla bona to this writ:—Held, that evidence that B. and his wife spoke of these shares as their own was inadmissible in this action against the sheriff, even as primâ facie evidence of ownership, and so also were answers on oath by B. to interrogatories. *Robinson* v. *Grange*, 18 U. C. R. 160.

On the trial of an interpleader issue, defendants offered in evidence a letter from the judgment debtor to them, which was rejected:—Held, that as it appeared from the evidence that the plaintiff allowed the judgment debtor to make other declarations with respect to the property, it might be presumed that he permitted him to make those contained in the letter, which was offered in evidence and rejected; and that there being such a foundation laid at the trial as shewed primâ facie a joint interest, or an interest of some kind, between the plaintiff and the judgment debtor with regard to the goods in question, the letter was admissible as evidence. *Harndon* v. *Bank of Toronto*, 14 C. P. 496.

Execution Debtor's Statement as to Title.]—In an interpleader to try the right to goods seized under execution against A. and B., and claimed by the plaintiff, C., a brother of B.:—Held, that B.'s statement, while in possession of the property with the plaintiff's assent, that it belonged to his sister, could not be evidence, as against the plaintiff, to disprove the plaintiff's right. *Earnshaw* v. *Tomlinson*, 26 U. C. R. 610.

Fire—*Sparks from Steamer.*]—In an action to recover the value of buildings destroyed by fire, started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack is admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size, if they escaped, might have been carried to the building in question, is too conjectural and speculative. *Peacock* v. *Cooper*, 27 A. R. 128.

Fire from Engine—*Previous Fires.*]—In an action against a railway company for loss occasioned by fire alleged to have arisen from one of their engines, with a view of shewing that the engine was defectively constructed evidence that on previous occasions, when it was in the same or an improved condition, it had thrown out sparks causing fires, was held to be properly receivable. *Canada Central R. W. Co.* v. *McLaren*, 8 A. R. 564.

Grantor's Statement as to Bona Fides of Attacked Grant.]—In a suit by a creditor to set aside a deed on the ground (amongst other things), that it was made to defendant on a secret trust for the grantor and to defeat his creditors, it was held, that the grantor's statements after the conveyance that it was a real transaction, were admissible evidence for the defendant, but were not entitled to much weight. *Wood* v. *Irwin*, 16 Gr. 398.

Holder of Overdue Note.]—The admissions of the holder of an overdue note are admissible, without calling him, against a person suing upon the note, to whom he has subsequently transferred it. *Myers* v. *Cornell*, 2 U. C. R. 279.

Indorsement of Note—*Statement of Custom.*]—I. was asked whether F. did not say to him when he asked him to indorse one of the series of notes of which the one in question was a renewal, that he, F., "never backed anybody's note":—Held, this question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible. *Bank of Hamilton* v. *Isaacs*, 16 O. R. 450.

Joint Tenants] — Quære, whether the admission of one joint tenant or tenant in common, as to the extent of the interest held by him and his co-tenants, is admissible as evidence against his co-tenants. *Bernard* v. *Walker*, 2 E. & A. 121.

Letters.]—Letters are admissible as evidence of the case of the party producing

them, though they are not mentioned in the pleadings. *Widnott* v. *Boulton*, 1 Gr. 479.

Loan—*Res Gestæ.*]—The Great Western Railway shareholders resolved in 1857, to advance £150,000 stg. to the Detroit and Milwaukee Railway Company, and again, in 1858, a further sum of £100,000 stg. The first loan was expressly sanctioned by parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway Company, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee Company to be deposited with the plaintiffs, and exchange on the Great Western Railway Company's London board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee Railway account, Great Western Railway," and kept distinct from the Great Western Railway account proper. Large advances were made, and exchange drawn; the business was carried on for two years, and moneys advanced beyond the amount of the two loans, the result being a large balance, in favour of the plaintiffs. It was proved that of the two loans only about $700,000 was paid to the plaintiffs by exchange or traffic receipts. Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co. or to the individual directors negotiating the arrangement, and the plaintiffs sued for the balance overdrawn, amounting to about $1,000,000. B. and R. (defendants' managing and financial directors), wrote to the plaintiffs, asking for a credit of $100,000 on their D. & M. account, which was considered on the 1st April, 1858, at the plaintiffs' board, and was accepted by letter of their cashier on the same day:—Held, that the minutes of the board were admissible for the plaintiffs, as part of the res gestæ. Held, also, that a bank statement sent by the plaintiffs' agent at Hamilton to their head office shewing how the account was kept, was properly admitted. When it was proposed to open the account, the plaintiffs' cashier met R., defendants' financial director, in Toronto, to discuss the matter, and made an arrangement which it appeared R. was aware the cashier had to report to his board for approval, which he told R. he had no doubt would be carried out:—Held, that the cashier's verbal report to the plaintiffs' board on his return, two days after, was admissible as part of the res gestæ as a declaration accompanying an act. *Commercial Bank* v. *Great Western R. W. Co.*, 22 U. C. R. 233; 2 E. & A. 285.

Negligence—*Absence of Safeguards—Subsequent Placing.*]—Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relative to such subsequent placing. *Cole* v. *Canadian Pacific R. W. Co.*, 19 P. R. 104.

Partner.]—The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor* v. *Cook*, 11 P. R. 60.

Partners.]—The admission of one partner, that a third person was jointly interested with himself and his co-partners, is not evidence against the latter to prove such joint interest. *Carfrae* v. *Vanbuskirk*, 1 Gr. 539.

Scheme to Defraud Creditors—*Other Fraudulent Transactions.*]—Plaintiff was son-in-law of one J. D., and lived in the same house, using half the same shop, and it was clearly shewn that the plaintiff and J. D. had made certain arrangements with the express object of putting J. D.'s property out of the reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D.'s real estate prior to the plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D.'s goods, it appeared that the purchase money paid by plaintiff had been credited to him out of sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D.:—Held, 1. that evidence of the settlement was admissible as being material to the subject matter in dispute; 2. that the jury rightly found against the plaintiff's claim. *Cook* v. *Hendry*, 7 C. P. 354.

Status of Rectors.]—Certain persons were sued as incumbents of certain rectories belonging to the Church of England in this Province, and it was objected that the constitution of the said rectories had not been legally proved:—Held, that evidence as to the possession or occupancy by the plaintiffs of their respective churches, and as to their officiating according to the rules of the Church as persons having the cure of souls, and of their recognition by the Church Society or Synod, was admissible as some evidence of their status as such rectors. *Langtry* v. *Dumoulin*, 7 O. R. 499.

Usury—*Making Notes Payable at Distant Place.*]—On the trial of an action on a promissory note, brought by the plaintiffs, a banking corporation, to which defendants pleaded usury, consisting in the plaintiffs making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest, in the shape of commission, than they were legally entitled to, the plaintiffs' agent was asked in cross-examination, whether during the time he was in P. (the place of discount) he had directed or caused any other note to be made payable at any other place than P.:—Held, that the question was admissible. *Bank of Montreal* v. *Scott*, 17 C. P. 358.

Weeds in Rented Field—*Settlements by Lessors with other Lessees.*]—The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of $10 an acre. In answer to the claim for rent, the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be

made in such case for the loss to the defendant:—Held, that evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how the defendant had himself settled with other persons who had thistles in their fields rented by him. *Wienhold* v. *Klein*, 10 A. R. 20.

See Tracey v. *Fowlds*, 13 A. R. 115.

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8. *Secondary Evidence.*

(a) *In General.*

Absence of Witness.]—Where on a second trial it appears that a witness who was examined at the first trial is absent from the country, his evidence then given may be received. *Sutor* v. *McLean*, 18 U. C. R. 490.

All Terms to be Proved.]—Where a party endeavours to prove by oral testimony the contents of a written document, the court before giving effect to such testimony should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the court may be able to give effect to all its provisions, and that by testimony of the clearest nature. The document need not be set forth in evidence in its very words, but its exact sense and effect must be shewn. *Ross* v. *Williamson*, 14 O. R. 184.

Bond Referred to in Letter.]—The recognition of a bond in a letter from defendant to plaintiff, with proof that a document purporting to be a copy or draft of such instrument was shewn by defendant with the title deeds of an estate to which it related, is evidence to go to a jury in proof thereof, after notice to defendant to produce. *Rocheleau* v. *Bidwell*, Dra. 345.

Certificate of Engineer.]—As there was evidence that a certificate or report had been given by the engineer in this case and parol evidence of the contents of the certificate or report was held to be inadmissible. *City of Quebec* v. *Quebec Central R. W. Co.*, 10 S. C. R. 563.

Certified Copy of Registered Agreement—*Admission at Former Trial.*]—In an action on an agreement for the sale of land in Manitoba, the agreement, which was registered by defendants, was produced by the registrar of Winnipeg, in whose official custody it was, on his examination under a commission. The registrar refused to part with it, but left a copy certified under his hand and official seal to be a true copy, which was attached to the commission, and produced at the trial. A witness who was examined under the commission, and also at the trial, proved that the agreement produced by the registrar was the original, and that it was signed by the defendants, and the copy attached to the commission was a true copy:—Held, that the registrar's certificate as to the copy was sufficient under O. J. Act, Rule 203, and that a certificate by the commissioner was not required; that the absence of the original was sufficiently accounted for to enable secondary evidence to be received by means of the copy. *McDonald* v. *Murray*, 5 O. R. 559.

At a former trial a copy of an agreement between the parties was admitted in place of the original:—Held, that the admission so made was good for the subsequent trial. *Ib.*

Conversation and Letters Referring to Deed.]—In ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the land to one J. R., deceased, (under whom defendant derived title). Evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., or that the title was vested in J. R., and a letter from T. R. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—Held, that such evidence, under the circumstances, was admissible on the part of defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Rogers* v. *Card*, 7 C. P. 89.

Doubtful Claim.]—Lands had been sold pursuant to an order of court in a proceeding (under 12 Vict. c. 72), for the sale of infants' estate; and the purchaser sold and took back a mortgage for purchase money, upon which a decree of foreclosure had been obtained. The conveyance from the original patentee was alleged to have been destroyed in a fire at Chicago without being registered. The defendant in the foreclosure suit subsequently procured a deed from the heirs of the patentee, and instituted proceedings to set aside the mortgage as a cloud on his title; but the court being of opinion that the evidence sufficiently established the existence at one time of the missing deed, and that the conduct of the plaintiff had been too much that of a prowling assignee, refused the relief sought, and dismissed his bill, with costs. *Johnson* v. *Sovereign*, 25 Gr. 434.

Evidence Required.]—To complete the chain of the paper title to the land in respect to which a certificate of title was prayed, production or proof of a power of attorney from the patentee to one J. was required. Search had been made for it without success, its existence was not sworn to positively by the petitioner, and the only evidence of it was an affidavit of one P., who did not swear that he had ever seen it and did not state his means of knowledge of its existence. There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power. The only evidence as to possession was a statement in the petitioner's affidavit that one H., to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title. No notice appeared to have been given to the person who was in possession. No affidavit was put in as to adverse claims served upon the person directed to receive them. The evidence as to possession and the existence of the power of attorney was—Held, insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed, said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee. Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be furnished. *Re Street*, 8 C. L. J. 197.

Lost Grant]—The evidence shewed that A. B., the ancestor of the female plaintiff, through whom the title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B., before his death, told a witness examined at the trial that he had got this deed, which he shewed to witness:—Held, sufficient evidence of a deed in fee to A. B. *Steinhoff* v. *Burtch*, 17 C. P. 160.

Lost Seal.]—The covenant in question had no seal on it when produced at the trial, but there was a mark of where the seal had been, and the witness to its execution swore he had put a seal on it before execution. The jury having found that it was sealed when executed, the finding was accepted. *Stewart* v. *Clark*, 13 C. P. 203.

Malicious Arrest—*Writ.*]—To connect a defendant sued for malicious arrest with the writ, the writ itself should be produced, or, to let in secondary evidence, its loss must be shewn or notice to produce it, unless defendant has adopted the arrest, as by filing affidavits in justification. *Thorne* v. *Mason*, 8 U. C. R. 236.

Malicious Prosecution—*Warrant.*]—In an action for malicious prosecution:—Held, that under the first count the warrant under which the plaintiff was arrested should have been produced, or evidence of a search and its loss given, to enable secondary evidence of its contents to be given; but as such secondary evidence was given at the trial without objection, an objection taken for the first time in the rule nisi was too late. A similar objection taken in the rule nisi as to proof of the information, even if such proof were necessary, was for the same reason held to be too late. *Crandall* v. *Crandall*, 30 C. P. 497.

Memorandum of Lease.]—Upon an action against a sheriff for a false return upon a fi. fa. goods, his defence was a chattel mortgage on part of the goods, and a distress for rent to cover the remainder:—Held, that parol evidence was admissible to prove a demise by the landlord, so as to sustain a distress, although a memorandum had been drawn up as to the terms of the lease, but signed only by the tenant. *Valentine* v. *Smith*, 9 C. P. 59.

Minute Book of Company.]—Under the circumstances shewn in the evidence set out in the report:—Held, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross* v. *Machar*, 8 O. R. 417.

Objection not Taken.]—Where a sealed instrument was pleaded with a profert and produced at the trial, and subsequently in term, but was afterwards mislaid, and when secondary evidence was gone into, defendant objected to that secondary evidence, but not to any secondary evidence, the court refused to allow a nonsuit to be entered for the non-production of the instrument. *Rowand* v. *Tyler*, 4 O. S. 257.

In ejectment, a copy of an under-lease between the tenant and his under-tenant was proved in evidence upon notice given to produce it. Upon objection in term:—Held, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial. *Connell* v. *Power*, 13 C. P. 91.

Order and Writ of Execution.]—A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost. *Wardrope* v. *Canadian Pacific R. W. Co.*, 7 O. R. 321.

Quebec Law.]—Writings under private seal which have been signed by the parties but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence. *Powell* v. *Watters*, 28 S. C. R. 133.

Quebec Law—*Commercial Matters—Commencement of Proof.*]—See *Forget* v. *Baxter*, [1900] A. C. 467.

Records Burnt.]—Where the papers belonging to the district court and to the sheriff had been burned, and the records themselves thus destroyed:—Held, in ejectment, that the defendant, claiming under a sheriff's deed, might prove the judgment and executions by secondary evidence contained in the sheriff's books and in a fee book of the court, and by the attorney who obtained the judgment, whose papers had also been burned, and by the plaintiff; and that he was not bound to obtain exemplifications. *Heany* v. *Parker*, 27 U. C. R. 509.

Sheriff's Deed.]—In ejectment, the defendant claimed under a sheriff's deed, which was not produced, and, after giving evidence of a search, which the court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment against F., and of the fi. fa. goods returned nulla bona, and he produced the fi. fa. lands found among the papers of the sheriff, since deceased, with a memorandum annexed, written and signed by the sheriff, stating that this lot had been sold at sheriff's sale on the 11th December, 1824, for £125, to M., who had paid the sheriff's fees. The Gazette containing the advertisement of the sale of this lot on that day under the execution was also produced. A memorial was then produced from the registrar's office, of a deed dated 16th December, 1830, by which the sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed until eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it:—Held, that the sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed. *Fields* v. *Livingston*, 17 C. P. 15.

Trover for Notes.]—Trover for promissory notes. The plaintiff's counsel, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly, before any demand

on the defendant or refusal on his part to return them:—Held, that no notice to the defendant to produce was necessary; and that the plaintiff was entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilly v. Fisher*, 10 U. C. R. 32.

Witness in Prison.]—Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit, was afterwards committed to the Provincial penitentiary, and refused to be examined in this cause, the court ordered his evidence to be read from the notes of the Judge who had tried the action at law. *Switzer v. Boulton*, 2 Gr. 633.

Witness's Refusal to Produce Agreement.]—Assumpsit for work and labour. The plaintiff's witness swore that the work was done upon a written agreement, which he had in court, but refused to produce. He had not been subpœnaed:—Held, that he was as much bound to produce the writing as if in attendance under a subpœna duces tecum. But, semble, that if the witness had been required by the court to produce the agreement, and had still refused, this would not have been sufficient to warrant the reception of secondary evidence. *Farley v. Graham*, 9 U. C. R. 438.

Writ of Execution.]—It is not necessary that a writ of fi. fa. which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence; and if lost and unenrolled, secondary evidence may be given of it. *Soules v. Donovan*, 15 C. P. 124.

(b) *Lost Documents.*

Existence—*Loss and Search.*]—Where a promissory note had been indorsed to an attorney's clerk in the course of business, and mislaid:—Held, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called and swore to his belief of its loss. *Grover v. Clark*, 5 O. S. 208.

After secondary evidence of a document has been received, it is too late to object to the sufficiency of the search. *Doe d. Maclem v. Turnbull*, 5 U. C. R. 129.

At the trial a witness stated that as agent for plaintiff he gave defendant certain parcels to deliver, with a memorandum of charges on each to collect, and that defendant owed a balance to the plaintiff, for which this action was brought; that witness had entered in a memorandum book all the parcels given to defendant, with the charges against them, and had credited defendant with the amounts paid; that he had given this book to plaintiff, and had since searched among papers left by him with plaintiff's agent for it, but without success. The witness produced a statement made from the memorandum book, and said he recollected the delivery of the parcel, his recollection not depending on the book, but that he could not speak of the sums except from the memorandum book:—Held, that the non-production of the memorandum book was not sufficiently accounted for to admit secondary evidence of its contents. *Stovel v. Allen*, 1 C. P. 300.

The loss of a bond being alleged and not traversed, evidence may be given of its contents without proving the loss. *Commercial Bank of the Midland District v. Muirhead*, 4 C. P. 434.

The plaintiff, claiming under a bill of sale which had been lost, offered evidence to shew that he (the plaintiff), and his wife (who were then inadmissible as witnesses), had made search in the presence of witnesses, who did not make any search themselves, and had declared they could not find it:—Held, insufficient, as being merely his own declaration and that of his wife, which were not evidence. *Bratt v. Lee*, 7 C. P. 280.

In ejectment it was proved that the deed in question was about 1824 in the possession of one W., who had bought the property, but who stated that he was an alien and therefore could not hold it, and that before he conveyed to C. he had mislaid this deed, but that if found he would deliver it to C. C., who conveyed to the plaintiff, proved that he had never had this deed; there was no ground for surmising that it had ever come to the plaintiff; and it had not been seen for thirty years. No inquiry after W. or his papers was proved, but no objection on this ground was taken at the trial. Secondary evidence of the deed having been admitted, the court after verdict refused to interfere. *Tiffany v. McCumber*, 13 U. C. R. 159.

The degree of diligence required in a search must depend on the circumstances of each case, and after a long lapse of time the same amount of search ought not to be required. *Ib.*

Held, that the secondary evidence of the search for and contents of a lost bond, as given on the trial of this cause, was clearly admissible and sufficient. *Arnold v. Buller*, 15 U. C. R. 255.

Certain letters put in at the first trial in the county court were filed in the court of common pleas on appeal from the decision, and at the second trial a witness proved that he had applied to the clerk of the court, who searched in his office, and told the witness that he had also inquired of the Judge, but that the papers could not be found:—Held, sufficient to let in secondary evidence. *Sutor v. McLean*, 18 U. C. R. 490.

In dower, the loss of most of the deeds affecting the title was proved (or rather presumed) from the burning of the house of the owner in fee, but a deed was proved to the demandant's husband and brother as joint tenants, by production of a memorial from the registry office, and the death of the demandant's husband before his brother and co-joint tenant was also proved:—Held, that secondary evidence of the deeds was admissible. *Haskill v. Fraser*, 12 C. P. 383.

Before secondary evidence can be let in, proof must be adduced that such deed once existed, and that it has been destroyed or lost, and diligent search made therefor. *Ansley v. Breo*, 14 C. P. 371.

Ejectment on a sheriff's deed. To prove a deed from the sheriff, the memorial was put in, it having been shewn by B. (a partner of W. D., the said W. D. having formerly been partner of J. D., then attorney for the plaintiffs), that the deed had come into the office of J. D. (J. D. not being called), and could

not be found there on diligent search by B. It being objected that the plaintiff's attorney, to whose hands the sheriff's deed was traced, should have been called:—Held, that diligent search by B., who was partner with W. D., the former partner of J.D., with whom the deed had been left, the said B. having succeeded J. D. in the business, and having access to all his papers, and having seen the deed in his office lately, was sufficient search to admit of secondary evidence without calling J. D. *Nesbitt* v. *Rice*, 14 C. P. 409.

In ejectment on a sheriff's deed, secondary evidence of the fi. fa. lands having been rejected:—Held, that every place should have been searched where there was reasonable ground to suppose that the fi. fa. might be found, and that some of the sheriff's papers having been left in the court house, search should have been made among them before secondary evidence was admissible; but affidavits having been filed that diligent search had since been made in the court house, a new trial was granted on payment of costs. *Soules* v. *Donovan*, 14 C. P. 510.

Held, that upon the evidence in this case there was no sufficient proof of the execution of the lease under which defendants claimed to let in secondary evidence of it. *Dickson* v. *McFarlane*, 22 U. C. R. 539.

Where, to let in secondary evidence of a bond, the attorney of the obligor was called, and upon being shewn letters written by himself in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of these instruments, although he had no doubt from reading the letters that such bond existed, the court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the res gestæ. *Clarke* v. *Little*, 5 Gr. 363.

P. was absent from the country, and the plaintiff proved a search with several of his relatives for a deed from P. to him, but it was not shewn that P. had lived or left the charge of his papers with any of them. Secondary evidence being then admitted, subject to objection, the plaintiff proved the existence of this deed, and the execution by P. of a memorial of it, which the deputy registrar produced:—Held, that the search was not sufficient to let in secondary evidence. *Covert* v. *Robinson*, 24 U. C. R. 282.

In the case of lost deeds, it is always a question for the presiding Judge whether sufficient search has been made to justify the admission of secondary evidence as to their contents. In this case the witness, who was the son of the late agent of one of the grantors, stated that his father had possession of all the papers of the grantor relating to lands in Upper Canada; that he had searched through his father's papers and the papers of the grantor, all of which were then in possession of himself and mother; that at the suggestion of the executors of the said grantor, another person had searched among those of his papers deposited in a certain bank, as well as elsewhere amongst his private papers, but that he had not applied to the heirs or devisees of the grantor, though he had made every other inquiry where there was a probability of his finding the deeds in question; nor had he searched among the papers of the other grantor, because he was a bankrupt, and the grantor amongst whose papers he had already searched was his assignee:—Held, sufficient to admit secondary evidence of the deeds. *Russell* v. *Fraser*, 15 C. P. 375.

The plaintiff in ejectment claimed under a mortgage from C. to O., executed in 1856. C. being called proved his execution of such a mortgage, and the memorial of it signed by him was produced from the registry office. He had last seen the mortgage with O., the mortgagee, in 1857. O. in 1859 became insolvent, and made an assignment of all his estate to F. He absconded to the United States shortly after, and was followed by F. It was not shewn that F. had ever had the mortgage, though the land was assigned to him; and it appeared that in a suit against him and O., in chancery, on behalf of the creditors, commenced many years after the assignment, which resulted in the appointment of the plaintiff as receiver, F. produced the papers in the suit under an order of the court, and this mortgage was not among them. A search was proved to have been made in the master's office, with the plaintiff's solicitor in that suit, and among the receiver's papers, but not with O., who was still living in Michigan, nor with his solicitor in the suit:—Held, that the proof of search was sufficient to let in the secondary evidence; for under the circumstances of the case there was no presumption that O. retained the mortgage or took it to the United States with him. *Gordon* v. *McPhail*, 32 U. C. R. 480.

In ejectment by trustees of a Wesleyan Methodist congregation for the parsonage property, it was proved that a search was made for the deed from the patentee to the trustees at the parsonage house, its proper and usual place of deposit, and that an inquiry had been made of the minister who officiated there when the deed was supposed to have gone astray. None of the ministers formerly officiating there had any interest in the deed or the possession of it, and it was of no use to any one unconnected with the present enjoyment of the property:—Held, sufficient proof of the loss to let in secondary evidence. *Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for $75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 more in settlement with him, making $200 in all. In September or October following, the plaintiff's agent in passing through Woodstock heard of the sale, and telegraphed to the plaintiff to send up the contract, which on the same day the plaintiff mailed to him at Woodstock, but it never reached him. Search was made at the post-office and the hotel where he was staying, and also at the plaintiff's place at Toronto. A witness from the post-office stated that unless registered they could not tell if any letter had come for

the plaintiff, and that letters after being advertised were sent, two months after receipt, to the dead letter office at Ottawa:—Held, that secondary evidence of the contract was properly admitted, without proof of a search at the dead letter office. *Williams* v. *Grey*, 23 C. P. 561.

Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed, and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the court house, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed:—Held, sufficient evidence to authorize the court in admitting secondary evidence of its contents; which, on being taken, established satisfactorily the existence and contents of such warrant; and, on rehearing, an objection being raised which had not been taken at the original hearing, that the township or county clerk should have been called to produce or negative the existence of a duplicate of such warrant:—Held, that if such proof were necessary, affidavit evidence to shew what was the fact should be received. *Ferguson* v. *Freeman*, 27 Gr. 211.

In ejectment the plaintiff claimed under a deed from the patentee of the Crown to his father. The deed was not produced, but it was—Held, that the evidence, set out in the report, was sufficient to prove its existence, and its having been subsequently burnt. *McCarthy* v. *Arbuckle*, 29 C. P. 529.

In an action for calls on shares held by a defendant as executrix and in her own right transferred under powers of attorney which were not produced:—Held, that there was sufficient evidence to shew the existence of such powers, and to let in secondary evidence thereof, the defendant and the testator having fully admitted their liability as owners of the shares. *Provincial Ins. Co.* v. *Cameron*, 31 C. P. 523.

On a reference, H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence of its contents; and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty* v. *Haldan*, 10 O. R. 278.

On the hearing of an equity suit secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking him for it, and to his sister and other persons connected with him inquiring as to his whereabouts, but information was not obtained:—Held, that this was not a sufficient foundation for secondary evidence. The suit was for a specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among her children, to sell lands of the estate in New Brunswick to the plaintiff; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence and the case made out by the bill:—Held, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by both the trustees, could convey no estate, legal or equitable, to C.; and that the proof of its contents was not satisfactory. *Porter* v. *Hale*, 23 S. C. R. 265.

And see *Clark* v. *Stevenson*, 24 U. C. R. 200.

(c) *Memorials.*

On a traverse of office a memorial of a mortgage for years from an alien to the original grantee of the Crown, under whose heir the traverser claims, is not conclusive evidence of a seisin in fee in the alien at the time of the mortgage. *Rex* v. *Theale*, Dra. 331.

A memorial is good secondary evidence of such parts of the deed as are transcribed in it, without calling the subscribing witness. And it is no objection for this purpose that the additions of the subscribing witnesses to the deed are not inserted in it. *Doe d. England* v. *Crysdale*, 6 O. S. 254.

Memorials of registered deeds are secondary evidence only, if produced and proved, or if thirty years old without proof, coming from the registry office. *Marvin* v. *Hales*, 6 C. P. 208; *Marvin* v. *Curtis*, *ib.* 212.

Copies of memorials certified by the registrar are evidence of the contents of the deeds. *Lynch* v. *O'Hara*, 6 C. P. 259.

A memorial signed by the grantor is not sufficient evidence of a deed against a person not claiming under him, without first accounting for the original. *Smith* v. *Neville*, 18 U. C. R. 473.

In ejectment the plaintiff proved a paper title, but the patent did not issue until 1826, and the deed from the patentee was executed in 1824. This deed was lost, and the memorial of it shewed it to have been an ordinary conveyance in fee, but not what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title:—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little*, 20 U. C. R. 425.

Proof by a witness that he saw a deed apparently answering the description contained in the memorial, and its loss, without further proof of handwriting or genuineness, is not sufficient to make a memorial in the county registry executed by the grantee only, and proved by an affidavit, indorsed, of a witness who swore that he saw the conveyance duly signed by the grantor, good secondary evidence of the original conveyance, in the absence of any act

done or possession taken for a long series of years. *Gough* v. *McBride*, 10 C. P. 166; followed in *Ansley* v. *Brco*, 14 C. P. 371.

In ejectment, the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shewn to be in defendant's possession, who declined to produce it on notice. Two memorials were then offered as secondary evidence, but rejected on the ground that they were not shewn to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848 between the four sons of B., by which the land in question went to L., under whom defendant claimed; and the memorial of the will purported to be executed by S., another of the four sons, as a devisee:—Held, that the memorials when tendered, were rightly rejected, for the reason given, though they would have been admissible after the subsequent evidence; but as they were not then again offered, and the plaintiff's case was not one to be favoured, the court refused to interfere. Held, also, that defendant was not compellable to produce the will. *Hayball* v. *Shephard*, 25 U. C. R. 536.

In ejectment by trustees of a Wesleyan Methodist congregation for the parsonage property, a search for and the loss of the deed from the patentee to the trustees at the parsonage house having been proved:—Held, that the evidence of the subscribing witness as to the execution of the deed and memorial, with a copy of the memorial certified by the registrar, was clearly sufficient secondary evidence. *Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

In examining a title under the Act for quieting titles, a memorial executed by the grantee, is good secondary evidence where the possession has been in accordance with the title so claimed. The weight of authority appears to be also that such evidence is admissible in ordinary suits. *Re Higgins*, 19 Gr. 303.

Held, that a memorial twenty-five years old, which a witness stated he believed to be signed by the deceased grantor in the deed, basing his belief on the fact that the signature closely resembled his handwriting, which he had seen in the books and papers belonging to him in his (the witness's) charge, though he had never seen him write, and the signatures of the witnesses to which memorial, one of whom was dead and the other out of the jurisdiction, he knew; or a memorial upwards of thirty years old, produced by the deputy registrar from the registry office, and signed by the grantor in the deed, reciting the deed and its contents; is good evidence of the execution of the deed; in the latter case either as affording secondary evidence of its contents, which would be good against all the world, or as a declaration or admission under seal by the owner of the fee, when in possession, that he had sold and conveyed to the grantee. Semble, that in the former case proof of handwriting of the grantor alone would have been sufficient evidence. Held, also, that a memorial signed by the grantor is evidence not merely against the grantor and all claiming under or in privity with him, but against third parties also, as being a statement and act by the party in possession against his own interest as the reputed owner of the land in question. Quære, whether this would be so if it appeared that the land was at the time in actual possession of some one other than the grantor, and not holding in privity with him. *Russell* v. *Fraser*, 15 C. P. 375.

A conveyance executed by a married woman and her husband in the year 1825, was lost:—Held, that the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been indorsed on the deed. *Re Higgins*, 19 Gr. 503.

In an action for dower in three lots of land, to prove that defendant was tenant of the freehold, a witness was called, who stated that he had occupied one of the lots as tenant to defendant; and about ten years ago conveyed all three lots to one H., who swore that he had conveyed to defendant after having occupied as owner and built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to defendant:—Held, sufficient evidence to go to the jury. *Fisher* v. *Harty*, 23 U. C. R. 408.

Held, that a registered memorial of a deed, executed under a power of attorney, is not sufficient evidence of the power under 39 Vict. c. 29, s. 1, s.-s. 3 (O.) *Canada Permanent Loan and Savings Co.* v. *Ross*, 7 P. R. 79.

A memorial, over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, in an action of ejectment, under 39 Vict. c. 29, s. 1, s.-s. 3, and s. 7 (O.) *Regina* v. *Guthrie*, 41 U. C. R. 148; *Regina* v. *McDonell*, *ib.* 157.

A memorial registered over sixty years, but executed by the grantee only:—Held, not sufficient secondary evidence of the deed to which it purported to relate, notwithstanding that conveyances had been made at early dates by persons claiming under the registered title, but who had not had actual possession of the land. *Van-Velsor* v. *Hughson*, 9 A. R. 390; 45 U. C. R. 252.

The land in question was one out of several lots mentioned in the memorial, which had been patented by the Crown to the grantor named in the memorial, and two others, as tenants in common. The memorial set out a grant of an undivided moiety of each lot described in it. Proceedings in partition had been taken in 1834 by the grantee against another tenant in common, in which the lot in question had been assigned in severalty to the grantee:—Held, that these proceedings did not, even in connection with the conveyances above mentioned, avail to make the memorial admissible as evidence of the deed:—Held, also, that it would not be made admissible by the fact that possession of some of the lands had gone in accordance with it, so long as there had been no such possession of the lands now in question; and that it was not aided in this respect by the Vendors and Purchasers' Act, R. S. O. 1877 c. 109. But held that the plaintiffs, who claimed only an undivided moiety of the lot under the grantee named in the memorial, while they could not recover in respect of the title of the grantor in that memorial, could nevertheless make title, by virtue of the judgment in partition, to the undivided interest of the patentee against whom the partition was

had; that judgment being evidence against the last mentioned patentee of title to the whole lot. One of three patentees was not accounted for by the evidence, and it was not shewn that her title had devolved upon the others. The plaintiffs were therefore held entitled to recover only for one undivided third part of the land. *Ib.*

The production of a registered memorial executed by the grantee, where possession is not shewn to follow the deed, is not sufficient evidence in proof of the deed. Evidence in proof of a paper title in the defendant commenced on. *Mulholland* v. *Harman*, 6 O. R. 546.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. Gough v. McBride, 10 C. P. 166, specially referred to. *McDonald* v. *McDougall*, 16 O. R. 401.

A registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) habendum "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, &c., * * subject to the provisos and conditions in said mortgage," which said deed poll or indorsement by way of assignment, is witnessed, &c., was offered as evidence of the assignment:—Held, sufficient. *Re Mara*, 16 O. R. 391.

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

See also sub-titles, XIV., XV.

II. Admissions.

1. *In General.*

Acknowledgment of Bank Account.]—The acknowledgment of the correctness of a bank account at the end of a month was held to be at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties. *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 A. R. 192.

Agent.]—A., defendant's attorney, accepting his instructions from B. as defendant's agent, and defending under them, is bound by the admissions B. has agreed to make. *Doe d. McDonald* v. *Long*, 4 U. C. R. 146.

Agreement to Admit Deeds.]—The defendants' attorney being the subscribing witness to certain deeds, was asked before the trial by the plaintiff's attorney to admit their execution. He said that he would do so in the box, but insisted on being called. While the jury were being called for the trial, he went out of court, and did not return:—Held, that the deeds could not be received as proved on evidence of such agreement to admit; and, quære, whether it would have been sufficient to warrant the reception of proof of the witness's handwriting. *Doe d. Wilkins* v. *Moore*, 9 U. C. R. 445.

Where defendant's attorney had agreed, in an action of ejectment to admit deeds by the production of memorials without accounting for the deeds, and to admit the execution of such deeds as the plaintiff might produce, without proof by a subscribing witness:—Held, that it could not be objected that a memorial signed by the grantee was no evidence of the deed. *Rutledge* v. *McLean*, 12 U. C. R. 205.

Amendment of Account.] — The rendering of an account by the plaintiffs' attorney in this Province, (the plaintiffs residing abroad) is not binding finally on the plaintiffs as to the mode of calculation; and even the plaintiffs themselves incorrectly stating an account may have it legally adjusted at any time before a final settlement. *McGregor* v. *Gaulin*, 4 U. C. R. 378.

Answer in Former Action.]—Defendant made a note payable to T. or bearer, and T. died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife, to recover the assets. A bill was filed by defendants to restrain this action, and in his answer the plaintiff swore that in consequence of the difficulties with the administrator, he had returned the note to G. before this action; that he had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit; and the plaintiff had recognized it, saying he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder:—Held, on motion for a new trial, that the plaintiff's answer in chancery, though very strong evidence, was not conclusive; and that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought. *Coates* v. *Kelly*, 27 U. C. R. 284.

Commission Merchant—*Account Sales.*] Plaintiffs, being commission merchants in N. Y., received from defendant a quantity of wheat, with instructions to ship it to L. for sale there, not limiting them as to price, nor directing the employment of any particular agent; and they made advances upon it, which, as they alleged, exceeded the net proceeds of the sales, one cargo having realized more than the advances, the other two cargoes much less. In an action for the excess thus advanced, the plaintiffs proved that they had mailed to

defendant the account sales received by them from their L. agents, with an account between plaintiffs and defendant founded upon them, and that these account sales were afterwards seen in his possession; and evidence was given that the wheat was in a bad condition when shipped, as defendant knew; that the prices realized were what might have been expected, and the charges such as were usual. It appeared, also, that part of the wheat belonged to one J., and that on receiving the first account sales shewing a profit, the defendant had settled with him. This cargo, however, had not been consigned to the same agents as the other two. The jury having found for the plaintiffs:—Held, that the evidence was not sufficient to shew the price for which the wheat was sold, nor the amount of charges connected with the sales; and a new trial was therefore granted, with costs to abide the event. *Craig* v. *Corcoran*, 23 U. C. R. 441.

Condition of Postponement.] — The third trial of an action of ejectment was put off upon payment of costs, "also on the condition of the defendant admitting on any future trial of this cause the title of the lessor of the plaintiff to the premises mentioned in the declaration, and the right to recover primâ facie, unless he shew a superior title to hers on the trial thereof, or any title or defence to defeat the same at law," &c. At the next trial the plaintiff refused to produce the patent, or admit the issuing or date of it, so that defendant was unable to go into his defence under the statute of limitations:—Held, that the plaintiff was entitled to take this course, for the effect of the order was to dispense with any proof or production of title on his part, not merely to oblige the defendant to admit such title when produced. *Doe d. Shepherd* v. *Bayley*, 15 U. C. R. 460.

Counsel's Statement.]—Where in ejectment the plaintiff's counsel in opening his case stated it as a question of legitimacy, and the defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary:—Held, that it ought to have been produced. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

Plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, such statement being promptly retracted. *Jannette* v *Great Western R. W. Co.*, 4 C. P. 488.

Credit at Defendant's Instance.] — The plaintiff is not bound by credits given by him in account on the mere statement of the defendant, but may reject such credits unless defendant can shew that they ought to be allowed. *Gordon* v. *Fuller*, 5 O. S. 576.

Custom House Entries.] — Held, that sworn entries in the custom house, of the quantity and value of goods imported by the party claiming the damages (occasioned by fire) under a policy of insurance, who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages. *Lazare* v. *Phœnix Insurance Co.*, 8 C. P. 136.

Different Statements in Letter.]—In an action for the price of certain fruit trees:—Held, that defendant having put in a letter from the plaintiff to establish that he had received the trees for sale, was not bound by a statement in the same letter of the amount due for such trees. *Leslie* v. *Morrison*, 16 U. C. R. 130.

Effect of Admitting Signature.]—An admission of the execution of the mortgage was held clearly to include the signature to the receipt, and the receipt of the money as there stated. *McDonald* v. *Clarke*, 30 U. C. R. 307.

Ejectment.] — The admissions of the plaintiff in ejectment, being a real person (the lessor being an infant), are not evidence to prevent the recovery of the premises. *Nicholson d. Spafford* v. *Rea*, 3 O. S. 84.

Examination for Discovery—*Disclosing Case.*]—The court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616. In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying on an entry made in a book belonging to her father that he had lent the defendant money on a certain day:—Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call: she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle* v. *Coyle*, 19 P. R. 97.

Fact Peculiarly within Party's Knowledge.]—The plaintiff agreed to sell to defendants certain timber which he was about to cut on a lot in the free grant district, of which lot he was in occupation on or before the 30th of September, 1871. He cut it and delivered the logs at the place agreed upon, but the government made a claim of $111 upon them for timber dues, for which they would be liable in case the plaintiff had not before cutting the trees obtained his patent. There was no positive proof of this, but defendant swore that he told the plaintiff he had better not be in a hurry about cutting, as he would soon have his patent, when there would be no dues, but that in the meantime there would be, to which the plaintiff replied that the local agent had informed him there would be no dues:—Held, that this, being unanswered, amounted to an admission on the plaintiff's part that the patent had not issued when the timber was cut, and was sufficient affirmative evidence of the fact, which was one peculiarly within the plaintiff's knowledge. *Brown* v. *Cockburn*, 37 U. C. R. 592.

Former Trial.]—Admission of copy in lieu of original holds good at subsequent trial. *McDonald* v. *Murray*, 5 O. R. 559.

Insurers' Consent to Assignment.]—Action upon a fire policy by A., the person insured, averring an assignment to B. and C., notified to defendants and indorsed on the policy, and an agreement by them that it should stand for the benefit of B. and C. Plea,

denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. and C. of the goods insured was proved. An assignment was indorsed on the policy, purporting to be made by A. to B. and C., but signed by D., the agent of A., in his own name, and witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office in Montreal; that the secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that afterwards B. and C. paid an additional premium to M. to cover an increase of the risk:—Held, that this evidence was sufficient to sustain the issue for the plaintiffs. Held, also, that the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants. *Ross* v. *Commercial Union Assurance Co.*, 26 U. C. R. 559.

Letters.]—Letters written by the parties to a suit, like receipts and other admissions, are always open to explanation, unless they may have led to acts by third parties involving loss to them. *Cuvillier* v. *Browne*, 4 U. C. R. 305.

Nolle Prosequi.] — The plaintiff declares on two counts, 1. on a note; and, 2. on an account stated. To the defendant's plea to the first count, the plaintiff replies, to which replication the defendant demurs. The plaintiff then, to avoid the risk of the demurrer, enters a simple nolle prosequi to the first count:—Held, that the plaintiff might give the note in evidence under the second count, on the account stated; semble, such evidence would have been inadmissible if the nolle prosequi had involved an express admission, as it sometimes does, that the plaintiff had no right of action on the note. *Leslie* v. *Davidson*, 3 U. C. R. 459.

Non delivery of Goods—*Invoice.*] — In an action for not delivering the proper quality of oil agreed for:—Held, that defendant's account rendered to the plaintiffs after the delivery, for 6,000 gallons of rock oil, was clearly evidence, as an admission by them of what it was they professed to sell. *Edgar* v. *Canadian Oil Co.*, 23 U. C. R. 333.

On Reference.]—Admissions made before the master in the course of a reference should be put into writing and signed by the party making the same. *Foster* v. *Allison*, 11 P. R. 233.

Partnership.]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability without producing the partnership deed. *Lee* v. *Macdonald*, 6 O. S. 130.

Party Entitled to Sue.]—Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration:—Held, that the plaintiff, and not his wife, was the proper person to sue. Held, also, that the acts or admissions of the plaintiff were clearly admissible in evidence. *Filschie* v. *Hogg*, 35 U. C. R. 94.

Pretended Title.]—A mere verbal bargain for the sale of land would not subject a person to the penalty under 32 Hen. VIII. c. 9, for buying a pretended title. A person could not be convicted merely on his own admission that he had taken a deed from a party out of possession; some evidence aliunde must be adduced of the existence of such a deed. *Aubrey q. t.* v. *Smith*, 7 U. C. R. 213.

Promise to Pay.]—The plaintiff, as administrator, sued defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laid promises to himself as administrator. Defendant denied the promise:—Held, upon the facts set out, that if the admissions proved could be construed into an absolute promise to pay, still, being made before the plaintiff had received his letters of administration, they could not support the issue raised. *Beard* v. *Ketchum*, 5 U. C. R. 114.

Quære, whether the admissions in evidence would support an absolute promise to pay, if made to the administrator himself; and if so, whether the fact of their being made to a third party instead of to the administrator, made any difference. *Ib.*

Quebec Law—*Judgment in Previous Action.*]—See *Durocher* v. *Durocher*, 27 S. C. R. 363.

Receipt in Mortgage.]—Held, that a mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt so that the mortgagee or his assigns can maintain an action for its recovery. *London Loan Co.* v. *Smyth*, 32 C. P. 530.

Seduction.]—Admissions of defendant in action of seduction. See *Palmby* v. *McCleary*, 12 O. R. 192.

Solicitor's Admissions.]—A defendant was allowed to attack certain items in an account, which, in the course of a reference, had been admitted to be correct by his former solicitor, since deceased, where the defendant swore that he had not authorized the admissions, and that the items were not properly chargeable against him, and where it was shewn that no report had been made and no change had taken place in the position of the parties by reason of the admissions. *McBean* v. *McBean*, 11 P. R. 429.

Trespass — *Constable's Admission as to Warrant.*]—The proof by the plaintiff of an admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he acted, is not sufficient evidence as against the justices to entitle the constable to an acquittal under 24 Geo. II. c. 44, s. 6. *Kalar* v. *Cornwall*, 8 U. C. R. 168.

Trustee—*Memorandum as to Beneficiaries.*]—One F. transferred a schooner to defendant, as trustee, to sell and pay certain creditors (himself among the number) debts due by him to them. A memorandum of defendant was proved on the trial, admitting the receipt of certain moneys on this account, and appropriating it proportionately to the creditors:—Held, that an action at law would lie to recover the amount so admitted. *Park* v. *Berzey*, 8 C. P. 173.

Withdrawal—*Leave — Motion for Judgment.*]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed:—Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the defendant to get judgment on the statement of facts; and if the sanction of the court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East* v. *O'Connor*, 19 P. R. 391.

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2. *By Pleading and Practice.*

(a) *Before the Judicature Act.*

Action on a note made by M. and indorsed by C. Pleas, by M., general issue and set-off, and by C., general issue, set-off, and release. The plaintiffs took issue on M.'s pleas, and entered a nolle prosequi as to C.:—Held, per Robinson, C.J., and Macaulay, J., that inasmuch as the plaintiffs confessed, by their nolle prosequi, that C. had a set-off sufficient to meet the note, they could not recover the amount against the other defendant; and per Jones, and Hagerman, JJ., that they were not precluded from doing so. *Robertson* v. *Moore*, 6 O. S. 646.

One of two indorsers, who at the time of indorsing were partners, pleaded that neither he nor his partner had due notice of non-payment:—Held, that the other partner having suffered judgment by default did not operate as an admission of notice as against the defendant pleading. *Pengnet* v. *McKenzie*, 6 C. P. 308.

A defendant having indorsed an admission of service on the bill of costs produced:—Held, to have admitted that the copy received was signed by the attorney. *Berry* v. *Andruss*, 3 O. S. 645.

The admission pro confesso by non-attendance of a party to the suit as witness when notified under 14 & 15 Vict. c. 66, was to be taken only as to the cause of action, and not the amount of damages. *Robertson* v. *Ross*, 2 C. P. 193.

A defendant, by his answer, admitted that he was devisee as alleged in the bill; but added that his right to deal with the property had been taken away by a suit for administration in England:—Held, that the latter statement was not an explanation of the former; and that the admission as to the will might be read by the plaintiff as evidence without making evidence of what followed. *Stickney* v. *Tylee*, 13 Gr. 193.

On a motion for decree the plaintiff was assumed, for the purposes of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term. *Wilson* v. *Cossey*, 14 Gr. 80.

A bill for redemption alleged that an absolute conveyance by the plaintiff was intended as a security for a debt then due. The defendants admitted that the conveyance was intended as a security, but alleged that it was to secure future advances, as well as the existing debt, and interest at twelve per cent. The plaintiff moved for a decree on the answer:—Held, that the defendant was entitled to a declaration that the security was to cover future advances, and twelve per cent. interest, as well as the existing debt; but the court gave leave to the plaintiff to abandon his motion, and to file a replication and proceed to a hearing in term, if he chose. *Ib.*

Defendants by their answer specified a certain sum as due when the conveyance was executed, and certain other amounts as admitted by the plaintiff to be due at subsequent periods:—Held, that on a motion for decree these allegations were not binding on the plaintiff, and must be established before the master. *Ib.*

In an action on a merchant's account, the writ was specially indorsed claiming interest, and defendant did not appear:—Held, that his non-appearance was an admission of the charge for interest. *Standing* v. *Torrance*, 4 L. J. 235.

Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others, the costs of an action in the common pleas between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay him all the costs of the reference and of the said action, and that they should execute mutual releases. Breach, non-payment of the costs. Defendant pleaded, 1. non est factum; 2. that the arbitrators did not make any such award:—Held, that on these pleadings the suit and the fact of its reference might be taken to be admitted. *Hibbert* v. *Scott*, 24 U. C. R. 581.

Dower. Plea, that the demandant never was accoupled to the said J. L. (the husband), during the time the said J. L. was seised of the said land:—Held, that the plea admitted the seisin and denied the coverture only. *Losee* v. *Murray*, 24 U. C. R. 586.

Plaintiff sued upon a policy of insurance on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendant pleaded that he was not, at the time of the loss, interested as alleged:—Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest, he would be entitled only to nominal damages. *Clark* v. *Western Assurance Co.*, 25 U. C. R. 209.

In an action for wages earned as a lumberman, the dispute being whether the person hiring the plaintiff was defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that no inference could be drawn from this as an admission by defendant of his liability for plaintiff's wages. *Stewart* v. *Scott*, 27 U. C. R. 27.

In a trespass for taking goods:—Held, that a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record. *McCrae* v. *Osborne*, 6 O. S. 500.

In indebitatus assumpsit the defendant, except as to £33 14s., pleaded the general issue, and as to that sum payment of £1 1s. 8d. into court, and no damages ultra; and the plaintiff replied, that he had sustained greater damages:—Held, that the plaintiff was not entitled to a verdict for the difference between £33 14s. and £1 1s. 8., paid into court, as a sum admitted on the record, without giving any evidence, but that he must prove damages, no specific sum being admitted on the record in this form of action. *Ross* v. *Garrison*, 6 O. S. 626.

In trespass q. c. f. defendant pleaded in one plea title in A., and license from A. to enter, and in the other pleas pleaded title specially in A., giving colour to the plaintiff; and the plaintiff denied the license and took issue on the other pleas:—Held, that the admission by plaintiff of the title in A. by the replication to the plea of license, did not extend beyond that line of pleading, and could not be used by defendant in support of his other pleas of title in A. *Wilkinson* v. *Walker*, 2 U. C. R. 162.

A jury cannot be called upon to infer from anything on the record that an issue contained in such record, and which is to be tried, is to be found either for plaintiff or defendant. Such issue must be supported by testimony other than that to be gathered from the record:—Held, that in this case it could not be taken as admitted by the pleadings that the defendant had given her consent before a Judge to be barred of her dower. *Huffman* v. *Askin*, 2 C. P. 423.

Whole Pleading to be Looked at.]—A bill was filed by D. D. against I. and B., "trading as partners," and J. D. alleging a wrongful conversion by I. and B. of certain timber, the property of the plaintiff, and further alleging that J. D. was a party to an agreement set forth therein respecting the sale of the timber as a surety only, and claiming the return of the timber, an account and damages. I. and B. in their answer admitted that the timber had been removed by them, but alleged that it had been in accordance with an agreement entered into by them with J. D., and with A., his assignee, who had a proper authority for that purpose:—Held, that the whole of the admission was to be looked at, and it was not such as entitled the plaintiff to a decree because it did not admit a conversion of timber of which the plaintiff was sole owner, as alleged in the bill; but under it I. and B. might shew that J. D. had an interest in the timber and authority to act for and represent D. D. in the transaction in question. *Dorey* v. *Irwin*, 4 O. R. 8.

(b) *Since the Judicature Act.*

Absence of Denial.]—When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore, it was, in this case, competent for C., a co-defendant, to deny the execution of the bond, his pleading not expressly admitting it. *Waterloo Mutual Ins. Co.* v. *Robinson*, 4 O. R. 295.

Whole Pleading to be Looked at.]—The plaintiffs, sought to support their case by reference to a certain statement in the defendant's pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleading which suited their purpose and reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber* v. *McKay*, 17 O. R. 562.

III. AFFIDAVITS.

1. *Before Whom Made.*

Attaching Creditor's Attorney.]—An affidavit for an attachment in insolvency, made before the plaintiff's attorney prosecuting the attachment:—Held, sufficient, under s. 25 of the Insolvent Act of 1865. *Hillborn* v. *Mills*, 5 C. L. J. 41.

Attorney's Partner.]—An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made cannot be read. *Hadley* v. *Hearns*, 1 U. C. R. 405; *White* v. *Petch*, 6 U. C. R. 13.

Attorney's Partner.]—A., B., and C. were partners in chancery. A. B. and D. were partners at common law. An affidavit tendered by C. on an application in chancery, was rejected, it having been sworn before D. *Dunn* v. *McLean*, 9 C. L. J. 212.

British Commissioner.]—Sworn before a commissioner for taking affidavits in the English court of chancery at Glasgow:—Held, insufficient. *McEwan* v. *Boulton*, 3 Ch. Ch. 63.

British Consul.]—Quære, whether affidavits sworn before a British consul in the United States can be read in answer to a rule. *Bird* v. *Folger*, 17 U. C. R. 536.

British Mayor.]—Affidavits sworn before the mayor of a city or town in the United Kingdom received on motion for a new trial. *Tetley* v. *Knowlson*, 2 P. R. 275.

British Mayor.]—An affidavit purporting to be sworn before the mayor of a city in England is inadmissible in this court, without proof of his signature and authority to administer oaths; but where the affidavit is sworn out of England it is receivable as evidence here, under the Imperial statute 14 & 15 Vict. c. 99. *Graham* v. *Macpherson*, 1 Ch. Ch. 85.

Commissioner not Available.]—Where no commissioner under statute for taking affidavits to be used in Upper Canada, resided nearer than 210 miles from a place in Lower Canada, where an affidavit of service was to be made, the affidavit was ordered to be sworn before one of the ordinary commissioners for taking affidavits in Lower Canada. *Gould* v. *Hutchinson*, 1 Ch. Ch. 188.

Counsel's Partner.]—Affidavits sworn before an attorney who is a partner of counsel engaged in the cause, but not otherwise connected therewith, may be read. *Wilde* v. *Crow*, 10 C. P. 406.

Crown Lands Act.]—The provision of 23 Vict. c. 2, s. 28, the Crown Lands Act, that all affidavits required thereunder may be taken before "any justice of the peace," only empowers a justice to administer the oath in a place where he can act as such justice. *Regina* v. *Atkinson*, 17 C. P. 295.

The same interpretation of this Act applies to commissioners for taking affidavits mentioned therein. *Ib.*

Foreign Mayor.]—An affidavit of execution of a chattel mortgage, sworn before the mayor of a foreign town, is useless. *De Forrest* v. *Bunnell*, 15 U. C. R. 370.

Foreign Notary.]—Affidavits sworn before a notary public in the United States, and "certified under his hand and official seal," can be used under 26 Vict. c. 41, on a motion in this court. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274; *S. C.*, 2 Ch. Ch. 319.

Relator's Attorney.]—Semble, that the attorney of the relator in a contested municipal election may take the recognizance and affidavit. *Regina ex rel. Blaisdell* v. *Rochester*, 12 U. C. R. 630.

Separation of Counties.]—A commission was granted for the Midland district, which then included the present county of Prince Edward and the united counties of Frontenac, Lennox, and Addington. Prince Edward was afterward set aside as a separate district, the commissioner then being resident in the united counties of F., L., and A.:—Held, that his authority in such united counties would continue. *McWhirter* v. *Corbett*, 4 C. P. 203.

Separation of Counties.]—A commission to take recognizances of bail, &c., within the Gore district:—Held, not valid since 12 Vict. c. 78, in the county of Brant after its separation from that district. *Carter* v. *Sullivan*, 4 C. P. 298.

Separation of Counties.]—K. held a commission for taking affidavits in the district of Wellington, issued in 1848:—Held, that he might act under it in the county of Waterloo, where he was living, being part of the old district, and a junior county disunited from the union of Wellington, Waterloo, and Grey. *Glick* v. *Davidson*, 15 U. C. R. 591.

Separation of Counties.]—Held, approving this case, and dissenting from Carter v. Sullivan, 4 C. P. 298, that a commissioner appointed in 1840, for the district of Gore and Wellington, might after 12 Vict. c. 78, and 14 & 15 Vict. c. 5, continue to take affidavits in Galt, formerly within the Gore district. *Fleming* v. *McNaughten*, 16 U. C. R. 194.

Witness.]—One of the witnesses swore to the affidavit proving the execution of the memorial of a deed before the other witness:—Held, no objection. *Reid* v. *Whitehead*, 10 Gr. 446.

2. *Form and Requisites.*

Affidavit of Execution.]—Affidavits of the execution of a chattel mortgage will not be treated with the same particularity as affidavits used in proceedings before the court. *DeForrest* v. *Bunnell*, 15 U. C. R. 370; *Moyer* v. *Davidson*, 7 C. P. 521.

Affidavit of Execution.]—In affidavits of execution of bonds, &c., produced for the approval of the court of chancery, it is sufficient to use the form of a jurat generally used. *Re Auscbrook*, 4 Gr. 109.

Affidavit of Service.]—The affidavit of service upon which the rule for an attachment for non-payment of costs is founded, is good, though it state the service as made on the day of a certain month instant, without stating the year. *Regina* v. *Tomb*, 4 U. C. R. 177.

Commissioner's Addition.]—The addition of the words, "a commissioner, &c.," or "a commissioner," or "a comr." to the commissioner's signature is sufficient; and semble, no addition is necessary. *Henderson* v. *Harper*, 2 U. C. R. 97; *Brown* v. *Parr*, 2 U. C. R. 98; *Murphy* v. *Boulton*, 3 U. C. R. 177; *Pawson* v. *Hall*, 1 P. R. 294; *Brett* v. *Smith*, 1 P. R. 309.

Commissioner's Addition.]—But—held, that the mere signature was insufficient. *Babcock* v. *Township of Bedford*, 8 C. P. 527.

Deponent's Addition.]—The additions of "plaintiff" and "defendant" must be inserted. *Brown* v. *Simmonds*, 1 U. C. R. 280; *Chafe* v. *Parr*, 2 U. C. R. 98.

Deponent's Addition.]—Semble, under our rule 2 Wm. IV., an affidavit of either plaintiff or defendant need not state the deponent's degree, certainly not where the affidavit is sworn in a foreign country. *Ewing* v. *Lockhart*, 3 U. C. R. 248.

See, also, *Lymon* v. *Brethron*, 2 C. L. Ch. 108.

Deponent's Addition.]—"Secretary of the Board of Arts and Manufactures:"—Held, a sufficient addition. *Noell* v. *Pell*, 7 L. J. 222.

Deponent's Addition.]—The addition of a deponent is only descriptive, not an allegation of a fact. *Hood* v. *Cronkrite*, 4 P. R. 279.

Deponent's Addition.]—An affidavit should contain the description or addition of the deponent; or, if made by a plaintiff or defendant, should shew that he is such. *Rogers* v. *Crookshank*, 4 C. L. J. 45.

An affidavit on production made by W. R., not stating any description or addition, or otherwise shewing that he was a party to the suit, was ordered to be taken off the files; but, as the omission was a mere slip, the order was made without costs, and leave granted to re-file the affidavit. *Ib.*

Deponent's Name.]—An affidavit made for a ca. sa. by a plaintiff who has two Christian names, need not state the second, where his identity sufficiently appears by the affidavit describing him as the above plaintiff. *Perkins* v. *Connolly*, 4 O. S. 2.

Deponent's Name.]—Where all the affidavits in a cause, after verdict, were intituled with an initial letter between the Christian and surname of the defendant:—Held, no objection to an affidavit made by defendant, that the second name was not set out at length, as the initial might be nothing more than a distinctive letter. *Kendrew* v. *Allen*, T. T. 4 & 5 Vict.

Deponent's Name.]—On a motion by the defendant to set aside an order for his arrest in an action for breach of promise of marriage, the plaintiff's affidavit on which the order was based was headed in the proper style of cause, and proceeded, "I, Alberta Jane Boad, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed "Berta J. Vansickle:"—Held, that the affidavit was not a nullity, but the mistake therein was merely an irregularity, and the objection thereto should have been expressly taken in the notice of motion. *Vansickle* v. *Boyd*, 14 P. R. 469.

Deponent's Signature.]—An affidavit of execution of cognovit, made by "William D. Baby," signed "W. D. Baby:"—Held, sufficient. *Folger* v. *McCallum*, 1 P. R. 352.

Deponent's Source of Information.]—The court, in a proper case, may relax the rule requiring a deponent to state his means of information; and where deponent swore that such a disclosure would tend to defeat the ends of justice, the court dispensed with it. *Merchants' Union Express Co.* v. *Morton*, 15 Gr. 274; *S. C.*, 2 Ch. Ch. 319.

Deponent's Source of Information.]—An affidavit by plaintiff's agent, stating that he had the management of all the plaintiff's business in this country:—Held, sufficient to shew his source of information. The expression "owner in fee" held to mean the beneficial owner. *McEwen* v. *Boulton*, 2 Ch. Ch. 399.

Interlineation.] — An interlineation not noted by the commissioner does not necessarily avoid an affidavit. *Leeming* v. *Marshall*, 5 P. R. 276; *Lyster* v. *Boulton*, 5 U. C. R. 632.

Interlineation.]—But in the court of chancery all erasures and interlineations in affidavits must be initialled by the commissioner before whom they are sworn, otherwise they cannot be read. *Crippen* v. *Ogilvie*, 2 Ch. Ch. 304; *McMartin* v. *Dartnell*, 2 Ch. Ch. 322.

Interlineation.]—In the plaintiff's affidavit on a motion to sign final judgment under rule 80, O. J. Act, the word "defence" had been struck out, the word "appearance" interlined, without being initialled by the commissioner before whom the affidavit was sworn:—Held, under rule 468 O. J. Act, that the affidavit could not be read. *Boyd* v. *McNutt*, 9 P. R. 493.

Intituling — *Affidavit before Action.*] — Quære, whether affidavits to be made in England for proof of debts sued for in this Province, made before a suit is commenced, can be read at a trial subsequently had, or if such affidavits must be intituled in the cause. *Gordon* v. *Fuller*, 5 O. S. 174.

Intituling — *Ambiguity.*] — An affidavit intituled C. D. (the defendants) at suit of,—or, and—A. B. (the plaintiff), is bad. *Winter* v. *Mixer*, 10 U. C. R. 110; *Wright* v. *Jennings*, 7 C. P. 26; *Lewis* v. *Blackwood*, 3 L. J. 134.

Intituling — *Amended Bill.*]—Affidavits need not in their intituling distinguish the parties by original and amended bill. It is sufficient to describe them as the new parties to the suit. *Somerville* v. *Kerr*, 2 Ch. Ch. 154.

Intituling—*Appeal.*] — The papers and affidavits used on a motion to set aside a bond for security for costs of appeal from the court of chancery, should be intituled in that court. *Denison* v. *Denison*, 4 C. L. J. 45.

Intituling — *Certiorari.*] — Affidavits under 13 & 14 Vict. c. 53, s. 85, to remove a cause from the division court, must be intituled in the court in which the motion is made, not in the division court. *Smyth* v. *Nicholls*, 1 P. R. 355.

Intituling — *Certiorari.*] — Quære: Whether the affidavits were properly intituled. The Queen (plaintiff) v. Robert Farley (defendant), on an application to quash an inquisition returned to a writ of certiorari. *Regina* v. *Farley*, 24 U. C. R. 384.

Intituling—*Change in Name of Court.*]—An affidavit intituled in the Queen's bench, and sworn before the Judicature Act came into force, might under s. 11, s.-ss. 2 and 3, be made the foundation of an order in the Queen's bench division. *Elliot* v. *Capell*, 9 P. R. 35.

Intituling—*Contractions.*]—It is no objection to an affidavit of execution of a commission to take evidence abroad, that the contractions "plff." and "deft." were used in the intituling of it. *Frank* v. *Carson*, 15 C. P. 155.

Intituling—*Court Not Named.*]—Where the commissioner designates himself, "A commissioner in B. R., &c.," it is no objection that the affidavit is not intituled in any court. *Ellerby* v. *Walton*, 2 P. R. 147.

Intituling—*Information.*]—The affidavit of the service of a subpœna ad respondendum, directed to defendant in an information of intrusion, is properly intituled in styling the attorney-general "informant." *Attorney-General* v. *McLachlin*, 5 P. R. 63.

Intituling—*Information.*]—On a motion for leave to file a criminal information against a justice of the peace the affidavits should not be intituled as of a suit pending. *In re Bustard* v. *Schofield*, 4 O. S. 11.

Intituling — *Insolvency.*] — Affidavits on an appeal from a county court Judge in insolvency, not intituled in any court, were not allowed to be read. *Re Sharpe*, 2 Ch. Ch. 67.

Intituling —*Insolvency.*] — Semble, that the omission to describe the parties in the intituling of an affidavit under the Insolvent Act, 1875, ss. 9, 14, 18, is not a fatal objection, if the description appears in the body of the affidavit. *McDonald* v. *Cleland*, 6 P. R. 289.

Intituling — *Quashing By-law.*] — An affidavit in support of a motion to quash a by-law, not intituled in any court, but sworn

before a commissioner styling himself "A Commissioner in B. R. and C. P. &c.":—Held, sufficient. *In re Kinghorn and City of Kingston*, 26 U. C. R. 130.

See, also, *In re Frazer and Stormont*, 10 U. C. R. 286.

Intituling — *Quashing By-law.*] — But where there was nothing to shew that it was sworn before an officer of any court, the words "commissioner, &c.":—Held, insufficient. *In re Hirons and Township of Amersburg*, 11 U. C. R. 458.

Intituling—*Style of Cause.*] — Affidavits styled in short form "A., B., and others, plaintiffs," and "C., D., and others, defendants," were held sufficient. *Dickey* v. *Heron*, 2 Ch. Ch. 490.

See Crooks v. *Crooks*, 1 Gr. 57.

Intituling—*Mandamus—Amendment.*] — Where a meritorious application was made, in an action, for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R. S. O. 1887 c. 232, it was directed that the affidavits should be re-sworn and intituled as in an application (not in an action) for the prerogative writ. *Toronto Public Library Board* v. *City of Toronto*, 19 P. R. 329.

Intituling—*Style of Cause.*] — Where a defendant moved for a rule, on an affidavit incorrectly intituled as to the cause, and the plaintiff, in shewing cause by his attorney, intituled his affidavits as defendant had intituled his, stating the proper style of the cause, and shewing that he was not attorney for the plaintiff in the cause in which the affidavits were intituled, defendant's rule was discharged, there being a fatal variance if there was only one cause, and if there were two no service being proved. It was however, discharged without costs, as defendant's affidavits were intituled in the same way as the plaintiff's, whereas they should have been intituled in the right cause, denying the existence of the other. *Terry* v. *Matthews*, T. T. 3 & 4 Vict.

Intituling—*Style of Cause—Variance.*]—Where in the style of the cause the plaintiff was called "Davids Cass," but in the title of affidavits in support of a rule nisi in the same cause, "Davis H. Cass" and "Davis Hawley Cass":—Held, a fatal variance. *Beauchamp* v. *Cass*, 1 P. R. 291.

Intituling — *Wrong Court.*] — An affidavit, sworn abroad, of the due execution of a commission, intituled in the common pleas instead of the Queen's bench, was held sufficient, the proceedings being clearly identified. *Comstock* v. *Burrowes*, 13 U. C. R. 439.

Jurat—*Day not Arrived.*]—The jurat of an affidavit stated that it was sworn on a day which had not then arrived:—Held, that the affidavit was a nullity. *In re Robertson*, 5 P. R. 132.

Jurat—*Deponent's Name.*]—The omission, in the jurat, of the name of the deponent, vitiates the affidavit. *Dickey* v. *Heron*, 1 Ch. Ch. 293.

Jurat—*Illiterate Deponent.*]—When sworn by an illiterate person, the omission in the jurat of the statement that the deponent appeared to understand it is fatal. *Moore* v. *Jones*, Dra. 233.

Jurat—*Omission.*] — "Sworn before at, &c.," omitting the word me:—Held, sufficient. *Martin* v. *McCharles*, 25 U. C. R. 279.

Jurat—*Place.*]—Omission of the place of taking:—Held, not fatal. *McLean* v. *Cumming*, Tay. 184.

Jurat—*Place.*] — "Sworn before me at Belleville," (not saying in what district):—Held, sufficient. *Ridley* v. *Wilkins*, 1 C. L. Ch. 26.

Jurat — *Place.*] — Sworn "at Toronto," without giving the name of a county:—Held, sufficient. *Yeoman* v. *Steiner*, 5 P. R. 466.

Jurat—*Two Deponents.*]—An affidavit by two persons, not stating distinctly in the jurat that both were sworn, cannot be read. *Nicholson d. Spafford* v. *Rea*, 3 O. S. 85.

Jurat—*Two Deponents — Amendment.*] — But an amendment will be allowed by the insertion of their names. *Fisher* v. *Thayer*, 5 O. S. 513.

Jurat—*Two Deponents.*]—A jurat stating that two deponents (naming them) were sworn, is sufficient. *Keefer* v. *Hawley*, 1 P. R. 1.

Jurat — *Two Deponents.*] — The words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word "severally," in the affidavit to a chattel mortgage:—Held, sufficient. *Moyer* v. *Davidson*, 7 C. P. 521.

Jurat—*Two Deponents.*]—Semble, that a similar jurat to an affidavit of loss required by a fire policy, would be sufficient. *Mann* v. *Western Assurance Co.*, 17 U. C. R. 190.

See, also, *Regina* v. *Atkinson*, 17 C. P. 295.

Jurat Omitted—*Insurance Loss.*] — An affidavit of loss under a fire policy which had no jurat, and was not in the form of an affidavit:—Held, insufficient. *Shaw* v. *St. Lawrence County Mutual Insurance Co.*, 11 U. C. R. 73.

Notary—*Seal.*]—An affidavit for use in the court, sworn before a notary public in Ontario, should be authenticated by his official seal. *Boyd* v. *Spriggins*, 17 P. R. 331.

Paragraphs.]—It is not necessary, under the 112th rule T. T. 29 Vict., that an affidavit to hold to bail should be divided into paragraphs and numbered. *Ellerby* v. *Walton*, 2 P. R. 147.

Paragraphs.]—Attention called to rule of court 112, requiring affidavits to be divided into paragraphs. *In re Park and Park*, 24 U. C. R. 459.

Qui Tam.]—Affidavits in qui tam actions must shew the character in which plaintiff sues. *Robertson* q. t. v. *Orchard*, 4 P. R. 23.

Reference to Other Affidavits.]—As a general rule, each deponent should state in his affidavit the facts to which he swears, not by reference to the statements in other affidavits filed. *In re Campbell and Brown*, 2 P. R. 291.

3. *Miscellaneous Cases.*

Affidavit and Affirmation—*Presumption of Authority—Persons Having Religious Scruples.*]—The Act respecting newspapers in Manitoba (50 Vict. c. 23) provides that no person shall print or publish a newspaper until an affidavit or affirmation, containing the matter directed, is deposited with the prothonotary of the court and that such affidavit or affirmation may be taken before a justice or commissioner:—Held, that such affidavit or affirmation, if a corporation is proprietor of the newspaper, may be made by the managing director; that there is an option either to swear or affirm and the right to affirm is not confined to members of certain religious bodies or persons having religious scruples; and that if the affidavit or affirmation purport to have been taken before a commissioner his authority will be presumed. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

Amendment.]—Amendment of Christian names of plaintiff in affidavits. *Rose* v. *Cook*, 1 U. C. R. 5; *Grant* v. *Taylor*, 2 U. C. R. 407; *Beauchamp* v. *Case*, 1 P. R. 291.

Attachment—*Substitutional Service.*]—An affidavit for the allowance of service of an attachment should state what efforts have been made to effect personal service. *Stephen* v. *Dennie*, 3 L. J. 69.

Disingenuous Statements.]—Affidavits disingenuously drawn up, with a view of presenting inferences and giving colour to the transactions to which they refer, inconsistent with the whole truth, even though true so far as they go, should be read with suspicion, and carry but little weight. *Regina* v. *Allen*, 5 P. R. 453.

Impeaching a Deponent's Veracity.]—Affidavits impeaching the character for veracity of a deponent whose affidavit has been filed on moving a rule, were rejected. *Clark* v. *Chipman*, 26 U. C. R. 170.

Improper Allegations.]—Misconduct of magistrate in drawing up an affidavit in a case of seduction, inserting the words criminal connection, instead of carnal connection, strongly censured. *McIlroy* v. *Hall*, 25 U. C. R. 305.

Irregular Filing.]—The costs of affidavits for use on a motion in the weekly court filed with the clerk in chambers, instead of in the registrar's office, as required by rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the court on the motion, and are recited in the order made thereon. *Sturgeon Falls Electric Light and Power Co.* v. *Town of Sturgeon Falls*, 19 P. R. 286.

Irrelevant Expressions.]—Remarks as to improper and irrelevant expressions in affidavits, and the same censured. *Fisher* v. *Green*, 2 C. L. J. 14; *Davidson* v. *Grange*, 5 P. R. 278.

Interrogatories—*Jurat.*]—The answers of a prisoner to interrogatories, being styled in the cause, and intituled in the proper court, were headed, "The answers upon oath of," &c., and proceeded thus: "To the first interrogatory, he saith," &c. 2. "To the second interrogatory," &c., not adding, he saith. To the fifteenth interrogatory only the figures 15 were prefixed. The jurat stated that deponent was sworn, &c., "and made oath that the foregoing answers were true, on the 8th day of March, 1854:"—Held, that the form of the answers and the jurat was defective; and a summons obtained upon them was discharged, but without prejudice to another application. *Addy* v. *Brouse*, 1 P. R. 234.

Jurat.]—The jurat may be referred to, to explain the date of a fact deposed to in the affidavit. *Lyman* v. *Brethron*, 2 C. L. Ch. 108.

Jurat—*Perjury.*]—To sustain a conviction for perjury in an affidavit, it is not necessary that the jurat should name the place at which the affidavit is sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. *Regina* v. *Atkinson*, 17 C. P. 295.

There was no statement in the affidavit as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, County of Grey, to wit:" but the contents shewed that it related to lands in that county, and it was proved that defendant subscribed the affidavit; that the party before whom it purported to have been sworn was a justice of the peace for that county, and had resided there for some years; that the affidavit had been received through the post office, by the agent of the Crown lands there, by whom it was forwarded to the commissioner of Crown lands; and that subsequently a patent issued to the party on whose behalf the affidavit had been made:—Held, evidence from which the jury might infer that the affidavit was sworn in the county of Grey. *Ib.*

Papers Annexed.]—An affidavit is not insufficient for not mentioning the papers annexed separately, nor positively stating to what they are annexed. *McKay* v. *Dearmid*, 2 C. L. Ch. 1.

Papers Referred to.]—A copy of the by-law moved against was described as annexed, but was not annexed, to applicant's affidavit:—Held, no objection. *Bessey* v. *Township of Grantham*, 11 U. C. R. 156.

Quaker—*Affirmation.*]—An affirmation by a Quaker as follows:—"I, W. D. H., of &c., do solemnly, sincerely, and truly, declare and affirm, that I am one of the society called Quakers," and then proceeding with the subject matter of the affidavit, without any further affirmation:—Held, not in compliance with C. S. U. C. c. 32, s. 1. *Hillborn* v. *Mills*, 5 C. L. J. 41.

Registry Act.]—An affidavit of execution for the purpose of registration may be made by a person who in fact witnesses the signature, but who writes his name, not as a witness but as the person to whom a letter is addressed. Where an instrument is in fact registered, s. 80 of the Registry Act cures any irregularity in the proof for registration. *Hoofstetter* v. *Rooker*, 22 A. R. 175; 26 S. C. R. 41.

Scandalous Statements.]—Where the affidavit, on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor, altogether unconnected with the dealings between the solicitor and the client, such allegations were held to be scandalous, and were ordered

to be struck out of the affidavits. *In re Fitch*, 2 Ch. Ch. 288.

Statutory Provisions.]—It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of court. *Moyer* v. *Davidson*, 7 C. P. 521.

Style of Cause.]—The affidavit on which the order for an attachment in insolvency was granted, made no reference to the debtor's occupation or business, except that it described him in the style of cause as a merchant:—Held, that the heading of the affidavit is merely descriptive and not an allegation of fact. *Re Green*, 15 C. L. J. 35.

Trial on Affidavits.]—A Judge in chambers will not try the merits of a case on affidavits, but he may properly receive and consider explanatory affidavits filed in reply, so as to be able to exercise a discretion on all matters properly before him, and grant relief, if he think the facts before him warrant it. *Bank of Montreal* v. *Morrison*, 4 P. R. 331.

Trial on Affidavits.] — The court will not try matters of fact upon affidavits. Where, therefore, defendant moved to set aside a verdict, because the notice of trial had not been served in time, and the plaintiff's attorney swore that defendant's attorney agreed to take short notice of trial, which the plaintiff's attorney denied:—Held, that the verdict must be set aside. *Smith* v. *Ask*, 5 U. C. R. 497.

Two Deponents—*Perjury.*]—A joint affidavit made by the defendant and one D., stated * * * "Each for himself maketh oath and saith that, &c.: and that he, the deponent, is not aware of any adverse claim to, or occupation of said lot." The defendant having been convicted of perjury on this latter allegation:—Held, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. *Regina* v. *Atkinson*, 17 C. P. 295.

Unauthorized Affidavits.]—Remarks as to the practice of magistrates or commissioners taking unauthorized affidavits. *Jackson* v. *Kassel*, 26 U. C. R. 341.

See, also, *McIlroy* v. *Hall*, 25 U. C. R. 303.

IV. Contradictory Evidence.

Adultery.]—To a bill for alimony, the husband alleged as a ground of defence, that the plaintiff had been guilty of adultery. The evidence of the actual commission of the crime was distinct and positive by the brother and brother-in-law of the husband, who had watched on the outside of the house on the night that the alleged act of adultery was said to have been committed. These two witnesses also proved that the language used by the parties was of an obscene and offensive character and there was the fact that letters of an objectionable nature had been discovered as passing between the plaintiff and a young man against whom the husband had warned his wife. The court, under the circumstances, gave credence to the statements of these two witnesses, although without their evidence the case would not have been more than one of the very gravest suspicion: and this although the plaintiff and the partner in her guilt swore positively that no such act had ever been committed. *Campbell* v. *Campbell*, 22 Gr. 322.

The nature of the evidence to be accepted in such cases, and the rules to be observed in the consideration of it, discussed. *Ib.*

Attempt to Vary Deed.]—Where parol evidence is admissible to control the legal operation of a deed, no effect can be given to such evidence if contradictory, or its accuracy is involved in doubts. *Re Browne*, 2 Gr. 590.

Contradictory Certificate.] — Where, after the decease of one of the justices of the peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate, notwithstanding the evidence. *Romanes* v *Fraser*, 17 Gr. 267.

Credibility of Witnesses — *Reference —Irrelevant Evidence.*]—On appeal from a master's report on a reference to assess damages it was held that he was the final judge of the credibility of the witnesses and that his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence. *Booth* v. *Ratté*, 21 S. C. R. 637.

Denial of Receipt of Letters—*Jury's Functions.*]—Ejectment on a mortgage. The defendants pleaded usury; and they produced two papers purporting to be copies of letters written by the mortgagor to the plaintiff (the mortgagee), as tending to shew that they were copies made by the mortgagor of letters written by the plaintiff, which were produced: and they relied upon the whole correspondence as making out clearly a usurious bargain. The plaintiff was called and swore that he had never received the letters of which the defendant professed to produce copies, and that there was no usury in the mortgage transaction:—Held, that it should nevertheless have been left to the jury to say whether they did not believe, from the plaintiff's own letters, that such answers had been received as the defendants relied upon: and if so, whether on the whole correspondence there was sufficient proof of usury. *Mair* v. *Cully*, 10 U. C. R. 321.

Findings of Judge at Trial.]—On an appeal from a decree of the court below for specific performance of a parol contract, it appeared that the defendant denied that there was any contract for sale, and alleged that the plaintiff was in possession as tenant merely and not vendee; the contract as sworn to by the plaintiff's witnesses was not the contract alleged by the bill, and the evidence of there having been any contract was contradictory. The learned Judge who pronounced the decree having intimated considerable doubt as to the evidence, the decree was reversed, and the bill in the court below ordered to be dismissed, but under the circumstances without costs. *Grant* v. *Brown*, 13 Gr. 256.

Where the evidence is contradictory the court will not interfere with the findings of the Judge who tried the case. *Cook* v. *Patterson*, 10 A. R. 645.

Where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Grassett* v. *Carter*, 18 S. C. R. 105.

The Judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. The court of appeal while not differing from the Judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence, allowed the appeal, and reversed the decision of the court below. *Cameron* v. *Bickford*, 11 A. R. 52. But this judgment was reversed by the judicial committee.

Findings of Master.]—Although the rule is, that if the decision of a question of fact depends altogether on the credit to be given to direct testimony of conflicting witnesses, the court, as a rule, will adopt the finding of the master; still, where the evidence of the mortgagor and mortgagee as to an arrangement that a mortgage, which had been satisfied, should be allowed to continue as a collateral security for subsequent indorsements and other notes held by the mortgagee, and the mortgage deed had been allowed to remain in the hands of the mortgagee undischarged, and the mortgagee had also retained possession of the title deeds, the court considered these circumstances as strongly confirming the direct evidence of the mortgagee, and reversed the decision of the master, who had found against the fact of such an agreement having been made between the parties. *Morrison* v. *Rounson*, 19 Gr. 489.

The court will not interefere with the discretion of the master in deciding on the relative veracity of witnesses, where evidence has been taken viva voce before him. *Waddell* v. *Smyth*, 3 Ch. Ch. 412.

Where on a reference to the master the plaintiff swore that he never received the amount of a legacy to which he was entitled, and the defendant swore that he had paid all but $80, and a witness called by the plaintiff proved an admission by the defendant, that the whole legacy was due, but the master reported that the witness was not to be relied on, the court, in view of all the circumstances, refused to disturb the master's finding. *Cotter* v. *Cotter*, 21 Gr. 159.

Masters should be careful not to attach too much weight to oral testimony in opposition to evidence of facts and circumstances. *Day* v. *Brown*, 18 Gr. 681.

Legal or Illegal Purpose.]—The customer of a bank created a mortgage in its favour by the deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the officers of the bank, on the other hand, swore that the security was required by the bank and given by the debtor, to secure all his indebtedness, past as well as future, and a memorandum indorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627.

Motion to Commit.]—Where a breach of an injunction was sworn to by a single deponent, and was denied by the defendant, and there was no corroborative evidence, the court refused a motion to commit. *Stewart* v. *Richardson*, 17 Gr. 159.

Papers from Proper Custody.] — In 1859, a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with M., who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought and had for years been under the impression, that the whole claim under the assignment had been paid; that the plaintiff M. was not interested in this note; and that through oversight it had not been delivered up. The attorney who had acted for M. having sworn that this note was the one in which M. was interested, and that it had never been paid the court, in view of the fact that the mortgage and note were both found in the hands of the assignee, and that no demand during so many years had been made for their discharge, decreed in favour of the plaintiffs. *Scatchard* v. *Kiely*, 21 Gr. 30.

Parties not ad Idem.]—On the evidence in this case as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds were never ad idem, and the recovery could only be on the quantum meruit. *Hoener* v. *Merner*, 7 O. R. 629.

Positive but Improbable Statements.]—Where a witness being called to prove the plaintiff's case, persists in making positive, though very improbable statements, disproving it, the court, in the absence of any other witness, will not allow the case to go to the jury. *Vincent* v. *Sprague*, 3 U. C. R. 283.

Positive Denial against Ambiguous Acts.]—One C. entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and C. both swore that the arrangement had not been made by C. as agent of the defendant, but for his own benefit:—Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and C. that the contracts had not been made on behalf of and as agent for the defendant, freight being primâ facie payable to the master of a vessel, and the cargo need not be delivered by him until

the freight thereof is paid: although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Merchants Bank* v. *Graham*, 27 Gr. 524.

Positive Evidence as against Receipt.]—Ejectment for lots 15, 13, and north half of 12, in the 2nd concession of Sandwich. The defendant, in his notice of title, besides denying the claimants' title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st March, 1861. This action was commenced on the 12th October, 1861. The defendant, in reply, proved his tenancy commenced in May, and that one of the plaintiffs, in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain. The jury having found for the plaintiffs, and that the defendant was their agent on the premises:—Held, on motion for a new trial, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th March, for rent up to date. *Colby* v. *Wall*, 12 C. P. 95.

Presumption in Favour of Fair Dealing.]—If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes, personally at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court, holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Cameron* v. *Barnhart*, 14 Gr. 661.

Solicitor and Client—*Presumption of Forgetfulness.*] — Where witnesses directly contradict each other, the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts directly repel such an assumption. In investigating a charge instituted by the court against a solicitor, which if established would have proved of a very grave nature, the court acted on the above principle, and accepted the solicitor's explanation of the facts, although distinctly contradicted by the client. *In re Toms*, 3 Ch. Ch. 204.

Varying Opinions as to Value.]—It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses in toto and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, and that truth lies somewhere between the extremes. *Munsie* v. *Lindsay*, 10 O. R. 520.

Version of Deceived Party.] — There may be agency and its duties and liabilities without express words of appointment or acceptance: and where a party negotiating between two persons, the one desiring to sell, the other to buy, certain land, gave the former to understand that he was acting in her interest, it was held, that she was entitled to the full price which he obtained for the land, though it exceeded the amount which he had obtained her consent to accept. In such a case, there being a conflict as to what had passed in the conversations, and no other witness of them being produced, it was:—Held, that other things being equal, the version of the deceived party should be accepted in preference to that of the other party. *Wright* v. *Rankin*, 18 Gr. 625.

V. Corroboration.

Accomplices.] — The plaintiffs claimed that a sum of money had been stolen from them by defendant, and brought an action to recover the money or land in which it had been invested. The evidence in proof of the charge was that of accomplices, and, in corroboration, the evidence of detectives who stated that defendant admitted the charge. The Judge charged the jury that if it was a criminal trial he should be compelled to tell them that, though they might convict on the evidence of accomplices, it was never safe to do so, and there should be some corroborative evidence to turn the scale against the presumption of innocence. He further said that this was not a criminal case, but yet he could not say the rule ought not to be applied, perhaps not precisely in the same way, but they were to exercise their common sense as to how far they would credit or discredit the evidence of accomplices. He also stated that when he said that corroborative evidence was necessary when accusations were sworn to by accomplices, he desired them to understand that the more particular point of corroboration should be the identity of the person accused, and unless the corroborative evidence identified the defendant with the stealing on the occasion and under the circumstances detailed in the evidence, it would not be corroborative. His identity should be contained in the evidence of corroboration:—Held, that the effect of the charge and the impression it was calculated to leave on the minds of the jury, fairly considered, was that the evidence of accomplices in crime, which crime gave rise to the civil action, ought not to be credited or relied on, unless corroborated, and was misdirection; and there was also misdirection in charging that the corroboration must be as to the identity of the party charged with the criminal act. It was urged that the misdirection, if any, was immaterial, because the defendant could not have been present taking part in the stealing of the money, because an alibi was proved; but:—Held, that the effect that the evidence as to the alibi had upon the jury depended much upon the credit to be attached to the accomplices' evidence, and as it could not be ascertained on what ground the jury found for the defendant, it was impossible to say that the jury may not have discredited the accomplices' evidence because of the alleged want of corroboration. The Judge also in his charge, after stating that the plaintiff in an action had to make out his case, added, that is, he has to satisfy them that the evidence is sufficient to cause them to believe "without any reasonable doubt" that the claim the plaintiff makes is correct, and, if he fails to do so, there should be a verdict against him. Per Cameron, C.J.—While of opinion that this was putting the plaintiffs' obligation

more burdensomely than the law required, he could not say the learned Judge was without the warrant of authority for so charging. Thurtell v. Beaumont, 1 Bing. 339, and Richardson v. Canada West Farmers' Ins. Co., 17 C. P. 341, commented on. Per Rose, J.—The charge on this point was quite correct. *United States Express Co.* v. *Donohoe*, 14 O. R. 333.

Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices. *Re Monteith, Merchants Bank* v. *Monteith*, 10 O. R. 529.

Adultery.]—The evidence of one witness, by confession of loose character, is not sufficient to prove adultery unless corroborated. *Aldrich* v. *Aldrich*, 21 O. R. 447.

Agreement to Leave Money by Will.]—The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife, he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the mortgage and the plaintiff was compelled to pay it himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for him; that he would pay plaintiff $150 a year for ten years, and bequeath to his wife $1,000. By the will, however, only $100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for $200 and $200 respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by the statute R. S. O. 1877 c. 62. *Hetherau* v. *Moon*, 28 Gr. 319, and see *Orr* v. *Orr*, 21 Gr. 397.

Agreement to Pay Wages.]—Plaintiff, after her husband's death, and about twenty-five years before action brought, went to live with testator, her son-in-law, and resided with him up to the time of his wife's death, about twelve years before action. She alleged that after her daughter's death, testator agreed to pay her wages if she would continue to live with him and take care of his family. She accordingly did so till his death in 1855, up to which time she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator, about two years before his death, told witness plaintiff would be handsomely paid for her services; and also on the evidence of another son-in-law, that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested in mortgage securities and the whole income paid to plaintiff during her lifetime; but there was no evidence as to the value of this bequest, and it was suggested that after payment of debts the residue would be very small:—Held, that there was no sufficient corroborative evidence within R. S. O. 1877 c. 62, s. 10. *Tucker* v. *McMahon*, 11 O. R. 718.

Breach of Promise.]—In an action for breach of promise of marriage. See *Costello* v. *Hunter*, 12 O. R. 333; *Yarwood* v. *Hart*, 16 O. R. 23, 16 A. R. 532.

Compromise by Executors.]—Where a claim is made against the estate of a testator, and the executors in the bonâ fide discharge of their duty compromise the claim, it is not necessary, on passing the accounts of the executors, that any corroborative evidence should be adduced. *Re Robbins*, 23 Gr. 162.

Establishing Will.]—The evidence of various witnesses for the defence was conflicting as to the incidents which happened shortly before the testator's decease; and while they all spoke of the testator's unwillingness to give the plaintiff more than $10, there was no evidence, other than that of the defendant, of his desire to give her the bulk of his property or to make any disposition of it:—Held, that the second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg* v. *Maguire*, 11 A. R. 507.

Executors and Administrators.]—What is sufficient corroboration of the evidence of the surviving party to a transaction against the representatives of the other party thereto, considered and acted on. *Birdsell* v. *Johnson*, 24 Gr. 202, and see *Trust and Loan Co.* v. *Clarke*, 3 A. R. 429.

The provision under the statute that requires corroborative evidence to be adduced where one of the parties to an alleged contract is dead, is not that the evidence of the party setting up the claim must be corroborated in every particular; it is sufficient if independent support is given to the party's statement in so many instances that it raises in the mind of the court the conviction that such statements may be depended on even in respect of those matters in which there is no corroboration. *McDonald* v. *McKinnon*, 26 Gr. 12.

To enable an opposite or interested party to recover in an action against the estate of a deceased person, it is sufficient if his evidence is corroborated, i. e., strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements of facts deposed to. It is not necessary that the case should be wholly proved by independent testimony. Parker v. Parker, 32 C. P. 113, approved. The production by the plaintiff, an architect, claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's handwriting, shewing the rooms and the accommodation required and the suggested cost, and of a sketch of the property:—Held, sufficient corroboration of the plaintiff's evidence. *Radford* v. *Macdonald*, 18 A. R. 167.

Fraud.]—In cases where there is suspicion of fraud. See *McKay* v. *McKay*, 31 C. P. 1; *Morton* v. *Nihan*, 5 A. R. 20.

Independent Items.]—When each item in an account against the estate of a deceased person is an independent transaction, and constitutes a separate and independent cause of action, to satisfy the statute R. S. O. 1877 c. 62, s. 10, some essential corroboration of the interested party's evidence must be adduced as to each item. *Cook* v. *Grant*, 32 C. P. 511; *Re Ross*, 29 Gr. 385.

The plaintiff claimed to recover against the defendant as administrator of his deceased brother W. G., two sums, one of $800, which she alleged W. G. received for her from another brother, S. G., also deceased; and the other of $1,500, which she alleged W. G. promised to leave her in consideration of her remaining with him, taking care of and managing his house, as long as he lived. As to the $800, the plaintiff's evidence was held to be sufficiently corroborated by the evidence set out in the report, within the meaning of the statute, but otherwise as to the $1,500. *Cook* v. *Grant*, 32 C. P. 511.

Indorsements of Payments.]—The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, indorsements upon them shewing that payments had been made to him, does not require corroboration under s. 10 of R. S. O. 1887 c. 61. *In re Staebler, Staebler* v. *Zimmerman*, 21 A. R. 266.

Inference from Facts — *Interested Party.*]—In an action by or against the representatives of a deceased person, the corroborative evidence required by R. S. O. 1897 c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required. Semble, corroborative evidence within the meaning of that enactment may be given by an interested party so long as he is not the party obtaining the decision. *In re Curry, Curry* v. *Curry*, 32 O. R. 150.

Inferences or Probabilities Sufficient.]—The "material evidence" in corroboration, required by the Evidence Act, R. S. O. 1887 c. 61, in an action by or against the heirs, executors, administrators or assigns of a deceased person, may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the moneys in question were paid in due course to the deceased is sufficiently corroborated by shewing that the deceased, a close, careful, intelligent man, who lived for over a year after the transactions in question, and during that time saw and conversed with many persons, continued to entrust her with his business, and made no complaint of the non-receipt of the money. *Green* v. *McLeod*, 23 A. R. 676.

Interested Party.]—K. had assigned the moneys due to him by S.:—Held, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, R. S. O. 1877 c. 62, s. 10, and his evidence therefore did not require corroboration as against the executors of S. *Watson* v. *Severn*, 6 A. R. 559.

Leaving Evidence to the Jury.]—Under s. 10 of the Evidence Act, R. S. O. 1877 c. 62, any evidence adduced by a party interested against an executrix corroborating the evidence of the interested party in any particular, must be submitted to the jury, as sufficient in point of law, the weight to be attached to it in point of fact being a matter for their consideration. Orr v. Orr, 21 Gr. 397, and McDonald v. McKinnon, 26 Gr. 12, commented upon. *Parker* v. *Parker*, 32 C. P. 113.

In this case, which was an action on the common counts against the defendant as executrix, &c., for money paid to the use of the defendant's testator, the transaction arose out of some promissory notes made by the testator and the plaintiff, but which the plaintiff alleged he signed for the testator's accommodation, and had subsequently paid for the testator:—Held, on the evidence set out in the report, that the plaintiff's evidence was sufficiently corroborated within the meaning of the Act; and that the count for money paid was supported. *Ib.*

Loan from Wife to Husband.]—The widow of the intestate claimed against his estate a sum of $700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock-in-trade. The money was deposited in a bank at the time of the marriage, which took place before C. S. U. C. c. 73. Evidence was given in corroboration of the claimant to the effect that "He (Laws) told me he got $600 or $700 from his wife. She had got a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. * * He said his wife had helped him with $600 or $700. * * I understood he had used the money to buy out the business:"—Held, that she could not recover. *Re Laws, Laws* v. *Laws*, 28 Gr. 382.

Seduction—*Married Woman.*]—In an action for the seduction of a married woman the non-access of her husband, and her seduction by the defendant, may be proved by her own evidence. Evans v. Watt,. 2 O. R. 166, considered. *Mulligan* v. *Thompson*, 23 O. R. 54.

Transfer of Stock.]—W. D. B. alleged that in 1872, D. B. transferred to him as a gift 100 shares of a certain stock, part of the assets of the firm, and as corroborative evidence thereof proved the transfer of the stock to him, and a retransfer afterwards on January 30th, 1873; which retransfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the savings bank of 31st December, 1872, shewing this stock:—Held, that this was not such corroborative evidence of the gift as satisfied the statute R. S. O. 1877 c. 62, s. 10. *Burn* v. *Burn*, 8 O. R. 237.

Two Defendants in same Interest.]—In an action by an executor of a deceased mortgagee against two joint mortgagors, both the latter deposed to certain payments made by one or the other in the lifetime of the mortgagee:—Held, that each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section, and the fact of both the mortgagors testifying to such payments did not constitute corroboration within the meaning of R. S. O. 1887 c. 61, s. 10. *Taylor* v. *Regis*, 26 O. R. 483.

Wife's Evidence of Gift.]—In an administration suit the only proof of the receipt of certain moneys by the wife during the life of her husband, was her own evidence, when at the same time she stated that the money had been given to her by her husband. The court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Gr. 373.

VI. Examination de Bene Esse.

Aged or Infirm Person.]—C. S. U. C. c. 32, ss. 19, 21, authorizes the examination of aged or infirm persons under commission within, or any person out of Upper Canada, but provides for the proof and reception of such latter examination only:—Held, that an examination within Upper Canada was clearly, by necessary intendment, made receivable under C. S. U. C. c. 32, when duly taken, which in this case was proved by the commissioner. *Ryan* v. *Devereux*, 26 U. C. R. 100.

Claimant.]—The effect of a claimant's examination pro interesse suo considered. *Prentiss* v. *Brennan*, 2 Gr. 582; and see *Harvey* v. *Taylor*, 1 Ch. Ch. 353.

Costs.]—In examinations de bene esse if the evidence is not used, and the witnesses are within reach of subpœna, the costs of the examination should not be allowed. Where the evidence is material and is used, the costs become costs in the cause. *McMillan* v. *McMillan*, 8 C. L. J. 285.

An order was obtained by the plaintiff, who sued for damages for bodily injuries sustained, for his own examination de bene esse before the trial, but owing to the state of his health his examination was not completed:—Held, under the circumstances of the case, that the examination of the plaintiff de bene esse was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action. Beaufort v. Ashburnham, 13 C. B. N. S. 598; 32 L. J. C. P. 97; 7 L. T. N. S. 710; 11 W. R. 267; 9 Jur. 822, followed. *Carty* v. *City of London*, 13 P. R. 285.

The plaintiff's own physician attended on him during the examination de bene esse, and was called as a witness at the trial, when he stated what his charges for attendance on the plaintiff amounted to:—Held, that, there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action. *Ib.*

Ex Parte Order.]—An application for an order to examine a witness de bene esse on account of ill health may be made ex parte. *Oliver* v. *Dickey*, 2 Ch. Ch. 87; *Crippen* v. *Ogilvy*, *ib.* 304.

But not on the ground that he is about to leave the jurisdiction. *Early* v. *McGill*, 1 Ch. Ch. 257.

Nor on the ground of illness, unless there is immediate danger. *Anderson* v. *Anderson*, 1 Ch. Ch. 291.

An ex parte order may be made for the examination of a witness de bene esse on the ground that he is dangerously ill, and not likely to recover. *Baker* v. *Jackson*, 10 P. R. 624.

Semble, that an affidavit of the solicitor of his information and belief, with the grounds thereof, that the witness is dangerously ill is sufficient. *Ib.*

The affidavit, and the circumstance that the order was not acted upon for thirteen days after it was issued, were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order. *Ib.*

Forgery.]—No order of any moment should be made ex parte, except in a case of emergency. The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation:—Held, that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the court and jury. *Thomas* v. *Storey*, 11 P. R. 417.

Necessity to be Shewn.]—On applying for an order it should be clearly shewn that the witness is the only witness as to the fact sought to be proved by him. An affidavit of the solicitor as to his belief is insufficient. *Jameson* v. *Jones*, 3 Ch. Ch. 98.

Old Age.]—The court ordered a commission for examination of an aged witness to issue without requiring bill to be served in the first instance; the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of testimony being lost. *Hunt* v. *Prentiss*, 4 Gr. 487.

Purpose to be Shewn.]—Orders to examine witnesses de bene esse, are only granted where it is shewn that the evidence is to be used for some definite purpose; yet, the court will make such an order when it considers that justice requires it. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 5 L. J. 252.

Sole Witness of Accident—*Terms.*]—In an action under Lord Campbell's Act, an order was made for the examination before the trial de bene esse, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness. *Elliott* v. *Canadian Pacific R. W. Co.*, 12 P. R. 593.

Witness Going abroad.]—An order to examine a witness de bene esse will be made where the witness is going abroad; it is not necessary to shew that he is going away permanently, or that he is the only witness to the facts to be proved by him. *Spears* v. *Waddel*, 7 P. R. 260.

Witness Temporarily within the Jurisdiction—*Discretion.*]—Rules 566 and 588 are in pari materiâ and contemplate the examination of a witness de bene esse who is

about to withdraw from Ontario or who is residing without the limits thereof. And where witnesses residing out of Ontario come within the jurisdiction and are about to return to their homes, an order may be made for their examination here before their departure. Such an order is a discretionary one, and, where the witnesses have been examined under it, will not be reversed on appeal unless a very clamant case of error appears. *Delap v. Charlebois*, 15 P. R. 142.

VII. EXAMINATION FOR DISCOVERY AND UPON AFFIDAVITS.

1. *Before the Judicature Act.*

(a) *At Common Law.*

In General.]—See *Horsman* v. *Horsman*, 2 L. J. 211; *McLaren* v. *Hutchison*, 4 L. J. 85; *Bank of Upper Canada* v. *Ruttan*, 3 P. R. 46; *Street* v. *Proudfoot*, 2 L. J. 213; *McKenzie* v. *Clark*, 4 P. R. 95; *Street* v. *Cuthbert*, 3 L. J. 9; *Ferrie* v. *Great Western R. W. Co.*, 15 U. C. R. 513; *Colville* v. *Johnston*, 5 P. R. 462; *Plews* v. *Mutton*, 9 C. L. J. 259; *Lload* v. *Henderson*, 6 P. R. 254; *Canada Permanent Building Society* v. *Forest*, 6 P. R. 254; *Bacon* v. *Campbell*, 12 L. J. 17; *Re Attorneys*, 7 P. R. 2; *Elmsley* v. *Cosgrave*, 6 P. R. 164; *Morell* v. *Morrison*, 6 P. R. 210; *Fagan* v. *Wilson*, 6 P. R. 295; *Laird* v. *Stanley*, 6 P. R. 322; *In re Willing* v. *Elliot*, 37 U. C. R. 320; *Manufacturers and Merchants' Ins. Co.* v. *Atwood*, 7 P. R. 13; *Cerriby* v. *Wells*, 7 P. R. 330; *Dewalt* v. *Hughitt*, 7 P. R. 323; *Shelly* v. *Hussey*, 8 P. R. 250.

Breach of Promise.]—The parties in an action for breach of promise of marriage, not being competent or compellable witnesses for each other, the plaintiff was not allowed the costs of the preliminary examination of the defendant, under R. S. O. 1877 c. 50, s. 156. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant. *Woodman* v. *Blair*, 8 P. R. 179.

Breach of Promise.]—Discovery by means of oral examination under R. S. O. 1877 c. 50, s. 156, et seq., was limited to cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party. *Jones* v. *Gallon*, 9 P. R. 296.

Breach of Promise.]—Since the passing of 45 Vict. c. 10, s. 3 (O.), the parties to an action for breach of promise of marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act. *McLaughlin* v. *Moore*, 10 P. R. 328. Superseding *Woodman* v. *Blair*, 8 P. R. 179; *Jones* v. *Gallon*, 9 P. R. 296.

Fees—*Stamps.*]—Where an examination of parties pursuant to R. S. O. 1877 c. 50, s. 161, takes place before a deputy-clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps and not in money. *Denmark* v. *McConaghy*, 8 P. R. 136.

Officer of Company.]—Chief engineer, *Oakley* v. *Toronto Grey and Bruce R. W. Co.*, 6 P. R. 253; tie inspector, *Dalziel* v. *Grand Trunk R. W. Co.*, 6 P. R. 307; engine driver and paymaster, *McLean* v. *Great Western R. W. Co.*, 7 P. R. 358.

Pleas.]—On an examination of the defendant under the A. J. Act 1873, in an action for slander, he was asked what pleas he had pleaded, whether his plea of not guilty was true or untrue, and whether he knew that he had pleaded such a plea. He refused to answer until the pleas were produced. On application to attach him for contempt:—Held, that he was not bound to answer what pleas he had pleaded, and that verified copies of the pleadings should have been before the examiner, when the question would have been unnecessary. *O'Donohoe* v. *Donovan*, 41 U. C. R. 591.

Production.]—Where a party to be examined refuses to produce books, &c., as required by the notice to produce, served with the order to examine under R. S. O. 1877 c. 50, s. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the court, and not before a Judge in chambers. *Merchants Bank* v. *Pierson*, 8 P. R. 123.

Semble, that the action could not be dismissed under R. S. O. 1877 c. 50, s. 170a, 41 Vict. c. 3, s. 9, for disobedience by the plaintiff of the order to produce. *Ib.*

Held, that the refusal to produce the plaintiffs' books, under the facts stated in the report of the case, was not warranted. *Ib.*

Re-Examination.]—A party having before judgment examined another party to the cause adverse in interest under R. S. O. 1877 c. 50, s. 156, is not entitled to a re-examination of the same party except under the most special circumstances. *Thorburn* v. *Brown*, 8 P. R. 114.

Refusal to Answer.]—In support of an application for a writ of attachment against a party for contempt in refusing to answer certain questions on an examination under the C. L. P. Act, (R. S. O. 1877 c. 50) or for his attendance to be examined at his own expense:—Semble, that the copy produced of such examination should be a copy thereof certified under the hand of the examiner, and that a sworn copy is not sufficient. Semble, also, that before a witness can be rendered liable for contempt the examiner must express his opinion as to the propriety of the witness's answering. Under the Act it is provided: 1. If the party under examination demurs or objects to any question, such question and objection shall be taken down by the examiner and transmitted to the court, who shall decide thereon. 2. If either party is dissatisfied with the conduct of any witness, he may require the examiner to make a special report to the court, who shall make such order upon such report as justice may require. In this case neither of the above modes was adopted, and the writ of attachment was therefore refused:—Held, that in the absence of such special report no order can be made for the witness attending to be re-examined at his own expense. *Clark* v. *Allen*, 43 U. C. R. 242.

Separate Estate.]—Held, that a married woman cannot be compelled to disclose the

nature of her separate estate upon her examination not as a judgment debtor, but under R. S. O. 1877 c. 50, s. 156. *Standard Bank* v. *McCuaig*, 7 P. R. 356.

Written Interrogatory.]—A simple answer of "yes" or "no" to a written interrogatory, is not proper, though it may do on a vivâ voce examination. *Ryan* v. *Cullen*, 1 C. L. Ch. 229.

(b) *Bill for Discovery.*

See Peel v. *Kingsmill*, 1 Gr. 584, 2 Gr. 272; *Hamilton* v. *Phipps*, 7 Gr. 483; *Haybell* v. *Shepherd*, 12 Gr. 426; *James* v. *Snarr*, 15 Gr. 229.

(c) *In Chancery.*

In General.]—See *Covert* v. *Bank of Upper Canada*, 1 Gr. 566; *Fuller* v. *Richmond*, 2 Gr. 509; *Fowler* v. *Bolton*, 12 Gr. 437; *Mathers* v. *Short*, 14 Gr. 254; *Beckett* v. *Rees*, 2 Gr. 134; *Phelan* v. *Phelan*, 6 Gr. 384; *McDermid* v. *McDermid*, 2 Ch. Ch. 372; *Gallagher* v. *Gairdner*, 2 Ch. Ch. 480; *Kahn* v. *Redford*, 3 Ch. Ch. 55; *McClennaghan* v. *Buchanan*, 7 Gr. 92; *Proctor* v. *Grant*, 9 Gr. 26; *Douglass* v. *Ward*, 11 Gr. 39; *Fowler* v. *Boulton*, 12 Gr. 437; *Weir* v. *Matheson*, 1 Ch. Ch. 224; *Harrison* v. *Grece*, 2 Ch. Ch. 438; *Clarke* v. *Hawke*, 1 Ch. Ch. 346; *Dickson* v. *Covert*, 2 Ch. Ch. 342; *Patterson* v. *Kennedy*, 2 Ch. Ch. 372; *Felan* v. *McGill*, 3 Ch. Ch. 56; *Campbell* v. *Tucker*, 7 P. R. 135; *Vardon* v. *Vardon*, 7 P. R. 436.

Affidavits in Reply.]—In the absence of authority to the contrary, it was held that cross-examinations upon affidavits in reply should be allowed, as in the case of other affidavits, more especially as affidavits in reply could not otherwise be answered. *Re Foster*, 9 C. L. J. 313, 6 P. R. 95.

Agent of Bank.]—When the bill alleged that the contract in question was entered into by the agent of the bank on its behalf, an order was made for his examination. *Consolidated Bank* v. *Neilon*, 7 P. R. 251.

Co-defendants.]—Where one defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examine such co-defendant he is thereby made a good witness in the cause. *Grimshawe* v. *Parks*, 6 L. J. 142.

Committal—*Evidence of Service.*]—On an application that a witness be ordered to attend before a master or examiner at his own expense, the evidence of his default should shew that he was duly subpœnaed; the certificate of the master or examiner that evidence of the service of the subpœna had been produced before him will not be sufficient. *Waddle* v. *McGinty*, 2 Ch. Ch. 442.

Cross-examination.]—The master is bound equally with the court to allow a witness to be cross-examined on the whole case without regard to his examination in chief. But in some cases, the master may exercise a discretion as to who should pay the fees of the examination. *Crandall* v. *Moon*, 6 L. J. 143.

Death of Deponent.]—Where a defendant has been cross-examined on his answer, he has a right in all future proceedings in the case to make the same use thereof as, under the former practice, could be made of the answers to the interrogatories in a bill; and where a defendant after having been so cross-examined died, and the cause was revived against his real representatives, the defendants were allowed at the hearing to read such cross-examination in answer to the statements of the bill; thus rendering it necessary that such statements should be proved by two witnesses, or, if by one witness only, corroborated by attendant circumstances. *Powell* v. *Lea*, 20 Gr. 621.

Disclosing Evidence.]—A party making affidavit for the purpose of moving to change the venue, and stating that certain parties are material and necessary witnesses, is not bound on cross-examination to state what evidence he expects from such witnesses, or to state facts tending to test the materiality of the proposed evidence. *Crombie* v. *Bell*, 3 Ch. Ch. 195.

English Rule.]—The rule in force in England that a party who has made an affidavit must submit to cross-examination upon it, if required, on notice to his solicitor, before taking any further steps in the cause, being founded on a special English order, has no application in this Province. *Grant* v. *Winchester*, 6 P. R. 44.

Exhibits.]—Documents used on the examination of witnesses before an examiner, must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing. *Hollywood* v. *Waters*, 6 Gr. 329.

Exposure to Penalty or Forfeiture.]—On an application made by the plaintiffs in an administration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution recovered by a third party against a debtor to the estate, as being fraudulent and collusive, the debtor was subpœnaed as a witness in support of the motion, and on his examination touching the bona fides of a judgment in question, he thus stated his objection: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit, in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me;"—Held, that this objection was not tenable, and the witness was ordered to attend again, at his own expense, and answer, and pay all costs occasioned to the plaintiffs and the personal representative by his refusal:—Held, also, that to entitle the witness to privilege, on the ground that his answer would expose him to a "penalty or forfeiture," he must state explicitly that his answer would have that effect. *Grainger* v. *Latham*, 2 Ch. Ch. 313.

Irregularity—*Committal.*]—Where a party, plaintiff in a cause, had been served with a subpœna, dated before he was regularly liable to examination, a motion to commit him or dismiss his bill was refused, but without costs. *McMurray* v. *Grand Trunk R. Co.*, 3 Ch. Ch. 130.

Irregularity—*Waiver.*]—Where a subpœna had been sued out under order 266, and an appointment thereunder given by a special examiner at a time when no motion or other proceeding was pending, it was held to be irregular, and that the depositions taken could not be read. The attending under such a subpœna was held not to be a waiver of the irregularity, the objection being to the jurisdiction which no waiver could confer. *Stovel v. Coles*, 3 Ch. Ch. 362.

Irregularity—*Wrong County.*]—The defendant, who lived in the county of Russell, was served with a subpœna requiring his attendance before the master at Kingston for examination, and he accepted the conduct money without objection:—Held, that he could not be compelled to attend. *Campbell v. Tucker*, 7 P. R. 135.

Master's Office.]—Adding parties in the master's office for the purpose of discovery. See *Hopper v. Harrison*, 28 Gr. 22.

Parties Entitled to be Present.]—Upon the examination of two defendants before a master, he at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused. The master thereupon declined to proceed with the examination:—Held, that the master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of the plaintiff's interest, but by analogy to R. S. O. 1877 c. 50, s. 260, he might require such defendant to be examined first, if he was to be called as a witness. *Sivewright v. Sivewright*, 8 P. R. 81.

Parties Entitled to be Present.]—Under 34 Vict. c. 12, s. 9, a special examiner has power to exclude witnesses from his room during an examination, and he may exercise such power when the witness is a party to the suit. A refusal to comply with the ruling of an examiner, in not withdrawing when ordered to do so, is a contempt of court. *Sadlier v. Smith*, 14 C. L. J. 30.

Party without Solicitor.]—Where a party to a suit, having no solicitor, is required to attend before a master to be examined, it would seem that forty-eight hours' notice thereof should be given to him. *Watson v. Ham*, 1 Ch. Ch. 293.

Pending Motion.]—A party or witness who has made an affidavit in a cause is only liable to be examined before a special examiner as to the matters therein alleged, when a motion on which it may be used is pending. *Clindinning v. Varcoe*, 7 P. R. 61.

Re-examination.]—Only one examination of a party under order 138 can be had. *Paxton v. Jones*, 6 P. R. 135.

Residence out of Jurisdiction.]—The defendant, who resided in Quebec, arrived in Toronto on Saturday, intending to return home on Monday. He was served on the latter day with a subpœna to attend for examination on Monday, and was paid $1:—Held, that under these circumstances the bill could not be noted pro confesso for non-attendance. Held, also, that it was not necessary for defendant to move to set aside the subpœna. *Bolckow v. Foster*, 7 P. R. 388.

Service of Appointment.]—Service on the defendant's attorney at his home at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, is irregular, the notice not being sufficient. Rule of court 135 applies to the service of orders and appointments to examine, and this service must be treated as if made on the following Monday. *Scan v. Hewitt*, 8 P. R. 70.

Specific Performance — *Defence of Fraud.*]—Plaintiff filed a bill for specific performance of a contract alleged to be made with defendant at an auction sale of lands, at which the plaintiff was a bidder. The defendant set up that plaintiff bought as his agent: that the plaintiff was a puffer, and the sale illegal. Plaintiff moved to strike out the allegations as to the sale being illegal on the grounds stated, as scandal and impertinence; and defendant moved that the plaintiff submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction:—Held, that the matter being material, was not scandalous, and that the plaintiff must answer all proper questions. *Jones v. Huntingdon*, 3 Ch. Ch. 117.

Witness.]—The term "witness," in C. S. C. c. 79, s. 4, includes parties to the cause as well as witnesses in the ordinary sense of the word. *Moffatt v. Prentice*, 6 P. R. 33.

Examination of a defendant after answer under order 138 is an examination of witnesses within this Act. *Ib.*

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2. *Since the Judicature Act.*

(a) *In General.*

Copy of Shorthand Notes.]—Evidence given by a witness was taken before an examiner, in shorthand, by question and answer. The evidence was duly certified by the examiner and an office copy put in at the trial:—Held, under R. S. O. 1877 c. 55, ss. 165, 166, as amended by 41 Vict. c. 8, s. 8 (O.), and O. J. Act, rules 282, 285, the evidence was properly received. *McDonald v. Murray*, 5 O. R. 559.

Costs.]—By rule 1384, rule 1177 was rescinded and a new rule substituted, providing that the costs of every interlocutory examination should be borne by the examining party, unless otherwise ordered. Where an action was begun and the defendants examined for discovery before the rule was passed, but was tried and judgment given after it was passed, but before it came into force:—Held, that the new rule applied, and the taxing officer had no power to tax to the successful plaintiff the costs of the examination, without an order therefor. Application for such order should be made to the trial Judge at the trial or immediately after judgment. *McClary v. Plunkett*, 16 P. R. 310.

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

Habeas Corpus.]—Parties allowed to examine each other for discovery before hearing after return to a writ of habeas corpus. See *Re Smart Infants*, 12 P. R. 2.

Inspection of Buildings.]—Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which the property of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired. The plaintiff sued for damages for breaches of covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants:—Held, that an order for inspection by the defendants should not be made. *Mills* v. *Union Loan and Savings Co.*, 19 P. R. 1.

Judge Reading Examination to Jury.]—At the close of the defence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the Judge, in his charge, read other portions:—Held, there could be no objection to the Judge reading such other portions, as they were properly in evidence. *Scougall* v. *Stapleton*, 12 O. R. 206.

Residence out of Jurisdiction—*Subpœna—Special Order.*]—A party resident out of the jurisdiction cannot be examined for discovery in an action unless by means of a special order made under rule 477 of the rules of 1897; and, if served, pursuant to rules 439 and 443, while temporarily in the jurisdiction, with an appointment and subpœna for his examination, cannot be compelled to attend thereon.. Comstock v. Harris, 12 P. R. 17, is no longer applicable owing to changes in the rules. *Connolly* v. *Dowd*, 18 P. R. 38.

Residence out of Jurisdiction—*Member of Parliament.*]—Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained, under rule 477, by a Judge's order upon notice, and not by appointment under rule 443. An order was made under rule 447 for the examination in Ontario of a defendant who resided in British Columbia and who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member. Although this order could not be enforced by attachment against the defendant while the House was in session, in the event of his refusing or neglecting to attend, it could be enforced, under rule 454, by striking out his defence. *Cox* v. *Prior*, 18 P. R. 392.

Service of Appointment—*Enlargement—Default of Attendance.*]—The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant; the defendant's solicitor was served with a copy of the appointment more than forty-eight hours before the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment till the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he nor his solicitor attending, the officer enlarged the appointment till the 8th. On the 7th the defendant was served with the appointment for the 8th and with a subpœna, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th:—Held, that the defendant was in default for not attending for examination on the 8th. Rules 443 and 446 construed. *Reid* v. *Walters*, 19 P. R. 310.

Subpœna—*Substitutional Service.*]—An order will not be made for substitutional service upon an officer of a litigant corporation of a subpœna and appointment for his examination for discovery. *Mills* v. *Mercer Co.*, 15 P. R. 276.

Subpœna—*Substitutional Service.*]—A witness is not liable to attachment for disobedience to a subpœna served substitutionally pursuant to an order authorizing such service. Mills v. Mercer, 15 P. R. 281, applied and followed. *Barber* v. *Adams*, 16 P. R. 156.

Time.]—The former chancery practice as to the stage of the cause at which examination of parties may be had now governs in all divisions of the high court. In this case an appointment to examine under s. 159 of the C. L. P. Act was set aside because the affidavit required by that section had not been filed. *Tilsonburg Manufacturing Co.* v. *Goodrich*, 10 P. R. 327.

Vacation—*Special Examiner.*]—Where a special examiner issues an appointment for the examination for discovery during vacation of a party to an action, such party, if duly subpœnaed, is bound to attend for examination. A special examiner, although an officer of the supreme court of judicature for Ontario, in the sense of being subject to its control and direction, has no office in connection with the court that comes under any rule requiring it to be kept open or closed during any particular period of the year. Decisions reported in 15 P. R. 23, reversed. *Hogaboom* v. *Cox*, 15 P. R. 127.

Witness's Right to Counsel.]—Right of witness to presence of counsel upon examination under con. rule 576. See *Dominion Bank* v. *Bell*, 13 P. R. 471.

(b) *Before Pleading and on Pending Motion.*

General Rule.]—The right of extraordinary discovery must be jealously guarded, lest it be abused, and it should, under rule 285, O. J. Act, be conceded only when it is clearly proved to be necessary for the furtherance of justice. *Boulton* v. *Blake*, 11 P. R. 196.

An order for examination before the delivery of pleadings, whether for discovery or evidence, should only be granted under exceptional circumstances, and where absolutely necessary in the interests of justice. *Thompson* v. *Gye*, 13 P. R. 273.

Assignee for Creditors Examining Claimant.]—The plaintiff, who was the

father of an insolvent trader, sued the assignee and trustee for the benefit of the creditors, claiming a declaration of right to rank on the estate for a large sum. The assignee was instructed by the creditors to resist the claim and had himself no personal knowledge of it, and could find no entry of it in the books or papers of the insolvent. Under these circumstances an order under rule 285 for the examination of the insolvent by the defendant, for the purposes of discovery before the trial, was affirmed. *Murray* v. *Warner*, 11 P. R. 440.

Assignors of Plaintiff.]—The defendants asserted as a counterclaim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of the insolvents, stock brokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that the insolvents had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them. Under these circumstances an order was made under rule 285, O. J. Act for the examination of the insolvents for the purpose of discovery only. *Carnegie* v. *Cox*, 11 P. R. 311.

Cross-examination without Notice.]—The examination of a witness who has refused to make an affidavit, conducted by one party without notice to his opponent, is irregular and inadmissible as evidence upon a motion. *Stephenson* v. *Dallas*, 13 P. R. 450.

Defamation — *Libel—Defendants Examining Plaintiff before Defence.*]—In an action for libel against the publishers of a newspaper, the defendants on a motion under rule 285 O. J. Act, were allowed to examine with certain restrictions the plaintiff before defence filed. *Tate* v. *Globe Printing Co.*, 11 P. R. 285.

Defamation — *Slander—Examination of Defendant before Statement of Claim.*]—In actions of slander when the court is satisfied of the bona fides of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered under rule 566; but in such case a further examination after pleading will not be allowed except upon special grounds. Fisken v. Chamberlain, 9 P. R. 283; Gordon v. Phillips, 11 P. R. 540; McLean v. Barber, 13 P. R. 509, followed. *Campbell* v. *Scott*, 14 P. R. 203.

Defamation — *Libel — Examination of Plaintiff before Delivery of Defence.*]—Rule 566 does not apply to examinations for discovery. Fisken v. Chamberlain, 9 P. R. 283, and cases following it, overruled. But were that rule applicable, it was not "necessary for the purposes of justice," in the circumstances of this case, an action for libel, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence. Tate v. Globe Printing Co., 11 P. R. 251, and cases following it, specially referred to. Gourley v. Plimsoll, L. R. 8 C. P. 362, and Zierenberg v. Labouchere, [1893] 2 Q. B. 183, followed. Decision below, 15 P. R. 473, reversed. *Beaton* v. *Globe Printing Co.*, 16 P. R. 281.

Defendant's Ignorance of Facts.]—An application to examine under rule 285 is in the discretion of the court, and that discretion cannot be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get. *Boulton* v. *Blake*, 11 P. R. 196.

Examination of Party as Witness.]—Under rule 578 a party may require the attendance of the opposite party for examination as a witness upon a pending motion; and the consequence of default on the part of the party to be examined is to put him in contempt. And where, upon a motion by the plaintiff to set aside or vary an order staying proceedings until he should give security for costs, he required the attendance of the defendant for examination as a witness, and the defendant attended but refused to be examined, an order suspending the former order until he should submit to be examined, was affirmed. *Clark* v. *Campbell*, 15 P. R. 338.

Motion for Judgment.]—Upon a motion for judgment under rule 739 the defendant may satisfy the Judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examination of the plaintiff on his affidavit filed in support of the motion. *Kingsley* v. *Dunn*, 13 P. R. 300.

Motion to be Made.]—Immediately after appearance in an action a subpœna was issued and an appointment given for an examination of the defendant, and also of a person not a party, before a special examiner, to give evidence on behalf of the plaintiffs on a motion to be made by them under the rules respecting replevin for an order for replevying a certain guarantee, the subject of the action. The subpœna and appointment were moved against on the ground that there was no motion, petition, or other proceeding pending in the action, and the provisions of rule 578 were therefore not applicable:—Held, that there must be a pending motion on which the examination is to be taken; and such was not the case here, as the subpœna spoke of a "motion to be made." McMurray v. Grand Trunk R. W. Co., 3 Ch. Ch. 130; Stovel v. Coles, ib. 362, referred to. Held, also, that the intended examination, being manifestly on the merits of the action, was improper at this stage, as it was too early in the action for the plaintiffs to obtain discovery except by a special order under rule 566. *Traders Bank* v. *Kean*, 13 P. R. 69.

Plaintiff Examining Defendant before Defence.]—Rule 285, O. J. Act, applies to examinations for discovery before trial, and the examination of a defendant may be had under it before defence filed. An examination may be obtained under it at any stage of the cause and though no motion is pending. *Fisken* v. *Chamberlain*, 9 P. R. 283.

Plaintiff Applying to Examine Defendant before Claim.]—In an action by creditors of the defendant R. to set aside conveyances by him to the defendant G. as fraudulent, the plaintiff swore that it was necessary to have an examination of the defendants before delivering the statement of claim,

in order that it might be framed with proper particularity as to the fraud, of which he had no personal knowledge, and a local Judge, upon the application of the plaintiff ex parte, made an order for such examination:—Held, that the order should not at any rate have been made ex parte; and that in this case the order should not have been made at all, the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim, being vastly different. *Hoocy* v. *Gilbert*, 12 P. R. 114.

Plaintiff Unable to Frame Claim.]—Where the plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit:—Held, that he was entitled to such discovery under rule 285, O. J. Act, and that an order for such examination by a local Judge of the high court had been properly made. *Gordon* v. *Phillips*, 11 P. R. 540.

Procedure.] — Upon a motion pending, witnesses may still by G. O. Chy. 266 be examined under a subpœna and appointment. That order has not been superseded by rule 285 O. J. Act. Township of Monaghan v. Dobbin, 2 C. L. T. 260, overruled. *McMillan* v. *Wansborough*, 10 P. R. 377.

Witness Leaving Jurisdiction.]—The master in chambers has power under rule 285, O. J. Act, to direct evidence to be taken at any stage of the proceedings in a cause. In this case a witness about to leave the country was examined before a special examiner, under a chambers order, during a reference in the master's office, on which his evidence was to be used. *Re Dunsford, Dunsford* v. *Dunsford*, 9 P. R. 172.

Witness.]—An order for the examination of a witness before trial under O. J. Act, rule 285, will not be made where no greater necessity for it can be shewn than the convenience of the party who applies for it in preparing and presenting his case for trial. *Carnegie* v. *Federal Bank*, 10 P. R. 69.

(c) *Failure to Attend and Refusal to Answer.*

Appeal from Order for Re-examination.]—A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt is he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor* v. *McDonald*, 11 P. R. 518.

Company's Defence—*Default of Officer.*]—There is no power to strike out the statement of defence of an incorporated company for the default of an officer of such company in not attending for examination for discovery. *Badgerow* v. *Grand Trunk R. W. Co.*, 13 P. R. 132; *Central Press Association* v. *American Press Association*, 13 P. R. 353.

Offer to Attend after Motion to Dismiss Launched.]—Upon a motion to dismiss the action for the plaintiff's non-attendance to be examined for discovery pursuant to appointment, the plaintiff offered to submit herself for examination at any time at her own expense. The master in chambers, nevertheless, dismissed the action with costs, the plaintiff's claim not being, in his opinion, an honest or fair one. *Denham* v. *Gooch*, 13 P. R. 344.

Proof of Service and Payment.]—Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not shew that due service of subpœna and appointment and payment of conduct money had been made:—Semble, the certificate of the examiner as to these points would not have been sufficient; and:—Held, that, in the absence of evidence, it was not to be inferred from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not by such attendance waive his right to have the service and payment proved. *McLean* v. *Bruce*, 12 P. R. 602.

Staying Proceedings Pending Motion to Dismiss.]—A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the Judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular. *Merchants Bank* v. *Pierson*, 8 P. R. 129. See *S. C.*, *ib.* 123.

Staying Proceedings.]—Upon failure of the plaintiff to attend for examination, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time. *Comstock* v. *Harris*, 12 P. R. 17.

(d) *Mode of Conducting Examination.*

Examiner Appointing Stenographer.]—A special examiner or officer of the court taking an examination in a cause or proceeding pending in court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot be compelled, in the face of his objection, to submit himself for examination where the examiner proposes to have the depositions so taken. R. S. O. 1887 c. 44, ss. 147, 148, and rules 501-3 considered. *Bradt* v. *Bradt*, 13 P. R. 271.

Examiner's Chambers—*Discretion as to Admission of Persons.*]—A special examiner has a discretion to admit or exclude from his chambers persons who desire to be present upon an examination. And where the defendant attended for examination as a judgment debtor, but refused to answer questions unless a former partner of his, who was present to instruct counsel for the judgment creditors, was excluded:—Held, that the examiner rightly exercised his discretion in refusing to exclude; and the defendant was ordered to attend again at his own expense. *Merchants Bank of Canada* v. *Ketchum*, 16 P. R. 366.

A special examiner has authority to exclude one defendant from his office during the examination of the co-defendant, at the request of the plaintiff. *Culverwell* v. *Birney*, 10 P. R. 575.

Upon an examination before a special examiner at his chambers, the examining counsel has no right to have a clerk present to assist him, if the opposite party objects. It is within the discretion of the examiner to exclude from his chambers even the solicitor for the examinant, if his presence interferes, in the examiner's opinion, with the due execution of his duty as examiner. *Hands* v. *Upper Canada Furniture Co.*, 12 P. R. 292.

Exhibits.]—If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits. *Hands* v. *Upper Canada Furniture Co.*, 12 P. R. 292.

Production at Examination.] — The proper mode in examinations for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents shall be produced and have the examination adjourned for that purpose. The practice of enabling a party by means of a subpœna duces tecum to get production on a two-day notice of any documents he chooses to particularize is not to be encouraged, and a motion to commit for non-production was refused. It is desirable to postpone examinations for discovery until after production. *Lavery* v. *Wolfe*, 10 P. R. 488.

The powers of the special examiner under G. O Chy. 147, as to directing the production of documents, extend to examinations under rule 285, O. J. Act. *Orpen* v. *Kerr*, 11 P. R. 128.

Upon an examination of a party under rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced, such as would be produced in the ordinary course at a later stage. *Ib.*

It is unreasonable that books in constant use should be required to be brought from without the jurisdiction for the purpose of an examination, unless the examiner in the course of the examination rules that they are necessary. *Comstock* v. *Harris*, 12 P. R. 17.

Upon a pending motion to restrain the defendant from receiving any moneys due under a certain contract, and to appoint the plaintiff receiver of such moneys, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff; he was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books:—Held, that he should be ordered to attend for further examination, and to produce the books required, at his own expense. In re Emma Silver Mining Co., L. R. 10 Ch. 194, followed. *Russell* v. *Macdonald*, 12 P. R. 458.

In an action against an incorporated company to recover a money demand, the defence was that the indebtedness, if any, was not that of the company, but of the president in his private capacity. Upon an application for a better affidavit on production of documents from the company, it had been determined that the company had no documents to be produced:—Held, that upon the examination for discovery of the president as an officer of the company, he could not be compelled to produce documents or books which had been determined not to be in possession of the company, nor his own books or documents; and a subpœna served upon the president was set aside quoad the production of documents which it called for:—Held, by a divisional court, reversing this decision, that the subpœna should not be set aside, for the affidavits shewed that the accounts of the defendant company were kept in the books of the president; and the practice of setting aside a subpœna, as laid down in Steele v. Savory, [1891] W. N. 195, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner. *Alexander* v. *Irondale, Bancroft, and Ottawa Railway Company*, 18 P. R. 20.

Solicitor Withdrawing.]—If upon the refusal of the person under examination to answer questions on the ground of privilege the solicitor for the opposite party withdraws, the examination may be proceeded with, and the evidence afterwards taken will not be struck out. *Connolly* v. *Murrell*, 14 P. R. 187.

Witness's Right to Counsel.]—In an action against the maker and indorser of a promissory note judgment went by default against the indorser, but the maker appeared and upon the consent of the plaintiffs obtained an order under rule 566 for the examination before a special examiner of the indorser and his book-keeper before delivery of defence, the object being to shew that the indorser alone was liable on the note, that he procured it by fraud from the maker, and that the plaintiffs held it with notice:—Held, that the interests of the indorser as a party might be affected by the examination, and that he was entitled to have counsel present upon the examination to protect his interests. *Dominion Bank* v. *Bell*, 13 P. R. 471.

(e) *Persons Examinable and Place of Examination.*

Architect.] — In an action against the trustees of an Orange lodge for the price of work and materials in building a hall, the chairman of the board of trustees was examined, and could give no information as to the matters in dispute. His examination shewed that the architect employed by the defendants was the person from whom alone the information could be had. The defendants had successfully resisted production of the plans, as being in custody of the architect, and belonging to him. Under these circumstances an order for the examination of the architect by the plaintiff, for discovery only, was affirmed. *Smith* v. *Clarke*, 12 P. R. 217.

Assignee for the Benefit of Creditors.]—See *Frothingham* v. *Isbister*, 14 P. R. 112.

Assignor.]—One M., having effected certain insurances in his favour, assigned one of the policies to the plaintiff, one of his creditors, and the other to one C., as trustee for the benefit of creditors. In actions on such policies:—Held, that M. was examinable under rule 224 O. J. Act, as "a person for whose immediate benefit" the suits were prosecuted.

Macdonald v. *Norwich Union Ins. Co., Clarkson* v. *Fire Ins. Association*, 10 P. R. 462.

Breach of Promise.]—In an action for breach of promise of marriage. See *Woodman* v. *Blair*, 8 P. R. 170; *Jones* v. *Gallon*, 9 P. R. 296; superseded by *McLaughlin* v. *Moore*, 10 P. R. 326, holding that the parties to the action are examinable.

Champerty and Maintenance.]—Discovery was not enforceable in equity in cases of champerty and maintenance, nor should it be under the equivalent remedies given by the Judicature Act; and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement. Semble, that the rigorous rules which obtained in earlier days in England are not to be imported into her dependencies without some modification. Ram Coomar v. Chunder, 2 App. Cas., at p. 210, specially referred to. *Whitbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Chancery Action.] — An action having been brought in the chancery division to set aside a judgment as fraudulent, the plaintiff took out an appointment for the examination of the defendant after the delivery of the statement of defence, but before the close of the pleadings:—Held, that the former chancery practice must apply to actions in the chancery division in the case of examinations for discovery. Rule 219 O. J. Act refers to an existing practice which is not repealed by the Act. *Davis* v. *Wickson*, 9 P. R. 219.

Clerk of Defendant.]—A clerk in a Toronto warehouse accepted a bill of exchange on behalf of his employer, who resided in Philadelphia, U. S. In an action on the bill the employer denied the authority of his clerk to accept:—Held, that the clerk could not be examined under rule 285, O. J. Act. Semble, neither could the Toronto manager of the business be examined under the rule. *Rosenheim* v. *Stillman*, 11 P. R. 7.

Co-defendant.]—If the issues between co-defendants are material to the case of the plaintiff or to the character of the relief which he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself. *Alexander* v. *Diamond*, 9 P. R. 274.

Co-defendant—*Evidence against Plaintiff.*]—A defendant whose interest is identical with that of the plaintiff, is a party adverse in interest to his co-defendant, and may be examined by his co-defendant under G. O. 138, (See Con. rule 487). When the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff. The successful defendant will be allowed the costs of such examination. *Moore* v. *Boyd*, 8 P. R. 413.

Controverted Elections — *Penalties.*]—The plaintiff is not entitled to examine the defendant for discovery in an action for penalties under the Ontario Elections Act, 1892. Hunnings v. Williamson, 10 Q. B. D. 459, and Martin v. Treacher, 16 Q. B. D. 507, followed. *Malcolm* v. *Race*, 16 P. R. 330.

Criminal Conversation.]—In an action of criminal conversation there is no power, having regard to R. S. O. 1887 c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery. *Murray* v. *Brown*, 16 P. R. 325.

In an action for criminal conversation with the plaintiff's wife, the defendant cannot be compelled to submit to examination for discovery. Construction of s. 7 of R. S. O. 1887 c. 61, and difference between it and s. 3 of the Imperial Act 32 & 33 Vict. c. 68, pointed out. *Mulholland* v. *Misener*, 17 P. R. 132.

In an action for criminal conversation the defendant cannot be compelled to attend on examination for discovery. Mulholland v. Misener, 17 P. R. 132, followed. But where in the action damages are also claimed for the alienation of the affections and loss of the society of the plaintiff's wife, the defendant can be examined upon that branch of the case. Construction of s. 7 of R. S. O. 1887 c. 61, and difference between it and s. 3 of the Imperial Act, 32 & 33 Vict. c. 68, pointed out. *Taylor* v. *Neil*, 17 P. R. 134.

An action for criminal conversation and for alienating the affections of the plaintiff's wife is an action instituted in consequence of adultery within the meaning of s. 7 of the Evidence Act, R. S. O. 1897 c. 73, and a defendant in such an action cannot be compelled to submit to examination for discovery. Mulholland v. Misener, 17 P. R. 132, Taylor v. Neil, ib. 134, and Lellis v. Lambert, 24 A. R. at p. 664, referred to. Section 9 of the Act has no reference to such an action. *Fleury* v. *Campbell*, 18 P. R. 110.

Former Partner.]—An action against an indorser of a promissory note, was brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. and M., who had dissolved partnership, and the action was brought after the dissolution in the name of M. only. The master in chambers made an order under rule 224 O. J. Act for the examination of, and the production of documents by, B., as a person for whose immediate benefit the action was being prosecuted. On appeal, the appellate Judge thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the master, varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery. *Minkler* v. *McMillan*, 10 P. R. 506.

Infants.]—As a general rule, an infant, party to an action, may now be examined by the opposite party for discovery before the trial, under rule 487, in the same way as an adult. Mayor v. Collins, 24 Q. B. D. 361, distinguished. *Arnold* v. *Playter*, 14 P. R. 399.

Interlocutory Judgment — *Defendant Applying to Examine Plaintiff.*]—After the plaintiff had signed interlocutory judgment against the defendant in an action of tort, the defendant sought to examine the plaintiff for discovery, the action being about to come on at the assizes for assessment of damages. Rule 489 states that the examination of a plaintiff by a defendant may take place at any time after such defendant has delivered his statement of defence:—Held, that the defendant could not examine the plaintiff. *Ashley* v. *Brenton*, 13 P. R. 98.

Liquidator — *Examination before Statement of Claim.*]—An official liquidator cannot, as an officer of the court, be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery. Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under rule 556 for leave to examine one of the liquidators for discovery before statement of claim was refused. *Henderson* v. *Blain*, 14 P. R. 308.

Non-appearing Defendant.]—One of several defendants who has not appeared and who has not been served with a statement of claim in the action, which, however, was proceeding to trial against the other defendants, may be examined for discovery at the instance of the plaintiff. *Buist* v. *Currie*, 17 C. L. T. Occ. N. 335.

Officer of Corporation — *Assignors of Chose in Action.*]—Rule 441 of the rules of 1897 provides that where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery:—Held, that this rule cannot be extended, by reference to rule 439 or otherwise, to the examination of an officer of a corporation, the assignors of a chose in action. *Bank of Toronto* v. *Quebec Fire Ins. Co., Bank of Toronto* v. *Keystone Fire Ins. Co. of St. John*, 18 P. R. 41.

——— *Assistant Editor.*]—Held, that the assistant or sub-editor of the defendants was an officer of the company examinable for the purpose of discovery under R. S. O. 1877 c. 50, s. 156. *Maitland* v. *Globe Printing Co.*, 9 P. R. 370.

——— *Caretaker of Building.*]—In an action for damages for negligence in keeping a building in such a dangerous condition that the plaintiff was injured while in it:—Held, that the caretaker of the building, an employee of the defendants, was an officer examinable for discovery under rule 487. *Schmidt* v. *Town of Berlin*, 16 P. R. 242.

——— *Conductor—Ex Parte Order—Second Trial.*]—An order for the examination of a person as an officer of a corporation, under R. S. O. 1877 c. 50, s. 156, is properly made ex parte. The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred was held examinable as an officer of the railway company, under s. 156. *Leitch* v. *Grand Trunk R. W. Co.*, 12 P. R. 541.

Held, (1) affirming 12 P. R. 541, that the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured was an officer of the defendants within the meaning of R. S. O. 1877 c. 50, s. 156, examinable for discovery in an action for damages for the injuries sustained. (2) That such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, had been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession. *S. C.*, 12 P. R. 671.

On appeal:—Held, per Hagarty, C. J. O., and Burton, J. A., that the conductor was not examinable as an officer under R. S. O. 1877 c. 50, s. 156 (rule 487); and per Osler and Maclennan, JJ.A., that he was examinable. *S. C.*, 13 P. R. 369.

Per Burton, J. A. The only officers intended by s. 156 were such officers as might under the former system have been properly made defendants for discovery merely. The examination sought was not merely for discovery; it was a fishing inquiry, to ascertain before the trial what precise evidence a particular witness would give. Canada Atlantic R. W. Co. v. Moxley, 15 S. C. R. 145, discussed. *Ib.*

Per Osler, J. A. The test of the propriety of allowing an officer or servant of a corporation to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is as to that particular occasion and for that particular purpose to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment, or how summary the corporation's power of dismissal. *Ib.*

Semble, per Osler, J.A., that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination. *Ib.*

———*Conductor and Motorman.*]—In an action for damages for bodily injuries sustained by a pedestrian by reason of the negligent management and operation of a car of the defendants, an incorporated company:—Held, that the conductor and motorman of the car were officers of the company examinable for discovery; but, as the plaintiff had already examined the general manager, she must elect which of the above officers she would examine, under rule 439 (2). *Dawson* v. *London Street R. W. Co.*, 18 P. R. 223.

——— *Editorial Writer.*]—In an action against a newspaper publishing company for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendant pleaded justification:—Held, that the writer was not in a position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under rule 487:—Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification. *Murray* v. *Mail Printing Co.*, 14 P. R. 405.

——— *Engine-Driver — Track-Foreman — Switch-Foreman.*]—Held, that a track-foreman, a switch-foreman, and two engine-drivers in the employ of the defendant company were not officers of the company examinable for discovery under rule 487, in an action for damages arising out of a railway accident. *Knight* v. *Grand Trunk R. W. Co.*, 13 P. R. 386.

——— *Engine-Driver.*]—Where a corporation was sued for negligence resulting in an accident, an order was made for the examination for discovery of the driver of the traction engine which was the alleged cause of the accident. *Odell* v. *City of Ottawa*, 12 P. R. 446.

——— *Engine-Driver.*]—A rule of defendant company provided that the driver of a "light engine" has all the responsibilities of a conductor in cases where a train of cars is attached to the engine:—Held, overruling 13 P. R. 388, that the driver of the light engine which knocked down and killed the man for whose death the action was brought, was an officer of the company who could be examined for discovery under rule 487. Knight v. Grand Trunk R. W. Co., 13 P. R. 386, distinguished. *Leach* v. *Grand Trunk R. W. Co.* (2), 13 P. R. 467.

——— *Flagman at Crossing.*]—A flagman in the employment of a railway company whose duty it is to give notice of danger to persons intending to cross a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger. *Henderson* v. *Canada Atlantic R. W. Co.*, 17 P. R. 337.

——— *Former Officer.*]—Semble, that a person who has ceased to be an officer of a corporation cannot be examined for discovery under 42 Vict. c. 15, s. 7, and rule 227 O. J. Act, unless the matters in respect of which he is sought to be examined occurred while he was such an officer. *Maitland* v. *Globe Printing Co.*, 9 P. R. 370.

——— *General Manager of Bank.*]—In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager:—Held, that the plaintiff had the right under rule 487 to examine the general manager as an officer of the corporation, and, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance. *Dill* v. *Dominion Bank*, 17 P. R. 488.

——— *Local Manager of Bank—Production of Bank Books—Disclosure of Bank Accounts.*]—Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna:—Held, that a subpœna may properly be issued to compel the attendance of a witness before a master, who has jurisdiction by rule 484. 2. That it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the purposes of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the master to take the evidence at the banking office after banking hours. 3. That where the head office of the bank is outside the Province, the local manager is the person in charge and custody of the books, and is the proper person to subpœna to produce them, and should be ordered to do so, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank. Re Dwight and Macklam, 15 O. R. 148, followed. Crowther v. Appleby, L. R. 9 C. P. 23, and Attorney-General v. Wilson, 9 Sim. 526, distinguished. 4. That the witness's objection to produce the books, because the bank was precluded by law from exhibiting to any one or permitting any one to inspect the account of any person dealing with the bank, was untenable, the evidence sought being as to entries made of financial transactions in which a deceased person was engaged, his representatives desiring to know what moneys the bank received and what disposition was made of them, and all parties interested being willing that the evidence should be given. *Hannum* v. *McRae*, 17 P. R. 567.

——— *Local Insurance Agent.*]—In an action upon a fire insurance policy against a company:—Held, that the local agent of the company, who received the application and the premium and issued the interim receipt, and his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act. *Goring* v. *London Mutual Fire Ins. Co.*, 10 P. R. 642.

Quære, whether a person may be an officer examinable for the purposes of discovery, but not one whose evidence can bind the company. *Ib.*

In an action upon a life insurance policy an order was made, at the instance of the plaintiff, for the examination of the local agent of the insurance company, who procured the application for insurance, for discovery only. *Hartnett* v. *Canada Mutual Aid Association*, 12 P. R. 401.

——— *Locomotive Superintendent and Foreman.*]—Held, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R. S. O. 1877 c. 50, s. 156, and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial of this cause. *Canada Atlantic R. W. Co.* v. *Morley*, 15 S. C. R. 145.

——— *Medical Health Officer.*]—In an action for an injunction and damages in respect of the alleged unsanitary condition of a certain bay into which the defendants drained part of their sewage, the plaintiffs sought to examine for discovery the medical health officer of the defendants, whose sole connection with the subject-matter of the action arose from his having made an examination of, and a report to the local board of health upon, the sanitary condition of the bay. The only object of the examination was to ascertain the reasons and grounds of the report:—Held, that for this purpose he was not examinable as an officer of the defendants. Decision in 15 P. R. 27, affirmed on other grounds. *Coleman* v. *City of Toronto*, 15 P. R. 125.

——— *Roadmaster.*]—In an action for damages for the death of the plaintiff's husband, who was killed while on duty as a fireman on a train of the defendants, an incorporated company, owing to the displacement of a switch:—Held, that the roadmaster in charge of the section of the line in which the accident occurred, although he was under the

control of the chief engineer, was an officer of the company examinable for discovery. *Cuscaden* v. *Ottawa, Arnprior, and Parry Sound R. W. Co.*, 18 P. R. 261.

——— *Section Foreman.*]—In an action to recover the value of horses killed by a train on the defendants' railway, it was alleged by the plaintiff and denied by the defendants that the latter had failed to erect and maintain proper fences on either side of the railway where it crossed the plaintiff's property:—Held, that the foreman who had charge of the fences on the railway in the section which included the locus in quo, subject to the orders of a road-master, was not an officer of the company who could be examined for discovery. Knight v. Grand Trunk R. W. Co., 13 P. R. 386; Leach v. Grand Trunk R. W. Co., 13 P. R. 388, followed. *Fawle* v. *Canadian Pacific R. W. Co.*, 13 P. R. 413.

——— *Station Agent.*]—A station agent of a railway company is an officer examinable under R. S. O. 1877 c. 50, s. 156. *Ramsay* v. *Midland R. W. Co.*, 10 P. R. 48.

——— *Street Foreman.*]—In an action for damages for negligence in keeping a public way in a state of disrepair:—Held, that a street foreman in the employment of the defendants under their street commissioner, the latter having general supervision of the roads and sidewalks, was not an officer examinable for discovery under rule 487. Thomas v. Grand Trunk R. W. Co., 12 C. L. T. Occ. N. 42, followed. *Webster* v. *City of Toronto*, 15 P. R. 21.

——— *Use of Depositions at Trial.*]—Before delivery of his statement of defence one of the defendants obtained an order to examine an officer of the plaintiffs for discovery, and examined him thereunder, but he was not further examined by counsel for the plaintiffs:—Held, that such defendant could, under rule 506, read the depositions so taken, as evidence at the trial of the action. *Union Bank* v. *Starrs*, 13 P. R. 108.

Party out of Jurisdiction.]—A party out of the jurisdiction will be ordered to attend to be examined at that place within the jurisdiction where, in the opinion of the court, it is most expedient that the examination should be held, and not necessarily that nearest to his place of abode. *Smith* v. *Babcock*, 9 P. R. 97.

An appointment was made ex parte by the master at Ottawa, for the examination of the defendant at his office in Ottawa. A copy of the appointment and of a subpœna was served on the defendant, who resided in Hull, Que., and a copy of the appointment was served on the defendant's solicitor:—Held, that the proceedings were regular, and warranted by G. O. Chy. 138. (see con. rule 487), following Moffatt v. Prentice, 6 P. R. 33, and that consequently relief might be had on the defendant's failure to attend under G. O. Chy. 144, (see con. rules 499, 520), and also that the appointment might be made ex parte. Semble, this mode of examination, and that provided by R. S. O. 1877 c. 50, are not interfered with by the O. J. Act, s. 52. *Bank of British North America* v. *Eddy*, 9 P. R. 396.

See, also, *Bolckow* v. *Foster*, 7 P. R. 388.

Party Temporarily within the Jurisdiction.]—When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpœna, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the party so served to object at the time to the payment of conduct money. *Comstock* v. *Harris*, 12 P. R. 17.

The president of the plaintiffs lived in the United States, but being in Toronto, he was there subpœnaed on the 22nd April, to attend on the 28th April, for examination for discovery before a special examiner at Toronto. He was paid $1, and made no objection as to the amount, nor did he object that he was prevented by any engagements from attending, but he failed to attend:—Held, that he should have attended on the day appointed, and that the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; and he was ordered to attend at his own expense. Bolckow v. Foster, 7 P. R. 388, distinguished. *George T. Smith Company* v. *Greey*, 11 P. R. 345.

Penalty—*Alien Labour Act.*]—An action brought in the high court of justice for Ontario, in the name of Her Majesty, to recover a penalty for a violation of the statute of Canada, 60 & 61 Vict. c. 11, restricting the importation and employment of aliens, is an action to which the provisions of the Canada Evidence Act, 56 Vict. c. 31, apply, within the meaning of s. 2, which provides that the Act, shall apply "to all criminal proceedings and to all civil proceedings and other matters whatsoever respecting which the parliament of Canada has jurisdiction in this behalf." In such an action, having regard to the provisions of s. 5 of that Act, as now found in 61 Vict. c. 53, the defendant can be examined for discovery before the trial. *Regina* v. *Fox*, 18 P. R. 343.

Predecessor in Title.]—In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial:—Held, by the master in chambers, that the father might have been made a party under rule 309 on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son, and such being the case, there was no doubt of his liability to be examined under rule 285. *McMaster* v. *Mason*, 12 P. R. 278.

Quasi-Plaintiff.]—In an action by creditors of a firm to establish the liability of the defendant as a partner therein, it appeared that the assignee of the firm for the benefit of creditors (who had received all the papers of the firm) was interested in the success of the action, had instigated its being brought, and was providing material in the way of

documents, &c., to the plaintiffs for its efficient prosecution:—Held, that although the assignee might have no direct beneficial interest in the result, he was to be regarded for the purposes of discovery as a quasi-plaintiff, and the defendant was entitled to have production of all the documents in the possession of the assignee, and to examine him for the purpose of such production. *Frothingham* v. *Isbister*, 14 P. R. 112.

Residence Mentioned in Writ.]—Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction, and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action; and an appointment for his examination in another county is irregular. *Dryden* v. *Smith*, 17 P. R. 500.

Seduction—*Examination of Plaintiff's Daughter.*]—The plaintiff in an action for seduction was examined for discovery by the defendant, but was able to give very little information:—Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter. *Hollister* v. *Annable*, 14 P. R. 11.

Specific Performance—*Defendant Examining Alleged Grantors.*]—In an action by a vendor for specific performance of a contract for sale of land, at the price of $24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was $5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant:—Held, that under these circumstances the defendant should be allowed, under rule 285, to examine the two sisters before delivering his defence. *Brown* v. *Pears*, 12 P. R. 396.

Third Party.]—In an action of replevin a party was added as a defendant at the instance of the defendant, who claimed indemnity against him on the ground of a warranty. After issue the plaintiff obtained an order to examine the third party:—Held, that though on the face of the pleadings there was no direct issue between the plaintiff and third party, yet as the latter had all the rights of the defendant, and virtually took his place, the case was within the spirit at all events, of rule 224 O. J. Act, and that the examination should be allowed. *Bradley* v. *Clarke*, 9 P. R. 410.

(f) *Scope and Nature of Examination.*

Application for Receiver—*Examination of Executor.*]—In answer to the defendant's application for a receiver to receive the interest of the plaintiff as residuary legatee under a will, of which he was also the surviving executor, the plaintiff filed an affidavit in which he stated that the estate was insufficient to pay the debts and specific legacies, and that there would be no sum coming to him as residuary legatee:—Held, that the plaintiff upon cross-examination upon his affidavit must answer as to whether there were any and what debts and legacies unpaid. *McLean* v. *Bruce*, 13 P. R. 504.

Bodily Injury—*Examination of Person by Surgeons.*]—In an action to recover damages for bodily injuries caused to the plaintiff by the alleged negligence of the defendants:—Held, that the court had no power to order the plaintiff to attend and submit to an examination of her person by surgeons chosen by the defendants. *Reily* v. *City of London*, 14 P. R. 171.

Bodily Injury—*Examination by Medical Practitioner—Questions.*]—The statute 54 Vict. c. 11 (O.), by which it is provided that an order may be made directing that the person in respect of whose bodily injury damages or compensation is sought in an action "shall submit to be examined by a duly qualified practitioner," does not authorize the putting of questions by the medical practitioner to the examinee. Clouse v. Coleman, 16 P. R. 494. Leave to appeal was refused by the court of appeal. *Clouse* v. *Coleman*, 16 P. R. 541.

Communication during Marriage.]—R. S. O. 1887 c. 61, s. 8, which provides that "no husband shall be compellable to disclose any communication made by his wife during the marriage," is still in force. It is competent for a husband who is making disclosures as to what took place between his wife and himself during coverture, at any time during an examination for discovery to refuse to disclose anything further. If upon such refusal the solicitor for the opposite party withdraws, the examination may be proceeded with and the evidence afterwards taken will not be struck out. *Connolly* v. *Murrell*, 14 P. R. 187.

Conspiracy.]—In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J. fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books relating to such transactions. *Colter* v. *McPherson*, 12 P. R. 630.

Defamation—*Justification—Immorality—Disclosure of Name of Paramour.*]—The defendants having in their newspaper charged the plaintiff with immorality, he sued them

for libel, and the defendants pleaded that the charges were true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her. *Macdonald* v. *Sheppard Publishing Co.*, 19 P. R. 282.

Denial of Right—*Details of Business Transactions.*]—In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—Held, that, there being a bonâ fide contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson* v. *Radcliffe*, 17 P.R. 586.

Disclosing Case.]—In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying on an entry made in a book belonging to her father that he had lent the defendant money on a certain day:—Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call: she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle* v. *Coyle*, 19 P. R. 97.

Discretion.]—The O. J. Act has introduced a new intermediate practice, departing in some measure from the old rules of chancery and common law, such new practice being indicated by rule 235, that where a question has been substantially answered, a further answer ought not to be compelled, and when discovery would be oppressive, it is the duty of the court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree. Parker v. Wells, 18 Ch. D. 477, considered and followed. *MacGregor* v. *McDonald*, 11 P. R. 386.

Duty to Obtain Information—*Privilege.*]—Upon the examination for discovery of an officer of an incorporated company, in an action brought against the company by a person whose building they supplied with electrical power, to recover damages for injury by fire which he alleged to have been caused by their negligence, the deponent, being asked whether on the date of the fire there was any indication at the power house or the defendants' works that there was any trouble or breakage in the wires on the circuit by which power was supplied to the plaintiff, answered that there were such indications:—Held, that he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; and if he had not such knowledge, but could obtain it from a servant of the defendants who acquired the knowledge in the course of his employment, he was bound to obtain it so as to enable him to answer the question; and even if the information which the deponent had was obtained for the purpose of enabling counsel to advise, and he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purposes of discovery. Bolckow v. Fisher, 10 Q. B. D. 161, and Southwark Water Co. v. Quick, 3 Q. B. D. 315, followed. *Harris* v. *Toronto Electric Light Company*, 18 P. R. 285.

Examination to Credit—*Identity of Plaintiff.*]—The examination of a party for discovery in the cause under rule 487 must be confined to matters which are relevant to the questions raised in the pleadings, but a fair amount of latitude is to be allowed. Questions which go only to credit are not admissible. In an action for a partnership account, where the defendant denied the partnership and set up that the plaintiff had been his servant, under the same name as that in which he brought the action, during the period of the alleged partnership:—Held, that it was not material to the issue that the plaintiff bore another name at a previous time, and the defendant could not examine him as to the details of his past life, long prior to the alleged partnership. *Mack* v. *Dobie*, 14 P. R. 465.

Fraud Charged.]—The bill alleged that the defendant assisted in the fraud by which the plaintiff was induced to convey certain land to her husband, the other deendant. She answered the bill denying all charges of fraud, disclaiming all interest in the subject-matter of the suit, and asking for her costs:—Held, that it was competent for the plaintiff on cross-examining the defendant on her answer and disclaimer, to establish if possible the fraud out of her own mouth. *McFarland* v. *McFarland*, 9 P. R. 73.

Malicious Prosecution—*Police Officer—Privilege.*]—In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on a information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained. Judgment below, 21 O. R. 553, reversed. *Humphrey* v. *Archibald*, 20 A. R. 267.

Patent Action.]—The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses. *Smith* v. *Greey*, 10 P. R. 482.

Tendency to Criminate.]—In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper, on examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband:—Held, on appeal, that defendants were justified in their refusals. *Millette* v. *Lytle*, 10 P. R. 265.

The penal provisions of the statute 13 Eliz. c. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction. *Dunsford* v. *Carlisle*, 10 P. R. 449.

No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him:—Held, that he was entitled to the privilege, and that it was not too late to claim it. The costs of the motion to commit were made costs to the plaintiff in the cause. *Hall* v. *Gowanlock*, 12 P. R. 604.

In an action of libel and slander, the plaintiff complained that the defendant had communicated to several persons the contents of a letter received from another person in which the plaintiff was accused of larceny, &c. Upon an examination of the defendant for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so:—Held, that the reason given was sufficient to protect the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of inquiry at the outset. Semble, that s. 5 of the Dominion statute of 1893, respecting witnesses and evidence, will, when it comes into force, supersede the privilege now existing in cases of this kind. *Weiser* v. *Heintzman*, 15 P. R. 258. *See* the next case.

The Ontario statute as to evidence, R. S. O. 1887 c. 61, s. 5, limits the scope of all preliminary examinations for discovery or otherwise in civil actions. Jones v. Gallon, 9 P. R. 296, followed. It has not been affected by s. 5 of the Dominion statute, 56 Vict. c. 31, which, by necessary constitutional limitations, as well as by express declaration (s. 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction. The language used in a previous decision in this case, 15 P. R. 258, at p. 260, is too broadly expressed in the absence of concurrent Ontario legislation. And, therefore, a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Vict. c. 31, be compelled to answer questions which may tend to criminate him. *Weiser* v. *Heintzman*, 15 P. R. 407.

See, also, *Nunn* v. *Brandon*, 24 O. R. 375; *D'Ivry* v. *World Newspaper Co. of Toronto*, 17 P. R. 387.

In an action upon promissory notes, the defendants pleaded that the plaintiff and certain other persons had contrary to 52 Vict. (D.) c. 41, s. 1 (c), conspired together to harass the defendants and lessen trade competition, and had procured the holders of the notes sued on to transfer them to the plaintiff, and the plaintiff was suing thereon as trustee for such other persons. Upon his examination for discovery, the plaintiff refused to answer questions as to the names of the persons for whom he was acting as trustee, claiming privilege on the ground that to answer would tend to criminate him or render him liable to criminal prosecution under the above statute:—Held, that he was not entitled to the privilege and must answer. *Mills* v. *Mercer Co.*, 15 P. R. 246.

See, also, *sub-title* XIV. 2, 5.

VIII. Foreign Commission.

1. *Application for and Form of.*

Administration.]—After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained to establish the fact that the party applying for the order is one of the next of kin. *Farrell* v. *Cruickshank*, 1 Ch. Ch. 12.

Before Pleading.]—The plaintiff was seeking damages for breach of a contract made with persons whom he alleged to be agents of the defendant. Before delivering a statement of claim, and after many months had elapsed since appearance, the plaintiff obtained an order to examine the defendant under a foreign commission at Chicago, in the United States of America, for the purpose, as he alleged, of obtaining information for the purpose of framing his statement of claim, and also for convenience, as the defendant was continually travelling about in the course of her career as a public singer, and it might not be possible to take her evidence later if it were not taken at Chicago, where she was shortly to be:—Held, that the circumstances were not such as justified the order, and it was set aside. *Thomson* v. *Gye*, 13 P. R. 273.

Commission to Follow the Order.]—Where an order was made for a commission to examine one M. *vivâ voce* and other witnesses on interrogatories:—Held, that the commission could not issue to examine M. only, without amending the order. *Smith* v. *Babcock*, 9 P. R. 175.

Cross-Interrogatories.] — Held, that upon the affidavits it sufficiently appeared that defendant had waived filing cross-interrogatories, more especially as the evidence had been taken more than six months before the trial, and he had never moved against the proceedings. *Bunnel* v. *Whitlaw*, 14 U. C. R. 241.

Cross-Interrogatories.] — When a foreign commission issues on the master's certificate, under G. O. 221, cross-interrogatories should be filed in the office of the clerk of records and writs; and where they were filed by a defendant in the master's office instead, and notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs. *Darling* v. *Darling*, 8 P. R. 391.

Custody of Infants—*Habeas Corpus.*]—Commission to take evidence abroad on the return to a writ of habeas corpus. See *Re Smart Infants*, 12 P. R. 2.

Discretion.]—It is not imperative upon the court to grant a commission to examine witnesses out of the jurisdiction; and where a suit was pending in Lower Canada for a claim arising there, and the plaintiff having found one of the defendants here served him with process, and desired the evidence of a witness in Montreal, the application was refused. *Mair* v. *Anderson*, 11 U. C. R. 160.

Discretion—*Terms—Security for Costs.*] —An order for a foreign commission being discretionary, there is power to impose proper terms in making it. And the plaintiff was required to give security for the costs of a commission to examine a witness abroad, where the information as to his exact locality was slender and it seemed doubtful whether he would attend to be examined. Langen v. Tate, 24 Ch. D. 522, followed. *Coleman* v. *Bank of Montreal*, 16 P. R. 159.

Election Petition.]—A commission may be ordered to take evidence abroad in the matter of an election petition, but it will not be ordered as a matter of course, and the power to order it is one which should be sparingly exercised. *In re Glengarry Election* (*Dom.*), *Chisholm* v. *McLennan*, 11 C. L. T. Occ. N. 321.

Election Trial.]—A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition. *Cornwall Election* (3) (*Dom.*), *Mackennan* v. *Bergin*, H. E. C. 803.

Expert Evidence.]—The rules of practice which allow evidence to be taken under commission are not to be extended where the object is to procure mere scientific testimony: that is to say, the testimony of experts. *Russell* v. *Great Western R. W. Co.*, 3 L. J. 116.

Forum for Application.]—Where an application for a commission to examine a witness in New York, was made before an official referee, and referred by him to a Judge, it was—Held that matters coming within the jurisdiction of any officer of the court should be disposed of by him in the usual way, and the parties might then appeal from such decision. *Hughes* v. *Rees*, 9 P. R. 86.

Fraud Charged.]—A commission to examine the parties will not issue where, as in the case of fraud being set up, it might be conducive to the ends of justice that either of the parties should be examined before the Judge who tried the case, and their evidence is important. *Vivian* v. *Mitchell*, 13 C. L. J. 198.

No order of any moment should be made ex parte, except in a case of emergency. The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation: —Held, that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the court and jury. *Thomas* v. *Storey*, 11 P. R. 417.

Impertinent Interrogatories.] — The referee made an order striking out as impertinent certain interrogatories to be administered to a witness under commission:—Held, on appeal, that the referee had no jurisdiction to strike out interrogatories for impertinence. The proper course is, for the witness to demur to the impertinent question. *Williams* v. *Corby*, 8 P. R. 83.

Jurisdiction of Referee.] — A referee upon a reference under s. 102 of the Judicature Act, R. S. O. 1887 c. 44, has jurisdiction to order the examination of foreign witnesses under a commission. Rules 34-37, 52, 58, 59, 73, 552, considered. Semble, the provisions of rule 590 are embraced by inference in rule 35 so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions. But the mere form, whether by certificate or order, is immaterial, having regard to rules 441, 442. Hayward v. Mutual Reserve Association, [1891] 2 Q. B. 236, and Macalpine v. Calder, [1893] 1 Q. B. 545, followed. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511.

Leading Questions.]—The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the master's office. A party to the suit who, in bringing his account into the master's office, files an affidavit verifying it, may be asked: "Is the account in the schedule to your affidavit correct?" thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item in order to avoid leading questions. *Lockwood* v. *Bew*, 10 P. R. 655.

Material on Application.]—The motion for a commission must be supported by affidavit. *McNair* v. *Sheldon*, Tay. 451.

In an action to restrain an alleged nuisance, caused by the defendants' cattle byres in the city of Toronto, an application was made by the defendants for the issue of a commission to certain cities in the United States to take evidence in their behalf concerning the cattle byres in those cities. It was admitted that the only point on which witnesses in the States could be usefully examined was, as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such

persons could not be ready to attend personally at the trial:—Held, upon this state of facts, that the order for the commission must be refused. *Attorney-General* v. *Gooderham*, 10 P. R. 259.

In an action for a libel published in the defendants' newspaper, the plaintiff applied for the issue of a commission to take his own evidence and that of other witnesses in England, where he and they lived. The plaintiff's affidavit stated only that the witnesses were material and necessary for him on the trial of the action, and that he was advised and verily believed that he could not safely proceed to trial without their evidence:—Held, sufficient to entitle the plaintiff prima facie to a commission. Smith v. Greey, 10 P. R. 531, commented on. Every application for a commission must be made in good faith, and the evidence sought to be obtained must be such as to warrant a reasonable belief that it may be material and necessary for the purposes of justice; but it is safer where any injustice to other parties, in the way of delay or expense or otherwise, can be provided against, to favour the granting rather than the refusing of the application. The main considerations are a full and fair trial and the saving of expense. Under the circumstances of this case the order for a commission to take the evidence of the plaintiff and his witnesses abroad was granted, upon the plaintiff securing the defendants for their costs of the execution of the commission and undertaking to speed the proceedings and not delay the trial. It was contended by the defendants that the evidence expected from the witnesses was unnecessary by reason of the implied admissions in the statement of defence:—Held, that it was for the defendants to make the evidence unquestionably unnecessary, either by amending their pleadings so as to expressly make the admissions or by undertaking to do so at the trial. *Rowins* v. *Empire Printing and Publishing Co.*, 14 P. R. 488.

Application for a foreign commission to take the defendant's evidence on his own behalf in England refused, where the matters in question were complicated accounts between the parties arising out of transactions between them in Ontario at a time when both were resident there; where it seemed that the expense of executing the commission would exceed the cost of the defendant travelling from England to attend the trial; and where the only reasons given by the defendant for his alleged inability to attend the trial were "engagements in England" and want of time and money. *Porter* v. *Boulton*, 15 P. R. 318.

Where an application for a foreign commission is made before issue joined, and it is not certain what the issues will be, the party applying must disclose the nature of the evidence to be given by the foreign witness, that the court may gauge whether it is likely to be material and necessary. Smith v. Greey, 10 P. R. 531, explained. And where issue had been joined two months before the sittings for which the plaintiff gave notice of trial, and the defendant applied five days before the sittings for a commission to examine a foreign witness, upon an affidavit simply stating that the witness was necessary and material, and he was advised and believed he could not safely proceed to trial without his evidence, and while not explaining the delay, stating that the application was made in good faith and not for delay, a Judge in chambers refused to interfere with a master's order for a commission and a stay of the trial, except by directing that the trial should take place, on the return of the commission, in an adjoining county. *Morrow* v. *McDougald*, 16 P. R. 129.

Municipal Arbitration.]—A Judge of the court of appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbitration pending before an arbitrator named by a Judge of that court, under s. 487 (1) of the Municipal Act, 55 Vict. c. 42 (O.), Such an arbitration is not a "reference by rule, order or submission," within the meaning of s. 29 of the Act respecting arbitrations and references, R. S. O. 1887 c. 53; nor, even if it were a "matter" within the meaning of rule 566, would a Judge of the court of appeal have any jurisdiction, by reason of his having appointed the arbitrator or otherwise. And semble, distinguishing Re Mysore West Gold Mining Co. (Ltd.), 37 W. R. 794, it is not such a "matter." *Re Macpherson and City of Toronto*, 16 P. R. 230.

New Trial.]—Where it was considered conducive to the ends of justice, publication was opened and leave given to examine further witnesses, and to issue a foreign commission upon payment of costs, and upon the terms of examining the witnesses in Canada at the next examination term, and the witnesses residing out of Canada at the same term, or by foreign commission in the meantime; if the latter, the commission to be returned and depositions disclosed two weeks before the examination term, it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before. *Blain* v. *Terryberry*, 1 Ch. Ch. 104.

Party to the Action.]—A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shewn that the commission would, under any circumstances, be conducive to the ends of justice. *Price* v. *Bailey*, 6 P. R. 256.

There is no hard and fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in the case of the examination of a party being sought the court will be more circumspect than in the case of an ordinary witness. *Mills* v. *Mills*, 12 P. R. 473.

In an action of alimony where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who had left the jurisdiction and applied to be examined abroad:—Held, that the defendant was a necessary witness and that the reason given by him for not being able to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, was sufficient; and a commission was ordered. *Ib.*

The court will not hesitate to make an order for a foreign commission for the examination of a witness who is abroad, and whose presence cannot be procured for the purpose of giving evidence in court, because such witness is a co-plaintiff or co-defendant of the person applying. *Wilson* v. *McDonald*, 13 P. R. 6.

The divisional court, on appeal, admitted evidence which was not formally before the master or Judge in chambers below, and being satisfied that the defendant McD. could not be induced to return from abroad to give evidence, and that his evidence was important to

the defendant C., were of the opinion that the latter was entitled to a commission to examine McD. abroad; but gave no costs of the appeal. *Ib.*

An application for a commission to examine witnesses out of the jurisdiction is one going to the discretion of the court, and this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf. In the case of a defendant proposing to have his own examination taken on commission, his personal affidavit may not be essential, but very cogent reasons should be given by some one who can speak with knowledge. And where the affidavit in support of an application to have the defendant and his mother, by whom the negotiation was conducted with the plaintiff out of which the cause of action arose, examined abroad, was made by the defendant's solicitor, who swore that he believed it was necessary to have their evidence; that it would save expense if it were taken on commission; and that it would be very inconvenient for the defendant to be long away from his place of abode:—Held, that no case was made for the examination of the defendant abroad; and as to his mother, that the absence of the usual affidavit as to her being a necessary and material witness, and the omission to state any reason why she should not appear at the trial, should prevail to the upholding of the discretion exercised by a master in refusing to order a commission. *Kidd* v. *Perry*, 14 P. R. 364.

Prosecution for Indictable Offence—*Witnesses—Materiality.*]—A prosecution for an indictable offence is "pending" within the meaning of s. 683 of the Criminal Code, 1892, when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered. But the discretion of the Judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence. And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses whom the Crown proposed to examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of a statement of the third witness that he was with the defendant upon a certain occasion. *Regina* v. *Verral*, 16 P. R. 444, 17 P. R. 61.

Re-examination.]—Where a witness who had been previously examined under a commission, stated on affidavit that he had further evidence to give to explain or correct his former evidence:—Held, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to re-examine him:—Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined, was not a sufficient ground upon which to resist the application. *Rogers* v. *Manning*, 8 P. R. 2.

Reference.]—A commission to examine a witness abroad to use his evidence in a pending reference to a master, should be moved for on the master's certificate, and not on an affidavit as to the facts. *Stephens* v. *Mears*, 1 Ch. Ch. 200.

The master cannot ex parte issue a certificate for a foreign commission. *McLennan* v. *Helps*, 3 Ch. Ch. 193.

Striking out Interrogatories.] — An application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence. *Lockwood* v. *Bew*, 10 P. R. 055.

Time.]—The court will not, under the provision of the Provincial statute for issuing commissions to examine witnesses about to leave the Province, order such commission before declaration filed. *Saunders* v. *Playter*, Tay. 37.

A demurrer had been argued, and the court instead of allowing the demurrer, gave the plaintiff liberty to amend on payment of costs. An application by the plaintiff for a commission to examine the defendant in Lower Canada before amendment, was refused with costs. *Chance* v. *Henderson*, 1 Ch. Ch. 30.

A party may have a commission upon his undertaking not to act under it until after issue joined. *Dougall* v. *Moodie*, 1 U. C. R. 257.

An order for the examination of witnesses out of the jurisdiction, will not be made before issue joined, merely to expedite proceedings. *Allan* v. *Andrews*, 5 P. R. 32.

A commission cannot regularly be issued until after replication filed. *Royal Canadian Bank* v. *Cummer*, 2 Ch. Ch. 388.

A commission to take evidence out of the jurisdiction will not be ordered till after issue joined, nor then unless the applicant shews by affidavit what evidence he expects to obtain. *Smith* v. *Greey*, 10 P. R. 531.

Upon an application for a foreign commission it is not necessary to shew that the action is technically at issue; it is sufficient that it be shewn that some issue is raised on the pleadings which must be tried in the action. *Smith* v. *Greey*, 11 P. R. 38.

Travelling Witness.]—On an application for a foreign commission to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution. *Singer* v. *C. W. Williams Manufacturing Co.*, 8 P. R. 483.

Viva Voce Examination.] — Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken in viva voce questions, instead of upon interrogatories. *Watson* v. *McDonald*, 8 P. R. 354.

Witness's Veracity Impeached.] — A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose. *Nordheimer* v. *McKillop*, 10 P. R. 246.

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2. *Execution and Return.*

Affirmation.]—It is no objection that one of the witnesses affirmed instead of swearing. *Bunnel* v. *Whitlaw*, 14 U. C. R. 241.

Authentication.]—Where the execution of a commission to examine witnesses in the United States was proved by the affidavit of the commissioner named therein, and the return thereof made under his hand (without his seal):—Held, that under the Provincial statute 2 Geo. IV. c. 1, the execution was sufficiently authenticated. *Beach* v. *Odell*, 4 O. S. 8.

The return of a commission under the hand, but not the seal, of the commissioner, is sufficient: and the affidavit of the execution may be sworn by the commissioner himself. *Ib.*

The signature and seal of a person affixing the same as chief magistrate to an affidavit proving the due execution of a commission issued from this court, will be presumed genuine until the contrary is proved. Quære, whether the witnesses should not sign their deposition, and whether it should expressly appear on the face of the answer that they were sworn. *Doe d. Lemoine* v. *Raymond*, 5 O. S. 337.

Where the mayor or chief magistrate of a place to which a commission is sent is the plaintiff, the due taking of the commission may be sworn before and certified by the person next in rank. *Thompson* v. *Cummings*, 6 O. S. 106.

Semble, that an affidavit stating that the examination of the witness was duly taken, and not that the commission was duly taken, in accordance with the literal wording of the statute, is sufficient. *McLeod* v. *Torrance*, 3 U. C. R. 146.

Semble, also, the affidavit need not be intituled in the cause. *Ib.*

The affidavit though not intituled in the court or in the cause, is sufficient, when annexed to the commission under the seal of the commissioners and referring to it. *Doe d. Park* v. *Henderson*, 7 U. C. R. 182.

Where the due taking of the evidence was sworn to by A. before B., who certified at the foot of the affidavit that he was "police Judge" of a certain town in the state of Kentucky; that A. was a person well known to him; and that he deposed before him the truth of the matters stated above, and who signed the certificate with a scroll, O. in the place of a seal, adding that he had no notarial seal:—Held,—upon an objection because the affidavit was not subscribed by the deponent, and there was no proof of the authority of B., and no seal attached to his name,—that the commission was duly executed, and might be read. *Passmore* v. *Harris*, 4 U. C. R. 344.

The affidavit of the due taking of the commission need not be signed by the deponent. *Wilmot* v. *Wadsworth*, 10 U. C. R. 594.

The affidavit stated that "the examination of B., the witness named in the said commission, was taken before me and the said W. at, &c., according to the directions of the said commission:"—Held, that the examination annexed to the commission was not proved, for the affidavit did not in any way identify it with that which it stated to have been duly taken. *William* v. *Grand Trunk R. W. Co.*, 16 C. P. 191.

Held, under 34 Vict. c. 14 (O.) that the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before a notary public there, and not before the mayor or chief magistate as required by C. S. U. C. c. 32, s. 21. *Beard* v. *Steele*, 34 U. C. R. 43.

The affidavit of the commissioner stated that "the examination of A. M., the witness named in the said commission, was duly taken before me at, &c., as above certified, under and according to the directions of the said commission." Preceding this affidavit was a certificate stating that "the foregoing are the depositions of A. M., in the annexed commission named, upon the interrogatories taken before me at, &c., under the commission hereto annexed; and I certify that the same were taken according to the directions in said commission contained, and that annexed hereto and to said commission are the said interrogatories and the documents therein respectively referred to." On the commission was indorsed the following return: "The return of the within written commission will appear by the depositions, affidavits, and papers thereunto annexed;"—Held, that the examination or depositions, which were in effect held to be synonymous terms, was, or were, fully identified as the examination of the witness under and annexed to the commission. *Muckle* v. *Ludlow*, 16 C. P. 420.

Observations on the inconvenience of the present rigid statutory provisions respecting the admissibility of evidence taken under a commission. *Ib.*

The affidavit need not state in so many words that the evidence was duly taken. It may describe the proceedings and thus shew it. *Bunnel* v. *Whitlaw*, 14 U. C. R. 241.

A commission issued to one G., of the city of H., in the United States, to take evidence of one S. of the said city. It was returned with an affidavit by the commissioner of due execution, sworn at H. before the mayor, but the affidavit did not shew that the witness was examined there:—Held, sufficient. *Stebbins* v. *Anderson*, 20 U. C. R. 239.

Quære, whether the affidavit must be sworn before the mayor, &c., of the place where the evidence is taken. *Ib.*

Changing Day for Examination.]—It is no ground at the trial for excluding evidence, that the day first named for the examination was changed by the plaintiff and another appointed. Such an objection, if available at all, must be taken by motion before the trial. *Comstock* v. *Galbraith*, 21 U. C. R. 297.

It is not essential that an examination should take place upon the first day appointed therefor, but a notice annulling the first one, and appointing a subsequent day for such examination:—Held, sufficient. *Comstock* v. *Tyrrell*, 12 C. P. 173.

Commissioner's Illness.]—Where a commission to take evidence abroad could not be executed in time by reason of the illness of the commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing. *McIntyre* v. *Canada Company*, 2 Ch. Ch. 464.

Commissioner's Oath.]—A commission directed to two persons, provided as follows: "and we give to each of you full power and authority to administer such oath or affirmation to the other." The sole acting commissioner was not sworn before his fellow com-

missioner, but before an ordinary commissioner of the court:—Held, that the commission was admissible. *Heyland* v. *Scott*, 19 C. P. 165.

The plaintiff by his counsel attended before the commissioner so sworn, and took part in the examination of the witness produced, without further objection than refusing to consent to the mode of administering the oath:—Quære, whether he could afterwards object. *Ib.*

Contractions and Errors in Affidavit.]—It is no objection to an affidavit of execution of a commission to take evidence abroad, that the contractions Plff, and Deft. were used in the intituling of it. *Frank* v. *Carson*, 15 C. P. 135.

Nor that such affidavit was intituled in the common pleas instead of the Queen's bench. *Comstock* v. *Burrowes*, 13 U. C. R. 439.

Document Produced—*Authentication by Commissioner.*]—See *McDonald* v. *Murray*, 5 O. R. 559.

Effect of Opening.]—Held, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution. *Walton* v. *Apjohn*, 5 O. R. 65.

Extension of Time for Execution—*Waiver.*]—The time for the return of a foreign commission was extended from the 1st February, by an order of the master-in-ordinary, in the following terms:—"I extend the time for the return of the commission peremptorily to the 24th February." The witnesses were examined vivâ voce on the 24th February, all parties being represented:—Held, that the master was wrong in excluding this evidence, as the commission being executed on the 24th February, there was no irregularity because of the necessary delay occasioned by its transmission from a foreign country, and in any event, the effect of the plaintiffs being represented at the examination was to waive any objection that the evidence was not returned to the master's office by the 24th February. *Darling* v. *Darling*, 9 P. R. 560.

Interrogatories—*Jurat.*]—The answers of a prisoner to interrogatories, being styled in the cause, and intituled in the proper court, were headed, "The answers upon oath of," &c., and proceeded thus: "To the first interrogatory, he saith," &c. 2. "To the second interrogatory," &c., not adding, he saith. To the fifteenth interrogatory only the figures 15 were prefixed. The jurat stated that deponent was sworn, &c., "and made oath that the foregoing answers were true, on the 8th day of March, 1854;"—Held, that the form of the answers and the jurat were defective; and a summons obtained upon them was discharged, but without prejudice to another application. *Addy* v. *Brouse*, 1 P. R. 234.

Misnomer of Commissioner.]—A commission was addressed to S. B. Henry, and G., of Philadelphia, jointly and severally. G. took no part in executing it, but all was done by one S. B. Huey, and an affidavit of the plaintiff's counsel at Philadelphia, taken before G., explained that Huey was the name forwarded by him to the plaintiff's attorney here, but through some clerical error it was directed to Henry; that he knew no such person as S. B. Henry in Philadelphia, but that the Huey before whom the depositions were taken, was the person intended. This objection was not taken to the commission at the trial, though others were, and the evidence of witnesses on both sides taken under it was read:—Held, that nevertheless the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity. Per Draper, C.J.:—It will be very desirable to adopt the suggestion in Grill v. General Iron Screw Collier Company, L. R. 1 C. P. 600, and to leave all merely technical objections to be taken advantage of by motion in chambers, giving effect at nisi prius only to the absence of what our statute makes conditions precedent to the use of the depositions. *Lodge* v. *Thompson*, 26 U. C. R. 588.

Mistake in Defendant's Name.]—Held, that a mistake in the intituling of the cause in the commission, (the defendant having been styled William instead of Samuel,) was fatal to it; and that the taking of the evidence under it was a void proceeding. *Graham* v. *Stewart*, 15 C. P. 169.

Mode of Examination.]—All examinations under foreign commission must be by interrogatories, unless otherwise arranged by consent. *Gordon* v. *Elliot*, 2 Ch. Ch. 471.

Note Sued on Referred to by Wrong Date.]—The note, the subject of the action, which was commenced on the 27th June, 1865, was dated 6th March, 1857. To an interrogatory, referring to the note as marked "A," but as dated the 9th March, 1857, the witness answered, "I was the holder of the pro. note marked 'A.' hereunto annexed, up to and until March 6th, '65; I was such holder from March 6th, '57, to March, '65." To a subsequent interrogatory, as to any payment made by defendant on the note, he stated that he had received, besides several previous amounts, the sum of $15 on the 26th November, 1859:—Held, that the note sued upon had been sufficiently identified as that upon which the payment had been made to take it out of the statute of limitations: that the mere mistake in the question as to the date had been set right by the answer; and that the maxim "falsa demonstratio non nocet" applied. *Muckle* v. *Ludlow*, 16 C. P. 420.

Objection to Authentication.]—At the commencement of the trial, the counsel for the defendant not being present, the counsel for the plaintiff opened his case, and while he was reading evidence taken under a commission at Montreal, the counsel for defendant appeared and objected to the commission, as the envelope enclosing it was not under the hand and seal of the commissioner, and there was no affidavit of the due taking:—Held, the the objection was fatal, and taken in time. *Reford* v. *McDonald*, 14 C. P. 150.

Objection too Late.]—Where at the trial an objection was taken to the form of the return, the court would not on argument allow another objection, which would have been fatal if urged at the trial. *Hibbert* v. *Johnston*, 6 O. S. 635.

Opening in Envelope—*Form of Return*—*Frame of Commission.*]—A commission enclosed in an envelope, which came to hand with an opening not large enough to allow of the escape of the papers contained therein,

is sufficiently close to render it admissible. *Frank* v. *Carson*, 15 C. P. 135.

Effect of the word "close" considered. *Ib.*

Such commission need not be endorsed with the style of the cause in which it is issued. *Ib.*

Nor need the evidence be annexed to the commission. *Ib.*

A commission should be so framed as to bind all parties to be examined under it, particularly as to the mode of administering the requisite oaths, as, for instance, to Jews. *Ib.*

Semble, 1. An objection to a return, which states that the execution thereof will appear "by the schedules and papers annexed," while the examination and affidavit of due taking are not annexed, if such objection be either that the return is defective, or that it is no return at all, may be fatal; but if the objection be merely that the return is separate from the schedule, it must fail; 2. That in all cases a return should be endorsed on the commission. *Ib.*

Opening in Envelope.]—A commission produced at the trial in an envelope open at both ends, though otherwise well secured, and under the hand and seal of the commissioner, is properly admitted in evidence, it appearing that it arrived at the Toronto post office in that state, and there being no suspicion of its having been tampered with by either of the parties interested. *Graham* v. *Stewart*, 15 C. P. 169.

It is always open to a party to explain to the satisfaction of the presiding Judge how the enclosure became open, and the reception of it being a matter resting very much with the Judge, the court will not be disposed to interfere with the exercise of his discretion. *Ib.*

Return to Wrong Office.]—Held, that the commission not having been returned to the office of the deputy clerk of the Crown pursuant to the Judge's order, was no objection at nisi prius to the admission of the evidence. *Stevenson* v. *Rae*, 2 C. P. 406.

Sending back to Commissioners for Authentication.]—Where a commission to a foreign country has been executed and returned, and remains unopened, and it is supposed that there is no proper affidavit of the execution attached, the court will order it to be returned to the commissioners. *Doe d. Hay* v. *Hunt*, 1 P. R. 44.

Two Commissioners—*One Refusing to Certify — Questions by Commissioners.*]—A commission was issued out of the supreme court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiffs' commissioner to proceed ex parte if the other neglected or refused to attend. Both commissioners attended the examination, and defendant's nominee cross-examined the witness but refused to certify to the return, which was sent back to the court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were put to the witnesses by the commissioners:—Held, that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received. Held, also, that the refusal of one commissioner to sign the return did not vitiate it. *Millville Mutual Marine and Fire Ins. Co.* v. *Driscoll*, 11 S. C. R. 183.

Waiver.]—Defendant having made one objection to the evidence which was overruled, allowed it to be read, and commented upon it:—Held, that he was precluded from taking any further exceptions. *Farrel* v. *Stephens*, 17 U. C. R. 250.

Where the commission prescribes a particular time and place for taking the evidence: Quere as to the effect of neglecting this direction. *Ib.*

A party who joins in acting under a commission, which contains specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted. *Frank* v. *Carson*, 15 C. P. 135.

Witness not Cross-examined.]—A material witness for plaintiff stated during the assizes that he was obliged to go to the States on business; and a commission was granted and the witness examined. Defendant's counsel objected to the issuing of the commission, and refused to cross-examine, as he could not consult his client, but he attended at the trial, and made the best defence he could. It being very important, under the circumstances of the case, that this witness should be subjected to cross-examination, the court granted a new trial on payment of costs. *Arnold* v. *Higgins*, 11 U. C. R. 191.

Witness's Full Name not Given.]—Upon a commission, the name of one witness was stated to be William Lansing Flynn, and in the return of the commissioners, they stated they had reduced to writing the answers of William L. Flynn:—Held, not to vitiate the commission. *Comstock* v. *Tyrrell*, 12 C. P. 173.

Witness Unable to Write—*Interpreter—Foreign Commissioner—Different Commissioners.*]—Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names:—Held, sufficient. *Darling* v. *Darling*, 8 P. R. 391.

On the facts stated in the judgment:—Held, that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground. *Ib.*

The commissioner was an Italian, and the instructions to him were in English:—Held, no objection, as it did not appear that the commissioner was unacquainted with the English language. *Ib.*

It did not appear that the commissioner took down the evidence:—Held, immaterial, under the instructions set out in the report. *Ib.*

The depositions of the claimant were taken by one commissioner, and those of a witness by another:—Held, immaterial. *Ib.*

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3. *Miscellaneous Cases.*

Co-defendant.]—Held, that where one defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examine such co-defendant, he is thereby made a good witness in the cause. *Grimshawe* v. *Parks*, 6 L. J. 142.

Costs.]—Notice of trial was given and duly countermanded. Defendant obtained a judgment as in case of nonsuit, the plaintiff not having proceeded to trial according to the practice, and claimed costs of a commission to examine witnesses in the United States; also, a counsel fee, and a fee for preparing a brief. These were refused by the master; and upon motion for revision, it was held that under the circumstances of the case the master ought to have allowed the costs of the commission, notwithstanding the countermand. *Pegg* v. *Pegg*, 7 U. C. R. 220; see *S. C.*, 1 C. L. Ch. 130.

The costs of a commission to take evidence in a foreign country form part of the costs of the cause. *Colborne* v. *Thomas*, 4 Gr. 169.

The costs of executing a commission are entirely in the discretion of the master; and where the amount paid to the commissioner and his clerk for two sittings on different days in London, was twenty-two guineas, and the master on taxation disallowed twelve, the court refused to interfere. *Fox* v. *Toronto and Nipissing R. W. Co.*, 7 P. R. 157.

The plaintiffs obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, but neither the plaintiffs, who succeeded in the suit, nor the defendant, put it in at the trial:—Held, that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiffs on the ground that the evidence had not been used. *Dominion, etc., Co.* v. *Stinson*, 9 P. R. 177.

Defendant Refusing to Attend.]—Where a defendant in a suit refused to attend before commissioners appointed for the purpose of taking his evidence in a foreign country, the usual order to set the cause down to be heard pro confesso was made. *Prentiss* v. *Bunker*, 4 Gr. 147.

General Order 53.]—The 53rd general order of May, 1850, does not apply to a foreign commission for taking depositions. *Anon.*, 2 Gr. 122.

Inferior Court.]—An action in which it will be necessary to issue such commission, may be brought in a superior court, although the amount sued for may be within the jurisdiction of an inferior court. *Comstock* v. *Leaney*, 3 L. J. 13.

Notice of Opening.]—When a commission has been executed and returned into court, an order ex parte will be granted for opening it and publication of the evidence, notice to the opposite party being required of the time of opening. *Neale* v. *Withrow*, 4 L. J. 88.

No order is necessary for leave to open a foreign commission duly returned. The proper practice is to open it without order, in the presence of all parties. *Chalmers* v. *Pigott*, 1 Ch. Ch. 282.

Proof that Witness is without the Jurisdiction.]—If a witness be examined under a commission in a foreign country, it is not necessary at the trial to prove that he is still without the jurisdiction. *Watson* v. *Lee*, H. T. 5 Vict.

Quebec.]—C. S. C. c. 79, ss. 4 et seq., which authorize the issue of subpœnas to the Province of Quebec, does not take away the power of the court, nor deprive the plaintiff of the right to examine witnesses there by commission. *McIntyre* v. *Fair*, 6 P. R. 110; *Stratford* v. *Great Western R. W. Co.*, 6 P. R. 91, 9 C. L. J. 312.

Sending Books out of Jurisdiction.]—Books and documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission. But documents produced in another action, which is sub judice, will not be taken from the office for such a purpose. *Clarke* v. *Union Fire, Ins. Co., Chabot's Case*, 10 P. R. 413.

Using Evidence.]—If a commission to examine witnesses abroad, issued at the instance of one party and executed at his expense, be returned by the commissioners into court according to the statute, the opposite party has a right to call for and make use of the evidence at the trial of the cause. Semble, that an order for the publication of the evidence may be obtained before trial. *Gordon* v. *Fulller*, 5 O. S. 174.

Using Evidence before Trial.]—Held, that the court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening. *Smith* v. *Grecy*, 11 P. R. 238.

IX. Letters Rogatory.

Dominion Act.]—Held, that the Act 31 Vict. c. 76 (D.), is not ultra vires the Dominion Parliament, for the taking of evidence in one of the Provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the Provinces by s. 92 of the British North America Act, inasmuch as such proceedings are of extra-provincial pertinence, and do not relate to civil rights in the Province. *Re Wetherell* v. *Jones*, 4 O. R. 713.

Reciprocity—*Form.*]—Letters rogatory, such as are provided for by an Act of the Congress of the United States as issuable from any foreign court, will be issued by the court here, although in the present state of our law no reciprocal accommodation can be afforded here to suitors in the United States. In letters rogatory so issued here, the usual offer to render similar service when required was necessarily omitted. Such letters need not necessarily be in the name of the sovereign, but may be issued as from the Judges of the court of chancery. *United States* v. *Denison*, 2 Ch. Ch. 176.

X. Particulars.

General Rule.]—The practice in ordering particulars depends in this Province on the inherent jurisdiction of the court to prevent injustice being done; the rules in force in England not having been adopted here. *Queen Victoria Niagara Falls Park Commissioners* v. *Howard*, 13 P. R. 14.

Arrest.]—After the service of non-bailable process, a Judge's order obtained by defendant for the delivery of particulars, with a stay of proceedings, does not prevent the plaintiff from arresting defendant on an alias writ. *Wilson* v. *Wilson*, 3 O. S. 297.

Breaches of Bond.]—In debt on a bond to the limits, a rule for particulars of the breaches will be granted. *Church* v. *Barnhart*, Dra. 213.

Close of Pleadings—*Necessity.*]—After issue joined upon the statement of defence, the plaintiff cannot obtain an order for particulars of the defence without an affidavit shewing the necessity therefor. They cannot be for the purpose of pleading, and there must be evidence that they are required for the purpose of trial. Smith v. Boyd, 17 P. R. 463, followed. *Bank of Toronto* v. *Insurance Company of North America*, 18 P. R. 27.

Construction of.]—Defendant being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished but not for work and labour:—Held, that they could recover under the particulars, for proof of the work expended on the goods was a mode of ascertaining their value, and defendant could not have been misled. *Northern R. W. Co. of Canada* v. *Lister*, 27 U. C. R. 57.

Particulars are not to be construed with the strictness applicable to a count on a special contract. *Ib.*

The particulars in an action on the common counts were headed, "Detailed statement of extra work performed by R. (plaintiff) on secs. 3 and 4 Bruce gravel roads, under contract of 1866;"—Held, that this did not necessarily restrict the plaintiff to work done under the sealed contract of that year entered into between the parties, but that he might shew that any work mentioned in the particulars was done outside of such contract, and under a wholly separate and independent one. *Ross* v. *County of Bruce*, 21 C. P. 41.

Contract — *Errors in Progress Certificates.*]—In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent:—Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purpose of another action between the same parties; but:—Held, that information obtained by means of the measurements and examination of the company's surveyors was not per se privileged; and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications. *Canadian Pacific R. W. Co.* v. *Conmee*, 11 P. R. 297.

Corrupt Practices.]—The inquiry under 35 Vict. c. 36, s. 14, as to corrupt practices in procuring the passage of a by-law, must be confined to the particulars finally given by the applicant. *Re Credit Valley R. W. Co. and County of Peel Bonus*, 6 P. R. 62.

Criminal Conversation—*Affidavit of Denial.*]—In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant shewing his innocence and ignorance of the ground of complaint. Keenan v. Pringle, 28 L. R. Ir. 135, followed. *Murray* v. *Brown*, 16 P. R. 125.

Crown — *Petition of Right—Injury Received on Government Railway—Negligence.*]—Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servants of the Crown in charge of the train, and from defects in the construction of a railway, an order was made for the delivery to the respondent of particulars of such negligence and defects. *Dubé* v. *The Queen*, 2 Ex. C. R. 381.

Defence of "Not Guilty" by Statute.]—Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of "not guilty by statute" were ordered. *Jennings* v. *Grand Trunk R. W. Co.*, 11 P. R. 300.

Delay.]—Where a defendant delivers his particulars of set-off on a day later than that appointed by Judge's order, and plaintiff's attorney (through his clerk) accepts and retains them without objection, such conduct is a waiver of all objections on the ground of delay. *McLellan* v. *McManus*, 1 U. C. R. 271.

Where defendant had been ordered to deliver particulars of any credit claimed by him by the 17th September, and he did not deliver them until the 26th September:—Held, that he was restrained by such order from putting in evidence a letter from plaintiff, admitting a set-off in the shape of money received to defendant's use. *Campbell* v. *Gzowski*, 7 U. C. R. 412.

Demand — *Compliance — Restriction.*]—Where a party complies with a demand for particulars of his claim, he will be restricted at the trial to the particulars given by him, without any order for the purpose. *Young* v. *Erie and Huron R. W. Co.*, 17 P. R. 4.

Disturbance of Ferry.] — Particulars ordered in an action on the case for disturbing a ferry as to the number of passengers, goods, &c., conveyed. *Ives* v. *Calvin*, 1 C. L. Ch. 8.

Dower.]—Particulars of the premises cannot be obtained by the demandant in an action of dower. *Nolan* v. *Cherry*, 1 P. R. 277.

Effect of.]—Under a bill of particulars for work and labour, the plaintiff may give in evidence an acknowledgment of a specific balance due for work and labour. *Drummond* v. *Bradley*, Dra. 243.

Ejectment.]—A defendant is entitled to particulars of a plaintiff's claim in an action of ejectment after appearance, or at any other stage, if it appear proper to a Judge that he

should have them. *Watson* v. *Brewer*, 4 P. R. 202.

Evidence.]—Particulars of demand served by the plaintiff on defendant, containing an admission of payment on account, and shewing a balance in favour of the plaintiff, are put in at the trial by defendant to prove the payment. The plaintiff then relies upon the particulars so put in by defendant as a link in the chain of evidence, to shew that he was entitled to a verdict for the balance therein mentioned:—Held, that though the particulars rendered by the plaintiff and made use of by the defendant were not evidence per se of the balance as therein stated, still that the whole of the particulars ought to go to the jury as a fact in connection with other facts of the case, to assist them in forming their verdict. *Keesor* v. *Empey*, 4 U. C. R. 47.

Facts within Defendant's Knowledge.]—Where the circumstances mentioned in the statement of claim lie in the knowledge of the defendant rather than the plaintiff the latter should not be called on for particulars before examining the defendant for discovery. *Sims* v. *Slater*, 10 C. L. T. Occ. N. 227.

Failure to Deliver.]—After defendant has obtained a rule for particulars, and the plaintiff has not delivered them, the court will grant a rule that, unless the plaintiff shall deliver them within a certain time, defendant shall be at liberty to sign judgment of non pros. *Shaver* v. *Corey*, H. T. 3 Vict.

Fraud.]—Particulars will be ordered of the fraud charged in a plea to a declaration alleging the breach of an agreement. It is sufficient if the affidavit on which the application is founded is made by the attorney on the record. *Bain* v. *McKay*, 5 P. R. 405.

The defendant contested the validity of a will propounded by the plaintiffs, and also propounded two earlier wills, under which, in the event of the last in date being invalidated, he claimed:—Held, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman* v. *Appleman*, 12 P. R. 138.

Further Particulars.]—Rule 20 of T. T. 1856, does not debar a Judge from ordering on motion such further particulars as he may think fit. *Hall* v. *Bowes*, 2 L. J. 208.

Insurance — *Origin of Fire—Proofs of Loss—False and Fraudulent Statements.*]—The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was that the plaintiffs' claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises; (2) that the fire was not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true. Upon an application for particulars:—Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fire was caused by his procurement, means, or contrivance. 2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely. 3. Nor should further particulars be required as to now the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient. 4. That as to the alleged falsity and fraud of the declaration with respect to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had overstated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles. *Katrine Lumber Company* v. *Liverpool and London and Globe Insurance Company*, 17 P. R. 318.

Libel—*Damages in way of Trade.*]—In an action for damages for libelling the plaintiffs in the way of their trade, the plaintiffs did not allege special damage, but alleged generally that their business and commercial reputation had suffered. Upon the examination of the plaintiffs for discovery they refused to answer as to what business they had lost by reason of the alleged libel:—Held, that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place the figures before the jury to shew a general diminution of profits since the publication of the alleged libels; and if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled on the examination for discovery to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery. It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and if particulars given, that the examination should be continued and discovery afforded; but if particulars not given, that evidence of diminution of profits should not be given at the trial. *Blachford* v. *Green*, 14 P. R. 424.

Note Sued on.]—A promissory note declared on need not be mentioned in a bill of particulars. *Street* v. *Cameron*, H. T. 2 Vict.

Where a declaration contained a count upon a promissory note and common counts, and the plaintiff, under an order for particulars, gave an account for goods sold and delivered only, but at the trial the defendant cross-examined upon the note and afterwards at the close of the plaintiff's case, obtained a nonsuit because the note was not mentioned in the particulars:—Held, 1. That it was unnecessary to include the note in the particulars: 2. That the objections were too late after cross-examining on the note. *Bigelow* v. *Sprague*, 5 O. S. 65.

Where a promissory note is declared on, an error in its date, when given in a bill of particulars under a Judge's order, is immaterial. *Barney* v. *Simpson*, 6 O. S. 96.

Not Part of Declaration.]—Particulars of demand are no part of the declaration, and are not admitted by a plea of payment on the record. *Mulholland* v. *Morley*, 7 L. J. 325.

Not Part of Record.]—Particulars are not part of the record. *Davidson* v. *Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

Particulars without Order.]—Semble, particulars delivered after summons, but without any order for their delivery, do not bind. *Street* v. *Cameron*, 11. T. 2 Vict.

Patent Action—*Excision of Pleading—Exclusion of Evidence—Discretion.*]—In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good per se. And where both excision of the pleading and exclusion of evidence were provided for in an order:—Held, that the discretion of a Judge in chambers in striking out the provision for excision was rightly exercised. *Noxon Brothers Manufacturing Co.* v. *Patterson and Brother Co.*, 16 P. R. 40.

Payment.]—Semble, that it is not now the practice in England to give an order upon the defendant to deliver particulars of payment. *Campbell* v. *Gzowski*, 7 U. C. R. 412.

Seduction.]—The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts, with regard to which the plaintiff proposed to give evidence. Turner v. Kyle, 2 C. L. T. 598; 18 C. L. J. 402, explained. *Hollister* v. *Annable*, 14 P. R. 11.

Where the defendant in an action of seduction denies the seduction on oath, the plaintiff will be required to furnish particulars of the times and places at which it is charged that the alleged seduction took place. Hollister v. Annable, 14 P. R. 11, approved. Notwithstanding differences in the rules, the principle upon which particulars are ordered is the same here as in England. *Mason* v. *Van Camp*, 14 P. R. 296.

Set-off.]—Where there is no plea of set-off defendant cannot have the advantage of any mere items of set-off, not being payments on account, which the plaintiff has admitted in his particulars of demand; and where some items of the plaintiff's own demand, stated in his particulars, are barred by the statute of limitations, he has a right to place against these the items of set-off appearing in his particulars to be beyond the six years. *Ford* v. *Spafford*, 8 U. C. R. 17.

Slander.]—In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed:—Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend, by giving details, upon payment of costs. *Paterson* v. *Dunn*, 14 P. R. 40.

In an action for slander the statement of claim alleged that the defendant, on a specified day, spoke to C. and others the slanderous words alleged. In answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of the others to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts:—Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order particulars. Thornton v. Capstock, 9 P. R. 535, approved. *Winnett* v. *Appelbe*, 16 P. R. 57.

In an action of slander the defendant has a right to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered; and also to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander. Shifty and uncertain particulars, such as are rendered meaningless and evasive by saying "among others" and "some of the persons," are to be discouraged. The plaintiff is bound to give definite information, so far as he can, and to stop there; if further information comes to his knowledge, he can obtain leave to amend. The defendant is entitled to particulars of slanderous statements alleged merely as matters shewing express malice or in aggravation of damages. *Muller* v. *Gerth*, 17 P. R. 129.

The plaintiff alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words:—Held, that the defendant was entitled to some particulars as to the times when and the places where the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken. Winnett v. Appelbe, 16 P. R. 57, distinguished:—Held, also, that the plaintiff should have leave to examine the defendant before delivering particulars, in order to enable him to furnish them. *Robinson* v. *Sugarman*, 17 P. R. 419.

Slander of Title to Goods—*Damping Auction Sale.*]—In an action for slander of title to goods the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised, a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done:—Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article in respect of which damage was claimed a larger price than was realized at the sale; all that he could reasonably be required to particularize was the amount by which his sale had been damped. *Catton* v. *Gleason*, 14 P. R. 222.

Special Indorsement.]—A special indorsement on the writ of summons that the plaintiff claims a stated sum as the amount of an account rendered, is not sufficient particulars of demand. *Wilkes v. Buffalo, Brantford, and Goderich R. W. Co.*, 2 L. J. 230.

The particulars of claim upon a writ of summons specially indorsed to which the defendant appears, do not bind the plaintiff as particulars under a declaration on the common counts, and, in such a case, he must comply with a demand for particulars made by the defendant. *Huggins* v. *Guelph Barrel Co.*, 8 P. R. 170.

Staying Proceedings.]—After a demand made and sworn to, the court made a rule for particulars of demand, and to stay proceedings in the meantime, absolute in the first instance. *Butler* v. *Richardson*, 3 O. S. 605.

Service of demand of particulars still operates as a stay of proceedings under the C. L. P. Act, 1856. *Grover* v. *Pettigrew*, 3 L. J. 70.

Time—*Close of Pleadings—Discretion.*]—It is only in exceptional cases that particulars are ordered after the close of the pleadings. And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of the firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff and by his mismanagement, negligence, fraud, and embezzlement, and certain particulars were given thereunder, as to which the defendant swore that they were given with as much detail as he could command, shewing how the business had been conducted and the shortages which had arisen, for which he alleged the plaintiff was responsible as the acting partner:—Held, that the discretion exercised in chambers in refusing to order further particulars, after issue joined and notice of trial given by the plaintiff, should not be interfered with. *Smith* v. *Boyd*, 17 P. R. 463.

Time to Plead.]—Defendant has the same time to plead after the delivery of particulars under a Judge's order as he had when the summons was returnable. *Washburn* v. *Fothergill*, Dra. 476.

Title to Land.]—In an action of trespass to land the defendants pleaded a lease from the Dominion Government, and that the lands had been vested in the Government as ordnance lands. This was pleaded in an unexceptionable manner, and no affidavit was filed by the plaintiffs to shew that they were unable to reply without further disclosure. An order was made by the master in chambers for particulars of the facts and means by which and the time at which the lands became ordnance lands. It did not appear that the defendants had any special means of information as to the matter of title, not open to the plaintiffs:—Held, that the order was wrong in form, and should not have been made in this case; for a party is not obliged to disclose upon what evidence he relies, or by what means he is going to prove his contention. *Queen Victoria Niagara Falls Park Commissioners* v. *Howard*, 13 P. R. 14.

Trespass.]—A defendant in trespass may obtain particulars of the plaintiff's cause of action before declaration. *Nevills* v. *Hervey*, T. T. 3 & 4 Vict.

In an action brought for trespass to lands with counts for trespass to goods and trover:—Held, that the defendant, who lived on the adjoining lot, was entitled to particulars of the acts of trespass complained of as regarded locality, so as to inform him by reference to some object on the ground where the plaintiff claimed the division line between the lots to be. *Polk* v. *Donovan*, 7 P. R. 99.

Variance between Declaration and Particulars.]—Where the declaration claimed £75 for work and labour, but the bill of particulars only £19, the case was within the limits of the Act 8 Vict. c. 13, s. 55, and might be tried in the district court. *Martin* v. *Gwynne*, 5 U. C. R. 245.

Wrongful Dismissal—*Defence of Misconduct.*]—In an action for wrongful dismissal, where the defence is misconduct generally it is proper to direct particulars shewing the nature and character of the instances relied on by the employer; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely; and leave should be given to supplement with further particulars if discovered before trial. *Crabbe* v. *Hickson*, 14 P. R. 42.

XI. Presumptions and Onus of Proof.

1. *Matters Judicially Noticed.*

Corporate Capacity.]—Where a defendant pleads over and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of British North America* v. *Sherwood*, 6 U. C. R. 213.

Foreign Power.]—Held, that to charge a prisoner in a warrant of commitment issued under 59 Geo. III. c. 49, with attempting to engage or enlist a soldier in the land or sea service, for or under, or in aid of "Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America," was sufficiently certain; that the foreign power was sufficiently defined in the warrant, and one whose existence the court is bound judicially to notice, viz.: "The President of the United States of America"—the words relating to the Federal States being rejected as surplusage. *In re Smith*, 10 L. J. 247.

Imperial Acts.]—The court is bound to take notice that the Imperial Act 11 Geo. IV. & 1 Wm. IV. c. 60, enables lands in this Province held in trust by a person of unsound mind, to be conveyed by a committee appointed by the high court of chancery in England. *Thompson* v. *Bennett*, 22 C. P. 393.

Judge's Knowledge of Previous Steps in the Litigation.]—In trespass for false imprisonment, where the defendant justified under a writ of ca. sa., and the plaintiff replied that it had been set aside before action brought:—Semble, that the Judge at the trial—before whom the ca. sa. in this case had

been set aside, after argument in chambers, with consent of the parties, as if by the full court in term, and to whom the facts upon which the writ had been set aside had become judicially known—had a right to comment to the jury upon some of those facts, which had been left uncontradicted as well upon the trial as upon the application in chambers, although such facts had not been again expressly brought out by the plaintiff in his evidence before the jury in this case. The facts thus stated by the Judge were, however, afterwards withdrawn by him from the consideration of the jury. *Robertson* v. *Meyers*, 7 U. C. R. 423.

Legal Rate of Interest.]—Upon a covenant to pay interest at ten per cent., made while 16 Vict. c. 80, was in force, and before 22 Vict. c. 85:—Held, that the court was bound to notice that by the statute no more than six per cent. could be recovered, though non est factum only had been pleaded. *Girdlestone* v. *O'Reilly*, 21 U. C. R. 409.

Number of Coroners in County.]—In an action on a replevin bond given to B. one of the coroners of the county, the defendants having moved in arrest of judgment on the ground that the bond was made to and assigned by one coroner, not the coroners, of the county:—Held, that the bond being properly set out in the declaration, and no issue or point being raised on the record, the court was not bound to take judicial notice that there were more coroners than one in the county; and the declaration was therefore sustained. *Johnson* v. *Parke*, 12 C. P. 179.

Order-in-Council.]—Held, that a magistrate cannot take judicial notice of orders-in-council, or their publication, without proof thereof by production of the official gazette, and therefore that a conviction was bad which was made without evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of s. 96 thereof. *Regina* v. *Bennett*, 1 O. R. 445.

By s. 1 of the Seal Fishery (North Pacific) Act, 1893, it is provided that "Her Majesty the Queen may, by order-in-council, prohibit during the period specified by the order the catching of seals by British ships in such parts of the seas to which this Act applies as are specified by order:"—Held, that the court might take cognizance of such order-in-council without proof. *The Queen* v. *The Ship "Minnie,"* 4 Ex. C. R. 151.

The admiralty court is bound to take judicial notice of an order-in-council from which the court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament, 56 & 57 Vict. c. 23, The Seal Fishery (North Pacific) Act, 1893. A Russian cruiser manned by a crew in the pay of the Russian Government and in command of an officer of the Russian navy is a "war vessel" within the meaning of the said order-in-council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the admiralty court in an action for condemnation under the said Seal Fishery (North Pacific) Act, 1893, and is proof of its contents. *Ship "Minnie"* v. *The Queen*, 23 S. C. R. 478.

Public Act of Local Application.]—The courts are bound to take judicial notice of every public Act of the Provincial Legislature, though its operation may be locally limited. *Darling* v. *Hitchcock*, 25 U. C. R. 463.

Territorial Divisions.] — A Judge is bound to take notice of the territorial divisions of the Province. *McDonald* v. *Dicaire*, 1 Ch. Ch. 34.

Weights and Measures.]—The offence alleged in a conviction for selling spirituous liquors without license, was selling "a certain quantity, to wit, one pint:"—Held, sufficient, without negativing that it was a sale in the original packages within the exemption in 29 & 30 Vict. c. 51, s. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

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2. *Onus of Proof.*

Agistment.]—See *Pearce* v. *Sheppard*, 24 O. R. 167, as to primâ facie proof of negligence.

Breach of Bond.]—Where in debt on an indemnity bond the defendant pleaded that if the plaintiff was damnified she was damnified of her own wrong, and the plaintiff took issue on the plea, and did not assign any breach; and at the trial, the plaintiff not offering any evidence to prove that she was damnified, was nonsuited—on a motion for a new trial, on the ground that the issue was on the defendants, and that they should have begun, the nonsuit was held to be right. *Hamilton* v. *Davis*, 2 U. C. R. 137.

Breach of Condition in Policy.]—In an action brought upon a policy of insurance, defendants pleaded the non-fulfilment of the twelfth condition of the policy, which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiff took issue:—Held, that the proof of the plea rested upon defendants, and the plaintiff having given primâ facie proof of the fulfilment of the condition was entitled to the verdict. *Platt* v. *Gore District Mutual Fire Ins. Co.*, 9 C. P. 405.

British Ship.]—Where a vessel is seized as not being British built, under 7 & 8 Wm. III., the claimant, in order to recover, must prove that the vessel was built at a British port. *Rex* v. *Nash*, Tay. 197.

Cancelled Indorsement of Note.]—Where an indorsee suing the indorser upon a note produces it at the trial from his own custody, with defendant's indorsement thereon cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given to the jury for rejecting the inference that the note had been satisfied by defendant whose name is thus cancelled. *Peel* v. *Kingsmill*, 7 U. C. R. 364

Completion of Railway.]—A municipal corporation, under the authority of a by-law, issued and handed to the treasurer of the Province of Quebec 850,000 of its debentures as subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the Government Provincial subsidy was payable

under 44 & 45 Vict. c. 2, s. 19, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in council." The debentures were signed by a person who was elected warden and took and held possession of the office after the former warden had verbally resigned the position. In an action brought by the railway company to recover from the treasurer of the Province the $50,000 debentures after the Government bonus had been paid and in which action the municipal corporation was mise en cause as a co-defendant, the Provincial treasurer pleaded by demurrer only, which was overruled, and the corporation pleaded general denial and that the debentures were illegally signed:—Held, that the Provincial treasurer having admitted by his pleadings that the railway had been completed to the satisfaction of the Lieutenant-Governor in council, the onus was on the municipal corporation, mise en cause, to prove that the Government had not acted in conformity with the statute. *County of Pontiac* v. *Ross*, 17 S. C. R. 406.

Condition Precedent—*Insurance Policy.*]—Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. *Home Life Association* v. *Randall*, 30 S. C. R. 97.

Consideration for Note.]—Where in an action on a promissory note the defendant pleads no consideration, upon which issue is joined, the defendant must impeach the consideration; and it is not necessary for the plaintiff to prove the consideration in the first instance. *Sutherland* v. *Patterson*, M. T. 6 Vict.

Creditor's Action against Shareholder.]—In an action by a creditor of a railway company against a shareholder, it is not necessary that a fi. fa. (goods) should be returned nulla bona from all the counties through which the railway runs; but the onus of proof of fraud or of there being goods of the company to satisfy the judgment lies on the defendants, the plaintiff having obtained one return of nulla bona. *Jenkins* v. *Wilcock*, 11 C. P. 505.

Ejectment.]—In ejectment, the burden of proof to shew that the statute 4 Wm. IV. c. 1, s. 17, is inapplicable is thrown upon the defendant. *Doe d. McKay* v. *Purdy*, 6 O. S. 144.

Election Petition—*Status of Petitioner.*]—As to the onus probandi where preliminary objections affirm the disqualification of the petitioner, see *Megantic Election Case*, 8 S. C. R. 169.

By preliminary objections to an election petition, the respondent contended the petition should be dismissed because the petitioner had no right to vote at the election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed:—Held, that the onus probandi was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed. Megantic Election Case, 8 S. C. R. 169, discusssed. *Stanstead Election Case*, 20 S. C. R. 12.

The election petition was served upon the appellant on the 12th May, 1891, and on the 16th May, the appellant filed preliminary objections, the first being as to the status of the petitioners:—Held, that the onus was on the petitioners to prove their status as voters. Stanstead Election Case, 20 S. C. R. 12, followed. *Bellechasse Election Case*, 20 S. C. R. 181.

Election Trial—*Application of Saving Clause.*]—Where a corrupt practice is proved at an election trial, the onus is at once shifted to the respondent to bring himself within the saving clause, R. S. O. 1877 c. 10, s. 162. Prescott Election, Alexander v. Hagar, 1 E. C. 88, followed. *Muskoka and Parry Sound Election (Ont.)*, *Paget* v. *Fauquier*, 1 E. C. 197.

Execution of Bond.]—In an action on a bond against the sureties of the defaulting clerk of the municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it:—Held, that the plaintiffs had proved a primâ facie case of a bond properly executed on its face, and as the defendant had not negatived the due execution of the bond, it being consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover. *Marshall* v. *Municipality of Shelburne*, 14 S. C. R. 737.

Executors—*Breach of Trust.*]—See *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Exercise of Power of Sale.]—In proceeding to impeach a conveyance executed in pursuance of a power of sale in a mortgage, the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed. *Bartlett* v. *Jull*, 28 Gr. 140.

Existence of Convenient Road.]—The power of a municipal council to close a road under s. 504 of the Municipal Act, 1877, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation. *In re Adams and Township of East Whitby*, 2 O. R. 473.

Expropriation of Mineral Lands—*Proof of Value.*]—In a case of expropriation, the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. Brown v. Commissioner for Railways, 15 App. Cas. 240, referred to. Where, however, such tests or experiments have not been resorted to, the court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Factories Act.]—In action by workman against his employers for damages under the Factories Act, R. S. O. 1887 c. 208, see *Black* v. *Ontario Wheel Co.*, 19 O. R. 578.

Fishing by Foreign Vessel in Prohibited British Waters.]—Where the Crown alleged in its petition in an action in rem for condemnation and forfeiture, that a certain vessel had violated the provisions of the Act R. S. C. c 94, s. 3, by fishing in prohibited waters without a license, but offered no evidence in support of such allegation:—Held, that the burden of proving the license to fish was upon the defendant. *The Queen* v. *The Ship "Henry L. Phillips,"* 4 Ex. C. R. 419.

Foreign Judgment.]—In an action on a judgment obtained by plaintiff against defendant in the United States, defendant pleaded, 1. That the judgment had been recovered for money alleged to have been paid by plaintiff for the use of defendant; and that he was never indebted as alleged; 2. Payment before judgment:—Held, that the onus probandi was upon defendant. *Manning* v. *Thompson*, 17 C. P. 606.

Former Recovery.]—Where defendant pleaded a judgment recovered by him in a former action on the same promises, to which the plaintiff replied, that the judgment was not recovered on the same promises, it was held that the issue was on defendant, and he must prove the former recovery. *O'Neill* v. *Leight*, 3 U. C. R. 70.

Fraud.]—In cases where transactions are attacked as fraudulent under the insolvent law, see *Rice* v. *Bryant*, 4 A. R. 542; *Morton* v. *Nihan*, 5 A. R. 29.

Gift from Wife to Husband.]—Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—Held, that under these circumstances the onus was on the executor to prove that the moneys were a gift to the deceased, and it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in order to recover. In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and wife as shews that the money was so paid to him as a gift. *Elliott* v. *Bussell*, 19 O. R. 413.

Heirship.]—In ejectment, it was proved at the trial in 1847, that A. was last seen in the Province in December, 1827, and was never afterwards heard of. A fi. fa. against A.'s lands was placed in the sheriff's hands on the 13th July, 1833, tested the 29th June, 1833. The heir of A. brought ejectment against the purchaser at the sheriff's sale, and attempted to recover upon the ground that, after twenty-two years had elapsed since A. was last heard of, the presumption that he did not die till the expiration of the seventh year was at an end; and that defendant must shew that he did not die till after the seventh year; but,—Held, that the plaintiff, not the defendant, must shew when A. died. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510, 8 U. C. R. 291.

Highway.]—In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs. *St. Vincent* v. *Greenfield*, 15 A. R. 567.

Illegality of Contract.]—Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained:—Held, that, assuming the State law to be that if a contract to deal in such a way that only the differences in price should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing, and, this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice* v. *Gunn*, 4 O. R. 579.

Indian Lands.]—In regard to lands in the occupation of Indians, it is unnecessary, in the proceedings of commissioners under the statutes 2 Vict. c. 15, and 12 Vict. c. 9, to negative the exceptions specified in the latter of these statutes. *Regina* v. *Strong*, 1 Gr. 392.

Invalidity of Chattel Mortgage.]—In an interpleader action to try the right to the proceeds of the goods sold by the sheriff one of the plaintiffs was a mortgagee of the goods. He put in and proved the chattel mortgage, but gave no evidence of a debt or of pressure used. On this the Judge charged the jury that there was no evidence of a debt or of pressure, and he refused to allow the consideration to be proved after the plaintiffs had closed their case:—Held, that the mortgagee plaintiff proved enough to cast the burden of attack on the defendant, and that the defendant should have met the primâ facie case by shewing want of consideration or by other reason. *Furlong* v. *Reid*, 12 O. R. 607.

See, also, *Belanger* v. *Menard*, 27 O. R. 209.

Libel.]—In action of libel. See *Jackson* v. *Staley*, 9 O. R. 334.

Malice in Slander Action.]—As to proving malice in an action of slander against a public officer. See *Dowe* v. *Waterbury*, 6 S. C. R. 143.

Maritime Law — *Collision.*]—Where a collision occurs between a moving vessel and one lying at anchor, the burden of proof is upon the moving vessel to shew that such collision was not attributable to her negligence. The Annot Lyle, 11 P. D. 114, referred to. *Ward* v. *The Ship "Yosemite,"* 4 Ex. C. R. 241.

Marriage.]—Onus of disproving marriage of parties. See *O'Connor* v. *Kennedy*, 15 O. R. 20.

Merger.]—The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, they should find for the defendant; if taken under a stipulation that it should not have that effect, they should find for the plaintiffs; and that in the absence of evidence upon these points, the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant:—Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co.* v. *Udell*, 46 U. C. R. 511.

Mortgage Account.]—The decree directed a reference to the master at Brantford to take an account of the amount due upon the mortgage in question. The only evidence before the master, besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the master's report finding the whole amount due was allowed. Semble, that the onus of proof under such a reference rests upon the holder of the mortgage. *Elliott* v. *Hunter*, 15 Gr. 640.

Mortgage Account.]—When defendants in a redemption suit on proving their claim in the master's office produced their mortgages and filed an affidavit verifying their claims, and stating that $20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, that their claim was primâ facie proven, and the onus of reducing the amount rested with the plaintiff. *Court* v. *Holland, Ex parte Doran*, 8 P. R. 213.

Mortgage or Sale.] — A lessee of the Crown being in arrear for rent, assigned his interest to another, taking a bond to re-convey one-half thereof, on payment of half the amount advanced, within a year, which time having been allowed to elapse without payment of this sum, the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that under these circumstances the transaction was primâ facie one of mortgage, and that the onus of proving it to be a sale devolved upon the party attributing that character to the transaction. *Bostwick* v. *Phillips*, 6 Gr. 427.

Negligence.] — In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and although the Judge may rule negatively that there is no evidence to go to the jury on either issue he cannot declare affirmatively that either is proved. The question of proof is for the jury. Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury. *Morrow* v. *Canadian Pacific R. W. Co.*, 21 A. R. 149.

Negligence.] — In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. *Young* v. *Owen Sound Dredge Company*, 27 A. R. 649.,

Negligence—*Latent Defect in Axle of Car —Undue Speed in Passing Sharp Curve.*]—On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must shew affirmatively that there was negligence. The fact of the accident is not sufficient to establish a primâ facie case of negligence. *Dubé* v. *The Queen*, 3 Ex. C. R. 147.

Negligence — *Factory Act.*]—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of defendants' engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter to be inferred from the circumstances proved:—Held, that in order to maintain the action it was necessary to prove by direct evidence, or by weighty, concise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595.

Partnership.]—In June, 1874, the plaintiff and defendant, by writing, entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to:—Held, that the onus of negativing such right of the plaintiff rested on the defendant; and having failed to negative his right to such share, the court declared him entitled thereto and directed a reference to take the accounts between the parties. *Cameron* v. *Rickford*, 11 A. R. 52. This case was reversed by the Judicial Committee.

Patent of Invention—*Duty of Patentee as to Creating Market for his Invention.*]—It is not incumbent upon a patentee to shew that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to shew that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor. *Barter* v. *Smith*, 2 Ex. C. R. 455.

Prescriptive Right.] — Where one brought an action to restrain the diversion of the water which supplied his mill from the channel in which it had flowed for more than

twenty years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance and by the permission of the then owner of the creek in which the water naturally flowed partly for the benefit of the owner, who had, however, on many occasions, blocked up the cut, and so turned the water to its natural outlet:—Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right and shew that there had been a change in the mode of user after the origination by permission. *Malcolm* v. *Hunter*, 6 O. R. 102.

Production of Papers.]—It is not sufficient for a party to any litigation on whom the onus is to say that he could furnish the necessary proof if he had certain papers. It is his duty to have these papers, or to have them produced, the means of having their production being what the law deems ample. *Exchange Bank of Canada* v. *Springer*, *Exchange Bank of Canada* v. *Barnes*, 7 O. R. 309.

Production of Promissory Note—*Law of Quebec.*]—See *Pare* v. *Pare*, 23 S. C. R. 243.

Release.] — To an action for work and labour, defendants pleaded a release under seal, making profert. The plaintiff replied that the release was delivered as an escrow, to be void on non-payment by defendants of £200, by a certain day; also, that defendants did not pay:—Held, that defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery as part of his case. *Light* v. *Woodstock and Lake Erie Railway and Harbour Co.*, 13 U. C. R. 216.

Repealing Letters Patent.]—Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative. *McIntyre* v. *Attorney-General*, 14 Gr. 86.

Replevin.]—Replevin for a horse. Plea, that the horse was the horse of the defendant and not of the plaintiff as alleged, and issue thereon:—Held, that the plaintiff was entitled to begin. *Neville* v. *Fox*, 28 U. C. R. 231.

Seal Fishery—*Presence of a British Ship Equipped for Sealing in Behring Sea.*]—On 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb harbour, in Behring Sea, while taking in a supply of water:—Held, affirming 3 Ex. C. R. 241, that when a British ship is found in the prohibited waters of Behring Sea, the burden of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery (Behring's Sea) Act, 1891, 54 & 55 Vict. (Imp.) c. 19, s. 1, s.-s. 5:—Held, also, reversing 3 Ex C. R. 241, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of 54 & 55 Vict. c. 19, s. 1, s.-s. 5, *Ship "Oscar and Hattie"* v. *The Queen*, 23 S. C. R. 396.

Seal Fishery.]—The ship in question in this case having been seized within the prohibited waters of the thirty-mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the onus cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order-in-council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order-in-council. *The Ship "Minnie"* v. *The Queen*, 23 S. C. R. 478.

Shares in Trust.] — The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditors. Sweeney v. Bank of Montreal, 12 App. Cas. 617, followed. *Muir* v. *Carter*, *Holmes* v. *Carter*, 16 S. C. R. 473.

Slander—*Privilege.*]—Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false. *Hanes* v. *Burnham*, 26 O. R. 528; 23 A. R. 90.

Solicitor's Negligence.] — In actions against solicitors for negligence, see *O'Donohoe* v. *Whitty*, 2 O. R. 424; *Re Kerr, Akers and Bull*, 29 Gr. 188.

Specific Performance—*Title.*]—In May, 1890, a purchase was made by parol of a lot of land, in addition to three other lots previously bought by the same purchaser from the same vendor, and the purchaser went into possession and erected thereon a coach-house and stable, and the other portion of it was used as a lawn to the house which he had erected on the other lots which had been duly conveyed to him. In the year 1890, and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his note for the purchase money, but which he refused to accept. A bill for specific performance was subsequently filed by the vendor:—Held, that the purchaser, by his conduct, had waived his right to compel the vendor to make out a good title, but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract; the onus of proof under the circumstances being shifted from the vendor to the purchaser. *Denison* v. *Fuller*, 10 Gr. 498.

Stamping Note.]—Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double-stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act; and the evidence shewed that when the note came to the plaintiffs' hands it appeared to be properly stamped:—Held, that the defendant could not be allowed upon his own unsupported testimony, in such a case, to escape liability. The

onus was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him. *Bank of Ottawa* v. *McMorrow*, 4 O. R. 345.

Testamentary Capacity.]—See *Currie* v. *Currie*, 24 S. C. R. 712.

Title under Act.]—A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect portions of his estate not already declared forfeited and sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted: provided always, that nothing in the Act should affect any property sold or conveyed by the commissioners of forfeited estates, &c. In the preamble, it was recited that a part of the estate had been taken upon inquisition, and seized by the Crown:—Held, that the plaintiffs, claiming in ejectment as devisees of A. S., must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe d. Stevens* v. *Clement*, 9 U. C. R. 650.

Trust Account—*Alleged Debits.*]—See *Gagnon* v. *Prince*, 7 S. C. R. 386. Special leave to appeal to Her Majesty in council in this case, was refused. See *S. C.*, 8 App. Cas. 103.

Undue Influence.]—Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace, and an active, shrewd business man engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she however having sworn in her evidence that she never placed any dependence on him. The plaintiff's case was closed, and it was contended that the onus was now on the defendant to shew that the transaction was a righteous one. The defendant declined to call any witnesses, and plaintiff's action was dismissed:—Held, that the onus was not on the defendant, and that the plaintiff must prove her case. Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence. Wallis v. Andrews, 16 Gr. 637, followed. *McEwan* v. *Milne*, 5 O. R. 100.

Validity of Tax Sale.]—On 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown lands commissioner had made any returns to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown, under s. 106 of R. S. O. 1877 c. 180, so as to render it liable to be assessed prior to the year 1878:—Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid. At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed:—Held, that the plaintiff by production of his patent made out a primâ facie case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson* v. *Traynor*, 12 O. R. 804.

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

See, further, as to onus of proof in actions, the specific titles.

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3. *Presumptions.*

Acceptance of Devise.]—When one to whom a devise primâ facie beneficial to him is made neither accepts nor rejects the same, but remains passive, he will be presumed to accept. *Re Defoe*, 2 O. R. 623.

Advance.]—J. and R. living at P., had dealings extending over several years with D. & Co., who lived at K., and borrowed money from them from time to time. To secure the money borrowed they executed a mortgage to D. & Co., purporting to be for $4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the accounts in the master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as $4,000 had been advanced by D. & Co., J. and R. drew on D. & Co. for $1,500:—Held, that, under these circumstances, the presumption that D. & Co. owed J. and R. the $1,500 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D. & Co. *Court* v. *Holland*, 4 O. R. 688.

Appropriation of Payments.]—Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness. *Griffith* v. *Crocker*, 18 A. R. 370.

Assignment of Lease.]—Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an expired Crown lease, sold as belonging to B. by assignment:—Held, that after proof of the exemplification of the lease, the judgment, fi. fa. and sheriff's deed, a notice to produce the original lease and assignment without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B.; and that as A. shewed no title, nor that he had ever been

in possession, the same presumption should be made in favour of the purchaser as if he had been left to contend with the debtor himself. *Doe d. McGuire* v. *Dennis*, 2 O. S. 589.

Assignments and Preferences.]—Where an instrument made by a person in insolvent circumstances has the effect of giving one creditor a preference over others, and the instrument is attacked within sixty days after it is made, there is under the amended enactment 54 Vict. c. 20 (O.), an incontrovertible statutory presumption that the instrument has been made with intent to give an unjust preference and it is void. *Cole* v. *Porteous*, 19 A. R. 111. See the next case.

Held, per Hagarty, C.J.O. (hesitante), and Burton, J.A.—The presumptions spoken of in s-ss. 2 (*a*) and 2 (*b*) of s. 2 of R. S. O. 1887 c. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vict. c. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections. Per Maclennan, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable. Per Osler, J.A. —The presumption is general, and is irrebuttable; but the security in question in this action is supportable under the previous promise. Cole v. Porteous, 19 A. R. 111, distinguished. Judgment below, 22 O. R. 474, affirmed. *Lawson* v. *McGeoch*, 20 A. R. 464.

See, also, *Campbell* v. *Barrie*, 31 U. C. R. 279; *Evans* v. *Ross*, 30 C. P. 121; *Bank of Toronto* v. *McDougall*, 15 C. P. 475; *Davidson* v. *Ross*, 24 Gr. 22.

Cause of Fire.]—A train of the Canada Atlantic Railway Company passed the plaintiff's farm about 10.30 a.m. and another passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered and destroyed a quantity of the standing timber on said land. In an action against the company it was shewn that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous:—Held, affirming 14 A. R. 309, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed. *Canada Atlantic R. W. Co.* v. *Moxley*, 15 S. C. R. 145.

Conveyance.]—A lessee of the Crown verbally assigned his lease to B., who paid him for it and went into possession, and after some years died in possession, having received the original lease from A. A. afterwards died, and his administrator brought ejectment against B.'s administrator. At the trial the lessor of the plaintiff put in an exemplification of the original lease, and letters of administration. The defendant proved as above, and that after B.'s death the lease and other papers had been taken out of B.'s trunk, and the lessor of the plaintiff had since stated it was in his possession. The lease was not produced on notice, but the lessor of the plaintiff produced it after defendant's case closed:—Held, that the jury were justified in presuming a legal assignment of the lease under the circumstances. *Doe d. Murphy* v. *Mulholland*, 2 O. S. 115.

When the husband of a woman seised of land in her own right, during the coverture signed a writing (not sealed) acknowledging that he had bargained and sold certain lands, and been paid in full for them, and afterwards by letter directed his name to be signed to a deed of the same land, which was done, the wife not complying with the requisites of the statute to depart with her estate, and the vendee entered and continued in possession as owner upwards of twenty years:—Held, that a jury, in ejectment brought by such husband, might presume a conveyance from him; and that, during his life at least, no ejectment could be sustained to dispossess the vendee or those claiming under him. *Doe d. Wilson* v. *Wessells*, 5 O. S. 282.

In ejectment the plaintiff proved a patent to himself, which had been in his possession since 1803. Defendant claimed under a deed from A. to B., executed in 1806. A. was not shewn to have been in possession, and no deed from the plaintiff to A. was produced, nor any evidence given that he had ever executed such a deed; the facts proved only went to shew a bare probability that he might have done so:—Held, that there was no legal evidence for the jury, on the facts stated, to shew an alienation by the patentee. *Doe d. Petit* v. *Renard*, 6 U. C. R. 501.

The plaintiff claimed under deed from A. to S. in 1834, and from S. to plaintiff in 1843. In 1829 A. had made a deed to his stepmother, intended to be in lieu of dower in his father's lands. It was clear that his intention was to convey by this last deed the west part of the lot, but the deed was of the east part. It was proved, however, that S. had been in possession of the west part in 1829, and that he and the plaintiff had held it ever since:—Held, that a conveyance from A. to the plaintiff, in confirmation of this long possession, could not be presumed, for such a conveyance would be inconsistent with what was done in 1834. *White* v. *Myers*, 10 U. C. R. 574.

A., being a nominee of the Crown, transferred his certificate to B. in 1796, who soon after, by writing not under seal, contracted to sell to C. It was not shewn whether C. had made the payments specified by his agreement, but he went into possession, and he and his descendants had held uninterruptedly for more than fifty years. The defendant claimed under them. In 1837, a patent first issued to A., whose heir brought ejectment. It was left to the jury to presume a grant made by A. before the patent, but they found for the plaintiff, and the court refused to set aside the verdict. *McDonald* v. *Prentiss*, 14 U. C. R. 79.

Ejectment. The plaintiffs claimed under the grandson and heir-at-law of the patentee, F. D.; defendant under the patentee's second son D., to whom it was alleged that he had conveyed. The patent was for 1,200 acres, including the land in question.

The heir-at-law, who conveyed to the plaintiffs, was living in the state of Michigan, and appeared to have believed he had no title when the plaintiffs purchased his right from him there for a small consideration. For the defendant it was proved that it was always understood in the family of the patentee that D. owned this land; that D. had lent his father money, who had been heard to say that he had given him this land for the debt, if he could not pay; that he afterwards said he could not; and he and D. went together to the land, that his father might put him in possession; and on their return, the father was relieved from the debt, he having given D. the land. This was before 1812. The eldest son of the patentee had never set up any claim, knowing, as his brother swore, that D. owned the land. D. devised this, with other land, among his children, who by partition conveyed it to one of them, L., who afterwards devised to his brother R. R. died, and his land was sold under a judgment, obtained against C., his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to the defendant; C. and her second husband, M., first went to the land in 1836, and defendant and his father had held it since. The plaintiffs had also taken a conveyance from the heirs of D.:—Held, that there was sufficient evidence for the jury to presume a conveyance by the patentee, and that having found for the defendant, their verdict should not be disturbed. *Eades* v. *Maxwell*, 17 U. C. R. 173.

A. mortgaged lands in fee to B., and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No re-conveyance from B. to A. was proved. C. went into possession and continually held for about thirteen years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage:—Held, that D. was not entitled to recover in ejectment, and that, if necessary, a re-conveyance from B. to A. might be presumed. *Doe d. McLean* v. *Whitesides*, 5 O. S. 92.

Semble, that a certificate of a registrar of the discharge of a mortgage, indorsed on the mortgage, is sufficient evidence of a re-conveyance, without proof of the execution of the discharge itself. *Doe d. Crookshank* v. *Humberstone*, 6 O. S. 103.

In ejectment it appeared that the patent issued to one G. in 1802. No conveyance from the patentee to H., through whom defendant claimed title, was produced or proved; but one of the patentee's grandchildren proved that shortly before 1812 H. came to his father's and informed him that the patentee had executed such a deed, and it had always been so understood in the family. It was also proved that until the present suit, the patentee's family, though living close to the lot, had never made any claim to it; that in 1813 H. had assumed to deal with the property as his own by conveying a portion of it to one S.,—which deed was registered in 1816,— who subsequently conveyed with full covenants for title; that in 1835 H.'s son and heir-at-law conveyed the land in question with full covenants, under which possession had ever since followed; and that the patent was found among H.'s papers:—Held, that this was sufficient evidence from which a deed from the patentee to H. might be presumed. *Hill* v. *Long*, 25 C. P. 265.

Plaintiff purchased at sheriff's sale defendant's interest in certain lands, and, on ejectment brought in 1856, defendant produced a mortgage executed by one B., under whom he had gone into possession, to secure repayment of £28 in October, 1846. This mortgage had been satisfied, as was proved by the mortgagee, but no discharge had been registered:—Held, that the jury should have been directed, as a matter of course, to presume a re-conveyance, and the plaintiff should recover. *Collins* v. *Dempsey*, 14 U. C. R. 393.

In ejectment, it appeared that A. in 1829, conveyed to his son N., who devised to the plaintiff. For the defendant, it was proved that in 1823 A. had made a deed to another son, I., which was produced with the seals torn off, and had been found among A.'s papers after his death. A few years after this deed was given, I. had removed from that part of the country, leaving A. in possession. I. died in 1850, never having made any claim; and A., in 1838, and his son N., in 1841, both died in possession. In 1847, I.'s son brought ejectment against N.'s widow, this plaintiff being then an infant, but the suit was compromised. The jury were directed that if the deed to I. was voluntary, or, being made for good consideration, was cancelled by his consent before the conveyance to N., the plaintiff should recover; and they found in his favour:—Held, that the mere cancelling of the deed by I., or with his consent, would not divest him of the estate, but that if I. gave up and cancelled the deed intending to surrender the estate, and his father afterwards entered and conveyed to N., and that possession was held consistently with these facts till 1847, the jury might presume a re-conveyance by I., in pursuance of his intention. *Fraser* v. *Fralick*, 21 U. C. R. 343.

Of a conveyance from the patentee. See *McLeod* v. *Austin*, 37 U. C. R. 443.

Copy.]—Held, that the word "signed," before the lessor's name, raised no presumption that the lease was a copy not the original. *Becher* v. *Woods*, 16 C. P. 29.

Covenants in Deed.]—In ejectment the plaintiff proved a paper title, but the patent did not issue until 1826, and the deed from the patentee was executed in 1824. This deed was lost, and the memorial of it shewed it to have been an ordinary conveyance in fee, but not what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title:—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little*, 20 U. C. R. 425.

Death.]—It was proved at the trial in 1847, that A. was last seen in the Province in December, 1827, and was never afterwards heard of. A fi. fa. against A.'s lands was placed in the sheriff's hands on the 13th July, 1833, tested the 29th June, 1833. The heir of A. brought ejectment against the purchaser at the sheriff's sale, under an execution against A., and attempted to recover upon the ground that after 22 years had elapsed since A. was last heard of, the presumption that he did not

die till the expiration of the seventh year was at an end: that defendant must shew that he did not die till after the seventh year; and that the jury should be directed to find whether he did or did not die within the seven years; but, held, the proper direction was that at the end of seven years the fact of death was to be presumed, and not sooner, unless there was some evidence affecting the probability of life continuing so long, and also that the plaintiff, not the defendant, must shew when A. died. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510, 8 U. C. R. 291.

The eldest son and heir-at-law of a person who had in his lifetime agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of the purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company, it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers, without requiring any administration of the estate of the heir-at-law, the Canada Company not objecting thereto. *Burns* v. *Canada Company*, 7 Gr. 587.

The presumption of death arising from continued absence of the demandant's husband, unheard of for seven years, is sufficient to sustain an action for dower as against the objection that he is still living. *Giles* v. *Morrow*, 1 O. R. 527.

Deed — *Alteration.*] — The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, by virtue of s. 63 of the Registry Act, R. S. O. 1887 c. 136, primâ facie evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open. Whenever it would be an offence to alter a deed which has been completed, the legal presumption is that material alterations appearing on the face of the deed were made at such a time and under such circumstances as not to constitute an offence. *Graystock* v. *Barnhart*, 26 A. R. 545.

Deed—*Erasure of Date.*]—See *Fraser* v. *Fraser*, 14 C. P. 70.

Deed—*Execution—Delivery—Retention by Grantor.*]—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death. *Zwicker* v. *Zwicker*, 29 S. C. R. 527.

Delivery of Deed.]—Where an equity of redemption conveyed by deed was subject to a mortgage a discharge of which was registered the same day as the deed:—Held, that the deed must be assumed to have been delivered before it was registered. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

A deed is presumed to have been delivered on the day it bears date. *Hayward* v. *Thacker*, 31 U. C. R. 427.

Destruction of Books.]—St. L. filed a petition of right to recover from the Crown the balance alleged to be due on a contract for certain public works. On the hearing it was shewn that certain time-books and the original documents from which his accounts had been made up and also his books of account had disappeared. The Judge of the exchequer court found as a fact that these books and documents had been destroyed in view of proceedings before a commission appointed some time prior to the filing of the petition of right to inquire into the manner in which the works done under the contract had been carried on, and he dismissed the petition:—Held, reversing 4 Ex. C. R. 185, that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent and to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule omnia præsumuntur contra spoliatorem did not justify the learned Judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial shewing instead that the accounts would have been corroborated. *St. Louis* v. *The Queen*, 25 S. C. R. 649.

Destruction of Election Accounts.]—Where all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the cause be stripped of all other circumstances, the strongest conclusions will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *South Grey Election, Hunter* v. *Lauder*, 8 C. L. J. 17.

Execution of Deed.]—Defendant produced a deed, upwards of thirty-one years old, with a certificate of execution thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period:—Held, following *Osser* v. *Vernon*, 14 C. P. 573, that the deed with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed as produced had been properly executed, and that everything done by the justices, as public officers, had been rightly done until the contrary was shewn. *Monk* v. *Farlinger*, 17 C. P. 41.

Expropriation of Road.]—K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost:—Held, reversing the judgment of the supreme court of Nova Scotia, 20 N. S. Rep.

95, that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken, and K. could not recover. *Dickson* v. *Kearney*, 14 S. C. R. 743.

Fair Dealing.]—If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes personally at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court, holding that the presumption in case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Cameron* v. *Barnhart*, 14 Gr. 661.

Foreign Law.]—Presumption of foreign law. See *Re O'Brien*, 3 O. R. 326; *Langdon* v. *Robertson*, 13 O. R. 497.

Foreign Post Mark.]—A foreign post mark on a letter is primâ facie evidence of the time when the letter was posted. *O'Neill* v. *Perrin*, M. T. 3 Vict.

Foreign Subject.]—On an indictment against defendant, as a citizen of the United States, for entering this Province with intent to levy war against Her Majesty:—Held, that the fact of the invaders coming from the United States, would be primâ facie evidence of their being citizens or subjects thereof. *Regina* v. *Lynch*, 26 U. C. R. 208.

Identity of Note Sued on.]—Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties:—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity of the note was to be presumed. *Reynolds* v. *O'Brien*, 4 U. C. R. 221.

Innocence of Fraud.]—Quære, as to whether the presumption that a man is innocent of fraud until proved guilty, is sufficient to rebut the presumption of the execution of a fraudulent deed raised by the proof of the handwriting of an attesting witness. *Rogers* v. *Shortis*, 10 Gr. 243.

Judge.]—The defendant was convicted of perjury alleged to have been committed in a cause tried at a division court held by one H. under a commission issued by the Governor-General in council appointing him deputy Judge of the county court of the county of Victoria, during pleasure and the absence of the county Judge under the leave of absence granted to him by an order in council:—Held, it was not necessary for the Crown to prove the order in council granting the leave of absence, for its existence, and that the commission was not effete by the lapse of time, would be presumed, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorized to act, the onus of shewing the contrary being on the defendant. *Regina* v. *Fee*, 3 O. R. 107.

Judgment in Inferior Court.]—A judgment in an inferior court for a specific sum, is primâ facie evidence in a superior court against a less sum only being due, and as respects the merits it is conclusive till repelled by proof sufficient to destroy the effect of a foreign judgment as evidence of a debt. *Page* v. *Phelan*, 1 U. C. R. 254.

Landlord and Tenant—*Loss by Fire—Negligence—Law of Quebec.*]—See *Murphy* v. *Labbé*, 27 S. C. R. 126.

Land Titles Act—*Woman past Childbearing.*]—Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other children having conveyed their shares to her, applied under the Land Titles Act, R. S. O. 1887 c. 116, to be registered as owners with absolute title. The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of application had never returned. The evidence of a physician who had made a medical examination of the petitioner, shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would be an impossibility for pregnancy to take place:—Held, having regard to the provisions of s. 23, s.-s. 5, of the Act, that the master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration. *Re G.*, 21 O. R. 109.

Lease.]—A witness testified that A. B. leased the land to B. for five years; that both parties had informed him of this; that B. went into possession and told him he was a tenant to A. B., and that he remained on the land until the fall of 1843; that W. B. moved on and lived there with B.; and that both said the former had bought out the balance of the latter's term; that he heard of both having gone to one L. to have the lease signed, and W. B. said they had been there to get the "writings" signed. Another witness, the second wife of A. B., stated that B. had a lease for five years from March, 1843, at a certain rental, and that B. and her husband had both told her the terms of it. A third witness, the wife of B., said that her husband and she moved on to the land in 1843, under a lease from A. B., her father, for five years, and that her husband lived there for several months, when he sold out to W. B.:—Held, sufficient to warrant a jury in presuming a written lease for five years from March, 1843. *Steinhoff* v. *Burtch*, 17 C. P. 160.

Legality.]—The customer of a bank created a mortgage in its favour by the deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the

officer of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627.

Marriage.]—In an action against defendant, who was a married man, for persuading the plaintiff to go through a pretended marriage ceremony, and afterwards to cohabit with him:—Held, that the presumption of innocence, that the defendant had not been guilty of a crime, was an answer to any presumption of a marriage ceremony to be drawn from the cohabitation proved. *Wright* v. *Skinner*, 17 C. P. 317.

Presumption of marriage. See *O'Connor* v. *Kennedy*, 15 O. R. 20.

Means of Knowledge.]—Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge. *Sweeney* v. *Port Burwell Harbour Co.*, 17 C. P. 574. See, also, *London Election Case*, 24 C. P. 434.

Mercantile Usage.]—Where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there, when opportunity therefor is afforded, is a breach of the contract to purchase. Evidence of mercantile usage will not be allowed to add to or to affect the construction of a contract for sale of goods unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it. If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. *Trent Valley Woollen Mfg. Co.* v. *Oelrichs*, 23 S. C. R. 682.

Money Given to Election Agent.]—Presumption of candidate's intentions when he places money in the hands of his agent and gives no directions or exercises no control over it. See *Regina ex rel. Johns* v. *Stewart*, 16 O. R. 583.

Non-production of Books.]—On an information under 27 & 28 Vict. c. 3, against defendant as a distiller for the non-payment of duty on spirits manufactured by him:—Held, that the jury were rightly told that defendant's non-production, upon notice, of his books,, which he was proved to have kept, furnished ground for strong presumption against him. *Attorney-General* v. *Halliday*, 26 U. C. R. 397.

Non-production of Letter.]—Held, that the letter from K. to the defendants might be assumed upon the evidence set out in the report to state that he had made a sale of the goods to the plaintiffs at the prices named in the list, and that as such letter was not produced at the trial, though called for by the notice to produce, the court might, if necessary, presume that it stated anything further which might be necessary for the plaintiffs' case:—Held, also, that the effect of the letter from the defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order. *Ockley* v. *Masson*, 6 A. R. 108.

Notice of Dishonour.]—A protest is only presumptive evidence of the posting of notices of dishonour of a note, and is insufficient in the face of denial by the indorsers that they had received notice. *Ontario Bank* v. *Burke*, 10 P. R. 561.

Oath of Allegiance.]—Ejectment. In 1821 J. S., with his son S., and his daughter H., (who afterwards married M., a British subject,) came from the United States, and settled in Canada, all being aliens. On the 20th March, 1823, the Crown granted the land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on the 17th May, 1828, and S. about the 6th November, 1842:—Held, that under the Alien Act of 1828, assented to on 10th May, 1828, J. S was a British subject, for it might be presumed that he took the oath when he got the patent. *Her* v. *Elliott*, 32 U. C. R. 434.

Officer of Corporation.]—If a person acts notoriously as the officer of a corporation and is recognized by it as such officer a regular appointment will be presumed and his acts will bind the corporation, although no written proof is or can be adduced of his appointment. *Hamilton School Trustees* v. *Neil*, 28 Gr. 408.

Order Recited in Warrant.]—The plaintiff produced a warrant issued for his arrest for not finding sureties to the peace, in pursuance of an order to that effect recited in the warrant:—Held, that such warrant was prima facie evidence of the order. *Sprung* v. *Anderson*, 23 C. P. 152.

Partnership Dealings—*Laches and Acquiescence.*]—A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands, and to take an account of the dealings between J. and K. In the master's office K. asserted that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he contended a large sum was due him from J. for such overcharge:—Held, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption of acquiescence from long delay; and that such presumption was not rebutted by the evidence of the two partners, considering their relationship and the apparent concert between them. *Tooth* v. *Kittredge*, 24 S. C. R. 287.

Payment.]—The principle that the later items of an account draw the others after them, and thus save all from the statute of limitations, does not apply when quarterly payments, (e. g. for rent or tuition), are made and received as for a late specific and independent quarter, due at the time of payment, unmixed with items for any earlier quarter. The presumption in such a case is, unless the contrary be shewn to be the fact, that the earlier quarters have been all paid and satisfied. *King's College* v. *McDougall*, 5 U. C. R. 315.

Police Magistrate.]—An information was laid before K., who described himself as "one of Her Majesty's police magistrates in and for the county of Oxford;" and he was similarly described in the summons and conviction. K.'s commission was issued on the 12th January, and appointed him police magistrate in and for the county of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed was the case here; and therefore K. could not be police magistrate for the county which included these towns, as there could not be more than one police magistrate for the same county. On motion to quash the conviction:—Held, that the application must be refused; that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise; that even if there was more than one police magistrate, the other might have been appointed subsequently to K.; and the appointment of such other, and not K., would be void; and under R. S. C. c. 106, s. 17, the conviction must be deemed sufficient. *Regina* v. *Atkinson*, 15 O. R. 110.

Protocol of Examination.]—In an action for condemnation under the Seal Fishery (North Pacific) Act, 1893 [56 & 57 Vict. (Imp.) c. 23]:—Held, that where a protocol of the examination of an offending British ship by a Russian vessel did not disclose on its face that the person who signed the same was an officer in command of the examining vessel, or that the vessel was a Russian war vessel, the court, by reason of it being a matter involving international obligations, must apply the maxim omnia praesumuntur rite esse acta and assume that the person who signed the protocol was an officer properly in command of the examining vessel, and that such vessel was a Russian war vessel within the meaning of the Act. *The Queen* v. *The Ship Minnie*, 4 Ex. C. R. 151.

Receipt of Letter.]—As to the presumption of the receipt of a letter duly posted See *Shannon* v. *Hastings Mutual Insurance Co.*, 2 A. R. 81.

Recital in Warrant.]—Semble, that a recital in a warrant by the commissioners appointed under 2 Vict. c. 15, to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *Little* v. *Keating*, 6 O. S. 260.

Regularity of Discharge.]—A discharge from a foreign bankruptcy court held primâ facie evidence that all proper steps had been taken to obtain it. *Ohelemacher* v. *Brown*, 44 U. C. R. 366.

Report of Sessions.]—On an application for a mandamus to open a highway alleged to have been established by the sessions in 1839, under 50 Geo. III. c. 1, a surveyor's report, dated 5th July, 1839, that he had laid out the road, was produced from the clerk of the peace, on which was an indorsement not dated, "Allowed. I. F., Chairman Quarter Sessions, M.D." but that report bore no date of filing or entry, and there was no entry in the minutes of the July or October sessions of any order referring to this report:—Held, that the application must fail for want of proof that the report was filed or presented to the sessions next after its date or the road ordered to be opened. Semble, that if there had been a minute in the proceedings of the next sessions that the report was presented, and the road ordered to be opened, the court would presume that the sessions had done all that was necessary to warrant such entry or minute. Semble, also, that a minute of the allowance of the report, omitting to shew that the road was ordered to be opened, would not be sufficient. *In re Lawrence and Township of Thurlow*, 33 U. C. R. 223.

A road was surveyed in 1834, and the surveyor's report was made to the quarter sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the sessions under the Act then in force, nor was there a record of any order directing it to be opened. It was, however, actually opened before 1853, with the assent of the owners of the land, and was used for several years, and statute labour was done upon it:—Held, that the maxim omnia praesumuntur rite esse acta applied, and that the due adoption of the road by the quarter sessions should be presumed. *Palmatier* v. *McKibbon*, 21 A. R. 441.

Report of Master.]—The master's report is primâ facie evidence of what it contains, unless appealed from. *Nichols* v. *McDonald*, 4 L. J. 260.

Sale of Land—*Indemnity against Mortgage.*]—Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser. Parol evidence, however, could not have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity. *Corby* v. *Gray*, 15 O. R. 1.

Satisfaction of Mortgage.]—When a mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time of the payment of the

mortgage money. *Doe d. McGregor* v. *Hawke*, 5 O. S. 496.

Where interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently that the mortgagee has no subsisting title. *Doe d. Dunlop* v. *McNab*, 5 U. C. R. 289.

See Culbertson v. *McCullough*, 27 A. R. 459.

Seduction—*Loss of Service.*]—The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance:—Held, per Osler, Maclennan, and Moss, JJ.A.: 1. That under the Seduction Act, R. S. O. 1887 c. 58, an action lies by the parent, although the daughter may not have been living with him at the time of the seduction or subsequent illness. 2. That while mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary. Per Osler and Moss, JJ.A.: That the evidence fell short of that in this case. Per Burton, C.J.O.: That while there is under the Act, in an action by the parent, an irrebuttable presumption of service, there is no presumption of loss of service to the parent, which must still be proved, and that the action failed. Kimball v. Smith, 5 U. C. R. 32; L'Esperance v. Duchene, 7 U. C. R. 146; Westacott v. Powell, 2 E. & A. 525; and Cole v. Hubble, 26 O. R. 279, considered. In the result the judgment below, 26 O. R. 140, was affirmed. *Harrison* v. *Prentice*, 24 A. R. 677.

Seisin.]—Possession is evidence of livery of seisin of land; and where possession goes with a deed for upwards of thirty years, seisin may well be presumed. *Nolan* v. *Fox*, 15 C. P. 565.

By a deed dated 27th March, 1824, one J. S. leased land to H. T. to hold from the thirtieth day of the same month, until her decease:—Held, that though under the authorities, it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good. *Ib.*

Semble, that the jury might properly have been asked under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

Sheriff.]—In an action against a sheriff for seizing and taking goods, it is sufficient to prove that the deputy sheriff seized them colore officii, without proving the writ of execution, or giving other evidence of his being deputy sheriff than that of general reputation. *Holt* v. *Jarvis*, Dra. 190.

Statutory Title.]—The Provincial statute, 1 Wm. IV. c. 26, vesting in a trustee certain lands as belonging to the estate of the late St. G., has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve his trustees from the necessity of shewing title in the first instance. *Doe d. Baldwin* v. *Stone*, 5 U. C. R. 388.

Substitution of Road Allowance.]—Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out:—Held, affirming 8 O. R. 98, that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the owners through their lands, and that a by-law to open up the original road allowance as of right was invalid. Burritt v. Marlborough, 29 U. C. R. 119, approved; Cameron v. Wait, 3 A. R. 175, explained. *Beemer* v. *Village of Grimsby*, 13 A. R. 225.

Survey—*Road Allowance between Counties.*]—Monuments placed in compliance with the provisions of ss. 34, 35, 36 and 37 of R. S. O. 1887 c. 146, must be placed at the true corners, governing points or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from general sessions on an indictment for obstruction of a highway, being the town line between two counties. Tanner v. Bissell, 21 U. C. R. 553; Regina v. McGregor, 19 C. P. 69; Re Fairbairn and Sandwich East, 32 U. C. R. 573; and Boley v. McLean, 41 U. C. R. 260, distinguished. *Regina* v. *Crosby*, 21 O. R. 591.

Tax Collector.]—To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such. *Smith* v. *Redford*, 12 Gr. 316.

Testamentary Capacity.]—Letters probate issued by the proper surrogate court are, notwithstanding the Devolution of Estates Act, only primâ facie evidence as far as real estate is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity. *Sproule* v. *Watson*, 23 A. R. 692.

Title to Goods.]—There is no presumption that goods sold in one year continue the property of the vendee when afterwards found in the possession of a third party as owner; and the sheriff may shew that they belonged to such third party. *Kissock* v. *Jarvis*, 9 C. P. 156.

Toronto Agent.]—In applications of strict right the law will not assume that where an affidavit is made by "the agent" of a person, he is the professional Toronto agent of such person, and that such person is a practising attorney. *Leslie* v. *Foley*, 4 P. R. 246.

Withholding Books.]—If a party withhold from inspection a book containing entries relating to the matters in question in the cause, on the ground that it is private, it will be taken to contain evidence unfavourable to himself. *Lovell* v. *Todd*, 15 C. P. 306.

See, also, Sub-Title XV.

XII. Production and Inspection of Documents Before Trial.

1. *In General.*

(a) *At Common Law.*

See Horsman v. *Horsman*, 2 L. J. 211; *Small* v. *Eccles*, 3 P. R. 189; *Barwick* v. *De Blaquiere*, 4 P. R. 267; *Plews* v. *Mutton*, 9 C. L. J. 259.

(b) *In Chancery.*

In General.]—See *Wilson* v. *Thompson*, 3 Gr. 557; *Dougall* v. *Wilburn*, 1 Ch. Ch. 155; *Richardson* v. *Beaupré*, 2 Ch. Ch. 54; *Cattle* v. *Vansittart*, 2 Ch. Ch. 296; *Howcutt* v. *Rees*, 2 Gr. 268; *Paterson* v. *Bowes*, 4 Gr. 44; *Ross* v. *Robertson*, 2 Ch. Ch. 63; *Abel* v. *Hills*, 6 P. R. 122; *Lindsay Petroleum Co.* v. *Pardee*, 6 P. R. 140; *Bryce* v. *McIntyre*, 7 P. R. 134.

Admission in Pleading.]—Semble, where a defendant admits in his answer the possession of documents, and, in answer to an order to produce, files an affidavit excusing production, the answer and affidavit must be read together. *Manning* v. *Cubitt*, 1 Ch. Ch. 177.

Co-defendants.]—Under an order to produce taken out by one defendant, other defendants have no right to compel production or inspection. A motion for a further affidavit by defendant, was under such circumstances refused with costs. *Seymour* v. *Longworth*, 3 Ch. Ch. 112.

Evidence.]—Although a party to a cause may be entitled to call for the production of documents, in order to obtain discovery, it does not follow that the contents of such documents are in themselves evidence. *Canada Central R. W. Co.* v. *McLaren*, 8 A. R. 564.

Examination.]—The proper mode of contradicting an affidavit on production is by cross-examination of the deponent and not by counter-affidavit. *Stratford* v. *Great Western Railway Co.*, 9 C. L. J. 313.

An affidavit on production is not within the provisions of order 268, and therefore the party making it, does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under order 138. Only one examination of a party under order 138 can be had. *Paxton* v. *Jones*, 6 P. R. 135.

Semble, that a party may be examined on his affidavit on production. See *Dobson* v. *Dobson*, 7 P. R. 256; *Campbell* v. *McArthur*, 7 P. R. 46.

Further Documents.]—The defendant's solicitor admitted that several material documents, not mentioned in his client's affidavit on production, had been discovered after the affidavit was made:—Held, that defendant must make a further affidavit. *Campbell* v. *McArthur*, 7 P. R. 46.

Master's Office.]—In moving for an order nisi for non-production in the master's office, the master's certificate as to non-production must bear the latest possible date. *Sommerville* v. *Joyce*, 1 Ch. Ch. 202.

Master's Office.]—Orders to produce under G. O. 134, are made for the purpose of the hearing only, and such orders will not be enforced for the purposes of a reference—the proper course is an application to the master to whom matters in dispute have been referred. *Hilderbroom* v. *McDonald*, 8 P. R. 389.

Next Friend.]—Where a person of unsound mind sues by a next friend, the usual præcipe order that the plaintiff do produce is proper, and is sufficiently obeyed by the affidavit of the next friend. *Travis* v. *Bell*, 8 P. R. 550.

Parting with Papers.]—A person parting with papers after service on him of an order to produce, was ordered to file a better affidavit, and pay costs. *Ross* v. *Robertson*, 2 Ch. Ch. 66.

Schedules.]—Where an affidavit was a printed copy of the form in schedule K. to the orders, and referred to documents in the various schedules annexed, but no documents were set out in the schedules, the affidavit was directed to be taken off the files with costs. *Rogers* v. *Crookshank*, 4 C. L. J. 45.

Time.]—The affidavit on production is a substitute for discovery on interrogatories, and a party is entitled to such discovery up to the latest possible date. When an affidavit had been sworn before the service of an order to produce, it was held to be irregular and insufficient, and a new and better affidavit ordered to be filed. *Kennedy* v. *Royal Insurance Co.*, 3 Ch. Ch. 489.

(c) *Since the Judicature Act.*

Before Pleading.]—In an action to recover an amount alleged to be due by the defendants upon an advertising contract after crediting an amount admitted to be due by the plaintiff to the defendants for rent, and also to recover damages for illegal distress for rent, it appeared that the defendants had agreed to pay a certain sum to the plaintiff for advertising, and had also written a letter to the plaintiff agreeing that a certain part of the rent should be taken out in advertising. This letter purported to be in answer to a letter which was in the defendants' possession, written by the plaintiff but of which he had no copy, making a proposal which the defendants had agreed to:—Held, that the plaintiff was entitled to have his own letter produced by the defendants for his inspection before delivery of his statement of claim, in order to enable him to frame it properly. Hoosey v. Gilbert, 12 P. R. 114, distinguished. *Maclean* v. *Barber & Ellis Co.*, 13 P. R. 500.

Before Pleading—*False Representations.*]—Production of documents should not be ordered to a plaintiff before he pleads, unless the Judge is satisfied that the documents called for are essential to the statement of the plaintiff's claim. In an action for damages for false representations made by the defendants whereby the plaintiffs were induced to supply them with goods and money,

and to enter into agreements with them, to the plaintiffs' loss:—Held, that it was enough for the plaintiffs to aver in their statement of claim that the goods and money were supplied on the faith of statements, oral and written—specifying them—falsely and fraudulently made; and this they could do without the production of the defendants' balance sheets, books of account, etc. If particulars were afterwards claimed, it would then be time enough to apply for discovery. *Arthur & Co.* v. *Runians*, 18 P. R. 205.

Committal—*Forum.*]—On motion for an order for the committal of one of the defendants for non-production of documents under rule 420, O. J. Act, which vests in the master in chambers the powers of the referee in chambers of the court of chancery, the master held that matters relating to the liberty of the subject having been excepted from the jurisdiction of the clerk of the Crown and pleas under the former practice, are still beyond his jurisdiction by rule 420, O. J. Act. *Keefe* v. *Ward*, 9 P. R. 229.

Contradicting Affidavit—*Admissions of Deponent — Examination for Discovery — Documents Mentioned in Document Produced.*]—Where, in an action upon a fire insurance policy, the plaintiff, in making discovery of documents, referred in his affidavit to the application for the insurance, which, when produced, shewed that at its date he had a set of books connected with the business in respect of which he was effecting the insurance, which books, however, he did not produce:—Held, that the books were material, and the reference to them in the document produced was sufficient ground for ordering a better affidavit on production. Quære, whether the admissions of the plaintiff upon his examination for discovery as to the existence of documents other than those mentioned in his affidavit could be looked at to contradict the affidavit. *Smedley* v. *British American Assurance Company*, 18 P. R. 92.

Contradicting Affidavit — *Inspection after Refusal of Production.*]—The plaintiff sought to compel the defendant F. McD. to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant D. M. McD., and also upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, wherein she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit on the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD., but not that she had them at the time of making her affidavit of documents:—Held, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and, per Rose, J., upon a subsequent motion, the court having refused to order a better affidavit of documents, an application under rule 234, made upon the same material, for inspection of the documents in question on the former application, could not succeed. *McGregor* v. *McDonald*, 12 P. R. 81.

See, also, *Lyon* v. *McKay*, 10 P. R. 557.

Custody—*Returning or Filing.*]—The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case; and when that object is accomplished the documents will go back to the custody of the party producing them. *Darling* v. *Darling*, 10 P. R. 1.

The master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the party producing them to take them back. *Ib.*

Examination on Affidavit.]—Chy. O. 268 has been superseded by rule 283 O. J. Act. A party to an action cannot now be examined upon his affidavit on production, with this exception that by rule 226 O. J. Act an officer of a corporation may be so examined. *Frith* v. *Ryan*, 10 P. R. 235.

Further Affidavit.]—Even against a party's own affidavit, if the court is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered. The rule laid down in Jones v. Monte Video Gas Co., 5 Q. B. D. 556, may be accepted as the general rule on the subject of the production of documents, but it should be read in conjunction with Attorney-General v. Emerson, 10 Q. B. D. 191. *Morley* v. *Canada Atlantic R. W. Co.*, 11 P. R. 39.

Further Affidavit—*Material on Motion.*]—Upon a motion for a better affidavit of documents from the defendants, the Merchants' Bank, the plaintiffs were allowed to read the depositions of an officer of the bank taken for use upon a previous motion in the action. *Pawson* v. *Merchants Bank*, 11 P. R. 18.

Further Affidavit—*Second Application.*]—Semble, a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first motion. *Boughton* v. *Citizens' Ins. Co.*, 11 P. R. 110.

Garnishee Issue.]—Where, after judgment in an action in the common pleas division, an issue on a garnishee application was directed to be tried under rule 373, O. J. Act by a county Judge and jury:—Held, that such Judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane* v. *Morrison*, 10 P. R. 606.

Indirect Cross-examination.]—Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under rule 578 for the purpose of using his evidence upon a motion for a better affidavit. *Dryden* v. *Smith*, 17 P. R. 500.

Interpleader Issue.]—After delivery of an interpleader issue a party to it may take out a precipe order for production by the opposite party. Such order should be issued and the record passed in the principal office of the court in Toronto, as no locality is pointed out by the usual proceedings in interpleader. *Dominion S. and I. Co.* v. *Kilroy*, 12 P. R. 19.

Material on Application.]—It is not necessary that an application by a plaintiff for inspection should be supported by a specific statement of merits, if from the material before the court it can be determined whether the claim is or is not based upon merits. *Madean* v. *Barber & Ellis Co.*, 13 P. R. 509.

Preliminary Issue.] — In an action against the defendants, as executors and residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, and for administration and partition:—Held, that the case came within rule 275, and until the plaintiffs established the alteration charged, they were not entitled to discovery of instruments affecting the estate of the testator. *Hurst* v. *Barber*, 12 P. R. 467.

Time for Production.]—The defendants had filed and delivered their statement of defence, but the pleadings had not been closed:—Held, that the plaintiff was entitled to the precipe order for production. *Dale* v. *Hall*, 9 P. R. 106.

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2. *What Must be Produced.*

Accountant's Reports — *Books of Account—Letters.*]—When a Judge in chambers has ordered the inspection and discovery of documents, the court will not interfere unless it appear that such order has not been made with due discretion with reference to the facts before him; and in this case the court refused to interfere. The plaintiffs sued defendants upon a banking account kept as they alleged upon the credit of the defendants, while defendants asserted that it was upon the credit either of the Detroit and Milwaukee R. W. Co., for whose benefit the money went, or on the credit of Messrs. B. & R., two of defendants' directors, who acted also for that company. Instruction and discovery were granted to the plaintiffs: 1. Of a statement or report of transactions between defendants and the D. & M. R. W. Co., made by accountants for a committee appointed by the defendants; 2. Of letters written by Messrs. B. & R. to the chairman or secretary of the defendant company respecting such transactions, and referred to in such report; 3. Of all letters in the defendants' custody, written or received before the controversy leading to this suit by Messrs. B. & R. as the defendants' managing and financial directors, to or from the defendants' chairman, and all the defendants' books of account relating to the matters in question. The defendants were also allowed inspection and discovery of letters written by the plaintiffs' cashier to a bank in New York, explaining the plaintiffs' position with the defendants, and on the subject of notes of the Detroit and Milwaukee R. W. Co. *Commercial Bank of Canada* v. *Great Western R. W. Co.*, 25 U. C. R. 335. See, also, *S. C.*, 2 C. L. J. 99.

Action for Account—*Mortgages in Dispute.*]—A plaintiff filed a bill against his assignee's representative for an account, charging that certain mortgages then in his possession, and apparently belonging to the assignee's estate, in reality were part of his estate. On being served with the usual order for the production of documents, the plaintiff filed an affidavit objecting to produce the mortgages, on the grounds that they were held by the assignee the plaintiff's trustee, and that he had a lien on them for moneys expended by him on account of the properties covered by them. The affidavit also described certain other documents in the plaintiff's possession generally. The answer denied, on information and belief, that the mortgages had ever been the property of the plaintiff. Upon the application of the defendant, an order was granted requiring production of the mortgages, and for a more particular affidavit. *Rhodes* v. *Neild*, 1 Ch. Ch. 131.

Action for Account—*Preliminary Trial of Right to Require Account.*]—Whenever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretional, until the plaintiff has established his fundamental right at the hearing. Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof:—Held, that upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in which to permit the defendants to apply under rule 655 for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial. *Graham* v. *Temperance and General Life Assurance Co.*, 16 P. R. 536.

Action for Account—*Denial of Right—Prejudice.*]—To an action by an incorporated association of cheesemakers against the president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realized and persons

to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested:—Held, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery. *Sydney Cheese and Butter Factory Association* v. *Brower*, 19 P. R. 152.

Administration—*Claimant's Books and Accounts.*]—In an administration suit, where certain creditors produced promissory notes as vouchers for nearly all their claim, the master, as of course, ordered production of the books and accounts:—Held, reversing 8 P. R. 86, that the executors were entitled to an affidavit identifying the books and accounts as being all in the possession of the creditors relating to the claim. *Re Ross Estate*, 5 A. R. 82.

Assignee in Trust.]—Upon an arrangement made by one P. with his creditors, by way of composition, the defendant M. held the estate of P. in trust to secure the reimbursement or indemnity of the plaintiffs and one H., who became sureties for the payment of the composition. Some time afterwards P. became again insolvent, and defendant M. was appointed his assignee. A bill being filed to enforce the arrangement for indemnity, charging that M., in breach of the arrangement, had suffered the estate to remain in the hands of P., documents held by M. as assignee were held liable to production. *Wagner* v. *Mason*, 6 P. R. 187.

Bank Agent.]—Where a bank agent refused to produce on the ground that he had no documents in his possession but as such bank agent, it was held that he ought to set out in his affidavit what documents were so in his possession; and it appearing from his answer that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause. *McDonell* v. *McKay*, 2 Ch. Ch. 141.

Books in Court.]—Documents formerly in the possession of the defendant, and filed by him in a master's office in another suit, were directed to be produced by the defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of court. *Hamelyn* v. *White*, 6 P. R. 143.

Books in Use.]—Where books were in actual use by defendant, the court refused to order him to make verified copies of entries relative to matters in question for plaintiff's use; but where it was sworn on the part of the plaintiff, and not denied by defendant, that the latter had documents so relating, which were not mentioned in his affidavit, he was ordered to produce them. *McDonell* v. *McKay*, 2 Ch. Ch. 141.

Books in Use.]—A defendant was ordered to permit the inspection by the plaintiff of the books in daily use in the defendant's business, which he objected to produce on that account, but which he was willing to produce at the hearing of the cause. *Hamelyn* v. *White*, 6 P. R. 143.

Deeds Relating Exclusively to Party's Own Title.]—A party is not obliged to produce deeds or documents which relate to his own title, and do not tend to establish the case of the party calling for the production. *Stacel* v. *Coles*, 4 Ch. Ch. 9.

Deeds Relating to Plaintiff's Title.]—To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead non est factum, does not give the defendant a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff: for the onus of proving it lies upon him, and if he fails he can go no further. Frankenstein v. Gavin's Cycle Co., [1897] 2 Q. B. 62, followed. *Griffin* v. *Fawkes*, 17 P. R. 540.

Denial of Relevancy.]—A plaintiff seeking to establish a partnership, is not bound by the defendant's view of the relevancy or otherwise of papers which he seeks; and although the defendant swears positively that the papers have no bearing upon the case made by the bill, the court will order their production. *Saunders* v. *Furnivall*, 2 Ch. Ch. 49.

The court will not act merely upon an allegation, by a party seeking to protect documents from production, that they are not material, if it appears from their nature, or otherwise, that they may afford material assistance to the party seeking production in establishing his case. *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.

Documents in Court — *Contradicting Affidavit.*]—The plaintiff, in his affidavit of documents, mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this court on the motion made by defendant for his discharge from custody, as I am informed and believe:"—Held, that the plaintiff's affidavit was sufficient; and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the court at his own place of abode:—Held, also, that an affidavit to shew the incorrectness of the affidavit of documents could not be received, following Jones v. Monte Video Gas Co., 5 Q. B. D. 556. *Lyon* v. *McKay*, 10 P. R. 557.

Document Sued on.] — An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States, which was not registered in Ontario:—Held, on an application for inspection of the mortgage, that the court had power, irrespective of the Common Law Procedure Act, to order inspection of the mortgage in question, or of any document sued upon. *Emmens* v. *Middlemiss*, 8 P. R. 320.

Grounds of Protection to be Stated.]—A party called on to produce documents

must state distinctly in his affidavit on production what are the documents he seeks to protect, and the grounds on which he claims privilege. *Wright* v. *Western Insurance Co.*, 2 Ch. Ch. 403.

Husband Defendant in Wife's Action.]—A suit was brought by a married woman in which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. The defendant applied to compel further production, viz., of documents which, it appeared, the defendant, the plaintiff's husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing:—Held, that a better affidavit will only be ordered upon proof of admission under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced; that a feme covert plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants; and that the rule respecting the obtaining of discovery from a co-defendant, protected the plaintiff's husband from liability to examination by his co-defendants. *Brown* v. *Capron*, 6 P. R. 293.

Investigation of Accounts.]—Letters written to the defendant company by a clerk, who was specially instructed to investigate the plaintiff's accounts and take the advice of the company's solicitors, which contained reference to their advice, were held privileged from production. *Boughton* v. *Citizens' Ins. Co.*, 11 P. R. 110.

Joint Interest.]—Where a party having joint interest in documents with a stranger to the suit, has the sole legal possession thereof, production will not be ordered unless the suit be of such a nature that the court can say that the party having the legal custody sufficiently represents the other party interested. But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit on production, with as much particularity as was required in answering the interrogatories as to documents under the former practice. *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.

Letters after Litigation Threatened.]—Letters written by the defendant to a third person, who was a principal in the transactions out of which the action arose, and letters written by such third person to the defendant:—Held, privileged from production in the action, where it appeared they were written after the plaintiff had threatened litigation, and in consequence of the advice of the defendant's solicitor, in the endeavour on the part of the defendant to obtain information for the purposes of the threatened litigation. *Donahue* v. *Johnston*, 14 P. R. 476.

Letters before Action.]—See *McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

Letters between Party's Agents.]—Letters passing between agents of a party to the cause, although written as between themselves in confidence are not privileged communications or protected from discovery. Such letters are considered in the custody or power of the party in whose interest they are written, and must be produced. Such party cannot withhold part of their contents by cutting out portions of the letters. *Wiman* v. *Bradstreet*, 2 Ch. Ch. 77.

Letters not Sent.]—In an action to establish a will, which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production, copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination. Their materiality and relevancy to the issues was not disputed:—Held, that all memoranda and writings, or pieces of paper with writing on, which may throw light on the case, whether they would or would not be evidence per se, are subject to production, unless they can be protected; and the mere fact in the case of a letter that it was not forwarded to its destination, is no ground for exemption. These letters were therefore ordered to be produced. *Cameron* v. *Cameron*, 10 P. R. 522.

Life Insurance Applications.]—It is provided by s.-s. 2 of s. 33 of the Insurance Corporations Act, 55 Vict. c. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto; and by s.-s. 3, that the question of materiality is for the jury, or if there is no jury, for the court. Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not, and never had been, subject to asthma, in an action to have it declared that the contract was a subsisting contract, production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued. *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366.

Measurements for Use in Action.]—In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent:—Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purpose of another action between the same parties; but:—Held, that information obtained by means of the measurements and examination of the company's surveyors was not per se privileged; and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications. *Canadian Pacific R. W. Co.* v. *Conmee*, 11 P. R. 297.

Mechanic's Lien—*Defendant's Title.*]—The bill was filed to enforce a mechanic's lien against the defendant, whose title to the property in question was under a sublease:—Held,

that the plaintiff was not entitled to the production of the sublease, as it was not necessary before decree to establish his case. *Bryce v. McIntyre*, 7 P. R. 134.

Mortgage Action.]—A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute. *Bell v. Chamberlen*, 3 Ch. Ch. 429.

Objection to Produce—*Specifying Document.*]—Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document" complies with rule 513 and sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, although no information is given as to its date, nature, or contents. *Vanwickle v. Axon*, 17 P. R. 535.

Papers in Possession of Assignee.]—The defendants objected to produce certain documents, on the ground that they were in the possession of a third party, to whom the defendants had assigned all their estate for the benefit of their creditors. The assignee had realized the estate and distributed the proceeds amongst the creditors:—Held, no excuse for the non-production, and a better affidavit was ordered. *British America Insurance Co. v. Wilkinson*, 6 P. R. 268.

Papers Material to the Issue.]—Before decree, no discovery will be ordered which appears to the court to be immaterial to the question to be tried at the hearing. *Merchants' Bank v. Tisdale*, 6 P. R. 51.

Papers Necessarily Relating to both Claim and Defence.]—The plaintiff had given a mortgage on a steamboat, and the mortgagee afterwards sold the vessel, and the question was, whether he was to be charged with the amount of the purchase money, or merely with certain securities received on the sale in lieu of such amount. The defendant (the mortgagee's executor) admitted the possession of a copy of a letter from the mortgagee, refusing to join in the sale, and an opinion of counsel relating to the same matter, but alleged that these documents did "not relate to the plaintiff's title or the case made by the bill":—Held, that the plaintiff was entitled to production, as the plaintiff's case and that of the defendant were, under the circumstances stated, so interwoven and inseparably connected, that nothing could relate to the one without also relating to the other. *Hamilton v. Street*, 1 Gr. 327.

Papers Procured for Use in Action.]—In an action to restrain the infringement of a patent, in which the defence set up that the supposed invention had been previously patented in the United States and England, copies of American patents material to the defendant's case, were procured by his solicitors of their own motion for the purposes of the action:—Held, that such documents were privileged from production. *Guelph C. Co. v. Whitehead*, 9 P. R. 509.

Papers Produced at Examination.]—The mere fact of the plaintiff, during the viva voce examination of a defendant, producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit. *Howcutt v. Rees*, 2 Gr. 553.

Papers Relating to Claim or Rebutting Defence.]—The plaintiff's case, for the purpose of discovery, consists of every thing necessary to obtain a decree, including what may be required to answer the defence set up. An affidavit on production, made by defendant, in which he objected to produce certain books of account, was held insufficient to protect them from discovery, because it did not state that the books did not contain evidence substantiating the plaintiffs' case, or that they only related to the defendant's case. *Western of Canada Oil Co. v. Walker*, 6 P. R. 191.

Papers Supporting Case or Defeating Defence.]—As a general rule a plaintiff in equity is entitled to a discovery, not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant; and as a part of that discovery, to the production of such documents as are material for the same purpose. Where, therefore, a bill was filed by a person claiming under a devisee, and in opposition to a motion to compel the production of deeds the defendant swore that the alleged testator had not made any valid will, it being sworn that he was not of sound mind when the supposed will was executed, the court ordered the deed to be produced. *Lawlor v. Murchison*, 3 Gr. 553.

Patent Action—*Opinions of Experts.*]—In a suit to restrain the infringement of a patent, the plaintiffs objected to produce documents described as "professional opinions of the writers of them," (who were engineers), "as to the validity of the patent, the subject matter of this suit," claiming that they were privileged communications:—Held, that documents of this description are only protected where they have been obtained in view of or in anticipation of litigation which has actually taken place, and in which the discovery is sought. *Toronto Gravel Road Co. v. Taylor*, 6 P. R. 227.

Penalty—*Double Tolls.*]—The double tolls imposed by s. 42 of the Timber Slide Companies Act, R. S. O. 1887 c. 160, for false statements, are imposed by way of punishment and not as compensation; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced. *Pickerel River Improvement Co. v. Moore*, 17 P. R. 287.

Photographs.]—In an action by certain persons, claiming to be the next of kin of a testator, the beneficiary under the will having predeceased him, against the administratrix with the will annexed, for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of theirs with the testator:—Held, that the photographs in question were "documents" within the meaning of

rule 507, and were not privileged nor protected, and therefore must be produced. *Fox v. Sleeman*, 17 P. R. 492.

Possession Prima Facie Imports Production—*Reference in Pleading.*]—When a party admits documents in his possession, he is prima facie bound to produce them, or assign a sufficient reason why he should not. But where a party refers in his bill to documents which otherwise he would not be liable to produce, he does not by so doing create a liability to produce them. *Green* v. *Amey*, 2 Ch. Ch. 138.

Prima Facie Right—*Special Motion.*]—A party to the suit admitting the possession of documents relating to the matters in question in the cause, the opposite party is prima facie entitled to their production, and the party in whose custody they are, must assign some ground for exempting them from the general rule. The defendant having obtained an order of course for the production of documents in the plaintiff's possession relating to the matters in question in the cause, the plaintiff, without producing any, lodged an affidavit stating that he had no such documents except the title deeds of the property in question in the suit, and certain letters addressed by the defendant to one K., who had purchased the property from the defendant, and who afterwards sold the same property to the plaintiff; that the suit was for the specific performance of a parol agreement partly performed and not admitted by the defendant, and that the letters did not relate to the matters in question otherwise than by affording evidence of the agreement and its part performance. The affidavit filed in support of the motion, merely said that defendant was desirous of inspecting the letters in order to correct his intended testimony:—Held, that he was not entitled to their production. *Howcutt v. Rees*, 2 Gr. 268.

Professional Communications—*Form of Affidavit.*]—Communications between solicitor and client are privileged, no matter at what time made, so long as they are professional and made in a professional character. Macdonald v. Putnam, 11 Gr. 258, not followed. *Hamelyn* v. *White*, 6 P. R. 143.

The following clause, in an affidavit on production, was held a sufficient statement of the nature of the document produced:—"I object to produce the documents set forth in the second part of the first schedule, on the ground that, being communications between solicitor and client, they are privileged." *Ib.*

Professional Communications—*Form of Affidavit.*]—In an affidavit of a party on production of documents, a certain letter was described by its date and as being from a firm of solicitors to the deponent, who said that he objected to produce it, that it was a communication between solicitor and client, and was privileged:—Held, doubting, but following Hamelyn v. White, 6 P. R. 143, that the statement was sufficient to protect the document from production. In the same affidavit two other letters were described by their dates and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them "on the ground that they are communications between solicitor and client and between my solicitors and others in the course of their conducting my business:"—Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection. It is irregular to go into the merits upon an application for a better affidavit. Morris v. Edwards, 23 Q. B. D. 287, followed. *Hoffman* v. *Crerar*, 17 P. R. 404.

Public Policy.]—See *Bradley* v. *McIntosh*, 5 O. R. 227.

Repairs Book and Train Register.]—The usual affidavit on production of documents made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the book "as are relevant, for inspection at the offices of the company;" and a further statement that the company "had sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiff called as witnesses the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding Judge refused, on the evidence then given, to direct the books to be unsealed:—Held, reversing 10 P. R. 553, that the facts of the case shewed a right in the plaintiff to have these books of the company produced. *Morley* v. *Canada Atlantic R. W. Co.*, 11 P. R. 39.

Report as to Accident.]—The plaintiff in an action for damages for injuries sustained in a railway accident, sought to compel the defendants to produce a certain report of an investigation held by the defendants immediately after the accident, and the notes of evidence taken at the investigation. These documents, according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced; but, "for the purpose of the management of the line; for our own purposes; it was not intended for a purpose of this kind" (i. e., for use in legal proceedings). In answer to the question whether the defendants' solicitor was present at the investigation, H. said, "No, it would be entirely between the officers of the company." The affidavit of the solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for that purpose and no other. The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants:—Held, that the

court need not under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them; and that upon the statements of H. and the solicitor the documents were not privileged and should be produced. Wheeler v. LeMarchant, 17 Ch. D. 675, and Westinghouse v. Midland R. W. Co., 48 L. T. N. S. 462, followed. *Betts* v. *Grand Trunk R. W. Co.*, 12 P. R. 86, 634.

In an action for damages for personal injuries received by the plaintiff in a tramway car accident, as to which the conductor of the car had made a report to the defendants:—Held, that the portion of the report containing the names of the eye-witnesses of the accident was privileged from production. *Armstrong* v. *Toronto R. W. Co.*, 15 P. R. 208.

Where reports by officers or servants of a railway company as to a casualty giving rise to an action are in good faith prepared for the purpose of being communicated to the company's solicitor with the object of obtaining his advice thereon and enabling him to defend the action, they are to be regarded as privileged communications and exempt from production for inspection by the opposite party, even if they answer the purpose of giving information to other people as well. *Hunter* v. *Grand Trunk R. W. Co.*, 16 P. R. 385.

Reports of Insurance Adjuster.]—Among the grounds of defence set up in an action to recover the amount of the policy of insurance were, that the plaintiff's books had been falsified; and that the fire had occurred through the wilful negligence of the plaintiff. The defendants employed two experts to investigate the plaintiff's books and his conduct with respect to the fire, and these experts made reports. The defendants' affidavit on production set out as documents which they objected to produce: "Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report, and for information of counsel." It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof:"—Held, that these documents were privileged from production. *Macdonald* v. *Norwich Union Fire Ins. Co.*, 10 P. R. 501.

Secret Formula.]—In an action on a promissory note given by the defendant to the plaintiffs in payment of a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the pads were made, in order to shew that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business:—Held, that the defendant was not entitled to the discovery. *Star Kidney Pad Co.* v. *Greenwood*, 3 O. R. 280.

Setting out Grounds for Non-production.]—Whatever discovery a defendant would have been bound to give by answer with respect to documents in his possession, must now be furnished by the affidavit in answer to a motion to compel production under the 31st order of May, 1850; and the ground upon which he relies to excuse production must be stated with the same particularity. When, therefore, a party filed a bill claiming title as heir-at-law of an intestate and called upon the defendant to produce deeds, &c., and in answer to a motion to compel production, the defendant put in an affidavit stating that the deeds in his possession did not prove the plaintiff's title, without furnishing any description so as to enable the court to judge of the effect proper to be given to this general allegation, such affidavit was held not to be sufficient, and production of the documents ordered. *Nicholl* v. *Elliott*, 3 Gr. 536.

Solicitor Co-defendant with Client.]—The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD. No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application:—Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to shew cause why they should not be produced. *MacGregor* v. *McDonald*, 11 P. R. 386.

Solicitor Dictating Letter.]—Held, that a letter written by the agent of a bank to his manager at the dictation of the solicitor for the bank, and the reply to it, were privileged communications, and not liable to production. *Merchants Bank* v. *Moffatt*, 6 P. R. 348.

Solicitor Engaged in Impeached Transaction.]—G. was general solicitor for the bank, and was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the bank but on behalf of himself and of other persons:—Held, that letters written to the bank by G. in reference to the transaction in question were not privileged from production. *Pawson* v. *Merchants Bank*, 11 P. R. 18.

Solicitor's Letters—*General Rule.*]—A defendant, one of the members of the firm of G. & C., when proving a claim in the master's office, was called on to produce "all the letters to or from Mr. L. (his solicitor), in reference to the questions involved in the proceeding of proving the claim of G. & C., excepting such as passed in contemplation of G. & C. proving their claim in the present suit:"—Held, that he was bound to do so. *Macdonald* v. *Putnam*, 11 Gr. 258.

The distinction between the protection afforded to solicitors and clients, respectively, with regard to communications made pending or in anticipation of litigation, pointed out. *Ib.*

Solicitor's Opinion.]—In a case between vendor and purchaser, where a defendant refused to produce a certain letter on the grounds: "that the same is and contains an

opinion from the said M., who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my solicitor, relative to my said title:"—Held, to be a privileged communication. *Wilson* v. *Brunskill*, 2 Ch. Ch. 137.

Sub-agent.]—Three members of a vestry being appointed a building committee, and by it, one of the three treasurer thereof, the treasurer, being a sub-agent, cannot be compelled, in a suit by a member of the vestry on behalf of himself and all other members except such treasurer, who was the defendant, to produce papers in his hands as treasurer—the other members of the committee being necessary parties. *Manning* v. *Cubitt*, 1 Ch. Ch. 177.

Tendency to Criminate.]—To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated. A statement that according to plaintiff's contention a document contains a libel, and therefore exposes the defendant to a criminal charge, is not sufficient to protect the document; the defendant must go further and express his belief that the production of the document will expose him to a criminal charge. *Bromley* v. *Graham*, 11 P. R. 451.

See, also, *Hall* v. *Gowaulock*, 12 P. R. 604.

Tendency to Criminate—*Incorporated Company—Indictment.*]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person, however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded. The statute, R. S. O. 1887 c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery. In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party. The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal prosecution. Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, specially referred to. Legislation suggested, similar to 32 & 33 Vict. c. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published. *D'Ivry* v. *World Newspaper Co. of Toronto*, 17 P. R. 387.

Third Person's Documents.]—Where a party to an action referred in his affidavit on production to certain documents as being in the hands of a third person, who refused to give them up until paid certain charges which were disputed:—Held, that the opposite party must content himself with inspecting the documents and taking copies, unless he would agree to indemnify his opponent against the cost of obtaining the documents. *Hogaboom* v. *Cox*, 15 P. R. 23. Reversed in part, 15 P. R. 127.

See, also, Sub-title I. (C).

See as to Production at the Trial, Sub-title XIV. 5.

XIII. Varying and Explaining Written Documents.

1. *In General.*

Agreement as to Indorsement of Notes.]—In an action on an agreement, by which—in consideration of the plaintiff giving defendant his promissory note for $438, payable four months after date, as the purchase money for a note for $730 made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note; and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said $730 note, by giving their seven promissory notes for equal amounts payable to my order, and payable in one, two, and three months," &c.:—Held, that the words "payable to my order" did not necessarily import an unconditional indorsement by defendant of the seven notes, but might mean only such an indorsement as would pass the property in them to the plaintiff; that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for $730, also payable to defendant's order, was indorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional indorsement as to the others:—Held, that he could claim only that these notes should be indorsed as the first one was. *McCarthy* v. *Vine*, 22 C. P. 458.

Agreement for Sale—*Omitted Terms.*]—The plaintiff agreed verbally to sell timber to defendant, to be got out by him upon certain timber limits held by her from the Crown, for 20s. per thousand feet, payable on its arrival at Quebec. These limits had formerly belonged to her husband, of whom she was administratrix, and it was agreed, defendant being a party to the arrangement, that half of the money should be applied towards payment of debts due by the intestate. A written agreement was then signed by plaintiff, intended to relate to the payment of her share only, by which she agreed to sell to defendant the right to cut the timber at 10s. per thousand feet:—Held, that evidence of the verbal agreement was admissible, as the writing did not contain, and was not intended to contain, the whole agreement between the parties; and that the plaintiff therefore might recover the 20s. per thousand feet. *Chamberlain* v. *Smith*, 21 U. C. R. 103.

Agreement not to Make Calls.]—Where certain shareholders of the G. L. Company sought to restrain a call on stock on the ground that it was being made in contravention of the terms of a certain unwritten agreement, alleged to have been entered into between all the promoters when the company was formed:—Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered

into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made. *Christopher* v. *Noxon*, 4 O. R. 672.

Agreement not under Seal.]—An instrument under seal may be varied in equity by an agreement for valuable consideration, not under seal. *Brown* v. *Deacon*, 12 Gr. 198.

Agreement to Buy Charter of Company.] — Defendant and one H. agreed to purchase from plaintiffs all their claims against an incorporated company, and their interest in the same, and, as far as they could sell it, their control over the charter of the company, for $3,000. Defendant and H. subsequently gave plaintiffs a written promise to pay the price agreed upon "for the charter," as expressed in writing:—Held, that evidence was admissible to shew that the subject of the sale was not the franchise itself, but a mere claim against or right in the company, capable of being legally sold. *Miller* v. *Thompson*, 16 C. P. 513.

Agreement to Deliver Timber—*Proof of Title.*]—By an agreement under seal between the plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to the plaintiff at Goderich harbour 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm; the plaintiff to draw it from the bush, and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which the defendant claimed under a purchase from B.:—Held, that the agreement clearly did not prevent the plaintiff from shewing that the timber to be delivered belonged to him, and not to B. *Little* v. *Foley*, 24 U. C. R. 177.

Agreement to Edit Magazine—*Leave of Absence.*]—In a declaration for not editing a magazine in accordance with agreement, the plaintiff alleged that, although defendant was allowed by mutual agreement to absent himself until the 27th January, 1864, yet he did not after that date return to his duties as editor. To this defendant pleaded that before any breach, by a memorandum under seal between him and the plaintiff, it was agreed that defendant should go to Europe to try to sell the magazine, and that during his absence the editorial department should be provided for by the plaintiff; that it was nowhere stipulated in such agreement that the defendant should return by the 27th January, or any other day; that he was necessarily absent on such journey until March following, and on his return was ready to resume his duties, but before his services were required the plaintiff discontinued the publication:—Held, on demurrer, a bad plea, for it was not averred that the agreement pleaded contained the whole contract as to the defendant's absence, and there might have been a collateral independent agreement that he should return by a specified day. *Elmore* v. *Hind*, 24 U. C. R. 136.

Agreement to Lease—*Improvements to be Made.*]—On a treaty for the lease of a mill property between the executors and trustees of a deceased owner, and an intending lessee, the executors and trustees expressly agreed that they would rebuild the dam upon the premises, and without this agreement the lease would not have been taken:—Held, that such agreement could be established by parol, and was binding on the estate of the testator. *In re Mason and Scot*', 21 Gr. 166, 629.

On appeal the above decision was reversed. Such an agreement, to be provable by parol, must not only be collateral to and independent of the written one, but it must be consistent with it. Here the lease bound the lessee to do what by the agreement was to be done by the lessors, and there was one agreement only, founded on one consideration, not two distinct independent agreements. The alleged parol agreement, too, was one concerning an interest in land, and was required, therefore, to be in writing under the Statute of Frauds. *S. C.*, 22 Gr. 592.

Agreement to Lease — *Repairs to be Made.*]—In an action on an agreement under seal to accept a lease:—Held, that parol evidence was not, under the circumstances, admissible to shew that the plaintiff was bound to complete certain repairs before calling on defendant to accept, for this would be to add to the sealed agreement. *O'Neil* v. *Lingham*, 9 C. P. 14.

Agreement to Pay in Lumber—*Shewing Variety.*]—In an action on the following agreement: "Due W. M. $100, payable in lumber:"—Held, that "lumber," being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists." *McAdie* v. *Sills*, 24 C. P. 608.

Agreement to Purchase.]—Assumpsit, on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial, the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 U. C. R. 345.

Assignment in Satisfaction of Claim.]—To an action on certain notes and bills, and on the common counts, against defendant and H., defendant pleaded satisfaction and discharge before action, by an assignment under seal of defendant's effects to the plaintiff and another for the benefit of creditors:—Held, that parol testimony was properly admitted of the agreement to accept the assignment in satisfaction and discharge, the effect of it being not to vary the writing, but merely to prove a collateral fact. *Whitney* v. *Wall*, 17 C. P. 474.

Assignment in Satisfaction of Claim.]—A man by an informal instrument assigned to a trustee all his estate and effects on the condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200:—Held, that the trustee could not set this up as part satisfaction of the $400 mentioned in the first

deed; and that declarations of the father, made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew that the conveyance was made, and intended to be, in part satisfaction of the sum so secured to the son. *Mulholland* v. *Merriam*, 19 Gr. 288; 20 Gr. 152.

Assignment of Lease — *Agreement to Purchase the Fee.*]—A woman sold her real estate, her husband joining in the conveyance, and receiving to his own use the purchase money; in consideration of which he agreed to settle on his wife certain other property which he held under lease with the right of purchase, and the lease was accordingly assigned to a trustee for the use of the wife, the husband at the same time promising to pay the amount agreed to be paid for the purpose of obtaining the conveyance of the fee. The husband having died and his estate being in the course of administration in the court, and his widow having brought a claim into the master's office for the amount necessary to procure the fee:—Held, that the master had properly received parol evidence to establish such claim of the widow. *Ross* v. *Mason*, 9 Gr. 508.

Bank of River.]—In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises, as, for instance, what is to be considered the bank of a river, other grants from the Crown are admissible to assist in the construction. *Clark* v. *Bonnycastle*, 3 O. S. 528.

By-law Establishing Road.]—A by-law to establish a road must on its face, shew the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence. *Township of St. Vincent* v. *Greenfield*, 12 O. R. 297.

Carriers—*Mode of Carriage not Defined.*]—An oral contract between the plaintiffs and defendants was proved, whereby defendants agreed to carry certain petroleum oil of the plaintiffs in covered cars, and on the faith of its being so carried it was delivered to defendants, but it was carried in open cars, and delayed at different places on the journey, in consequence of which a large quantity was lost. On the delivery of the oil the plaintiffs signed a receipt note, which said nothing about covered cars, and which stated that the goods were sent subject to conditions indorsed thereon, amongst which were, that the defendants would not be liable for leakage or delays, and that oil was carried at the owners' risk:—Held, following the previous decision in this case, 27 C. P. 528, that proof was rightly received of the oral contract, which must be incorporated with the writing, so as to make the whole contract one for carriage in covered cars. *Fitzgerald* v. *Grand Trunk R. W. Co.*, 28 C. P. 580.

On appeal, the above judgment was affirmed on another ground. *S. C.*, 4 A. R. 601.

Held, on appeal to the supreme court, that the evidence was admissible to prove an oral contract to carry in covered cars, which contract the agent at L. was authorized to enter into and which must be incorporated with the writing so as to make the whole contract one for carriage in the covered cars, and that non-compliance with the provisions as to carriage in covered cars prevented the appellants setting up the condition that "oil was carried at the owners' risk," as exempting them from liability. *Grand Trunk R. W. Co. of Canada* v. *Fitzgerald*, 5 S. C. R. 204.

Carriers—*Time for Delivery of Goods.*]—The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions indorsed on a receipt given by defendants—amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes—and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and so that the wool should be imported into the United States before the 17th March, when the reciprocity treaty would expire. Breach, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties. As to the first count, it appeared by the defendants' receipt, put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations, (as these goods were) defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport:—Held, a substantial qualification of the contract declared on, which therefore was not proved as alleged. As to the second count, the same receipt applied, which named no day for carriage into the United States, but there was oral evidence of an agreement to forward by the 17th March:—Held, that though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on. The plaintiffs, therefore, were held not entitled to recover on either count. *Fraser* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 488.

Chattel Mortgage—*Satisfaction in Goods instead of in Expressed Money Consideration.*]—A chattel mortgage of certain timber was expressed to be given in consideration of the payment of $300 to the mortgagor; all the covenants and provisions being applicable to a money payment or default therein. At the trial it was endeavoured by parol evidence to shew that upon the delivery of certain pieces of timber sold by the father of the mortgagor to the mortgagee, the whole of the provisions of the mortgage were to become ineffective and the mortgagee be prevented from claiming payment of the sum stipulated for in the manner and at the time set forth:—Held, that the parol evidence was inadmissible. *Tyson* v. *Abercrombie*, 16 O. R. 98.

Circumstances at time of the Contract.]—Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties. *Christie* v. *Burnett*, 10 O. R. 699.

Clear and Definite Agreement.]—Indorsee against indorser of a note. Upon the issue as to whether the claim upon this note was or was not included in a

certain composition alleged to have been entered into between the defendant and his creditors, the following memorandum in writing, given by the agent of the creditors to the defendant, was put in evidence: "I hereby acknowledge to have received as agent for the creditors of R., whose names are specified in the foregoing schedule of creditors, the promissory notes as stated in the foregoing schedule, to be applied, &c. And I hereby discharge the said R. from any further liability for or on account of the said claims save and except the claim of T. & C. and G., the same not yet having been ascertained by reason of an equitable security on certain real property of said R., but I have taken security on said notes for 7s. 6d. per pound on the whole of said claims of T. & Co., which is to be applied in liquidation of the same, leaving any balance to be stated in connection with the property, and any balance that may be coming to R. after paying the said composition, to be returned to him from the proceeds of the said notes." And he added these words: "I have received the within notes on account of the within mentioned claims, and I do hereby discharge R. in full of all the Montreal claims excepting T. & Co. and G.'s collateral claims, and in accordance with my letter to H. of August last." This was signed 23rd October, 1845:—Held, that the above memorandum so clearly excepted the plaintiff's claim upon this note from the composition, that parol evidence with respect to its meaning was inadmissible. *Geddes* v. *Rogers*, 4 U. C. R. 235.

Commission Agents—*Agreement to Insure.*]—Defendant obtained an advance from plaintiffs on wheat which he had shipped from Oakville to Oswego, consigned to them, to the care of C. & B. The plaintiffs were to sell the wheat for defendant, and pay him the proceeds, deducting the advance and charges, &c. The wheat having been lost on the passage:—Held, that defendant was bound to refund the sum advanced, as the wheat still continued his property. Defendant at the trial desired to prove that when the advance was made the plaintiffs were spoken to about insuring the wheat, and replied that they were their own insurers, and took the risk of wheat shipped on their account:—Held, that such evidence was rightly rejected; and that if admitted it would not have affected defendant's liability. *Gooderham* v. *Marlatt*, 14 U. C. R. 228.

Condition in Policy.]—By a policy of insurance on a "general stock of iron and hardware," it was provided that if gunpowder were kept on the premises without written consent, the policy should be void. To a plea setting up a breach of this condition, the plaintiff replied that it was well understood by the parties that the words, "general stock of iron and hardware," including gunpowder in tins and canisters to the extent of 25 lbs., which was the gunpowder mentioned in the plea:—Held, that the replication was bad, for the condition, which wholly excluded gunpowder, could not be thus qualified by parol evidence. *Mason* v. *Hartford Fire Ins. Co.*, 29 U. C. R. 585.

Condition of Bond.]—To an action on a bond defendant cannot set up as a defence a separate agreement not under seal, varying the condition from that which the bond itself imports, and alleged to have been entered into at the same time with the making of the bond. *Cramer* v. *Hodgson*, 3 U. C. R. 174.

Consideration for Bond.]—Defendant agreed by bond that upon the plaintiffs assigning to him a life policy for £5,000, he would pay them £6,000; and in suing defendant for the £6,000, the plaintiffs averred that the policy defendant was to receive was one for £3,000 only, and not for £5,000, as defendant well knew:—Held, declaration bad, for the written contract could not be varied by parol. *Bank of Upper Canada* v. *Boulton*, 7 U. C. R. 235.

Consideration for Guarantee.] — The defendant, after a note payable to the plaintiff had become due, and while it remained unpaid, indorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. T. D. & Co., (the plaintiffs) on demand." The evidence shewed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiff the note was given as collateral security:—Held, that the evidence that the giving of time to C. was the consideration for the guarantee, did not contradict the latter, though it was expressed to be "on demand;" for these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration. *Davies* v. *Funston*, 45 U. C. R. 369.

Consideration in Conveyance.] — The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favour of the vendor, on a bill filed by him impeaching the transaction, on the ground of inadequacy of price. *Shank* v. *Coulthard*, 19 Gr. 324.

Contract — *Indefinite Term—Placing in Position.*]—The plaintiffs agreed to sell to the defendants a waterwheel "and place the same in position" for $150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not in fact perform the work stipulated for:—Held, that the term "placed in position" was so indefinite that the defendants were at liberty to shew what was meant thereby, the writing, by such parol evidence, not being added to or varied, but only rendered intelligible. *Harris* v. *Moore*, 10 A. R. 10.

Contract—*Horses*—"*Plant.*"]—By one of the clauses of a railway contract for excavation, "all machinery and other plant, materials and things whatsoever," provided by the contractor were until the completion of the work to be the property of the company, when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words "teams and horses" were respectively used as well as the word "plant":—Held, under the contract, that horses were not included in the word "plant;" and that expert evidence was not admissible to explain its meaning. *Middleton* v. *Flanagan*, 25 O. R. 417.

Contract — "*Prime Logs.*"]—Defendants contracted in writing to purchase from plaintiff 1,000 "prime" saw logs, at so much per 1,000 cubic feet, which defendants sent their agent to cull and measure. Plaintiff charged the agent not to select any that did not conform to the contract, but notwithstanding this

the agent, without complaint or comment, marked the logs with defendants' mark, designating them as of two qualities, and defendants, instead of refusing them, accepted and used them, without informing plaintiff of the mode adopted by their agent, or giving him the opportunity of shewing that the logs did in fact conform to the contract, and at the same time refused to pay for the second quality more than half the price agreed to be paid for "prime" logs. On the trial of an action brought to recover the full contract price of the logs, (for which the jury gave a verdict) a witness called by plaintiff was asked to explain the meaning of the word "prime," and as he stated that the word had no technical meaning, and was not used in the trade, his evidence was objected to by defendants' counsel:—Held, that the evidence under the circumstances was admissible. *Spring* v. *Cockburn*, 19 C. P. 63.

Contract—*Oral Agreement.*]—D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, agreeing to pay a commission of 5 per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale:—Held, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury. *Dunsmuir* v. *Lowenberg, Harris & Co.*, 30 S. C. R. 334.

Contract—*Prior Representations.*]—Suppliant alleged that one M., who had acted on behalf of the Government in making a contract with him for the carriage of Canadian Pacific Railway steel rails between Montreal and Lachine for the year 1875, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination:—Held, (1) The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract. (2) That although the suppliant could not import into the formal contract any representations made by M. prior to its being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875, for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Contract — "*Work*" — "*Rig.*"]—Held, that the letters of the defendant, set out in the report and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within s. 17 of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie* v. *Burnett*, 10 O. R. 609.

Contract for Delivery of Material—*Condition as to Time.*]—The defendants in writing offered the plaintiffs to "furnish scows and deliver all the stone required for the Omemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard," which the plaintiffs in writing accepted "at the price and conditions named:"—Held, reversing 9 O. R. 728, that parol evidence could not be received to shew that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a depth as would enable the defendants to use their steamers in towing the scows. *McAvelay* v. *McWilliams*, 13 A. R. 524.

Contract to Cut Wood—*Collateral Agreement for Lien.*]—By an agreement in writing A. contracted to cut for B. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labour, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and be sold for the amount of his claim:—Held, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him. *Byers* v. *McMillan*, 15 S. C. R. 194.

Contract to Supply Printing Paper—*Omission in Schedule.*]—On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may be required or desired from time to time for the printing and publishing of the Canada Gazette, of the statutes of Canada, and of such official and departmental and other reports, forms, documents, and other papers as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf." Attached to the contract, and made part thereof were a schedule and specifications shewing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy, —the paper ordinarily, though not exclusively, used for departmental printing:—Held, that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing. *Clarke* v. *The Queen*, 2 Ex. C. R. 141.

Contradicting Agreement to Give Notes for Price of Machine.]—In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant, who swore at the trial that he never agreed to give such notes, and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made, and that when the writing was read over by the agent

no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts:—Held, that the evidence ought to have been submitted to the jury, and if necessary for that purpose that an amendment should have been permitted at the trial. *McPherson* v. *Wilson*, 15 A. R. 294.

Contradictory Evidence.]—Where parol evidence is admissible to control the legal operation of a deed, no effect can be given to such evidence if contradictory, or its accuracy is involved in doubt. *Re Browne*, 2 Gr. 590.

Conveyance.]—Parol evidence held inadmissible, under the facts stated, to vary or add to a contract of conveyance. *Cayley* v. *McDonell*, 8 U. C. R. 454.

Covenant for Payment — *Collateral Agreement as to Allowances.*]—Action by the sheriff upon a mortgage made by defendant to one L. seized by the sheriff under an execution against L. An equitable plea, admitting the making of a mortgage for a certain amount, but claiming that an agreement that certain sums (when paid as therein mentioned,) were to have been allowed on the first instalment, for which this action was brought, was held not to amount to a variance of a covenant by a parol agreement, and therefore good. *Smith* v. *Bernie*, 10 C. P. 243.

Covenant for Payment of Royalties —*Agreement to Prevent Infringement.*]—Action to recover royalties alleged to be payable on threshing machines manufactured by defendant under an indenture made between plaintiff B. and defendant, whereby the plaintiff B. sold and transferred to the defendant the right to manufacture and use a certain invention known as "Beam's Thresher;" and in consideration whereof the defendant agreed to pay a named royalty on all machines manufactured "upon or after" the principle of the invention. Parol evidence was admitted, subject to objection, that the plaintiff agreed to prevent any infringement of the patent, and, if he failed to do so, he should not be entitled to any royalties. The agreement contained no such stipulation:—Held, that the parol evidence was not admissible to vary the deed, following McNeely v. McWilliams, 13 A. R. 324. *Beam* v. *Merner*, 14 O. R. 412.

Deed—*Collateral Agreement to Postpone Delivery of Possession.*]—In an action for foreclosure of a certain morigage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant; that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form) and give the mortgage; that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date; that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the time of payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counterclaimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays* v. *Emard*, 10 O. R. 314.

Deed—*Description—Plan.*]—Held, in this case, that inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots conveyed. *Grasett* v. *Carter*, 10 S. C. R. 105.

Deed—*Description.*]—See *Scotten* v. *Barchel*, 21 A. R. 569, 24 S. C. R. 367.

Deed—*Evidence to Explain Description —Evidence to Rectify Deed.*]—See DEED, III. 4 (b), VII.

Deposit of Notes as Collateral Security.]—Defendants, two directors of the Canada Powder Company, placed in the hands of C., their secretary, their promissory note for $8,000, made in November, 1858, payable to the plaintiffs on demand, which C. deposited with the plaintiffs, having a receipt written under it and signed by their agent, which expressed that the note was to be held by the plaintiffs as collateral security for any unretired paper they might at any time hold of the company. In an action on this note the plaintiffs' agent swore that he took it upon the understanding expressed in the receipt, which was in C.'s handwriting, and he believed was signed at the same time; and that he made the arrangement wholly with C., never having any communication with the defendants regarding it. Defendants had pleaded as an equitable defence, and desired to prove, that the note was given in consequence of a doubt as to the power of the powder company to become parties to a note, and as security only against the want of such power, and until it should be conferred upon them by the legislature, which was done in May, 1859, without loss in the meantime to the plaintiffs:—Held, that such evidence was rightly rejected, for that the defendants having entrusted C. with their note were bound by his agreement, on which the plaintiffs had advanced their money, which could not be varied by parol testimony. *Commercial Bank of Canada* v. *Merritt*, 21 U. C. R. 358.

Description—*Conduct of Parties—Prior Correspondence.*]—By a deed made in August, 1882, the appellant ceded to the government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot No. 1937, in St. Peter's ward in the city of Quebec, situate between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings

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

Description in Bond for Conveyance.]—The defendant gave a bond to the plaintiff in $1,000, reciting that he had that day purchased certain land known as the mill property, in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over 2½ acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included four acres, part of which at the eastern end was covered with water:—Held, that the defendant clearly was not entitled to retain 2½ acres of dry land, in addition to that covered with water, but only 2½ acres of the whole:—Held, also, that parol evidence of the expressions and declarations of the parties as to the land intended, was inadmissible to support the defendant's construction of the bond. *Greer* v. *Johnston*, 32 U. C. R. 77.

Description in Patent.]—The description of a lot by metes and bounds from the Crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession. *Hagarty* v. *Britton*, 30 U. C. R. 321.

Remarks as to the nature of the evidence admissible,—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent. *Juson* v. *Reynolds*, 34 U. C. R. 174.

See, also, *Clark* v. *Bonnycastle*, 3 O. S. 528.

In construing a patent, reference may be had to papers in the Crown lands office, connected with the application for the patent. *Brady* v. *Sadlier*, 13 O. R. 692.

See S. C., 16 O. R. 49; 17 A. R. 365.

The description of a lot prepared for and used by the Crown lands department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot. The plan of survey of record in and adopted by the Crown lands department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground. *Kenny* v. *Caldwell*, 21 A. R. 110, 24 S. C. R. 699.

Discharge from Covenant.]—A. covenants that he will repay B. on the 1st September, 1847, any advances of cash and goods made by B. to C. for the purpose of taking out timber provided the timber should not before then be sold and disposed of at Quebec. B. after the 1st September, 1847, sues A. upon this absolute covenant for the moneys advanced to C. A. pleads that after this covenant was made, and the moneys were advanced, it was agreed between B. and C., that if C. would make the arrangement described in the plea, then B. would discharge A. from his covenant; and that C. did make the arrangement, whereby A. became wholly discharged from his agreement:—Held, that this plea being taken either to set up in effect a parol agreement to discharge A. from his agreement under seal (which the court seemed to think that it must be), or, to assert that such a consequence resulted from the facts stated, independent of the alleged agreement, was not in either case a legal defence. *McPherson* v. *Dickson*, 8 U. C. R. 29.

Discharge from Covenant—*Collateral Act.*]—Action to recover back the purchase money paid by plaintiff for two years' profits of certain mining shares under a sealed agreement, on the allegation that before the two years had expired the defendant had sold the shares, and that the consideration had failed. Plea, that such shares had become valueless and unproductive of profit, and that the act of selling was in fact at the plaintiff's parol request, and for his benefit:—Held, that the sale not being a breach of the sealed agreement, the plea was not objectionable as setting up a parol discharge from such agreement. *Sanders* v. *Baby*, 7 C. P. 252.

Disproving Consideration for Note—*Time for Payment—Waiver.*]—Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified. *Davis* v. *McSherry*, 7 U. C. R. 490.

Where the defendant, however, at the trial, disclaiming any wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, and a verdict is given against him, he cannot be allowed afterwards to argue in banc the technical objection he had waived at the trial. *Ib.*

Division of Real Estate—*Agreement to Pay Amount in Equalization.*]—On a division of real estate, a written agreement was signed providing for the payment of $1,100 to D. P., one of the parties interested, to make his share equal to the others:—Held, that evidence was inadmissible of a contemporaneous verbal agreement that the amount agreed to be paid was $1,800, part of the difference depending on a contingency. *Pherrill* v. *Pherrill*, 13 Gr. 476.

Evidence not Corroborated.]—An alleged parol agreement said to have been entered into contemporaneously with a covenant under seal, was not permitted to control the covenant, the parol agreement having been proved by one witness only, whose intention to speak the truth was admitted, but whose recollection was not confirmed by other evidence. *Lewis* v. *Gibson*, 18 Gr. 395.

Explaining Shipping Bill.]—The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendants' cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, etc., addressed to N. Dyment (the plaintiff), Wyoming, to be sent subject to their tariff, etc. Then, in the appropriate columns, followed the description of a car load of shingles, giving the number of the car, etc. Then under this were the words, "To Henry James, Mitchell," and then another car load of shingles was described. Parol evidence was admitted at the trial to shew that the meaning of the shipping bill was that the first named car load was to go to the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods:—Held, that the evidence was properly admitted. *Dyment* v. *Northern and North-Western R. W. Co.*, 11 O. R. 343.

Extending Time for Performance of Covenant.]—Declaration on defendant's bond for the performance by one H. of the covenants in a lease of land to H. from the plaintiff, alleging that H. thereby covenanted that he would by the 1st of March, 1873, divide a certain field on the premises by a rail fence into four fields of equal dimensions; breach, non-performance by H. Equitable plea, that in the spring of 1872, H., in part performance of his covenant, erected a fence across the field, so as to divide it into two parts, and thereafter, while there was time for him wholly to perform his covenant, H. requested the plaintiff to extend the time for erecting the other fence until the 1st March, 1874, which the plaintiff did verbally, before the time for performing the contract had elapsed, without the knowledge or consent of the defendant, and such extension remained unrevoked until after the time for performing the covenant had elapsed:—Held, on demurrer, plea bad, as shewing no binding agreement to give time, and setting up a new contract, not founded on any consideration, to contradict the written one. *Fair* v. *Pengelly*, 34 U. C. R. 611.

Extension of Time for Payment of Note.]—Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. *Porteous* v. *Muir*, 8 O. R. 127.

Identifying Document Referred to in Letter.]—Parol evidence was held admissible to identify a mortgage as the instrument enclosed in a letter mentioning it. *Ward* v. *Hayes*, 19 Gr. 239.

Identification under the Statute of Frauds.]—Although extrinsic parol evidence may be given to identify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made, or for whom it was intended. *White* v. *Tomalin*, 19 O. R. 513.

Incorporating Advertisements with Tender.]—The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for $1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B. by whom the tenders were to be received, who had been sent to him by M., and who in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender by which he was to get 75 cents a day for every three meal tickets, and the committee were to charge $1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract. At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection. In an action to recover the amount of the plaintiff's loss from the defendants:—Held, that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable. McNeely v. McWilliams, 13 A. R. 324, and Lindley v. Lacey, 17 C. B. N. S. 578, commented on. *Betts* v. *Smith*, 15 O. R. 413. Reversed in appeal, 16 A. R. 421.

Insurance Policy.]—To rectify mistake in amount of life assurance policy. See *Ætna Life Ins. Co.* v. *Brodie*, 5 S. C. R. 1.

Insurance—*Description of Mode of User of Premises.*]—In an action on a policy of insurance:—Held, that the term "machine and repair shop," did not necessarily mean a shop in which iron work alone is to be done: that it was properly left to the jury to say whether the business carried on there, of making shingles, was that of a machine and repair shop; and that the evidence set out warranted their finding that it was. *Chaplin* v. *Provincial Insurance Co.*, 23 C. P. 278.

Insurance—*Mortgagee Insuring Mortgagor's Interest.*]—Held, that a mortgagee of a vessel who was alone named in a policy as the assured, without any general words, or other indication of interest in any other person, but who had in fact insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured, on parol evidence of that fact. *Richardson* v. *Home Ins. Co.*, 21 C. P. 291.

Insurance Policy—*Undisclosed Principal.*]—A marine policy was in this form: The

Ætna Insurance Company of, &c., on account of C., loss, if any, payable to M. in gold, do make insurance, &c.:—Held, that the contract on this policy was entered into with C., and that making the loss payable to M. did not make him the party insured. Semble, that the insertion in the policy after M.'s name of the words "for, or in the name of all persons interested," &c., or "for whom it may concern," would have enabled M., on shewing interest, to recover; also, that the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy. *McCollum* v. *Ætna Insurance Co.*, 20 C. P. 289.

See, also, *Every* v. *Provincial Insurance Co.*, 10 C. P. 20.

Land Omitted from Mortgage.]—Parol evidence is admissible to reform a mortgage which omitted land shewn by the mortgagor to the mortgagee as part of the property to be mortgaged. *Merchants Bank of Canada* v. *Morrison*, 19 Gr. 1.

Lease—*Agreement to Pay for Improvements.*]—A., by memorandum of agreement, leased to B. a farm for four years, which B. agreed to work, &c.; and if A. sold the farm, he (B.) would give it up in three months after notice. A., before his death, sold to C., from whom B. leased, and B. sued the administratrix of A. for repairs done on the farm during A.'s life, alleging that there was a verbal agreement that such improvements should be paid for by A.:—Held, that the action was not maintainable, there being no stipulation in the lease as to improvements; and that the plaintiff could not qualify or add to the written instrument. *Losee* v. *Kezar*, 5 C. P. 234.

Lease—*Collateral Agreement as to Crops.*]—Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was verbally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent verbal agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by s. 4 of the Statute of Frauds, might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as shewing an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

Lease—*Covenant to Build, but Time not Fixed.*]—The plaintiff had under several leases been in occupation of a farm of the defendant's for about twenty-five years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of $150 a year. Plaintiff also agreed to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:—Held, that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected:—Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable. *Bulmer* v. *Brumwell*, 13 A. R. 411.

Lease—*Payment in Advance.*]—In an action for illegal distress before the rent was due, evidence was tendered that the instructions to draw the lease and the agreement of both parties was that the rent should be paid in advance:—Held, there being no equitable plea, that such evidence was properly rejected, and that an equitable defence was not admissible under the general issue by statute. *Brown* v. *Blackwell*, 35 U. C. R. 239.

Lease—*Postponing Date of Delivery of Possession.*]—Action by lessee against lessor on a covenant to deliver possession of the demised premises to plaintiff on the 20th March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff, and had deprived him of the use of the land and premises. Defendant pleaded, on equitable grounds, that the plaintiff by an agreement in writing executed contemporaneously with the lease, in consideration that defendant had leased to him the premises mentioned in the declaration, which were then in the possession of one Y., who had agreed to surrender possession by the said 20th March, agreed not to bring any claim for damages against defendant, if possession could not be obtained on the day as provided in the deed; averring that on 20th March Y. was and continued in possession of the premises, and refused to deliver them up to defendant, who, consequently, could not obtain possession thereof on the said day, and could not by reason thereof deliver possession on 20th March to plaintiff. Plaintiff now assigned that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises on the 20th March:—Held, on demurrer to both plea and new assignment, that the plea was bad as a legal defence, for attempting to alter an instrument under seal by one merely in writing not under seal; as a legal and equitable defence, for want of a good consideration; alleging, as it did, a past consideration as that on which the agreement was based. That

if it was intended to be urged that the agreement was part of the instrument under seal, and executed contemporaneously with it, it was not so stated; if executed before the lease, and as part of the consideration for making the lease, it was not so pleaded. *Wilson* v. *Keys*, 15 C. P. 32.

Lease—*Prior Agreement Inconsistent with Covenants.*]—The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the lease. At the trial defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber:—Held, that evidence of the parol agreement could not be admitted. *Gilroy* v. *McMillan*, 6 O. R. 120.

Lease—*Right to Make Improvements.*]—The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, etc., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental shew cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the shew cases were put in:—Held, that the evidence of such agreement was not admissible as it would add to the written agreement, and was not collateral thereto; but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it. *McKenzie* v. *McGlaughlin*, 8 O. R. 111.

Lease with Power to Sell.]—Declaration, that defendant leased certain land from the plaintiff for a year, and covenanted to purchase it within the term, or to pay the interest for a year on a mortgage given by the plaintiff on the land, but did neither. Plea, that it was agreed by the same deed, that if the plaintiff should, during the term, sell the land to another, defendant should not pay the interest, and that the plaintiff sold and defendant gave up possession to the purchaser. Replication, that before the term expired defendant notified the plaintiff that he would not purchase, and requested him to sell, and that the plaintiff in consequence sold, but subject to the defendant's term, which is the sale alleged in the plea:—Held, after verdict for the plaintiff, that the replication was bad, as attempting to vary the deed by a parol agreement; and a verdict was entered for defendant. *Malott* v. *Carscadden*, 31 U. C. R. 363.

Legal Effect not Intended.]—The court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties. *Merritt* v. *Ives*, 2 O. S. 25.

Letters Referring to Condition in Ticket.]—In an action by the plaintiff, a passenger by defendants' railway, for the loss of her baggage, and in which the defence was that the defendants' liability was limited by a condition on the ticket to $100, certain letters were admitted in evidence, one written by the defendants' baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the company's rules did not require unlimited first-class tickets to be signed, and that this ticket had been sold at full tariff rate:—Held, that the letters were properly admitted; but they were of no consequence as the ticket on its face shewed that it was not purchased subject to the condition. Kirkstall Brewing Co. v. Furness R. W. Co., L. R. 9 Q. B. 468, followed. *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747.

Location of Roads.]—In trespass for cutting timber the question was in which of the two townships there was an allowance for road, and the grants from the Crown not being very explicit, parol evidence was admitted on both sides. *Miller* v. *Palmer*, 3 O. S. 425.

Materiality of Condition in Policy.]—The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of shewing that the plaintiff having become aware of them before the application made by him was justified in believing that the defendants did not regard the condition in the policy as to occupation as a material one:—Held, that this evidence was properly rejected. *Peck* v. *Agricultural Ins. Co.*, 19 O. R. 494.

Mistake.]—Parol evidence is not admissible to shew that by mistake the written bond did not express the true agreement, unless mistake is expressly charged. *McDonald* v. *Rose*, 17 Gr. 657.

Mistake.]—Held, that the rule that the court will not interfere to rectify an instrument on parol evidence, on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question. *Ferguson* v. *Winsor*, 10 O. R. 13.

See S. C., in appeal, 11 O. R. 88.

Mortgage—*Assignment as Collateral Security between Mortgagor and Assignee.*]—A mortgage made by T. to W., was assigned to M. No money was actually advanced on the mortgage by W., but before the assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for the debt which T. owed to M. on a note:—Held, that M. was entitled to hold the mortgage as security for the amount due him from T. *McIntyre* v. *Thompson*, 6 O. R. 710

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle applies whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor as here. *Ib.*

Mortgage for Purchase Money—*Agreement Silent as to Interest.*]—A vendor executed an agreement to convey certain premises and receive back a mortgage for part of the price payable by instalments, the agreement not stating that the mortgage should be payable with interest In a suit brought to enforce specific performance of the agreement, and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding was that interest should be payable. *Gould* v. *Hamilton*, 5 Gr. 192.

Nature of Interest Insured.]—Held, in this case that the policy was a general insurance of the property itself and not merely of the mortgagee's interest, and that parol evidence was not admissible to prove that the loan company and insurers had in effecting an insurance on mortgaged property, only the interest of the mortgagees under consideration. *Howes* v. *Dominion Fire and Marine Ins. Co.*, 2 O. R. 89. But see *S. C.*, 8 A. R. 644.

Notarial Transfer.]—Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof by writing. *Bury* v. *Murray*, 24 S. C. R. 77.

Notes Collateral to Mortgage—*Payment to Mortgagee after Transfer.*]—Upon a purchase of land from one Mrs. C., the plaintiff gave her a mortgage for $1,100, of which $200 was paid at the time of execution, and indorsed on the mortgage; the balance was to be paid in nine equal instalments with interest at six per cent., the first of which became due on the 7th November, 1875. At the same time the plaintiff gave her nine promissory notes, payable at intervals of one year. The first of these notes were drawn payable to Mrs. C. or bearer, one year after date, and contained the additional words "Which when paid is to be indorsed on the mortgage bearing even date with this note." In August, 1875, Mrs. C. and her husband executed an assignment in general terms of this mortgage to the defendant, purporting to grant and assign all the estate and interest of Mr. and Mrs. C., in the land, and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage, it was stated that in consideration of $1,100 the plaintiff conveyed and assured the lands by way of mortgage to Mrs. C. The amount then due upon the mortgage was not expressly mentioned in the assignment. At the date of the assignment, the first note had been transferred to a third party for value. The plaintiff in ignorance of this, paid the amount of it to the defendant, to whom he had been notified the mortgage had been assigned. The defendant told the plaintiff that he had not got the note but that he would get it and give it to him. The plaintiff was afterwards sued by the holder of the note, and was compelled to pay it, whereupon he sued the defendant for the amount. The jury found that the defendant only purchased $800 of the mortgage money and eight notes; that the plaintiff made the payment under the impression that the defendant held the note as well as the mortgage; and that when the plaintiff paid the money, the defendant promised unconditionally to give him the note:—Held, that the note was a negotiable instrument; and that being negotiable and having been transferred before the assignment, parol evidence was admissible to shew that it had not in fact been assigned to defendant, and that under the circumstances, the plaintiff was entitled to recover. *Chesney* v. *St. John*, 4 A. R. 150.

Order for Payment—*Latent Ambiguity as to Fund.*]—The following draft or order directed to defendant in favour of plaintiff, and signed by W.: "A. Ker, Esq., treasurer, town of Galt.—Please pay to E. S. Cutten or order the sum of $191, and charge same to my account. C. A. Wilber," was accepted by defendant in these terms: "Accepted, payable from the first moneys to be paid Mr. Wilber. A. Ker." The evidence shewed that W., being a sub-contractor for certain work about the town hall of Galt, and having an unsettled claim against the corporation for extras, gave this order, and that it was understood at the time, and stated in plaintiff's presence, that it was accepted only with reference to the moneys expected for such extra work. After the acceptance, defendant, as treasurer, and on the order of the committee, of whom the plaintiff was one, paid W. certain moneys for work done upon a bridge, the contract for which, however, had not been entered into, or even contemplated, until after the acceptance of the order in question. Subsequently it was ascertained that nothing was due to W. for extra work on the town hall. It did not appear that the plaintiff had ever applied to defendant to be paid the amount of the order out of the moneys due to W. on the bridge:—Held, in an action by plaintiff against defendant on his acceptance; that the evidence failed to shew that defendant had ever as an individual received any moneys to be paid to W., but that the only moneys that came to his hands were moneys belonging to the corporation, which, as treasurer of the corporation, he was bound to pay out as directed by the latter, and that the moneys which he had paid to W. had been paid to him under such direction. Held, also, that even rejecting the express evidence of the understanding, such of the surrounding facts as might indisputably have been given in evidence fully warranted the conclusion that the first moneys to be paid to W., meant the first moneys that might be ordered to be paid to him on his claim for the work on the town hall. Semble, that the instrument sued on contained a latent ambiguity, and that in that case the view contended for by defendant, that the acceptance must be construed as referring to the claim for extra work, would be aided by averment and proof, and that the latter would fully sustain such a defence. *Cutten* v. *Ker*, 16 C. P. 227.

Partnership—*Registered Declaration.*]—An action was brought by W. McL. and F. W. R. to recover the amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the

effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death:—Held, that such evidence was inadmissible. *Caldwell* v. *Accident Insurance Co. of North America*, 24 S. C. R. 263.

Percentage on Cost—*Mode of Ascertaining.*]—The defendants carrying on business in manufacturing and upholstering goods, entered into an agreement in writing with plaintiff whereby he was to manufacture all the upholstered goods sold by them at an advance of eleven per cent. upon the actual first cost of goods made and shipped from Toronto, the percentage to pay cost of packing and shipping the goods, and material used as packing to be charged at actual cost price. Before the agreement was reduced to writing certain estimates were made as to what the actual first cost would be, taking material and labour as constituting the cost, and the plaintiff in forwarding some of the manufactured goods adopted the estimates:—Held, that the parties by their agreement had precluded themselves from shewing anything inconsistent with the natural meaning of the words "actual first cost;" that such meaning must govern; and that the plaintiff was entitled to recover his percentage thereon. *Black* v. *Toronto Upholstering Co.*, 15 O. R. 642

Personal or Representative Capacity.]—Plaintiff sued defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at Hamilton. The defence was, that the society, an incorporated body, was liable, and not defendant. The learned Judge left it to the jury to find whether defendant had contracted personally, or as one of a committee who undertook to superintend—in either of which events, he held him to be personally liable; but the jury were told, that if he contracted only as representing, or on behalf of the corporation, he would not be liable:—Held, that the direction was correct. *Simpson* v. *Carr*, 5 U. C. R. 326.

Prior Conversation.] — A conversation prior to a written agreement under seal cannot be received to alter its terms. *Gilpin* v. *Greene*, 7 U. C. R. 586.

Purchase Price more than Amount Stated in Deed.]—A conveyance was made by the plaintiff to the defendant for the expressed consideration of $5,000. It was shewn by the evidence of the plaintiff and her two daughters, that the defendant in bargaining for the purchase of a lot of land, had agreed to give $7,500 therefor, the defendant paying $5,000 down and retaining in his hands $2,500 to meet certain claims which he alleged were likely to be made against the property. This the defendant denied, but the plaintiff obtained judgment giving her a lien for the $2,500 and interest, and on appeal this judgment was affirmed. Remarks as to the admissibility of parol evidence in such a case. *Marsh* v. *Hunt*, 9 A. R. 595.

Purpose for which Conveyance was Made.]—I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement. At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such consideration was paid:—Held, that it was competent for F. to shew what the indenture was given for, that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness. *Bank of Hamilton* v. *Isaacs*, 16 O. R. 450.

Qualifying Release—*Equitable Effect.*]—Declaration on a note made by defendants P., W., and D., jointly and severally, payable to plaintiff. Equitable pleas, 1. By defendant D., that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W., that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.; that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. and D. should be liable only as sureties; and that the plaintiff, without W.'s consent, by deed released P. Equitable replications, 1. That the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in $250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the $250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "$250, not any sureties on this;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed. 2. That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties:—Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient:—Held, also, that the second replication was bad. *Fowler* v. *Perrin*, 25 U. C. R. 227.

Receipt — *Error—Commercial Transaction.*]—S. brought an action to compel V. to render an account of the sum of $2,500, which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s book-keeper gave the following receipt: "Montreal, 6th October, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. M. V., per F. L." and which V. failed and neglected to apply. V. pleaded that he never got the $2,500 and that the receipt was given in error and by mistake by his clerk:—Held, (1) that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with. (2) That

the prohibition of Article 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not d'ordre public, and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal. (3) That parol evidence in commercial matters is admissible against a written document to prove error. Ætna Insurance Co. v. Brodie, 5 S. C. R. 1, followed. *Schwersenski* v. *Vineberg*, 19 S. C. R. 243.

Receipt for Purchase Money—*Terms of Sale.*]—A receipt, quâ receipt, is not a contract, but a mere acknowledgment, and is open to explanation and contradiction by parol. S. sold all the elm and soft maple trees on a certain lot to T., and at the time of sale gave T. the following receipt: "Received from J. L. for T., the sum of $500, on account of elm and soft maple," etc., on the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that "one of the conditions of the sale was that the timber was to be removed by T. within two years:"—Held, that the receipt was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted. Held, also, that the effect of the condition was that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement. Johnston v. Shortreed, 12 O. R. 633, followed. *Steinhoff* v. *McRae*, 13 O. R. 546.

Receipt for Rent.]—Action for wrongful distress. The plaintiff produced a receipt dated 3rd March, 1890, for rent to date:—Held, that parol evidence was admissible to explain the circumstances under which the receipt was given, but not to vary or control it. *Baskerville* v. *Doan*, 12 C. P. 127.

Release of Indebtedness for Benefit of Debtor and Another.]—A widow, by writing duly signed, sealed, and attested, released to her son W. a sum of $14,477.95, "standing to my account in my son William's books at this date, and which I intended to give him; I hereby give it to him and release him from all claim in respect thereof." W. subsequently went into a somewhat hazardous business, and afterwards becoming insolvent made an assignment under the Insolvent Act. In a suit by the official assignee claiming the money for W.'s creditors, the court allowed parol evidence to be given, shewing that such release, though absolute in form, was as to one-half of the amount transferred, intended to create a trust in favour of another son, A., his wife and children; and the court being satisfied of the truthfulness of such evidence refused the relief asked. *Kerr* v. *Reid*, 23 Gr. 525.

Relief against Re-entry for Non-payment of Rent—*Misrepresentations by Lessee.*]—To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reason of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified:—Held, that evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief. The origin both of the action for specific performance and of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the court; and in each the court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 22 O. R. 1. Approved 21 A. R. 176.

Repayment of Money Loan in Goods.]—Defendant got from the plaintiff six different sums of money, amounting together to $3,000 for which he gave receipts. Three of these stated that defendant received so much money from plaintiff, "loan on oil, usual rate of interest." The remaining three were similar to the others, but concluded "payable within one year from date, with interest at nine per cent. per annum." Defendant set up a parol agreement with plaintiff, by which defendant had the right at any time to require plaintiff to take in payment of the moneys so lent the oil which defendant had in plaintiff's tanks at the market price at the time when defendant so required plaintiff to take the oil:—Held, that such a parol agreement could not be set up to alter the terms of the receipts which shewed such loans were to be repaid in money; and although the jury found the parol agreement to have been made, the court having all the facts before them, set aside the verdict and judgment for the defendant and directed judgment to be entered for the amount of the plaintiff's claim. *Lancey* v. *Brake*, 10 O. R. 428.

Representative Capacity of Maker of Note.]—As to admissibility of extrinsic evidence to explain the capacity in which the maker signed a promissory note. See *Brown* v. *Howland*, 9 O. R. 48; 15 A. R. 750.

Reservation of Timber on Sale of Land.]—Declaration q. c. f. for cutting and removing trees, with a count in trover and the common counts. Pleas, leave and license; and a special equitable plea, setting up that the defendant, being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract and of the conveyance of the land to defendant, it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be, and it accordingly was not, inserted in the conveyance; and that the defendant entered and cut the trees, &c., which are the trespasses, &c. The defendant as a witness at trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea:—Held, that such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license. Semble, that the equitable plea shewed a good defence; and that at all events, the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried. *Walter* v. *Dexter*, 34 U. C. R. 426.

Sale of Business—*Parol Explanation of Mode of Arriving at Price.*]—The plaintiff bought the office and plant of a newspaper, gave a chattel mortgage thereon to W., and placed P. in charge. The defendants made

advances to P. for the purpose of carrying on the business. W. sold the property by auction for the amount of the mortgage debt to the defendants, who supposing that P. was the owner, wished to secure themselves for the advances made to him. The defendants then agreed to sell the property to the plaintiff; but a dispute arose as to the price, and this action was brought to obtain specific performance of the agreement. There was written evidence of the agreement in a document signed by the defendant Moore, part of which was as follows: "Price of this office to be what it cost Mr. Horton (the other defendant) and myself." Specific performance was decreed by consent, and it was referred to the master at London to take the accounts, and to report what was the true agreement between the parties:—Held, that the defendants had the right to shew before the master what they meant by the reference to the cost of the office as fixing the price; and that, upon the evidence, the true agreement between the parties was, that the price was to be the amount paid to W. plus the advances to P. *Hughes* v. *Moore*, 11 A. R. 569.

Sale of Goods.]—Sale of goods on written orders—Parol evidence of previous verbal warranty. See *Gordon* v. *Waterous*, 36 U. C. R. 321.

Sale of Goods—*Right of Selection of Brand.*]—The plaintiffs in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2,000 tons more, negotiations were entered into between H., the plaintiffs' agent, C. & G., and the defendant, which resulted in a note being signed on the 14th January, by C. & G. addressed to the defendant, advising him that they had sold to the plaintiffs on the defendant's account 2,000 tons of rails (56 lbs. to the yard) at £8 18s. 9d. stg. per ton, payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant, who was then in Montreal signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs. "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendants were dealers in, and not manufacturers of, rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale, for the manufacture of rails of a section known as "Hamilton and North Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North-Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had a right to name the section:—Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter; and that the contract was therefore performed by the section delivered. *Page* v. *Proctor*, 5 O. R. 238.

Sale of Goods—*Time for Acceptance.*]—The plaintiff sued defendants upon a contract by them to purchase from him 4,000 barrels of crude petroleum, claiming damages for the loss of a large quantity destroyed by an accidental fire, which he alleged should have been previously taken by them under the agreement, which bound them to take it as fast as their barrels could be received, emptied and returned. The defendants refused to accept, on the ground that the oil was not of the quality contracted for:—Held, that evidence was inadmissible that, in conversation shortly before the written agreement, the defendant spoke of agreeing to receive six or seven car loads per week; and such evidence having been received a new trial was granted without costs. *Noble* v. *Spencer*, 27 U. C. R. 210.

Sale of Limits and Plant—*Identification by Collateral Papers—Terms of Payment.*]—Where a contract was expressed to sell limits Nos. 1 and 3 for the sum of $15,500; also all the plant used in connection with the shanty now in operation on limit No. 1, included in the list made out last summer and the material then not included which had been used in the winter's operations of 1880 and 1881, at the price of $3,000:—Held, sufficiently definite to satisfy the Statute of Frauds, since the plant referred to therein could easily be identified by parol evidence as being that specifically described in a certain writing which accompanied the above contract, which was signed in the firm's name and by the purchaser, as also could the terms of credit to be allowed as to the payment of $15,500, and such parol evidence was admissible though the contract imported primâ facie, etc., a down payment of the $15,500. *Reid* v. *Smith*, 2 O. R. 69.

Sale of Vessel—*Apportionment of Insurance.*]—Plaintiff wrote to defendants, proposing to sell them a vessel for a certain sum, the proportion of premium on the insurance then effected, during the time the policy had yet to run, to be paid by the purchaser in cash. The proposition was accepted orally, and a regular assignment of the vessel executed to defendants, in which no mention of the insurance was made:—Held, that the plaintiff might nevertheless recover the premium from defendants. *Mason* v. *Brunskill*, 15 U. C. R. 300.

Shares Issued at a Discount Sold as Paid-up.]—Defendant was a shareholder in a company, of which some of the capital stock subscribed for had not been taken up, and these shares being offered to the stockholders

at 90c. in the dollar, defendant took some of them. On the 23rd March the plaintiff agreed to purchase the defendant's shares at 67½c. in the dollar, and on the 25th March the following transfer was executed: "For value received, W. E. S. transfers and assigns to J. C. fourteen shares, on each of which has been paid $500, amounting to the sum of $7,000, in the capital stock of the Lake Superior Navigation Company." &c.:—Held, that evidence was admissible to shew that at the time of the sale on the 23rd, the plaintiff was told that these shares had been issued at 90c., so that they were paid up in full only as between the directors and the shareholders; for this was evidence to shew what was the subject matter of the contract; and the transfer was not the concluded bargain between the parties. The plaintiff having sued defendant to recover the difference:—Held, therefore, that he could not recover. *Clark* v. *Sanford*, 25 C. P. 256.

Time for Payment of Note.]—"For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102 15s. cy., to be paid in yearly proportions:"—Held, that no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiff's father. *McQueen* v. *McQueen*, 9 U. C. R. 536.

Time for Maintenance of Station.]—At the trial of an action to enforce performance of an agreement to maintain a station evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting a bonus, to the effect that by the agreement entered into the defendants would be bound to maintain the station for all time:—Held, that this evidence was clearly inadmissible. *Township of Nottawasaga* v. *Hamilton and North-Western R. W. Co.*, 16 A. R. 52.

Warranty.]—The plaintiff sued the defendant, a piano maker, for a breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out in the report, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quære, whether this question should not have been left to the jury. *McMullen* v. *Williams*, 5 A. R. 518.

Warranty.]—Held, by Hagarty, C.J.O., and Rose, J., that parol evidence of a warranty was properly admitted; that (as held in Bennet v. Tregent, 24 C. P. 565, approved of in McMullen v. Williams, 5 A. R. 518), it was a question of fact for the jury whether the written order embodied the whole contract, and therefore, their finding on this point was conclusive:—Held, by Burton, J.A., and Cameron, C.J. C. P., that parol evidence of a warranty was improperly admitted. Per Burton, J.A. (1) When a proposal is made in writing by one party and accepted ad idem by the other, either orally or by acting upon it, the contract is a written one. (2) If the writing embodies the contract, the Judge is bound to exclude all evidence to shew that the real intention of the parties was different from that which appears in the writing. (3) A warranty, though a collateral undertaking, is part of the contract of sale, and, if the contract is in writing, antecedent representations, not embodied in the written contract, are not warranties, and cannot be proved unless it is shewn that they were fraudulently made and the contract was so induced. (4) If the contract is not reduced to writing, or if, though there is a written document, the evidence leads the court to infer that the writing does not contain the whole agreement, it is for the jury to say whether antecedent representations did or did not amount to warranties. In this case there was no admissible evidence of a warranty, and the judgment should be for the defendant. *Ellis* v. *Abell*, 10 A. R. 226.

Warranty.]—A mortgage on a vessel was executed to secure the purchase money and registered with the customs, and annexed to it was an instrument of the same date under seal executed by the defendants reciting the mortgage, and that the terms of payment were set forth therein for convenience of registry, and "this indenture is executed for the purpose of evidencing the true agreement between the parties which is hereinafter stated." The terms of payment were then stated, differing from those in the registered mortgage; and defendants covenanted to insure the vessel for $1,400 and assign the policy to plaintiff. The alleged warranty was oral and was not made out at the time of executing the writings, but defendants swore that they would not have bought without the warranty, and would not otherwise have given over one-third of the price for a vessel which could not be insured:—Held, that evidence of the oral warranty was admissible; that it did not vary or alter the writings; and that the declaration that the instrument was made to evidence the true agreement referred merely to the terms of payment. *La Roche* v. *O'Hagan*, 1 O. R. 300.

Work and Labour—*Parties Liable not Mentioned.*] — In an action for work and labour against A. and B. the plaintiff put in an agreement headed, "An estimate for the carpenter and joiner work of a brick cottage, to be done for William Walker," (defendants' father.) Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were indorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was not to find materials, and no time was mentioned for completion of the work:—Held, that parol evidence was admissible to shew that defendants were liable on the contract. *Hubbard* v. *Walker*, 13 U. C. R. 205.

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2. *Shewing Trust or Right to Redeem.*

Absolute Deed as Security.]—Parol evidence cannot be received that a deed absolute in its terms was intended only as a security. *Gilmour* v. *Hayes*, 6 O. S. 631.

Conveyance to Third Person.]—In a suit by the representatives of B. against the representatives of C., parol evidence clearly

proved that A. and B. had agreed to exchange properties, B. paying A. £74 for difference of value; that B. had conveyed his property to A., and after the arrangement was completed, A.'s property had been conveyed to C. by B. as a security for the £74, which C. undertook to pay B. in goods, and it appeared from C.'s books that he had charged the £74 to B., and credited and afterwards satisfied that amount to A., and had credited the rents to B., and charged him with the repairs of the premises; and letters written by C. were also in proof, which indicated the existence of some agreement respecting the property:—Held, that the parol evidence was admissible; and it appearing that the debt had been paid, the defendants were declared trustees of the property in question for the plaintiff. *Willard* v. *McNab*, 2 Gr. 601.

Discussion of Principle.]—The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on. Le Targe v. DeTuyll, 1 Gr. 277, commented on and approved of. *Bernard* v. *Walker*, 2 E. & A. 121.

Fraud—*Relying on Legal Effect.*]—Where a party, being in close custody at the suit of another, agreed to execute a conveyance to him as security for his debt and costs, and executed an assignment accordingly, but the instrument was deemed in law an absolute assignment giving the assignor a right of repurchase, and after the day of payment had elapsed this was set up as a bar to the party's right to redeem, parol evidence was admitted on the ground of fraud. *Stewart* v. *Horton*, 2 Gr. 45.

Grantee's Acts not Inconsistent with Absolute Grant.]—Where an absolute deed of real estate had been executed, and the grantor, by his bill, alleged that the deed so executed was intended as a security only, and that it had been verbally agreed to execute a defeasance at some future time, but it did not appear that any acts of the grantee were inconsistent with his supposition that the conveyance was intended to be absolute, and not by way of security, parol evidence of the alleged agreement was held inadmissible. LeTarge v. DeTuyll, 1 Gr. 277, remarked upon. *Howland* v. *Stewart*, 2 Gr. 61.

Where a party assigned his interest by way of security, but the assignment purported to be absolute, and he remained in possession from the execution till the time of the hearing, parol evidence was admitted to shew the real nature of the transaction. *Barnhart* v. *Patterson*, 1 Gr. 459.

Inadequacy of Consideration.]—One test by which a conditional sale is distinguished from a mortgage is, the adequacy of the consideration. Where, therefore, it was shewn that the plaintiff had conveyed an estate for less than one-fourth of its value, with a clause giving him a right to re-purchase, the conveyance was declared to be a security only. *Stewart* v. *Horton*, 2 Gr. 45.

One of Two Joint Owners Conveying.] — A deed was made by one joint owner of property at the instance of the other to a third person, under a parol agreement that the grantee should hold the property to secure money which he was to advance to pay interest on a mortgage on the property, and subject thereto in trust for the wife of such other joint owner, who remained in possession: — Held, that parol evidence of the agreement was admissible. *Campbell* v. *Durkin*, 17 Gr. 80.

Parol Evidence in Trust.]—See *Bank of Montreal* v. *Stewart*, 14 O. R. 482.

Possession by Grantor—*Parol Agreement for Redemption.*]—Where an absolute conveyance is executed with a parol agreement for redemption, and the grantor continues in possession, if the parties so deal with one another as to render such possession clearly referable to the parol agreement, as by demand and payment of the debt or interest, or some part thereof, such parol agreement will be enforced in equity. Semble, where it is clear from written evidence that the agreement really made between the parties to a deed is not that stated in the deed, but the written evidence does not shew what it was, parol evidence of it is admissible. Semble, the fact of a grantor continuing for years in possession of property after execution of an absolute conveyance, is alone sufficient to let in evidence of the parol agreement for redemption, in pursuance of which such possession took place. *LeTarge* v. *DuTuyll*, 1 Gr. 277.

A decree was subsequently made to let plaintiff in to redeem. *S. C.*, 3 Gr. 369.

Possession by Grantor's Tenant.]—Where a party assigned his estate by way of mortgage, but the instrument purported to be absolute, and no change of possession took place, the tenant of the mortgagor continuing to hold possession:—Held, that this was not such a possession by the mortgagor as would affect a purchaser from the mortgagee with notice of the interest of the mortgagor. LeTarge v. DeTuyll, 1 Gr. 277, approved of. *Greenshields* v. *Barnhart*, 3 Gr. 1; affirmed on appeal to the privy council, 5 Gr. 99.

Prior Mortgage Assigned to Purchaser's Son.]—A mortgagee purchasing a prior mortgage was advised by his solicitor to take the assignment to another person as trustee, and took it accordingly in the name of his son, not intending it as an advancement to the son:—Held, that parol evidence was admissible to prove the trust. *Barr* v. *Barr*, 15 Gr. 27.

Having afterwards foreclosed all other incumbrancers, the father was advised to release his interest to his son, so that the whole title might be in him as trustee. The deed did not mention any trust, but was retained by the father, and the son knew nothing of it for more than five years, during all which time the father received payments from the mortgagor to his, the father's, own use, with the knowledge of the son, and without any claim by him:—Held, that parol evidence was admissible to prove these facts, and a conveyance to the father was decreed. *Ib.*

Purchase at Sheriff's Sale for Debtor.]—The plaintiff, who was the owner of land about to be sold at sheriff's sale, agreed with defendant that defendant should buy the property at the sale for him, and pay out of defendant's own funds, and give the plaintiff two years to repay him. The property was then sold for about one-fifth or

one-eighth of its value to defendant, who paid for it, and the plaintiff remained in possession for two years, under the agreement, and made valuable improvements:—Held, that parol evidence was admissible to prove the agreement. *Papineau* v. *Gurd*, 2 Gr. 512.

Purchase at Sheriff's Sale for Debtor's Devisees.]—A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment. An execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and the mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations, and the mill and mill-premises to an infant on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and that he should hold the same for the several owners. Accordingly he attended at the sale and bid the stipulated amount, the proprietors and their agents also attending there, and preventing competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and mill-premises, which the purchaser retained, occupied, and improved during the minority of the devisee, who on his attaining his full age, demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court, under the circumstances, held the plaintiff entitled to redeem the mill-premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol. *McGill* v. *McGlashan*, 6 Gr. 324.

Purchase by Agent.]—Where the purchase was made by a person in his own name, but in reality for the benefit of another, parol evidence of the agency was held admissible, and the purchaser who entered into the contract in his own name, and who was a defendant, was held a good witness on behalf of the plaintiff against his co-purchaser, the other defendant. *Sanderson* v. *Burdett*, 18 Gr. 417.

Purchase by Agent.]—D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name:—Held, that evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K.:—Quære, whether Bartlett v. Pickersgill, 1 Cox 15, 4 East 577 (n.), is still to be regarded as good law. *Kitchen* v. *Dolan*, 9 O. R. 432.

Purchase for Joint Benefit.]—The plaintiff agreed with J. to purchase a mining lease for their joint benefit, the consideration for which was to be the testing of the ore at the crushing mill of the plaintiff, and at his expense. In pursuance of this arrangement, J. did arrange for the lease, but took the agreement therefor in his own name. The ore was, as agreed upon, tested at the crushing mill of the plaintiff, and at his expense, but J. attempted to exclude the plaintiff from any participation in the lease, asserting that he had obtained the same for his own benefit solely:—Held, that the true agreement could be shewn by parol; and that the plaintiff was entitled to the benefit of the agreement. *Williams* v. *Jenkins*, 18 Gr. 536.

R. and S. became the purchasers of the estate, real and personal, of an insolvent debtor (D). S. asserting in the presence of R. that he was purchasing for the benefit of D. The property was duly conveyed to the purchasers by an absolute deed of transfer, and D. was retained to manage the business, and continued to occupy the property, S. assuming the exclusive control of the financial part thereof and making all payments on account of the purchase: and after the liabilities of the estate had all been discharged, R. filed a bill claiming to have the surplus of the estate realized, and the proceeds divided between himself and S. and D.:—Held, that the transaction was one in which, owing to D.'s possession, notwithstanding the Statute of Frauds, parol evidence was receivable to shew that the purchase was intended for the benefit of D.; but the court, being of opinion that the evidence was not of that clear and positive nature required in such cases, made a decree in favour of R., which, on re-hearing, was affirmed by the full court. *Robertson* v. *Smith*, *Ogden* v. *Robertson*, 21 Gr. 303.

Ratification by Principal of Sale by Agent.]—J. S. F. and his two brothers were joint owners of a lot of land which the former, without any authority from his brothers, agreed to sell to the plaintiff, and for a portion of the purchase money, signed a receipt "Fowlds Brothers," the name in which J. S. F. and one of his brothers carried on business. A watercourse ran through the lot which J. S. F. swore he expressly stipulated should remain open; this, however, was denied by the plaintiff and the receipt was silent in respect to it. The owners refused to execute any conveyance which did not reserve the use of the water, the brothers of J. S. F. swearing that they never would have sanctioned any sale that did not make such reservation, and that they had only approved of the sale effected by J. S. F. on his statement that it had been so reserved. In an action for specific performance as claimed by the purchaser, the evidence of the brothers as to the nature of the bargain reported to them by J. S. F., (which they had ratified), was rejected and judgment was given in favour of the plaintiff:—Held, that the evidence was improperly rejected, and that there being no authority to J. S. F., either antecedent or subsequent to bind his co-owners, the plaintiff's case failed and the action was dismissed, with costs. At or about the time of the negotiations with the plaintiff it was alleged that other persons had been endeavouring to purchase the lot but failed on the ground that the owners insisted on the reservation of a right

to use the water:—Quære, whether the evidence on this point was so collateral in its nature as to justify its rejection by the Judge at the trial. *Tracey* v. *Fowlds*, 13 A. R. 115.

Second Absolute Assignment.]—Parol evidence to vary a written instrument rejected, although it was doubtful if it contained all the agreement between the parties. *McAlpine* v. *How*, 9 Gr. 372.

An assignment of a bond for the conveyance of land was made from a debtor to his creditor, by a writing absolute in form, but the creditor at the same time executed a memorandum shewing such assignment to be by way of security only. Subsequently the debtor executed another absolute assignment without receiving back any such memorandum. The court refused to act upon parol evidence that the assignor was to be interested in the proceeds of the land over and above his indebtedness to the assignee. *Ib.*

Special Facts.]—Held, that the evidence, which is set out in the case, shewed that the transaction was a sale. *Rose* v. *Hickey*, 3 A. R. 309. Affirmed in the supreme court. *Cassels' Dig.* 534.

Subsequent Release to Legal Holder.]—A man conveyed land absolutely on a parol trust, and the trustee made large advances on account of the grantor and his family. They afterwards settled accounts, and it was agreed that the grantee should retain a portion of the land at a specified price in satisfaction of the balance due to him; mutual releases were executed, and the relation of the parties terminated. After the death of the grantee the grantor's wife and children filed a bill alleging that the land so retained was held in trust for them; but the court, being satisfied that this was not so, dismissed the bill. *Hervey* v. *Boomer*, 17 Gr. 558.

Unsigned Contemporaneous Memorandum — *Subsequent Agreement to Waive Right of Redemption.*]—Upon the question whether a deed, absolute in its terms, was really intended as a security merely, an unsigned memorandum of the transaction, made at the time for the use of the parties by the attorney's clerk who drew the deed for them, was held sufficient to let in parol evidence. Parol evidence does not become admissible in this class of cases, because of a note in writing sufficient to take the case out of the Statute of Frauds, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed in the deed. Where an absolute deed appeared from parol evidence (which, under the circumstances, was admissible) to have been intended as a security only, and the defendant, the devisee and executrix of the grantee, swore that she believed the equity of redemption, if any, was put an end to by a subsequent parol agreement between the parties, casual conversations by the mortgagor with third persons, from which such an agreement was attempted to be inferred, were held insufficient proof of it, though it was said the mortgagor had claimed no interest in the property from the time of the alleged agreement until after the death of the mortgagee, a period of about ten years. *Holmes* v. *Matthews*, 3 Gr. 379.

The decree in the above case was reversed on appeal, and the plaintiff's bill dismissed with costs. *Matthews* v. *Holmes*, 5 Gr. 1; and on appeal to the Privy Council the judgment was affirmed. *Holmes* v. *Matthews*, 5 Gr. 108.

XIV. Witnesses and Evidence at Trial.

1. *Attendance of Witness.*

(*a*) *In General.*

Arbitration.] — Upon a submission to arbitration being made a rule or order of court, a suit is pending within the meaning of C. S. C. c. 79, s. 4, so as to enable the superior courts of law and equity to issue process to compel the attendance, before arbitrators, of witnesses resident out of the jurisdiction of the courts. *Elliott* v. *Queen City Ass. Co.*, 6 P. R. 30.

Attachment for Non-Attendance.]—An attachment for not obeying a subpœna was refused against a witness who resided twenty-five miles from the assize town, and had been subpœnaed only the day before the trial. *Fairclaim d. Thompson* v. *Putman*, M. T. 6 Wm. IV.

When a witness is subpœnaed to attend on a particular day, and not from day to day, he cannot be attached if he were present on that day, but went away afterwards. *Rainville* v. *Powell*, 3 U. C. R. 128.

The court in banc, cannot attach a witness disobeying a subpœna issued at nisi prius by the clerk of assize. *Regina* v. *Kerr*, 3 U. C. R. 247.

Quære, can the court at nisi prius punish a witness for contempt of its authority in disobeying a subpœna. *Ib.*

Where the affidavit of service did not state that the original subpœna had been shewn to the witness:—Held, that attachment would not lie, though the witness attended several days before the trial, and was paid. *Corporation of East Nissouri* v. *Cogswell*, 2 P. R. 385.

A county court Judge being served with a subpœna duces tecum to produce a deed, did not attend; and on motion for an attachment excused his absence on the ground of important private business, urging also that he obtained the deed and became possessed of the information as an attorney; that he had a lien on the deed, and that he was entitled to witness fees as an attorney:—Held, that he was not so entitled, and should have attended; and the rule was made absolute. *Deadman* v. *Ewen*, 27 U. C. R. 176.

Parliamentary Duties.] — The engagements of a witness, who was a senator of the Dominion and a member of the executive council, at his duties at Ottawa, where the senate was in session, was deemed sufficient excuse for not procuring his attendance, and good ground for putting off the hearing. *Rees* v. *Attorney-General*, 2 Ch. Ch. 386.

Persons Present in Court.]—A witness or a party is not obliged to attend and give evidence, or submit to cross-examination, unless he be duly notified or subpœnaed, even if he happen to be present when the proceedings

are going on. Where, therefore, a party to a suit who had made an affidavit was present in the master's office, and the solicitor for the opposite party proposed to cross-examine him on his affidavit, and he refused to answer, a motion ex parte to compel him to attend and be examined was refused. *Robins* v. *Carson*, 2 Ch. Ch. 343.

Postponing Hearing.]—The fact that a defendant in a cause has, since the filing of the bill, temporarily left the jurisdiction of the court, is no ground for postponing the examination of witnesses and the hearing of the cause. *Galbraith* v. *Gurney*, 1 Ch. Ch. 279.

Postponement of Trial.] — Postponement of trial where party unable to attend owing to ill health and swears that he is a material witness in his own behalf. See *Schultz* v. *Wood*, 6 S. C. R.585.

Prisoner — *Habeas Corpus.*] — An order for a writ of habeas corpus ad testificandum granted in a civil action to bring up a defendant and his brother both serving sentences in the penitentiary for felony, they being necessary witnesses. *Spellman* v. *Spellman*, 10 C. L. T. Occ. N. 20.

Travelling Expenses of Party to Action.]—The plaintiff, who was a necessary and material witness in his own behalf, came to Toronto from England to give evidence at the trial:—Held, that he was entitled to his expenses. *Fox* v. *Toronto and Nipissing R. W. Co.*, 7 P. R. 157.

Witness to Award.]—The attesting witness to an award may be compelled to attend and prove the award. *Taylor* v. *Bostwick*, 1 Ch. Ch. 23.

Witnesses not Called—*Postponement.*]—Where defendants, expecting that certain witnesses, whose evidence was material to the defence, would be called by the plaintiff, did not subpœna such witnesses and they were not in court, an adjournment of the hearing was allowed after plaintiff had rested, so that such witnesses might be subpœnaed by the defendants, upon terms that plaintiff have costs of the day, and that the same be paid before the case be proceeded with on adjournment. *The Queen* v. *Black*, 6 Ex. C. R. 236.

Witness Fees.]—Semble, that a returning officer whose conduct has been impeached is not entitled to his expenses as a witness before a committee of the house of assembly. *Blacklock* v. *McMartin*, Tay. 329.

Notice by plaintiff to revise taxation. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vict., and the master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries. *Ham* v. *Lasher*, 24 U. C. R. 357.

All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay. *Ib.*

Plaintiff having attended under defendant's notice without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendant's costs. *Ib.*

A witness appearing upon an order granted by the Judge under s. 10, s.-s. 4, of the Insolvent Act of 1864, is not bound to be sworn until his expenses as paid. *Worthington* v. *Taylor*, 10 L. J. 304.

The insolvent who appears by virtue of the same order, is not entitled to claim his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in s.-s. 1 of s. 10. *Ib.*

A public officer in charge of documents for which he is responsible, and attending as a witness in his public capacity, and in relation to matters connected with his office, will be allowed professional witness fees of $4 a day. *In re Nelson*, 2 Ch. Ch. 252.

See COSTS, IV.

(b) *Notice to Parties to Suit to Attend Trial as Witnesses for the Opposite Party, under 16 Vict. c. 19, s. 2 (C. S. U. C. c. 32, s. 15.)*

Held, no ground for setting aside a verdict for plaintiffs that one of the plaintiffs notified to attend by defendant failed to attend, as he was not called for at the trial—defendant's counsel being also absent. *Pegg* v. *Plank*, 3 C. P. 396.

A defendant notified failed to attend, and a verdict pro confesso was taken against him, the Judge declining to hear evidence in support of the plea:—Quære, whether the evidence should not have been received; and whether the court has power under this statute to review the decision of the Judge at nisi prius. *McGann* v. *Keyes*, 12 U. C. R. 429.

The defendant having failed to attend on notice:—Held, that no attention should be given to his affidavit impeaching the correctness of the verdict. *Manning* v. *Mills*, 12 U. C. R. 515.

A proper sum for his expenses should be tendered to the party with the notice. *Street* v. *Faulkner*, 15 U. C. R. 116.

Parties resident out of the jurisdiction could not be compelled to attend on notice. *Patchin* v. *Davis*, 10 U. C. R. 639; *Tyre* v. *Wilkes*, 18 U. C. R. 46.

A notice to attend served on the 25th October for the 1st November, was too late, not being "at least eight days." *Young* v. *O'Reilly*, 24 U. C. R. 172.

A corporation aggregate was not bound to appear at the trial as witness under a notice served on their attorney under 16 Vict. c. 19, s. 2. *Dunwich School Trustees* v. *McBeath*, 4 C. P. 228.

Held, that under the facts stated in this case, the whole case might have been taken pro confesso for defendant's non-appearance, and a verdict entered for the plaintiff, which the learned Judge had declined to do. *McWhinney* v. *McQuaid*, 5 C. P. 161.

A plaintiff or defendant called as a witness under 16 Vict. c. 19, is not entitled to any other notice or to be subpœnaed differently from any other witness. *Nash* v. *Bush*, 5 C. P. 300.

(c) *Subpœna and Service.*

Costs of Serving.]—Held, that service of subpœnas made by one of the defendants could not be allowed on taxation, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion. *Ham* v. *Lasher*, 24 U. C. R. 357.

Criminal Information.] — It is not necessary that there should be fifteen days between the teste and return of a subpœna on a criminal information, where the venue is laid in the home district. *Regina* v. *Crooks*, E. T. 3 Vict.

Forms.]—B. having been served at Niagara with a subpœna tested 22nd May, issued by the clerk of assize, to attend on the 6th of the same month, at the assizes then sitting in Toronto:—Held, 1. That the subpœna was invalid on its face; and, 2. that a subpœna issued by the court of nisi prius, which is of local jurisdiction, is not binding out of the county where such court is then sitting. *Grantham* v. *Bishop*, 1 C. P. 237.

A subpœna should be under the seal of the court, and if under that of a deputy registrar, the witness is not bound to obey it. *Waddell* v. *McGinty*, 2 Ch. Ch. 445.

Lower Canada Subpœna.]—Where the subpœna issued, under C. S. C. c. 79, out of the superior court of Lower Canada, had not the statement or notice required by s. 7:—Held, that the witness could not be punished, under s. 8, for non-attendance. Held, also, that in this case, on the facts set out in the report, it sufficiently appeared that the witness was a resident of Toronto. Semble, also, that payment of conduct money to the witness was sufficiently shewn, the money appearing to have been paid with a previous subpœna also disobeyed. *Re Darling*, 39 U. C. R. 339.

Subpœna out of the Jurisdiction.]—Quære, whether s. 4 of C. S. C. c. 79, authorizing the issue of a subpœna to Lower Canada, applies to a party to the suit. Semble, not, as C. S. U. C. c. 32, s. 16, apparently contemplates a commission in such case. *Young* v. *O'Reilly*, 24 U. C. R. 172.

Held, that looking at the object of the Act and the propriety of its application to the examination of parties, the term "witness" in s. 4 should be used in its widest sense, and should include parties to the cause as well as witnesses in the ordinary sense of the word. *Moffatt* v. *Prentice*, 9 C. L. J. 159.

The plaintiff in a bill of discovery was out of the jurisdiction, and defendant having answered had obtained the usual order for payment of his costs, but in consequence of the plaintiff's neglect to comply with it the defendant was obliged to take out a subpœna, and apply to the court for leave to serve the plaintiff out of the jurisdiction; the court gave defendant such leave, and directed the plaintiff to pay the costs of the motion. *Peel* v. *Kingsmill*, 2 Gr. 272.

Where, between the time of obtaining an order for service out of the jurisdiction and the service, the name of a town (before the mayor of which the affidavit of service was directed to be made) had been changed, a certificate of the town clerk sealed with the corporate seal of the town, under its new name, was received as proof of the fact of such change having taken place. *Rolph* v. *Cahoon*, 2 Gr. 623.

The court has authority to grant an order for a subpœna to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause. *McKerchie* v. *Montgomery*, 1 Ch. Ch. 225.

A defendant asking for an order for a subpœna to examine a plaintiff resident in Lower Canada, need not shew that there is no cause of action for the same matter pending in Lower Canada. *Daly* v. *Robinson*, 1 Ch. Ch. 271.

Before a subpœna will be issued to the Province of Quebec, it is necessary to shew that no suit is pending in that Province for the same cause of action. *McPherson* v. *McPherson*, 3 Ch. Ch. 58.

Substitutional Service of Subpœna.]—A plaintiff desirous of obtaining the evidence of a defendant who resided out of the jurisdiction, and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpœna on the solicitor, and that if default was made in attending, the bill might be taken pro confesso. The application was refused with costs. *Sefton* v. *Lundy*, 4 Ch. Ch. 33.

Time of Issuing.]—A subpœna should not be dated prior to the time at which the party taking out such subpœna is entitled to examine the party or witness served. *McMurray* v. *Grand Trunk R. W. Co.*, 3 Ch. Ch. 130.

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2. *Examination of Witness.*

(a) *In General.*

Breach of Promise—*Character.*]—In assumpsit for breach of promise of marriage, the defendant is entitled to cross-examine the plaintiff's own witness respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 493.

Cross-examination by Two Counsel.]—The defendants appeared by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of one of the plaintiff's witnesses, both counsel claimed the right to cross-examine the witness:—Held, that only one counsel could cross-examine the witness. *Walker* v. *McMillan*, 6 S. C. R. 241.

Cross-examination on Whole Case.]—The master is bound equally with the court to allow a witness to be cross-examined on the whole case without regard to his examination in chief. But in some cases, the master may exercise a discretion as to who should pay the fees of the examination. *Crandall* v. *Moon*, 6 L. J. 143

Opposite Party.]—Where after close of the plaintiff's case he is allowed to examine the defendant, this does not re-open the matter, so as to entitle him to call other witnesses. *Wilkes* v. *Heaton*, 17 U. C. R. 95.

Held, that where a party to the suit is called by the opposite party, he is not thereby made a witness for all purposes, but can be cross-examined by his own counsel, or the counsel of his co-plaintiff or defendant, only as to those matters upon which he has been examined by the party calling him. *Lamb* v. *Ward*, 18 U. C. R. 304; followed in *Mutual Fire Ins. Co. of Prescott* v. *Palmer*, 20 U.C. R. 441; but dissented from in *Dickson* v. *Pinch*, 11 C. P. 146, where the court of common pleas decided that a party so called was made a general witness, and his incapacity by reason of interest wholly removed.

Held, that where a plaintiff examines a defendant, whose interest in the suit is such that a decree for the plaintiff must necessarily operate for the benefit of such defendant, such examination does not disentitle the plaintiff to relief against the other defendants. *McLellan* v. *Maitland*, 1 Gr. 268.

A party calling the opposite party as a witness, makes him his witness to all intents and purposes. *Dunbar* v. *Meek*, 32 C. P. 195.

Previous Examination.]—The plaintiff has a right to examine the defendant at the examination and hearing of the cause, although the plaintiff may have already cross-examined him on his answer, and on an affidavit which he has made in the cause. *Thompson*, v. *Hind*, 1 Ch. Ch. 247.

Quebec Law—*Aveu Judicaire—Dividing Answers.*]—See *Fulton* v. *McNamee*, 2 S. C. R. 470.

Refreshing Memory—*Memorandum.*] —A witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind. *Fraser* v. *Fraser*, 14 C. P. 70.

In a libel action it was held that evidence of what took place at a meeting was admissible as proof that the plaintiff was the person intended by a resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place. *Taylor* v. *Massey*, 20 O. R. 429.

(b) *Contradicting.*

Collateral Issue.]—In trespass against the sheriff for taking goods, the plaintiff called the bailiff who made the seizure and sale. He swore that the plaintiff, after giving notice of his claim to the goods, withdrew it, and that the sale went on. The plaintiff offered to disprove the withdrawal:—Held, that such evidence was admissible under C. L. P. Act, s. 214, as relevant to the issue, though contradicting the plaintiff's own witness. *Robinson* v. *Reynolds*, 23 U. C. R. 560.

Action on a fire policy. Plaintiff was called as a witness, and said: "I did not tell E., defendants' agent, I had not been burned out before. I was not asked by him." E. was called and it was proposed to ask him questions to contradict the plaintiff on this point:—Held, that such evidence was properly rejected, as raising a collateral issue. *McCulloch* v. *Gore District Mutual Fire Insurance Co.*, 32 U. C. R. 619; 34 U. C. R. 384.

A person having a paper title to land of which he was not the actual owner, created a mortgage thereon, to a person not a party to a suit, by the party beneficially interested, to get rid of another mortgage created by him on the estate, was asked if he had given notice of the claim of the real owner, when creating the first mortgage, which he asserted he had given, and also denied having made such mortgage:—Held, not a collateral issue, and that evidence was admissible to contradict him. *Gray* v. *Coucher*, 15 Gr. 419.

A question cannot be put to a witness on cross-examination, for the mere purpose of contradicting, unless such question be relevant to the issue; and if such question be put, the answer is conclusive. *Gilbert* v. *Gooderham*, 6 P. R. 39.

Disproving Witness's Opinion as to Signature.]—Plaintiff sued as indorsee of a note. A witness for defence said he thought the signature of the indorser not genuine. On cross-examination he was asked whether two signatures on a paper shewn to him were the indorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case:—Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been so left to the jury. *Royal Canadian Bank* v. *Brown*, 27 U. C. R. 41.

Inconsistent Admissions of Witness.] —Where the plaintiff, in trespass for cutting and carrying away timber, issue being joined on a revocation of license, called the agent of defendant to prove that he had revoked the license to him, and the witness denied such revocation:—Held, that the plaintiff might call other witnesses to prove that they had heard this witness admit that the license had been revoked to him, and that the witnesses knew that he had still gone on and cut the timber after he had made the admission. *McNab* v. *Stinson*, 6 O. S. 445.

Leave of Judge.] — Where a witness (whether party to the action or not) is called to prove a case, and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit the former, but to contradict him on facts material to the issue; and the right to contradict by such other evidence exists without leave of the Judge at the trial. *Stanley Piano Company of Toronto* v. *Thomson*, 32 O. R. 341.

Opposite Party.]—When a party to a suit calls the opposite party, he is not necessarily concluded by his answers. *Mair* v. *Cully*, 10 U. C. R. 321.

Previous Inconsistent Deposition.]—Defendants called the plaintiff, and after asking him some questions, produced a deposition made by him before a magistrate, which was

at variance with his answers. He admitted the contradiction, but said his present evidence was correct, and gave as an explanation that he was much confused at the time, being without papers which he wished to refer to, and that all he said was not in the deposition:—Held, that this explanation was a collateral matter, and defendants therefore could not call the magistrate to disprove it. *Beemer* v. *Kerr*, 23 U. C. R. 557.

(c) *Refusal to Answer.*

Contents of Deeds.]—A defendant, tenant in dower, is not compellable to give evidence of the contents of the title deeds, &c., under which he claims. *Lynch* v. *O'Hara*, 6 C. P. 259.

An attorney is not obliged to answer as to contents of deeds, &c., placed in his hands by defendant for the purposes of his defence. *Ib.*

Creditor's Dealings with Insolvents.]—A person summoned as a witness in insolvency proceedings, cannot refuse to give evidence respecting his own dealings with the insolvents by alleging that he is a creditor. *Re Hamilton and Davis*, 1 C. L. J. 52.

Discretion of Judge.]—It is in the discretion of a Judge at nisi prius to refrain from committing a witness for contempt in not answering, if it be sought by the questions put to elicit an admission of facts importing scandal upon himself; and especially so if the witness be intoxicated and not able to give evidence at all. *Doe d. Marr* v. *Marr*, 3 C. P. 36.

Effect.]—Quære, whether the refusal to answer the direct question as to authorship, or the claim of privilege against criminal proceedings, affords any evidence thereof, by way of admission or estoppel or otherwise. *Harkins* v. *Doney*, 17 O. R. 22.

Tendency to Criminate.]—In a proceeding charging that the mother, in concert with the other two defendants, had abducted and kept in concealment the children of the plaintiff, the two defendants refused to answer certain questions put to them respecting the children on the ground that their answers would tend to render them liable to criminal prosecution under the "Act respecting offences against the person," 32 & 33 Vict. c. 20:—Held, that, under these circumstances, the defendants were not bound to answer. *Keith* v. *Lynch*, 19 Gr. 497.

Plaintiff (respondent), a teller in a bank in New York, absconded with funds of the bank, and came to St. John, N. B., where he was arrested by defendant (appellant), a detective residing in Halifax, N. S., and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram, and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank and that her husband was in custody. In an action for assault and false imprisonment, and for money had and received, the defendant pleaded inter alia, that the money had been fraudulently stolen by the plaintiff at the city of New York, from the bank, and was not the money of the plaintiff; that defendant, as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the question proposed. The learned Judge then told the jury that there was no identification of the money, and directed them that, if they should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff:—Held, that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him. *Power* v. *Ellis*, 6 S. C. R. 1.

Refusing to answer questions in an action of libel tending to criminate. See *Hall* v. *Gowanlock*, 12 P. R. 604.

Too Late to Take Objection before the Divisional Court.]—See *Millar* v. *McTaggart*, 20 O. R. 617.

See, also, sub-title VII., 2.

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3. *Opening and Enlarging Publication and Admitting Further Evidence.*

Admitting Further Evidence.]—The court will not refuse to admit evidence recently discovered even after a cause has been set down for hearing on a petition of review. Where a cause is against the representatives of a deceased trustee, who had been defendant, the court in its discretion will exercise a greater degree of indulgence in the reception of new evidence than if the original defendant himself, who should have known all the circumstances, was alive. *Small* v. *Eccles*, 2 Ch. Ch. 97.

An application to take evidence after hearing, should be by petition and in court, and an application made in chambers was dismissed with costs. *Nicholls* v. *Moore*, 2 Ch. Ch. 474.

Application to let in evidence after the hearing of a cause, refused under the circumstances. *Carradice* v. *Currie*, 19 Gr. 108.

Where a reference back to the master to review his report is directed, the master is at liberty to receive further evidence. *Morley* v. *Matthews*, 3 C. L. J. 21.

Where the court on a reference back to the master, does not mean that he shall take further evidence, the order contains a direction to that effect; unless the reference back is expressed to be for a purpose on which further evidence could not be material. *Ib.*

The particulars stated that are necessary to be shewn in support of a petition to be allowed after the hearing of a cause to put in newly discovered evidence. *Mason* v. *Seney*, 12 Gr. 143.

Where after the evidence at the hearing of a cause was closed on both sides, the court ordered the cause to stand over to add a party,

further evidence between the original parties was held to be inadmissible at the adjourned hearing. *Attorney-General* v. *Toronto Street R. W. Co.*, 15 Gr. 187.

An application to open up a judgment on the ground of newly discovered material evidence is provided for by rule 782, and is properly made in court to the Judge who tried the action, and is a proceeding in the cause. *Armour* v. *Merchants Bank of Canada*, 17 P. R. 108.

Enlarging Publication.] — Quære, whether upon an application by the plaintiff for a stay of proceedings, to which the court considered him not entitled, an enlargement of publication can be ordered when an order in that form would partially accomplish what the plaintiff desired by his motion. *Howcutt* v. *Rees*, 2 Gr. 437.

Quære, whether the court would enlarge publication so as to enable a plaintiff to be present at the viva voce examination of the defendant, where such examination had been postponed by an accident, of which the defendant or his solicitor was the unintentional cause, till after the plaintiff's departure from the Province on pressing business, and the plaintiff swore that it was necessary for his interests that he should be present. *Ib.*

Opening Publication.]—Where on the examination of a witness, on the 24th of January, a person's name was mentioned as having been resident on a lot, and on the 28th March, after publication had passed, the cause set down for hearing, and a subpœna to hear judgment served, the defendant moved for leave to open publication and examine as a witness the person whose name had been mentioned, and who, he had sworn, could give material evidence, the motion was refused with costs. *Waters* v. *Shade*, 2 Gr. 218.

The principles laid down by the court in Waters v. Shade, 2 Gr. 218, in respect of opening publication, apply as well to suits for alimony as other cases. *McKay* v. *McKay*, 6 Gr. 279.

Where a defendant had applied to open publication, and an order had been made for that purpose on payment of costs, it was subsequently discovered that the plaintiff had proceeded to set the cause down for hearing, without taking out the rules to produce and pass publication; the defendant thereupon moved to strike the cause out of the paper of causes for hearing; the motion was refused with costs. *Hamilton* v. *Street*, 3 Gr. 122.

Where publication had passed shortly before a motion to open was made by the plaintiff, and it appeared on the motion that the defendant had examined witnesses, but the plaintiff had not examined any; and the plaintiff and others swore that his evidence was material, and that the delay had arisen from the poverty of the plaintiff, publication was opened on payment of costs. *Taylor* v. *Shoff*, 3 Gr. 153.

Where it was considered conducive to the ends of justice, publication was opened, and leave given to examine further witnesses, and to issue a foreign commission, on payment of costs, and upon the terms of examining the witnesses in Canada at the next examination term; and the witnesses residing out of Canada, at the same term, or by foreign commission in the meantime; if the latter, the commission to be returned, and depositions disclosed two weeks before the examination term; it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before. *Blain* v. *Terryberry*, 1 Ch. Ch. 104.

The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants. *Mallock* v. *Pinhey*, 1 Ch. Ch. 105.

An order made on motion to dismiss, giving leave to go to examination, has the effect of opening publication. *Weir* v. *Weir*, 1 Ch. Ch. 194.

In a creditor's suit a witness had been examined in the master's office, touching the claim of an alleged creditor, with a view to the claim being disallowed. After his examination had been concluded, plaintiff stated on affidavit that since the examination he had learned that the witness could have deposed to the fact of the alleged creditor having admitted that his claim had been settled, and moved to be allowed to re-examine the witness on this point. The motion was refused with costs. *Patterson* v. *Scott*, 1 Gr. 582.

Where the master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law; the court sustained his ruling. *Waddell* v. *Smyth*, 3 Ch. Ch. 412.

After judgment had been given in a cause, an application was made to open publication, on the ground that since the decree had been pronounced it was discovered that a material witness in the cause was beneficially interested in setting aside a will which it was the object of the suit to have declared void, and had entered into an agreement to indemnify the plaintiffs from the costs; but as the result would have been the same had that witness's testimony been out of the case, the court refused the motion; but offered the defendant, who applied, liberty to give evidence to establish the fact of interest in the witness, in order that in the event of the cause going to appeal, his evidence should not appear there as the evidence of an unbiassed witness. *Waterhouse* v. *Lee*, 10 Gr. 176.

It is incumbent on the court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance, should be imposed upon parties. Where, therefore, a defendant did not appear at the hearing of the cause, and a decree was pronounced in favour of the plaintiff, and three months afterwards defendant applied to open publication, so as to let in proof of a document of the existence of which he was aware, and a copy of which he had in his possession, the court refused the application with costs. *Colonial Trusts* v. *Cameron*, 21 Gr. 70, 76.

Upon the discovery of material evidence publication may be opened even after judgment affirmed by two courts above. The Judge

here considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition, with costs. *Synod* v. *DeBlaquiere*, 10 P. R. 11.

Passing Publication.]—When a cause is set down for the examination of witnesses, publication passes at the end of the ensuing examination term, although issue may have been joined less than three weeks before the commencement of that term. *Wallace* v. *McKay*, 1 Ch. Ch. 67.

Rehearing.]—A party is entitled to have an order upon præcipe, to prove vivâ voce at the re-hearing of a cause depositions which had not been used at the original hearing. *Cotton* v. *Corby*, 1 Ch. Ch. 10.

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4. *Practice and Procedure at the Trial as to Evidence.*

Admission at Former Trial.]—Admission of a copy in lieu of original holds good at second trial. *McDonald* v. *Murray*, 5 O. R. 559.

Affirmative Testimony — *Interested Witnesses—Common Rumour.*]—In the estimation of the value of the evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses. Evidence of common rumour is unsatisfactory and should not generally be admitted. *Lefleunteum* v. *Beaudoin*, 28 S. C. R. 89.

Arbitration and Award — *Swearing Witnesses before Arbitrators—Right to Cross-examine.*]—Semble, where an arbitrator or assessor to whom a claim is referred by the Crown for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses and giving each party an opportunity to cross-examine them. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Arbitration and Award—*View of Premises.*]—*See In re Christie and Toronto Junction*, 22 A. R. 21, and *Re Macpherson and City of Toronto*, 26 O. R. 558.

Co-defendant.]—At the hearing of the cause evidence is not admissible by one defendant against another. *Attorney-General* v. *Toronto Street R. W. Co.*, 15 Gr. 187.

Collateral Issues.]—When collateral issues arise out of comparison of handwriting, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it. *Royal Canadian Bank* v. *Brown*, 27 U. C. R. 41.

Plaintiff sued as indorsee of a note. A witness for defence said he thought the signature of the indorser not genuine. On cross-examination he was asked whether two signatures on a paper shewn to him were the indorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case:—Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been left to the jury. *Ib.*

Contradicting Answer.] — Where a party who had given a mortgage to secure a debt for which he had made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, afterwards filed a bill to foreclose the latter and redeem the first mortgage; and the principal, at the hearing, objected to the bill, on the ground that it was multifarious:—Held, that evidence taken by the plaintiff to contradict statements made in the answer, was admissible though not put in issue by the bill. *Schram* v. *Armstrong*, 1 O. S. 327.

Contradicting Hypothetical Evidence.]—A medical man called by the defendant stated, from the evidence given by the defendant and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery:—Held, inadmissible. *VanMere* v. *Farewell*, 12 O. R. 285.

Denial in Answer.]—The rule that a distinct denial in an answer of statements made in the bill, must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, considered and acted upon. *Boulton* v. *Robinson*, 4 Gr. 109.

Held, in this case, that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Moberly* v. *Brooks*, 27 Gr. 270.

Depositions.]—Held, that under s. 23 of 32 Vict. c. 32, it is irregular for the Judge who tries the case to call a jury or to receive depositions of witnesses as evidence; but this is not ground for prohibition. *In re Brown and Wallace*, 8 C. L. J. 81.

Depositions.]—Where it is desired to use depositions at a trial, the order that should be made is that the depositions be transferred to the clerk of assize or local registrar, the trial Judge being left free to decide as to their admissibility. Judgment below, 22 O. R. 693, affirmed. *Erdman* v. *Town of Walkerton*, 20 A. R. 444.

Depositions of Officer of Company.]—Before delivery of his statement of defence one of the defendants obtained an order to examine an officer of the plaintiffs for discovery, and examined him thereunder, but he was not further examined by counsel for the plaintiffs:—Held, that such defendant could, under Con. rule 506, read the depositions so taken, as evidence at the trial of the action. *Union Bank* v. *Starrs*, 13 P. R. 108.

And see the cases as to examination of officers of corporations, *ante*, VII. 2 (*e*).

Drawing Inferences.]—See *Demorest* v. *Miller*, 42 U. C. R. 56.

Evidence Improperly Admitted.]—If in a case tried without a jury evidence has been improperly admitted a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it. *Merritt* v. *Hepenstal*, 25 S. C. R. 150.

Evidence under General Issue.] — When a defence is specially pleaded, the court will not, with the consent of the parties, admit evidence of such defence under the general issue. *Longworth* v. *McKay*, 6 O. S. 149.

Excluding Evidence.]—Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the court. *Vannatto* v. *Mitchell*, 13 Gr. 665.

Identity.]—A question of identity was held to have been wrongly submitted to the jury, when not disputed on the pleadings and evidence. *Weinaugh* v. *Provincial Ins. Co.*, 20 C. P. 405.

Indecent Assault—*Evidence of Reputation—Evidence of Specific Acts of Impropriety.*]—In an action for damages for indecent assault evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not. *Gross* v. *Brodrecht*, 24 A. R. 687.

Judge's Discretion as to Order of Evidence.]—In an action upon a building contract the plaintiff tendered evidence to shew that the architect had acted maliciously in the rejection of materials, but the trial Judge required proof to be first adduced tending to shew that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved and if necessary, what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants:—Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling of evidence within the discretion of the trial Judge. *Neelon* v. *City of Toronto*, 25 S. C. R. 579.

Semble, that the precise time at which, upon a trial, particular evidence may be introduced, is for the Judge exclusively to determine. *Robinson* v. *Rapelje*, 4 U. C. R. 289.

Materiality.]—Where the materiality of certain inquiries is obvious, and is assumed at the trial, as e.g., in the present case with regard to the temperate habits or otherwise of the deceased, there is no need to submit it to the jury. *Russell* v. *Canada Life Assurance Co.*, 32 C. P. 256.

Motion for Decree.]—On a motion for decree, the plaintiff was assumed, for the purpose of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term. *Wilson* v. *Cossey*, 14 Gr. 80.

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

In an action to recover damages for alleged malpractice the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition. Sornberger v. Canadian Pacific R. W. Co., 24 A. R. 263, approved and distinguished. *Laughlin* v. *Harvey*, 24 A. R. 438.

New Trial.]—Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence, is less strict than it was before the parties were admissible as witnesses. *Canadian Bank of Commerce* v. *McMillan*, 31 U. C. R. 596.

See TRIAL.

Objecting to Evidence.]—An objection to evidence for insufficiency must be taken at the hearing, and cannot be taken on a motion to vary the minutes. *McDonald* v. *Garrett*, 8 Gr. 290.

Omission of Evidence.]—In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it or read the article containing the alleged libel. Defendant's counsel opened his case, and said he would call no witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned Judge allowed, reserving leave to the defendant to move to enter a nonsuit, if, according to strict practice, the plaintiff was not entitled to read the paper:—Held, that the evidence offered was not admissible, except in the discretion of the Judge trying the cause, and a nonsuit was therefore ordered. *Cross* v. *Richardson*, 13 C. P. 433.

Option of an Issue.]—Where the evidence was not sufficiently clear to entitle the plaintiff to a decree, though it was such as rendered his equity probable, the court gave him the option of an issue, or to have his bill dismissed without costs. *Carfrae* v. *Vanbuskirk*, 1 Gr. 539.

Ordering Attorney out of Court.]—The attorney for the respondent may be ordered out of court when a witness is being examined on a charge of a corrupt bargain for his withdrawal from the election contest, when the evidence of such witness may refer to the sayings and doings of such attorney in respect of such withdrawal. *South Oxford Election (Ont.)*, *Hopkins* v. *Oliver*, H. E. C. 243.

Ordering Witness out of Court.]—Where in an action for goods sold and delivered, plaintiff made out a primâ facie case through his clerk, who proved a delivery of the goods; and the promise to pay on request implied therefrom was repelled by defendant,

who stated a special contract varying from that implied:—Held, that the plaintiff was admissible as a witness to reply to the new case set up by defendant, and semble, he could not be excluded as a witness by reason of his presence in court during the examination of his clerk. *McFarlane* v. *Martin*, 3 C. P. 64.

Notice had been given on a previous day of the assizes, that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses; the Judge rejected the evidence of a defendant for disobedience of such notice:—Held, that he had authority to do so. *Winter* v. *Mixer*, 10 U. C. R. 110. But it was held otherwise in *Strachan* v. *Jones*, 3 C. P. 253, and in *Macfarlane* v. *Martin*, 3 C. P. 64.

At the beginning of a trial all witnesses were ordered out of court, except the parties to the action. Judgment having been given dismissing the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in court and heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground:—Held, that the evidence of P. was improperly rejected, and a new trial was ordered. *Mahoney* v. *Macdonell*, 9 O. R. 137.

At the trial of an action the witnesses were ordered out of court. Before the case was closed the defendant's counsel tendered a witness who had remained in court, but the presiding Judge refused to allow him to be examined:—Held, that there must be a new trial. The practice is to receive such evidence, but with great care. *Black* v. *Bosse*, 12 O. R. 522.

Plaintiff—*Failure to Proceed.*]—Where plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day; his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into evidence unless by leave of the court. *Wallace* v. *McKay*, 1 Ch. Ch. 67.

A cause was set down for examination of witnesses, and when called the plaintiff was not prepared to proceed:—Held, overruling the last case that the defendant was entitled to have the case struck out of the paper with costs of the day. *Cobourg and Peterborough R. W. Co.* v. *Covert*, 7 Gr. 411.

Previous Inconsistent Evidence.]—The plaintiff claimed as belonging to him a mortgage, which was in defendant's name, and had been given for the purchase money of the mortgaged land. The plaintiff had been in the insolvent court at one time after the transaction, and had sworn that he had parted with his interest in the property to the defendant in satisfaction of a debt:—Held, that though there was some (not satisfactory) evidence in favour of the plaintiff's present claim, it was not sufficient against this sworn statement of his own. *Ross* v. *Ross*, 16 Gr. 647.

Previous Judgment.]—In an action for false imprisonment:—Held, that the counsel for the plaintiff had the right to read at the trial from the original judgment of the court, given on discharging the plaintiff from the arrest and setting aside the ca sa., to shew the grounds upon which the judgment proceeded. *Robertson* v. *Meyers*, 7 U. C. R. 423.

Prima Facie Case in Ejectment.]—The lessor of the plaintiff supported his title by a deed, in consideration of love and affection. Defendant proved a subsequent deed from the same party for a valuable consideration, and impeached the first deed as voluntary. The plaintiff then offered to prove a real consideration for the first deed beyond what was expressed in it. This evidence was rejected as going into a new case; but, Held, that it might have been received, the principle that the plaintiff should go into his whole case at once not admitting of such a strict application in ejectment. *Doe d. Lawrence* v. *Stalker*, 5 U. C. R. 346.

Rebuttal.]—It does not necessarily follow, that because the plaintiff's witness when recalled to rebut the defendant's evidence, makes statements which in fact amount to a new case for the plaintiff, the Judge must therefore refuse to allow such statements to go to the jury. *Devlin* v. *Crocker*, 7 U. C. R. 398.

Repeal of Patent.]—Under the general order of the exchequer court of Canada bearing date the 5th December, 1892, and the provisions of s. 41 of 15 & 16 Vict. c. 83 (Imp.), the defendant in an action of scire facias to repeal a patent of invention is entitled to begin and give evidence in support of his patent, and, if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply. *The Queen* v. *Laforce*, 4 Ex. C. R. 14.

Reply after Prima Facie Case.]—Where a party upon whom the onus of proof lies produces a receipt before the master, or other proof of a nature generally conclusive, and closes his evidence, and the other side produces testimony tending to shake this evidence, further evidence in support should be allowed to be produced, though in strictness it may be such as might have been produced in the first instance. *Moody* v. *McCann*, 1 Ch. Ch. 88.

Reply after Re-examination.]—The Judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of the plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that such re-examination did not deprive the plaintiff of his right to call witnesses in reply to the defendant's evidence of fraud; at all events this was a matter for the Judge at the trial, and the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald* v. *Murray*, 5 O. R. 559.

Reply—*New Case.*]—Semble, that the Judge at the trial should have prevented the plaintiff setting up a case in reply, which he did not set up at first as his case. *Orser* v. *Vernon*, 14 C. P. 573.

Report of Case in Foreign Court.]—After judgment at the trial, but before the argument in banc, the defendants put in the report of a case bearing upon the question, decided in the supreme court of the United States, verified by affidavit:—Held, admissible. *Rice* v. *Gunn*, 4 O. R. 579.

Shorthand Notes—*Election Trial.*]—Evidence taken by a shorthand writer, not an official stenographer of the court, but who had been sworn and appointed by the Judge, need not be read over to the witnesses when extended. *Pontiac Election Case*, 20 S. C. R. 626.

Trade Custom—*Bill of Lading.*]—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests require them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. *Parsons* v. *Hart*, 30 S. C. R. 473.

Variance in Line of Proof.]—In an action for insurance upon a vessel under the usual interim receipt, the plaintiff, at the trial, claimed as owner under a sale of an equity of redemption under execution, which the Judge held to pass no interest; and he was then allowed to prove his interest as mortgagee. Upon a motion for nonsuit upon that ground:—Held, that it was a matter in the discretion of the Judge at nisi prius, to permit such a variance in line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd* v. *Equitable Fire Insurance Co.*, 8 C. P. 415.

Vouching Account.]—The person bringing into the master's office an account, verified by affidavit, is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined. Where no such notice was given, and the executor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the master properly considered that the affidavit verifying the accounts under rule 63 and the vouchers had sufficiently proved the accounts. Wormsley v. Sturt, 22 Beav. 398; Re Lord, L. R. 2 Eq. 695; McArthur v. Dudgeon, L. R. 15 Eq. 102; Meacham v. Cooper, L. R. 16 Eq. 102; Bates v. Eley, 1 Ch. D. 473, followed. Upon an application to reopen an account of $55,129.54, comprised in upwards of 1,600 items of disbursements, one or two items were pointed out as appearing primâ facie to be of such a character as might have been objected to:—Held, not sufficient to justify opening up the whole account, especially in view of other facts appearing. *Re Curry, Curry* v. *Curry*, 17 P. R. 379.

Withdrawing Evidence.]—In ejectment upon a sheriff's deed, the plaintiff produced the original judgment, but upon its being objected that it was not stamped, he withdrew it by leave of the court, and rested his case upon the fi. fa. lands:—Held, that the judgment having been withdrawn as evidence by leave of the court, must be considered as if it had never been offered. Semble, the defendant's proper course, if he desired to shew the invalidity of the judgment, and the execution issued under it, was to have given it in evidence himself. *Ralston* v. *Hughson*, 17 C. P. 364.

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5. *Production and Proof of Documents at the Trial.*

(a) *In General.*

Admitting Possession of Paper.]—Quære, has the plaintiff a right to call on defendant's attorney in court, in an action for malicious arrest, to say whether he has or has not the writ in his possession. *James* v. *Mills*, 4 U. C. R. 366.

Agreement Fixing Price.]—In assumpsit for work and labour, where there is a written agreement fixing the price, such agreement must be produced on the trial of the case, unless it has been rescinded. *Wallen* v. *Mapes*, 5 O. S. 96.

Agreement in Plaintiff's Possession.]—In assumpsit for not delivering goods after the plaintiff had proved a verbal agreement, defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce:—Held, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their affidavit of debt; and that as the writing was the best evidence, it should have been produced. *Gilbert* v. *Sleeper*, 3 O. S. 135.

Assignment of Squatter's Right.]—An assignment of a squatter's right in the Crown lands office is not "an original record" or "original memorial" requiring a Judge's order to the commissioner of Crown lands to produce it. *McGuire* v. *Sneath*, 2 L. J. 184.

Attorney—*Duces Tecum—Failure to Attend.*]—A county court Judge being served with a subpœna duces tecum to produce a deed, did not attend, and, on motion for an attachment, excused his absence on the ground, amongst others, that he obtained the deed and became possessed of the information as an attorney:—Held, that he should have attended; and the rule was made absolute, but the writ of attachment was directed not to issue for a month, and then only in case he should not have paid the costs of the application. *Deadman* v. *Ewen*, 27 U. C. R. 176.

Bailment—*Subsequent Agreement.*]—In January, 1872, the plaintiff, a musical instrument maker, at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff and the plaintiff brought trover. Semble, that the plaintiff was not bound to produce the contract, for his title

to the piano, which he had not acquired by the contract, was alone in issue; and, moreover, the plaintiff's original bailment to J. being by verbal bargain, it was for defendant to shew that a different disposition was afterwards made. *Williams* v. *Grey*, 23 C. P. 561.

Bank Books—*Disclosure of Bank Accounts.*]—The local manager of a branch in this Province of a chartered bank, when served with a subpœna duces tecum to attend as a witness before the court, or a master upon a reference in an action, is bound, whether the bank is a party or not, to produce the bank books specified in the subpœna, which are in his custody or control, containing any entry relevant to the matters in question in the action, and to give evidence as to such entries; and inconvenience to the bank is no ground for refusing to produce the books, which primâ facie are to be deemed in his custody and control and their production within the scope of his authority. Re Dwight and Macklam, 15 O. R. 148, approved and followed. Evidence as to a customer's account is not privileged at common law, and s. 46 of the Bank Act is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts save by a director. Discussion of the English Bankers' Books Evidence Act, 1879. *Hannum* v. *McRae*, 17 P. R. 567, 18 P. R. 185.

Counsel's Statement.]—Where in ejectment the plaintiff's counsel in opening stated it as a question of legitimacy and that the defendant claimed under a will, and the defence did not produce the will, as if the statement had rendered it unnecessary:—Held, that it ought to have been produced. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

Defence of Fraud in Action on Note.]—Where to an action on a note against the makers, defendants pleaded fraud:—Held, that the note must be proved, and that, as defendants had given no notice to produce, and it was not shewn that the plaintiffs or their attorney had the note in court, the defence could not be gone into. *Bank of Montreal* v. *Snyder*, 18 U. C. R. 492.

Documents in Custody of Court.]—See *Chadwick* v. *Thompson*, 2 Ch. Ch. 389; *Jay* v. *Macdonell*, 2 Ch. Ch. 71; *Gainer* v. *Doyle*, 2 Ch. Ch. 279; *Cottle* v. *Cummings*, 2 Gr. 580.

Document Relating to Public Service.]—In an action for libel and slander the plaintiff's counsel insisted on the production of a certain anonymous letter written by the defendant to the Ontario Government relating to the licensing of the plaintiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service, and it was therefore privileged. The Judge ordered the letter to be produced, but stated that if the court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The Judge told the jury that the letter was not evidence of libel as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff:—Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled. Under the circumstances a new trial without costs was granted. *Bradley* v. *McIntosh*, 5 O. R. 227.

Effect of Admission of Execution.]—Where a bond is pleaded with a profert, the admission of its execution, under a Judge's summons for that purpose, does not dispense with the necessity for its production at the trial, but only with the necessity of proof of execution. *Lesslie* v. *Leahy*, 5 O. S. 482.

Ejectment—*Will.*]—In ejectment, the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shewn to be in defendant's possession, who declined to produce it on notice:—Held, that defendant was not compellable to produce the will. *Hayball* v. *Shephard*, 25 U. C. R. 536.

Exhibits.]—When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit. *Killaly* v. *Graham*, 2 Gr. 281.

Exhibits.]—The copy of affidavit marked as an exhibit to the affidavit of the Toronto agent was not filed as an exhibit, and was subsequently produced to the court as an original affidavit, a new jurat having been added:—Held, that the exhibit, even though it was not actually in the hands of the officer of the court, was part of the record of the case, and should not have been so dealt with. *Gilbert* v. *Stiles*, 13 P. R. 121.

Existence of Document not Shewn.]—One of the plaintiff's witnesses proved that defendant took possession of the land under an oral agreement with the plaintiff to purchase it from him; and on cross-examination, he swore that several days afterwards he heard the plaintiff say that there was some writing between him and the defendant:—Held, not sufficient evidence of a written agreement to render its production by the plaintiff necessary. *Taggart* v. *Ross*, 13 U. C. R. 611.

Material on Appeal.]—A document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal. *Lionais* v. *Molsons Bank*, 10 S. C. R. 526.

Order for Subpœna to Registrar.]—An ex parte order under rule 31 T. T., 1856, will be granted in the first instance, for a subpœna to the registrar of a surrogate court for the production of an original will, upon affidavit that said will is necessary to establish the case of a party applying, and that no notice has been given of his intention to use the probate or letters of administration cum test. annex. of same, and shewing good reason for not having given or giving such notice. *Sladden* v. *Smith*, 2 L. J. 233.

Paid Note.]—An executor sued for money received for his testator on a note payable to him. The maker swore that he had paid defendant, who handed him the note, which he still had, though with the name torn off:—Held, not necessary to produce the note. *Van Allen* v. *Frymere*, 14 U. C. R. 579.

Papers Filed in Court.]—Papers filed in court should not be sent away to be used as evidence at nisi prius, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interest of public justice requires their transmission; and in that case the officers sending should take a voucher from the officer receiving them. *Gaynor* v. *Salt*, 24 U. C. R. 180.

Papers Proved but not Filed.]—Right of plaintiff, after closing his case, to read papers proved by him, but not filed or read. See *Cross* v. *Richardson*, 13 C. P. 433.

Possession not Shewn.]—In ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shewn in whose custody it was or what its terms were, and it was proved the defendant had written a letter to the plaintiff's agent, stating that he was to give up the premises on a certain day:—Held, that the plaintiff need not produce the agreement, as it was not sufficiently shewn to be in his custody or power. *Doe d. Mitchell* v. *McLeod*, 6 O. S. 553.

Putting in Further Papers in Term.]—In an action of ejectment on the argument in term, the court, on the application of the plaintiffs' counsel, under R. S. O. 1877 c. 49, s. 8 (41 Vict. c. 8, s. 7), granted leave to the plaintiff to supply evidence of a search for the memorandum of the compromise, and also to put in the original writ of ejectment in a former action, and the affidavit of service thereof, a copy of such writ only having been filed at the trial; but as without this the plaintiffs would have failed, the defendants were allowed costs in term. *Young* v. *Hobson*, 30 C. P. 431.

Separate Counts on One Agreement.]—The plaintiff declared in assumpsit on two counts, each on an agreement, dated the 16th November, 1853, to deliver timber. Breach, non-delivery. Defendant pleaded non-assumpsit to the whole declaration, and several other pleas to the first count, and to that count a nolle prosequi was entered:—Held, that it was sufficient at the trial for the plaintiff to produce one agreement corresponding with that declared on in the second count, and that it was not necessary for him to prove one corresponding with each count. *Usborne* v. *Grover*, 13 U. C. R. 164.

Solicitor's Letter.]—Semble, that a letter written before action by the solicitor of the defendants to the solicitor for the plaintiff was improperly received in evidence. *Wagstaff* v. *Wilson*, 4 B. & Ad. 339, referred to. *McBride* v. *Hamilton Provident and Loan Society*, 29 O. R. 161.

Surety—*Bond.*]—To an action on a bond, the plea was the discharge of the defendant as surety by time given to the principal debtor:—Held, that it was necessary for defendant to prove the bond, in order to identify it with the arrangement mentioned in the plea. *Kerr* v. *Boulton*, 25 U. C. R. 282.

Telegrams.]—In an election trial the court ordered the agent of a telegraph company to produce all telegrams sent by the respondent and his alleged agent during his election, reserving to the respondent the right to move the court of appeal on the point. *South Oxford Election (Ont.)*, *Hopkins* v. *Oliver*, H. E. C. 243.

Telegraph Company.]—No privilege attaches to telegrams in the possession of a telegraph company. 45 Vict. c. 93, s. 18 (D.), should not be read as giving an absolute privilege:—Held, also, that the operator was the proper person to subpœna to produce telegrams, as he had the control of them and the ability to produce them. *Re Dwight and Macklam*, 15 O. R. 148.

Title to Goods.] — Where goods have been transferred to the vendee by writing, the vendor remaining in possession, the vendee suing in trespass for taking the goods, must produce the writing to prove his title. *Caldwell* v. *Green*, 8 U. C. R. 327.

See, also, *Bratt* v. *Lee*, 7 C. P. 280.

Will—*Letters Probate.*] — See *Barber* v. *McKay*, 17 O. R. 562.

(b) *Notice to Produce.*

Effect of and Necessity for.]—In assumpsit for not delivering goods, after the plaintiff had proved a verbal agreement, defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce:—Held, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their amdavit of debt; and that as the writing was the best evidence, it should have been produced. *Gilbert* v. *Sleeper*, 3 O. S. 135.

Before parol or secondary evidence can be given of a note being received by the plaintiffs in satisfaction of claim for work done, defendant must prove notice to the plaintiff to produce the note. *Heward* v. *McDougall*, 3 O. S. 647.

In trespass for taking goods:—Held, that a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record. *McCrae* v. *Osborne*, 6 O. S. 500.

Trover for promissory notes. The plaintiff's counsel, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly, before any demand on the defendant, or refusal on his part to return them:—Held, that no notice to the defendant to produce was necessary: and that the plaintiff was entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilly* v. *Fisher*, 10 U. C. R. 32.

In ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the land to one J. R., deceased (under whom defendant derived title). Evidence was given of conversations in which T. R. had stated either that he had given a deed to

J. R., or that the title was vested in J. R., and a letter from T. R. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—Held, that such evidence, under the circumstances, was admissible on the part of defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Rogers* v. *Card*, 7 C. P. 89.

A letter written by defendant to plaintiff, saying that he was still willing to settle amicably, but that if the plaintiff refused to meet him in the same spirit he would push the matter to the utmost:—Held, not provable by secondary evidence, without a notice to produce. *Hood* v. *Cronkite*, 29 U. C. R. 98.

Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause under the deed so produced, the party calling for it, is not bound to prove its execution. *Chisholm* v. *Sheldon*, 2 Gr. 178.

Where the plaintiff claimed under a will, and the defendant under a deed from the heir-at-law, registered before the will:—Held, that the plaintiff, by calling for the deed under a notice to produce, and putting it in on another branch of the case, furnished primâ facie evidence of the consideration as mentioned in it. *Bondy* v. *Fox*, 29 U. C. R. 64.

The declaration alleged that the plaintiff and defendant each became bound to the other, conditioned, after reciting certain differences that had arisen, to abide by the award of two persons named, and such third person as they might appoint concerning the same, costs to be in their discretion: that an award was duly made that defendant should pay the plaintiff $440, and each pay their own costs of the submission, and that $60, other costs, should be paid by them equally. Breach, non-payment of the $440, and a moiety of the $60. Pleas, denying the submission and award. The plaintiff proved the execution of the defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of the third arbitrator indorsed on it, having served a notice to produce on defendant's attorney, at 11 a. m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail. He also proved by one of the arbitrators the execution of the award by all three:—Held, that the execution of plaintiff's bond being put in issue, it might properly be presumed to be in possession of defendant's attorney; and if it were not, that the notice under the circumstances, was sufficient. *Sullivan* v. *King*, 24 U. C. R. 161.

Where in ejectment notice to produce a Crown lease, under which the lessor of the plaintiff claimed, had been given, and the lease was not produced, but an exemplification of it put in, and defendant gave parol testimony that the lease had been assigned to a third party who had given a mortgage on it to the lessor of the plaintiff, which had been paid at the day; and the jury found for the defendant:—Held, that the evidence that the lessor of the plaintiff had parted with his interest was sufficient to support the verdict. *Doe d. Crawford* v. *Cobbledick*, 4 O. S. 328.

In dower, notice was given to defendant to produce his title deeds, and defendant's father, who was called, declined to swear positively whether they were in his possession or that of his son:—Held, that secondary evidence of the deeds was admissible. *Graham* v. *Law*, 6 C. P. 310.

Form.]—Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an unexpired Crown lease, sold as belonging to B. by assignment:—Held, that—after proof of an exemplification of the lease, the judgment, fi. fa., and sheriff's deed,—a notice to produce the original lease and assignment, without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B. *Doe d. McGuire* v. *Dennis*, 2 O. S. 589.

In an action for malicious arrest, there was a notice to produce the writ of ca. re. issued, &c., at the suit of A. against the defendant in this cause:—Held, sufficient, the mistake in using the word "defendant" for "plaintiff," being a mere clerical error, which could not mislead. *Wilson* v. *Gilmour*, 5 U. C. R. 212.

Plaintiff sued defendant for the price of some fruit trees, and the defence was that they had not been purchased by defendant, but received to sell upon commission for plaintiff. Defendant had given notice to produce "the several documents hereunder specified and all other documents, letters, &c., "relating to the matters in question in this cause." The schedule specified all letters, &c., and "particularly certain orders given by defendant to plaintiff to forward the trees which defendant was to sell for the plaintiff under the agreement between them, and which orders are dated in or about March, 1856:"—Held, sufficient to let in secondary evidence of a letter written by defendant to plaintiff in March, requiring the trees to be sent by a certain time. *Leslie* v. *Morrison*, 16 U. C. R. 130.

Service of Notice.]—Where defendant, residing in the assize town, was served on Saturday with a notice to produce on the following Monday:—Held, sufficient. *Robertson* v. *Boulton*, H. T. 6 Vict.

In trespass for seizing the plaintiff's property under an illegal execution said to have been issued by defendants, a notice to produce the writ, served on defendants' attorney four days after the commencement of the assizes, defendants living more than ninety miles from the assize town, was held, insufficient. *McCrae* v. *Osborne*, 6 O. S. 500.

Quære, can a notice to produce be served on the agent of the defendant's attorney. *James* v. *Mills*, 4 U. C. R. 366.

The sufficiency of a notice with respect to the time of service, seems to rest with the Judge at the trial. *Ib.*

Service on plaintiff's attorney on the day of and within one hour of the trial, is too late. *Nash* v. *Bush*, 5 C. P. 300.

In dower, the demand was served upon the tenant of the lands, who then declared that he did not own the lands:—Held, that a notice to produce served upon such tenant was unavailing to let in secondary evidence of the deeds under which demandant claimed. *Marvin* v. *Hales*, 6 C. P. 208.

An affidavit of service of notice to produce is not admissible under C. L. P. Act, s. 167, unless made by the plaintiff's attorney, or his clerk. *Patterson* v. *Morrison*, 17 U. C. R. 130.

Quære, whether service on a servant at the office and residence of defendant's attorney is sufficient. *Ib.*

(c) *Summons to Admit.*

See Wakefield v. *Lane*, 1 C. L. Ch. 181; *Cary* v. *Cumberland*, 1 P. R. 140; *Conger* v. *McKechnie*, 1 C. L. Ch. 220; *Da Costa* v. *Jordan Estate*, 2 L. J. 211.

See as to Secondary evidence, sub-title I. S, and as to Production, sub-title XII.

XV. Proof of Special Matters.

1. *Account Stated.*

A document which acknowledges a sum due at the time of its date, but payable on a future contingency, though not a promissory note, is evidence of an account stated. *Russell* v. *Wells*, 5 O. S. 725.

In an action against two joint makers of a note, one having signed as surety for the other, the note is primâ facie evidence only of an account stated, which the surety may rebut by shewing the facts. *Hogan* v. *McSherry*, 6 O. S. 633.

In an action against one of two joint makers, a surety for the other, the note is not evidence of an account stated. *Hogan* v. *Malone*, H. T. 7 Vict.

A promissory note given to an agent upon a settlement of accounts is evidence of an account stated with his principal, when the fact of agency was known to the other party. *Rhodes* v. *Executors of Crawford*, 1 U. C. R. 257.

Held, that the following instrument: "Ten days after date we promise to pay N. Newhorn the sum of £83 15s. for value received," upon which was indorsed at the time the note was given the following memorandum, "It is agreed that this note is to be paid by a lawful mortgage with interest on the same, having three years to run," could not be sued upon as a note between the original parties, and could not be given in evidence under the count in account stated. *Newhorn* v. *Lawrence*, 5 U. C. R. 359.

"For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102 15s. cy., to be paid in yearly proportions:"—Held, evidence of an account stated, though the money was not to be payable immediately. *McQueen* v. *McQueen*, 9 U. C. R. 536.

"Three months after date, we, or either of us, promise to pay to Elias S. Reed (the plaintiff), or John Fraser, his guardian, at the post office Embro, £119 17s. cy., value received in rent of farm," adding a count on an account stated. It was proved that defendant had been in possession of plaintiff's farm before and after the note was made, which was given for rent due, and that the plaintiff was abroad at the time of making the note:—Held, that this writing, though not a promissory note, would support a recovery under the account stated. *Reed* v. *Reed*, 11 U. C. R. 26.

A claim upon an account stated cannot be supported by a note which was not due at the commencement of the suit, and the defence is available under the general issue. *Hill* v. *Lott*, 13 U. C. R. 465.

The declaration contained three counts claiming each £50, but the damages were laid only at £50, and the particulars were for account rendered £55 15s.—less by cash £22 10s.—£33 5s. At the trial the plaintiff relied on the count on account stated, and produced a draft by himself on defendant for £55 15s. 1d., "being the balance in full of your account," and proved that when presented the defendant acknowledged the amount to be correct, but refused to accept it as he was afraid he would be sued. A verdict having been found for £34 5s. 3d.:—Semble, that the evidence of an account stated was sufficient. *McMurtry* v. *Munro*, 14 U. C. R. 166.

"$300—Good to T. T. to the amount of $300, to be paid to him on his order, at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber, at cash price:"—Held, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the count on account stated. *Tyke* v. *Cosford*, 14 C. P. 64.

An instrument dated at New York, signed and indorsed by defendant, promising to pay "to the order of myself $1,040.23 at the Bank of Upper Canada, in Toronto, with the current rate of exchange on New York:"—Held, sufficient evidence primâ facie of an account stated; for that the transaction would be assumed as immediate between plaintiff and defendant, without proof to the contrary, and though not a promissory note, it was a written acknowledgment of indebtedness in the sum named. *Grant* v. *Young*, 23 U. C. R. 387; *Wood* v. *Young*, 14 C. P. 250.

The defendant had signed a note or instrument agreeing to pay five per cent. a month:—Held, that the amount agreed upon was recoverable under the common count for interest and account stated. *Young* v. *Fluke*, 15 C. P. 360.

Held, that a bill of exchange not properly stamped was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor), as there was no privity between them; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise. *Stephens* v. *Berry*, 15 C. P. 548.

The notes sued on, which were void for want of stamps, were renewals, with interest at 20 per cent. added to them, of former notes which had been given up to defendant, and of which secondary evidence was given:—Held, evidence of an account stated, and that the

plaintiff was entitled to recover the amount of the original notes, and interest at 6 per cent. *Ritchie* v. *Prout*, 16 C. P. 426.

Held, that an instrument in this form, "Good to Mr. Palmer for $850 on demand," was not a promissory note, and so requiring a stamp; but that in the absence of any explanation of the circumstances under which it was given, it was prima facie evidence to go to the jury of an account stated. *Palmer* v. *McLennan*, 22 C. P. 258, 565.

In an action for goods sold, and upon an account stated, evidence of the acknowledgment by letter of an account being due, and of an account having been read over to the defendant, to which he made no objection, coupled with evidence that an item of £2 in the bill of particulars produced in court was the same which was read over to defendant, and with the witness's belief that the accounts were the same, was held sufficient to support the verdict, which was for £18, though one principal ground of the witness's belief of the accounts being correspondent arose from his knowledge of the plaintiff's character. *Large* v. *Perkins*, Tay. 62.

The plaintiff may recover on the count for an account stated on an express promise to pay a specified sum, part of an account, the admission of the correctness of which by the defendant cannot be received in evidence under 2 Geo. IV. c. 13, the account being in New York currency. *Crooks* v. *Law*, 5 O. S. 306.

An account stated by an executor, of a debt due by his testator never before ascertained or determined, is sufficient to charge the executor as a substantive debt, without any express promise to pay. *Watkins* v. *Washburn*, 2 U. C. R. 291.

A defendant casually observing to a third party, in the presence of the plaintiff, that he had paid the whole price for his land, except a certain sum, without any further explanation, is not satisfactory, if any, evidence of an account stated. Semble, that if otherwise the Statute of Frauds would not have applied, though the sum was due in respect of the sale of lands. *Curtis* v. *Flindall*, 3 U. C. R. 323. *See*, also, *Dalton* v. *Botts*, Tay. 281.

A district council cannot be sued upon the common money counts upon the account stated, unless at least the subject matter of the account be averred, and is seen to be such as can by law create a debt from the defendants to the plaintiffs to be satisfied out of the funds of the district. *Huron District Council* v. *London District Council*, 4 U. C. R. 302.

Where A., as part consideration for the purchase of certain timber from B., promised C. to pay B.'s debt to him of £20, and paid £10 to C., and was to pay the remaining £10 next morning:—Held, that C. could recover the £10 from A. on account stated. *Fergusson* v. *Kerr*, 5 U. C. R. 261.

Where to a special count upon an award made after the time had expired, there was added an account stated: — Held, that an award so given could not be taken as evidence of such account stated, as the arbitrators could not be said, after their authority had expired, to be proceeding with defendant's assent and to be stating an account for him as his agent. *Ruthven* v. *Ruthven*, 8 U. C. R. 12.

A. gave to B. and C. a writing, by which, for value received, he promised to pay them a certain sum in yearly proportions. This appeared to have been given for the price of land sold to A.:—Held, that it was immaterial whether the land was owned by A. alone or by A. and B., and that the plaintiffs might recover either under a count as on an agreement or on an account stated. *McQueen* v. *McQueen*, 10 U. C. R. 359.

One of two defendants having admitted to a witness called by the plaintiff that there was a balance of £203 15s. due to the plaintiff, from which was to be deducted an unascertained debt due to the other defendant, and also a balance on a certain sum due by the plaintiff to his brother:—Held, not sufficient evidence of an account stated. *Bloomfield* v. *Grinton*, 1 C. P. 309.

An admission made casually to a stranger, and not to the plaintiff or an agent of his, is not in itself sufficient to sustain an action on the account stated. *Green* v. *Burtch*, 1 C. P. 313.

An assignment of a right to real estate executed under seal by the defendant only, in which the consideration money is acknowledged to have been paid, will not support an action for the purchase money, nor be received as proof of an original executory agreement in writing for the sale of the premises; nor will subsequent admissions of defendant's liability supply the place of written proof or of an account stated, unless some specific amount be acknowledged. *Ib.*

The plaintiff sued the executors of Z. on account stated, and relied upon an account made out by defendants' book-keeper, headed as an account of the plaintiff with the estate of Z., including this work, and shewing a balance due to him; but the book-keeper stated that it was made out at the plaintiff's request, and on account of certain sealed contracts on which the plaintiff could not sue alone:—Held, not sufficient to give a right of action to the plaintiff alone. *Zimmerman* v. *Woodruff*, 17 U. C. R. 584.

The plaintiff having purchased land from defendant under a written contract, it was verbally agreed between them that the sale should be cancelled, and that defendant should return what plaintiff had paid, and pay him $102 for giving up his bargain. The plaintiff thereupon gave up possession, and defendant sold to another. In an action for the $102 (the declaration containing a count on account stated) it was proved that defendant had acknowledged that he was to pay the plaintiff this sum for giving up the land, but the plaintiff was nonsuited for want of an agreement in writing:—Held, that if the acknowledgment was made after the agreement had been cancelled, and the land re-sold by defendant, the plaintiff might recover on the account stated; and this not being clear upon the evidence, a new trial was granted to ascertain the fact. *Gross* v. *Bricker*, 18 U. C. R. 410.

The first count of the declaration claimed £100, being the consideration for the assignment by plaintiff to defendant of his interest in an agreement for the purchase of certain

freehold property. Second count, for money payable for land bargained and sold by plaintiff to defendant, on an account stated, and for interest. J., the owner of 50 acres, agreed to convey certain lots, in accordance with a lottery, to be held by one D. Lot No. 107 in the lottery was the prize, and was supposed to have a mill privilege upon it. One V., the holder of ticket No. 55, became entitled to No. 107, and he requested J. to convey it to plaintiff, which was done. Subsequently C. (defendant) agreed to purchase the mill privilege from plaintiff, but not being satisfied with his title, he took a quit claim deed from J., paying him £15 7s., which he said he would deduct from the amount he was to pay plaintiff. L. (plaintiff) had drawn another lot, and obtained a conveyance of it upon giving his notes for the purchase money, which notes J. gave to C. (defendant) when he conveyed the mill pond to him. These notes formed no part of plaintiff's payment for lot 107:—Held, that the evidence did not support a claim upon an account stated. *Lloyd* v. *Clark*, 12 C. P. 320.

The mere calculation of what is due as the balance of a former transaction will not support an action on account stated. *McKay* v. *Grindley*, 30 U. C. R. 54.

Plaintiff assigned to defendant his interest in a certain lease, by deed containing a receipt for the consideration money, $350. This deed was placed in K.'s hands to hold till defendant deposited that sum. K. delivered it to defendant on his promise that he would pay, and defendant afterwards paid him $75, saying that he would hand him the balance as soon as he obtained it. On being asked again he said that he had the money, but that the plaintiff should pay part of the expense of a bond which he had had to give respecting the title. Plaintiff then sued upon the common counts for the purchase money of land, and on an account stated:—Held, that he was estopped by the receipt under seal, and could not recover on either count. Cocking v. Ward, 1 C. B. 858, distinguished as to the account stated. *Sparling* v. *Savage*, 25 U. C. R. 259.

Plaintiff sold and conveyed certain land, the deed containing a receipt for the purchase money, $808, with a receipt for same also indorsed. Plaintiff then sued defendant upon the common counts for the purchase money of the land, and on an account stated. The defendant pleaded, among other pleas, payment. After the sale defendant told one M. that he had only paid plaintiff $41, and offered to pay him, M., whatever plaintiff was willing he should. It also appeared, though not very clearly, that plaintiff was present at this conversation:—Quære, whether the conversation between defendant and M. amounted to a statement of account, or anything more than an admission from which non-payment of the purchase money might be assumed. *Casey* v. *McCall*, 19 C. P. 90.

There must be an antecedent and subsisting debt between the parties, and a special agreement to pay a sum of money cannot be converted into an account stated. A bill of costs was put in, taxed at £40, in a suit by one V. against defendant, in which M., one of the plaintiffs, was plaintiffs' attorney. There was a receipt for $50 indorsed upon it signed by M., and a memorandum signed by defendant, "I will pay the above balance one week:"—Held, no evidence of an account stated. *Toms* v. *Sills*, 29 U. C. R. 497.

2. *Handwriting and Execution of Documents.*

(a) *In General.*

Agent Signing for Principal.]—A document executed by an agent in the name of his principal, the subscribing witnesses being dead or out of the Province, can be proved by proving the handwriting, i.e., by the same evidence which would be sufficient to prove its execution by the principal. *Dickson* v. *Jarvis*, 5 O. S. 694.

Comparison with Undoubted Signature.]—Action upon a note. Plea, non fecit. The plaintiff put in a bond admitted to have been signed by defendant, and called no witnesses, contending that the jury might compare the two writings, and find their verdict thereon. Galt, J., at the trial held that this could not be done, and nonsuited the plaintiff. Per Morrison, J., the nonsuit was right. Per Wilson, J., it was wrong. *King* v. *King*, 30 U. C. R. 26.

Deed—*Sealing.*]—In covenant against two defendants, the indenture of apprenticeship sued upon was produced from the custody of defendants, with whom the apprentice had served until his dismissal. It had four seals, and was signed by the plaintiff, his son the apprentice, and one of the defendants, but not by the other defendant:—Held, that there was evidence of execution by both defendants. *Judge* v. *Thomson*, 29 U. C. R. 523.

Deed — *Suspicious Circumstances* — *Want of Direct Evidence.*]—Where the signature to a deed under which the plaintiff claimed was spelt in a manner different from that in which it was shewn the alleged grantor had spelt his name, and other circumstances of suspicion were shewn, and his sister gave evidence that the signature was a forgery; the only evidence in support of the genuineness of the signature being that of the solicitor who prepared the instruments, who had no recollection of the circumstances, but swore he must have been satisfied, at the time, with the identity of the grantor or he would not have allowed the deed to be executed:—Held, that the execution of the conveyance had not been proved. *Duffy* v. *Smith*, 26 Gr. 428.

Destroyed Document — *Knowledge of Writing Acquired after Destruction.*]—That a document not in existence was written by a particular individual may be proved by a person who had had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. In an action for a written libel the defendant was asked, on cross-examination, if he had not changed his signature since the action began, which he denied:—Held, that documentary evidence was admissible to shew that the signature had been changed. *Alexander* v. *Vye*, 16 S. C. R. 501.

Expert's Opinion.]—In an action on a promissory note against the maker, the defendant swore that the signature was not his, but an expert, comparing it with admitted signatures, said that it was written by the same person:—Held, no ground for a new trial that the jury had not been directed that the evidence of experts was entitled to little weight when contradicted by direct testimony:

and the learned Judge below having been satisfied with the verdict, the court would not interfere. *Luce* v. *Coyne*, 36 U. C. R. 395.

Instrument under Company's Seal.]—The seal of a corporation having been proved:—Held, that the production of a document within the powers of the corporation with the seal attached, is sufficient primâ facie evidence of its proper execution. *Woodhill* v. *Sullivan*, 14 C. P. 265.

Interlined Words.]—A cheque of the plaintiff's, when produced at the hearing, had written on it, "in full of all his (the defendant's's) claims for notes or otherwise," which words the plaintiff swore were on the cheque, when sent to the defendant, which the latter denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of a clerk in the bank, whom he had requested to initial the words so introduced: The court refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness. *Livingston* v. *Wood*, 27 Gr. 515.

Knowledge Acquired for the Action—*Comparison of Signatures.*]—For the purpose of proving the execution of deeds, a witness, who was not the witness to the deeds, went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, and who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting:—Held, that evidence of these admissions and of the belief of the witness, from the knowledge of the handwriting thus acquired, that the signatures to the deeds were genuine, was good evidence to go to a jury: and, in the absence of any contradictory evidence, sufficient to warrant a finding that the deeds had been duly executed upon the respective days upon which they purported to have been executed. *Thompson* v. *Bennett*, 22 C. P. 393.

A deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved. *Ib.*

Mortgage—*Registered Duplicate.*]—Under R. S. O. 1877 c. 111, s. 56, the production of the registered duplicate original of a mortgage, with the registrar's certificate indorsed thereon, is primâ facie evidence of the due execution of such instrument. *Canada Permanent Loan and Savings Co.* v. *Page*, 30 C. P. 1.

Patched Instrument.] — In a suit against a widow by the assignee of a mortgage purporting to be executed by her late husband and herself, the plaintiff proved their signatures and that of the subscribing witness, who was dead. The Judge by whom the defendant had been examined verified his certificate, though he did not recollect the circumstances. The document was a patched instrument, and the parts were not referred to in the attesting clause or otherwise authenticated:—Held, that the unsupported evidence of the defendant, was not sufficient to disprove the execution of the instrument by her, nor to throw on the plaintiff the onus of proving that the patching of the instrument had been before execution. *Northwood* v. *Keating*, 17 Gr. 347; 18 Gr. 643.

Proof of Note by Marksman.]—Held, that the evidence stated in this case was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited. *Hand* v. *Agnew*, 32 U. C. R. 559.

Question for Jury.]—Although one of two witnesses to an agreement may deny his signature, and a person well acquainted with the handwriting of the other may refuse to say that the signature is genuine, it may still be left to the jury to say, under the circumstances of the case, whether the agreement has not in fact been signed by the parties. *Barber* v. *Armstrong*, 6 O. S. 543.

Shewing Witness other Writings.]—A defendant's counsel to get from a witness an opinion as to the handwriting of the plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to have been signed by the plaintiff, but in no way connected with the cause:—Held, that the learned Judge rightly refused to allow the witness to be examined as to the other writings till he had first, from his own recollection of the plaintiff's handwriting, given an opinion upon the signature of the receipt. *Gleeson* v. *Wallace*, 4 U. C. R. 245.

Weight of Evidence—*Defendant's Denial.*]—Where, in an action against the maker of a promissory note, the plaintiff produced several witnesses who swore to the defendant's signature, which two of them said he had admitted, but the jury found for the defendant on his own evidence alone, the court granted a new trial, with costs to abide the event. *Canadian Bank of Commerce* v. *McMillan*, 31 U. C. R. 596.

(b) *Subscribing Witness.*

Absence from the Country.]—Where the subscribing witness to a bond is out of the country, and his handwriting cannot be proved, evidence of the handwriting of the obligor is sufficient. *Bennett* v. *McDonald*, E. T. 3 Vict.

Accounting for Witnesses.]—All the witnesses must be accounted for, though the plaintiff is one of them, and his handwriting proved. *Doe d. McDonald* v. *Twigg*, 5 U. C. R. 367.

Character of Witness.]—Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due execution, the other party may shew the character of such witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him. *Chamberlain* v. *Torrance*, 14 Gr. 181.

Inquiry for Witness.]—Every reasonable inquiry must be made for the subscribing witness in the most likely place. *Tylden* v. *Bullen*, 3 U. C. R. 10.

Memorial.]—See *Doe d. Maclem* v. *Turnbull*, 5 U. C. R. 129.

Refusal to Call Attesting Witness.]—In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute:—Held, that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed. *Woodworth* v. *Dickie*, 14 S. C. R. 734.

Witness's Statement of Forgery of Grantor's Name.]—The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged the demandant's name:—Held, following Stobart v. Dryden, 1 M. & W. 616, that such evidence was rightly rejected. *Rose* v. *Cuyler*, 27 U. C. R. 270.

See sub-title I., 5.

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3. *Heirship.*

If the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father. *Doe d. Humberstone* v. *Thomas*, 3 O. S. 33.

To displace title made under a near relative capable of inheriting, it should be shewn that there is some one in existence representing the alleged elder branch of the family. *Doe d. Park* v. *Henderson*, 7 U. C. R. 182.

The circumstance of its coming out on the cross-examination of a witness of the lessor of the plaintiff claiming as heir that his ancestor left a will, does not disable the plaintiff from recovering as heir until he produces or gives evidence of the will; it is for the defendant to shew the contents of the will. *Doe d. Atkinson* v. *McLeod*, 8 U. C. R. 344.

Where it comes out in the course of a cause that the ancestor of one of the parties to the suit, who claims as heir-at-law, has in fact made a will, it is incumbent on the court to direct an inquiry on that point, although unnoticed in the pleadings. *Chisholm* v. *Sheldon*, 1 Gr. 108.

When a party claims as one of the heirs of the half-blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from an ancestor; or, if he did so obtain it, the claimant must shew that he is of the blood of such ancestor. *Tryon* v. *Peer*, 13 Gr. 311.

See sub-title I. 5.

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4. *Identity.*

(a) *Of Persons.*

Admission of Person Served.]—The admission of a person served with an office copy of the bill, that he was the proper party named in a bill, is not sufficient proof of the identity of the person served with the defendant. *Stilson* v. *Kennedy*, 1 Ch. Ch. 236, 237, note.

Person Served.] — It is not sufficient proof of the identity of a party served out of the jurisdiction, that the deponent to the affidavit of service swears that he served "the above named defendant." The affidavit should shew the means of knowledge. *Armour* v. *Robertson*, 1 Ch. Ch. 252.

Presumption from Name.] — Held, approving Spafford v. Buchanan, 3 O. S. 331, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the Crown office; and that the identity of defendant with deponent may be presumed primâ facie from the name. *Wilson* v. *Thorpe*, 18 U. C. R. 443.

Plaintiffs suing upon a judgment, offered no proof of the identity of defendant with the person named in the judgment;—Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of the name, was some evidence. *Hesketh* v. *Ward*, 17 C. P. 190.

Questions of Title.]—The court refused to set aside a nonsuit where defendants and their ancestors had been twenty years and upwards in possession, where it appeared that the patent from the Crown had been issued more than twenty years, and it was also shewn that the ancestor of the defendants had been allowed his claim under the Heir and Devisee Act for the land in question, though two or three years afterwards the patent issued in another name, but with a description that did not accord with that of the person under whom the plaintiff claimed. *Doe d. Baker* v. *Gould*, 5 O. S. 36.

Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes, it will be presumed from the identity of the names. In this case, however, to confirm the identity, there were besides the names the description of the parties and the hand-writing, and the fact that the patent had been handed down with the different conveyances; and it appeared further that both parties assented to the title of one M., who claimed through the deeds as to the names in which proof of identity was insisted upon. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

Plaintiff claimed under a deed to him from one G. O. G., the heir of the patentee, A. G. He gave evidence that his grantor was the heir of one A. G., who had been a captain in the navy, and put in the patent to A. G. of 980 acres, with a deed to himself from the alleged heir of the same land, of which the land in dispute formed part:—Held, sufficient evidence to go to the jury of identity between the patentee and the alleged ancestor. *Brown* v. *Livingstone*, 29 U. C. R. 520.

Lands were conveyed, in 1804, by deed to W. R. By a deed poll indorsed upon the deed of 1804, and dated in 1823, W. R., described as "the within named W. R.," granted the same lands to trustees of a marriage settlement executed in 1820, under which the plaintiff claimed:—Held, that the W. R. who executed the deed poll would be presumed to have been the grantee in the deed of 1804,

notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee in the deed of 1804 was dead before 1820. *Thompson* v. *Bennett*, 22 C. P. 393.

In ejectment, the plaintiff claimed under one D. L. C., whom he alleged to be the eldest son and heir-at-law of L. C., assignee of the grantee of the Crown. The patent from the Crown was to F. Weis and the deed to L. C. was signed by F. Weast as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of defendant, who claimed under the will of L. C., which he produced, and that it had been with the patent in the possession of the C. family since 1816. It was not shewn there was any other F. Weis except the person who conveyed as F. Weast:—Held, that the identity of Weis and Weast, who made the deed to L. C., was sufficiently proved. *Wallbridge* v. *Jones*, 33 U. C. R. 613.

In ejectment for land in the township of Mono, the plaintiff claimed under a deed from M., the patentee of the Crown; and defendant by adverse possession. M. had conveyed to the plaintiff in 1873, being then 84 years old. It appeared that in January, 1855, one H., describing himself as attorney to M., and asserting himself to be fully empowered by M. to locate and settle 100 acres to which M. was entitled for militia services, petitioned that the location might be made in the township of Mono or Caledon. In March, 1855, a location ticket was issued in the name of M. for the land in question, but stating that no patent should issue until a resident settler had been established on the lot, who should occupy and improve the same within six months from the date of the ticket; and in December, 1855, a patent issued to M. M., who was examined as a witness, swore that he never knew H. or gave him any authority, and that he knew nothing of the lot until the plaintiff applied to him for a conveyance:—Held, that there was evidence for the jury that M., by himself or his agents, had entered upon the land after the issuing of the patent, or was aware that it had been so entered upon; and that evidence should have been received of the acts and statements of H. relative to the clearing the land, so as to enable the Statute of Limitations to run; and as this evidence was withdrawn from the jury, and the only question submitted was as to the identity of the patentee with the plaintiff's grantor, a new trial was therefore granted. *Armstrong* v. *Stewart*, 25 C. P. 198, 205.

J. McK. having an order in council for 100 acres of land, executed in February, 1827, to one Shore a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor was described as of York, labourer. In May the patent issued to McK., and it was in the possession of Shore shortly after its date. Shore went into possession in 1828, cleared about seven acres, and after three years left the land in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of Shore, which took place in 1849. The plaintiffs, claiming as heirs-at-law of Shore, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants, Shortis and McC., produced a conveyance purporting to have been made by, and signed "J. McK., now of the town of Niagara," &c., yeoman, to James Smith, dated 7th September, 1833; and a conveyance from Smith to Shortis, dated May, 1849; both of which were registered. No oral testimony was given of the identity of the grantor in the deed to Smith with the locatee of the Crown, and no evidence of its custody during the thirty years which had elapsed since its alleged execution; but the signature and death of one of the attesting witnesses were proved and the absence of the other witness was accounted for:—Held, 1. That there was sufficient primâ facie proof of the execution of the deed from McK. to Smith; 2. that such proof must be taken to include that the party by whom the deed purported to be executed was not only a person of that name, but the identical person in whom was vested the estate which the deed purported to convey. *Rogers* v. *Shortis*, 10 Gr. 243.

There was no proof of identity of the different grantors and grantees in the deeds shewing the chain of title, except the similarity of names, and the possession of the patent and deeds:—Held, clearly sufficient. *Gallivan* v. *O'Donnell*, 36 U. C. R. 250.

Service on Wrong Defendant.]—Where in an action against a father process was served upon his son of the same name, and appearance was entered and defence made by the son—the court held, that a verdict for defendant was correct; and that whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father. *Killens* v. *Street*, M. T. 4 Vict.

(b) *Of Things.*

Account.]—Evidence of identity of account claimed with one admitted by defendant. See *Large* v. *Perkins*, Tay. 62.

Chattel.]—Proof of identity of chattel. See *Stevens* v. *Barfoot*, 9 O. R. 692.

Conviction.]—Trespass against a magistrate for seizing and selling plaintiff's goods. To prove the quashing of the conviction a rule of court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned:—Held, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in those respects. *Bross* v. *Huber*, 15 U. C. R. 625.

Goods in Mortgage.]—Goods were described in a chattel mortgage as "one kitchen table, four chairs, &c., (describing them,) all contained in and about the dwelling-house and barn of the mortgagor, situate at or on lots," &c.:—Held, sufficient. The mortgage contained a proviso, that in case the mortgagor should attempt to sell or part with the possession of or to remove out of the county the goods, or any of them, the mortgagee might take possession of and sell them, &c. The mortgagee, claiming under this proviso, brought trover for the goods, which the defendant had seized under a distress for rent. It appeared that the goods were seized in October in the house mentioned in the mortgage, which had been executed in the previous August, and were of the same kind and description as those set out in the mortgage:—

Held, sufficient evidence that they were the same goods as those mortgaged. *Nattrass* v. *Phair*, 37 U. C. R. 153.

Interpleader—*Goods in Question.*]—In an interpleader issue, the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor and duly filed:—Held, clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff and claimed. *Jones* v. *Jenkins*, 25 U. C. R. 151.

Note Sued on—*Promise to Pay.*]—Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties:—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity was to be presumed. *Reynolds* v. *O'Brien*, 4 U. C. R. 221.

Replevin — *Confusion by Defendant's Wrongful Act.*]—The plaintiffs were in possession of certain timber limits under a license from the Crown, which expired in April, 1872, but it was the practice of the Crown lands department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-73, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th April, 1873, but it was stated to cover the period between the 29th June, 1872, and the 30th April, 1873. During this period, certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiffs then went to where the logs were, and selected the logs in question, being of the same size and description as their own logs; and marked them:—Held, that plaintiffs might maintain replevin; that there was sufficient evidence of identity; and that at all events, as the defendant's own wrongful act was the cause of any difficulty, he could not object on this ground. *Gilmour* v. *Buck*, 24 C. P. 187.

Shares.] — Identification of pledged stock. See *Carnegie* v. *Federal Bank of Canada*, 8 O. R. 75.

Use and Occupation—*Premises in Question.*]—Where in an action for use and occupation, the plaintiff proved his case by evidence of admissions of defendant, who on his defence put in a lease under seal from the plaintiff, which he contended was for the same premises, but there was no distinct evidence of identity, and the jury found for the plaintiff, the court afterwards, on affidavits shewing that these were the only premises demised by the plaintiff to the defendant, made a rule absolute for a new trial without costs, unless the plaintiff would elect to enter his judgment for the amount of his verdict only without costs. *Boulton* v. *Defries*, 2 U. C. R. 432.

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5. *Judicial and Official Documents and Acts.*

Affidavit.]—In an action for a malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant. *Spafford* v. *Buchanan*, 3 O. S. 391; *Fitzgerald* v. *Webster*, T. T. 2 & 3 Vict.

Held, approving Spafford v. Buchanan, 3 O. S. 391, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the Crown office; and that the identity of defendant with deponent may be presumed primâ facie from the name. *Wilson* v. *Thorpe*, 18 U. C. R. 443.

Certificate of Court of Appeal.]—A certified copy of the certificate of the court of appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties. *Blackley* v. *Kenney*, 19 O. R. 169.

See Court v. *Holland*, *Ex parte Holland and Walsh*, 8 P. R. 219.

Certificate of Foreign Court—*Petition for Appointment of Trustee.*]—Where certain infants living with their mother in the Province of Nova Scotia were entitled to insurance moneys payable in Ontario, and their mother petitioned to be appointed trustee, without security, under R. S. O. 1887 c. 136, s. 12, as amended by 56 Vict. c. 32, s. 7 (O.), to receive such moneys, letters of guardianship having been issued to her by a probate court of the Province of Nova Scotia, a certificate of the Judge of that court shewing the facts necessary to bring the case within the proviso to the amending section was received as evidence in support of the petition. *Re Daniel*, 16 P. R. 304.

Company's By-law.]—The defendants were sued on a by-law, alleged to have been made by them enacting that all persons who at the time of subscribing should pay up their stock in full, should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed with the president's initials:—Held, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law. *McDonell* v. *Ontario Simcoe and Huron Union R. W. Co.*, 11 U. C. R. 267.

Company's Minutes.]—Defendant's secretary, called by the plaintiffs, produced copies of the proceedings of defendant's London board, which he said had been sent by them to the board in Canada as such copies, but which he could not prove otherwise to be so:—Held, clearly sufficient. *Commercial Bank* v. *Great Western R. W. Co.*, 22 U. C. R. 233.

Conviction.]—Semble, that a conviction returned under the statute to the quarter

sessions, and filed by the clerk of the peace, becomes a record of the court, and may be proved by a certified copy. *Graham* v. *McArthur*, 25 U. C. R. 478.

County Judge's Order.]—Held, that the county Judge's order to arrest was well proved, under R. S. O. 1877 c. 62, s. 28, by the production of a copy certified as such, under the hand of the clerk of the court; but that the affidavit on which the capias issued, filed in that court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the court, but not referred to or described in the certificate. *Timmins* v. *Wright*, 45 U. C. R. 246.

Depositions.]—The C. L. P. Act, s. 193, permits the transmission of certified copies of depositions. An application to transmit the originals was therefore refused. *Fagan* v. *Wilson*, 6 P. R. 295.

Deputy Sheriff's Status.]—In an action against a sheriff for seizing and taking goods, it is sufficient to prove that the deputy sheriff seized them colore officii, without proving the writ of execution, or giving other evidence of his being deputy sheriff than that of general reputation. *Holt* v. *Jarvis*, Dra. 190.

English Judgment.]—Plaintiff produced as evidence of a judgment against defendant in the court of the exchequer of pleas in England, a certified copy thereof under the hand of one of the masters of that court:—Held, insufficient; and that the plaintiff should at least have produced an exemplification under the seal of the court. *Hesketh* v. *Ward*, 17 C. P. 190.

Plaintiffs offered no proof of identity of defendant with the person named in the judgment. Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of the name, was some evidence. *Ib.*

English Vesting Order.]—Held, that a vesting order of the court of chancery of England proves itself on production, by the Imperial Act 14 & 15 Vict. c. 99, and was therefore properly received in evidence. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

Exhibits.]—Sworn copies of exhibits filed in the Crown office cannot be received in evidence; the originals should be produced. *Molson* v. *McDonell*, 5 O. S. 441.

Fence-viewers' Award.]—In trespass to land, defendant justified under an award of fence-viewers. The township clerk produced a copy, which he swore was a true copy of the award, the original being in his custody:—Held, that such copy was admissible in evidence under C. S. U. C. c. 32, s. 6, these awards being made by a statutory public officer acting in a judicial capacity, which might affect a large portion of the public, and even municipalities. Semble, that if the copy had been one delivered by the fence-viewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Deslippes*, 33 U. C. R. 59.

Field Notes.]—Semble, that an admitted copy of the field notes from the Crown lands office, may be received in evidence. *Doe d. Strong* v. *Jones*, 7 U. C. R. 385.

A certified copy of part of the field notes of the original survey is admissible in evidence. *Carrick* v. *Johnston*, 26 U. C. R. 69.

Foreign Judgment and Proceedings.]—The Judge's private seal is not evidence of the proceedings of a foreign court of justice. *Brown* v. *Hudson*, Tay. 272.

Evidence of one witness that he had seen the seal of a foreign court, and believed the seal affixed to the document produced to be the seal of that court, and of another witness, that he had been to the office of the foreign court, and compared the seal, which was shewn him by an officer of the court, with that produced in evidence:—Held, sufficient primâ facie evidence of the judgment. *Hall* v. *Armour*, 5 O. S. 3.

A foreign judgment cannot be proved by a certificate from the clerk of the foreign court that judgment has been entered for a certain sum in favour of the plaintiff. *Norton* v. *Post*, 5 O. S. 137.

The mere exemplification of such judgment, if properly proved to be under the seal of the court, is sufficient proof. *Warener* v. *Kingsmill*, 7 U. C. R. 409.

To prove a judgment of the supreme court of the state of New York, held at Watertown, in the county of Jefferson, a copy of the roll was produced, certified by the county clerk under the seal of the county:—Held, insufficient. *Woodruff* v. *Walling*, 12 U. C. R. 501.

Debt on a judgment rendered in an inferior court in the United States. It was proved that the court had no seal, and the Judge's book was produced containing the judgment, and his handwriting and signature proved:—Held, sufficient. *Kerby* v. *Elliott*, 12 U. C. R. 367.

In an action on a judgment recovered in the tenth judicial district of the state of California, the plaintiff put in evidence an exemplification under a seal which purported by the impression to be that of the fourteenth district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court:—Held, that the proof was insufficient. *Junkin* v. *Davis*, 22 U. C. R. 369, affirming *S. C.*, 6 C. P. 408.

Held, upon the evidence set out in the report, that the judgment of the supreme court of the state of New York was properly proved, for the certificate shewed the person certifying to be the clerk, and the seal to be the seal of the court. *Hughitt* v. *Saxton*, 42 U. C. R. 49.

The defendant in an action on a judgment obtained in Iowa, U.S.A., pleaded denying the recovery of the judgment. Upon a motion for judgment under rule 322 upon the pleadings verified by affidavit, and the production of an exemplification of a judgment:—Held, that judgment could not be ordered on these materials under rule 322, the defendant having put the judgment distinctly in issue. *Henebery* v. *Turner*, 2 O. R. 284.

Foreign judicial proceedings and documents on application for extradition. See CRIMINAL LAW, VII.

Indictment.]—The production of the original indictment is insufficient to prove an indictment for felony. A record must be made up, with a proper caption. *Henry* v. *Little*, 11 U. C. R. 296.

In an action for maliciously and without probable cause arresting the plaintiff:—Held, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *Aston* v. *Wright*, 13 C. P. 14.

Journals of Parliament.]—Certain alleged copies of journals of parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed, nor was it shewn that the copies tendered were copies of any original. They were, however, shewn to have come from the parliamentary library at Ottawa, and most of them purported to have been printed by the Queen's printer:—Held, that, in the absence of a statute making them admissible, they could not be received. *Langtry* v. *Dumoulin*, 7 O. R. 499.

Judgment.]—Judgments may be proved at nisi prius by producing the original roll, as well as by exemplification, but the clerk should not produce such roll without proper authority. *Paterson* v. *Todd*, 24 U. C. R. 296; *Sloan* v. *Whalen*, 15 C. P. 319.

Lower Canadian Judgment.] — To prove a judgment recovered in Lower Canada an instrument was produced, headed, "Province of Quebec, district of Montreal, superior court of Lower Canada," setting out the judgment of the court, and certified to be a true copy under the hand of the prothonotary and the seal of the court:—Held, sufficient, under C. S. U. C. c. 80, s. 1. It was also objected that the judgment was not sufficient, as the defendant had not been personally served with the process in the action in the foreign court; but—Held, that as defendant had procured bail to be put in, and so obtained his freight, which had been attached, the objection could not be raised. *Tilton* v. *McKay*, 24 C. P. 94.

Malicious Procedure — *Termination of Proceedings.*]—In an action of damages for malicious arrest and imprisonment of plaintiff, under a capias, issued by a stipendiary magistrate in Nova Scotia, whose judgment it was alleged was reversed on appeal by the supreme court of Nova Scotia, oral evidence "that the decision of the magistrate was reversed," was deemed by the Judge at the trial sufficient evidence of the determination of the suit below:—Held, that such evidence was inadmissible, and was not proper evidence of a final judgment of the supreme court of Nova Scotia. *Gunn* v. *Cox*, 3 S. C.R. 296.

——— *Proof of Acquittal.*]—Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment indorsed "no bill;"—Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced. *McCann* v. *Preneveau*, 10 O. R. 573.

——— *Proof of Acquittal—Production of Original Record by Clerk—Certified Copy.*]—In an action for malicious prosecution, the plaintiff sought but was not permitted to prove his acquittal before the county Judge's criminal court of a charge of misdemeanour, by means of the production of the original record signed by the county Judge under the Speedy Trials Act, R. S. C. c. 175, and produced and verified by the clerk of the peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer:—Held, that the evidence should have been admitted in either of the above two forms, and judgment dismissing the action was set aside and a new trial ordered. *O'Hara* v. *Dougherty*, 25 O. R. 347.

——— *Record of Acquittal—Admissions on Examination for Discovery.*]—In an action for malicious prosecution, the indictment, with an indorsement thereon of the acquittal of the plaintiff of the criminal charge on which he had been prosecuted, was produced by the clerk of the court, having been sent to him by the registrar of the Queen's bench division to whom the indictment had been returned which he had been subpœnaed by the plaintiff to produce, the court being informed that the attorney-general had refused his fiat to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—Held, that the indictment so indorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a fiat of the attorney-general. Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt* v. *Cane*, 26 O. R. 133.

See MALICIOUS PROCEDURE.

Officer's Affidavit.]—An affidavit cannot be required from a public officer as to the proper discharge of his duty. *Re Morton and County of York*, 7 O. R. 59.

Order in Council.]—The defendants, without objection, put in a notice published by the Crown lands department, that pursuant to an order in council of the 4th October, 1871, the Government would recognize the rights of all locatees of free grant lands before the 30th September, 1871, to sell the pine thereon subject to certain dues:—Held, that this was some evidence of the order in council, especially when taken in connection with the testimony that the Crown claimed only a lien for the dues. *Brown* v. *Cockburn*, 37 U. C. R. 592.

Patent.]—If a person rely on a patent from the Crown to make out his title, he should, in the event of its being mutilated or injured so as to render it impossible to ascertain its contents satisfactorily, obtain an exemplification. *Goodtitle ex dem. Snyder* v. *Barker*, 5 O. S. 333.

A person who has lost his patent for land, will not be allowed to give parol evidence of its contents; he must produce an exemplification of the patent. *McCollum* v. *Davis*, 8 U. C. R. 150.

A certified copy of a patent taken from the books in the provincial registrar's office, and

signed by the deputy registrar, is not sufficient as primary evidence instead of an exemplification. *Prince* v. *McLean*, 17 U. C. R. 463.

Petition.]—A copy of a petition to the administrator of the Government certified by the clerk of the executive council, purporting to be signed by petitioners, one being a marksman, the indorsement shewing that it was received on the 15th May, 1797, was held admissible as evidence, without proof of the signature. *Montgomery* v. *Graham*, 31 U. C. R. 57.

Power of Attorney.]—A certified copy of a power of attorney to convey lands, from the depository of notarial records in Lower Canada, under the corporate seal of the board of notaries of Montreal, is admissible, it being presumed that such power, although not in itself an official document, came officially into the hands of the notary among whose records it was found. *Gray* v. *McMillan*, 5 C. P. 400.

Private Prosecutor.]—The plaintiffs were tried for bribery at an election at the Haldimand assizes in the spring of 1887 and acquitted. The information upon which the indictment was supposed to have been founded was laid against them by the defendant, and he was examined as a witness before the grand jury. At the conclusion of the trial the presiding Judge, at the request of the counsel for the accused, indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution and brought this action to recover payment of these costs from the defendant. The information and indictment (there being no evidence connecting the latter with the former) with the indorsement and the fact that the defendant was examined as a witness before the grand jury were the only evidence that the defendant was the private prosecutor:—Held, that the indorsement on the indictment had no force as a judgment or finding of fact and could not be accepted as proof of the defendant's position. Held, also, that the facts that the information was laid by the defendant and that he was examined as a witness before the grand jury were not sufficient evidence that he was the private prosecutor. *May* v. *Reid*, 16 A. R. 150.

Proclamation.]—On an application to set aside a nonsuit in an action brought by the plaintiff for damages for injuries occasioned by the defendants' negligence while in their employment, the court, on the argument, allowed the plaintiff, on terms, to give in evidence the proclamation bringing into force the Ontario Factories Act. *Dean* v. *Ontario Cotton Mills Co.*, 14 O. R. 119.

Public Document.]—Any public document filed in a public office of the Government, may be proved by an examined copy. *McLean* v *McDonell*, 1 U. C. R. 13.

Renewal of Writ.]—Lands were sold under a fi. fa. lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff, which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal:—Held, that no renewal was proved, and the sale was invalid. *Daby* v. *Gehl*, 18 O. R. 132.

Sale under Execution—*Proof of Judgment and Writ.*]—See EXECUTION, IX. 2 *b*.

Third Party—*Judgment.*]—The plaintiff having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against the sureties, when a person, who had indemnified the sureties was made a third party under an order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with liberty to appear by counsel and defend the action and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendant's liability, if any, to the plaintiff. At the trial the judgment was put in and one of the defendants called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendant's liability, which was refused and judgment entered for the plaintiff:—Held, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed. *Zimmerman* v. *Kemp*, 30 O. R. 465.

Vesting Order.]—Where a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit:——Held, under Gunn v. Doble, 15 Gr. 635, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title. *Re Morse*, 8 P. R. 475.

See sub-title I. 2, 8.

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6. Miscellaneous Cases.

Account Sales—*Letter of Guarantee by Bank—Claim for Loss—Proof of Claim.*]—H. et al., upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S., with guarantee against loss, shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of $7,965 on the shipments, and the claim being contested the only witness they produced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss:—Held, that assuming that there was a valid guarantee given by the bank, the evidence as to the alleged loss was insufficient to entitle H. et al. to recover. *Hathaway* v. *Chaplin*, 21 S. C. R. 23.

Ancient Document.]—In ejectment, the plaintiffs claimed through two deeds, over thirty years old, in proof of which they shewed one to have come from the custody of the former owner's agent, and the other to have been produced under a written order from the agent:—Held, sufficient proof of their having come from the proper custody, without calling the agent who had had charge of them. *Cook* v. *Christie*, 12 C. P. 517.

Ejectment. The plaintiff claimed from the patentee under a deed executed in 1843. Defendant relied on a former deed executed in

1813 by the patentee, (a married woman), on which was indorsed a certificate of her separate examination. This deed was produced by the son of the executor of the grantee of the patentee, and proved to have been found among the testator's papers:—Held, a proper custody in point of law, so as to render its mere production evidence. Held, also, that the deed under which plaintiff claimed, rather than the ancient deed, carried with it the imputation of fraud, and the production and proof of it did not necessitate the calling of the subscribing witnesses to the old deed if living, or proving their signatures if dead. Held, also, that the objection that possession of the land did not accompany the ancient deed was not sustained by the evidence set out in the case. *Orser* v. *Vernon*, 14 C. P. 573.

Deeds purporting to be upwards of thirty years old were produced from the custody of the solicitors of the plaintiffs, who claimed as trustees, and one of which solicitors was a plaintiff in the action. The plaintiffs claimed under these deeds, through several mesne conveyances. The solicitor-plaintiff had once recovered judgment in ejectment for the land in question, as one of the three trustees:—Held, that the deeds were produced from the proper custody, to entitle them to be received in evidence as ancient documents. *Thompson* v. *Bennett*, 22 C. P. 393.

A deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved. *Ib.*

J. McK., having an order in council for 100 acres, executed in February, 1827, to Shore, a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor was described as of York, labourer. In May, the patent issued to McK., and was in the possession of Shore shortly after its date. Shore went into possession in 1828, cleared about seven acres, and after three years left the land in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of Shore in 1849. The plaintiffs, claiming as heirs at law of Shore, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants Shortis and McCabe, produced a conveyance purporting to have been made by, and signed "James McKenny," now of the township of Niagara, &c., yeoman, to James Smith, dated 7th September, 1833; and a conveyance from Smith to Shortis, dated in May, 1849; both registered. No oral testimony was given of the identity of the grantor in the deed to Smith, with the locatee of the Crown, and no evidence of its custody during the thirty years:—Held, that the deed from McK. to Smith did not come within the rule that an ancient document proves itself. *Rogers* v. *Shortis*, 10 Gr. 243.

A memorial more than thirty years old of a lost deed, is good evidence upon its bare production, without calling or accounting for the subscribing witness. *Doe d. Maclem* v. *Turnbull*, 5 U. C. R. 129.

Semble, that this principle extends to any written document, even to letters. *Ib.*

Although an ancient deed produced from the proper custody proves itself, this does not preclude a party interested from proving the deed a forgery, or invalid on any other ground. *Chamberlain* v. *Torrance*, 14 Gr. 181.

The production of an original mortgage, which was more than twenty years old, proves itself under R. S. O. 1877 c. 109, s. 1, s.-s. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue. *Allan* v. *McTavish*, 28 Gr. 539, 8 A. R. 440.

Boundary—*Concession Line—Survey.*]—In an action on bornage between the owner of lots 7, 8 and 9 in the tenth concession of the township of Eardley, Que., and S., the owner of like numbered lots in the ninth concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line, to be traced from the south-easterly angle of lot 14 in the tenth concession easterly on a course S. 87° 30′ E. to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828 and the remainder in 1850, and in 1892 the whole line was surveyed again, and the result was held by the court below to establish it in accordance with the claim of E. In 1867 there was a private survey which established the line further north as claimed by S., who contended that it, and not the survey in 1892, was a retracing of the original line:—Held, that the original surveys were made in accordance with the instructions to the surveyors and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made which the courts would not be justified in acting upon. *Spratt* v. *E. B. Eddy Co.*, 29 S. C. R. 411.

British Ship—*Ownership—Payment to Distressed Seaman.*]—A certificate of the assistant secretary of the board of trade that expenses for the relief of a distressed seaman left in a foreign port were incurred and paid, under the provisions of The Merchants' Shipping Act, 1854, s. 213, is sufficient proof of payment under the Act though the above section does not provide for a mode of proof by certificate. Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed. Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the registrar-general of shipping, at London is sufficient proof of ownership. *The Queen* v. *The Sailing Ship "Troop" Company*, 29 S. C. R. 662.

Church Canon.]—Evidence offered of the contents of a canon of the church society or synod discussed. See *Langtry* v. *Dumoulin*, 7 O. R. 499.

Conflicting Evidence.] — The court, upon the conflicting evidence in this case, upon a petition under the Act for Quieting Titles, decided that a power of attorney and bond relied upon were forgeries. *Brouse* v. *Stayner*, 16 Gr. 553.

Copy of Paper—*Information and Belief.*]—An affidavit verifying the copy of a paper, "that it is a true copy as the deponent is informed, and verily believes," is sufficient. *Chafe* v. *Parr*, 2 U. C. R. 98.

Customs Duties.]—The witnesses called to prove the imposition of a duty on goods in the United States after the 17th March, derived their knowledge from printed circulars:—Held, insufficient. *Fraser* v. *Grand Trunk R. W. Co.*, 26 U. C. R. 488.

Deed under Power of Attorney.]—The production of a deed thirty years old, purporting to be executed under a power of attorney, does not prove the power. In this case the only proof of authority was the production of a paper professing to be a copy of an unsealed power of attorney, dated in 1824, and received by the plaintiff's attorney from the son of the person appointed by it, since dead:—Held, clearly insufficient. *Jones* v. *McMullen*, 25 U. C. R. 542.

Equitable Plea.] — An equitable plea must be proved by such witnesses as a court of law can receive. *Perley* v. *Loucy*, 18 U. C. R. 429.

Lease.]—In ejectment by a son against his father, the plaintiff claimed under a deed from defendant. There was evidence to shew that since this deed defendant had been more than twenty years in possession without any recognition of the plaintiff's right. The plaintiff attempted to shew that, during a part of that period defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which defendant claimed to have held adversely. At the foot, but not in defendant's writing, was written the plaintiff's name, and the word "copy." No proof was offered respecting this paper, except that it was in defendant's handwriting:—Held, that such paper should have been received. *McQueen* v. *McQueen*, 10 U. C. R. 193.

Mental Capacity.]—See *Udy* v. *Stewart*, 10 O. R. 591.

Ownership of Vessel.]—In an action for services rendered to a vessel:—Held, that oral evidence of ownership of a vessel was admissible, and that it was not necessary to produce the certificate of registration; for, assuming that in actions by or against owners of a registered vessel as owners the ownership must be proved by certificate, yet the mere ownership may not create a liability, and defendants may be liable apart from it under a contract made by their agent, as in this case by the purser. Semble, that the objection was not open to the defendants after their proof, without production of the certificate, that W. B. had ceased to be owner. *Lake Superior Navigation Co.* v. *Beatty*, 34 U. C. R. 201.

Place of Filing Affidavit.]—In an action for the maintenance of an illegitimate child, the affidavit was produced from the office of the city clerk, and purported to be sworn before the police magistrate of Toronto, where the deponent resided:—Held, sufficient evidence to go to the jury that it was deposited by her in the proper office. *Jackson* v. *Kassel*, 26 U. C. R. 341.

Plan.]—A plan was produced from the registry office, sworn to be that furnished by the commissioner of Crown lands. It was headed "Cardiff," (the name of the township) and at the bottom was written "Department of Crown lands, Ottawa, November, 1865, A. Russell, assistant commissioner," whose signature was proved:—Held, sufficiently certified, and receivable in evidence. *Nicholson* v. *Page*, 27 U. C. R. 318.

Plan.]—A map produced from the custody of the son of the original owner of the lot, and sworn to be the map upon which the township was originally sold:—Held, to be properly admitted in evidence. *Van Every* v. *Drake*, 9 C. P. 478.

Registered Instruments.]—See *McDonald* v. *Murray*, 5 O. R. 559.

Release Witnessed by Defendant.]—In an action of dower, the tenant relied upon a release by the demandant and her husband to C., from whom the tenant had afterwards purchased the land. This release was executed by the demandant by mark, her name being written by some one else, and the tenant was the only subscribing witness:—Held, that proof of the tenant's signature was not rendered admissible to prove the deed by the fact of his being a party to the record; and that, as he could not be examined on his own behalf, and offered no other evidence that the demandant executed the release, the demandant must succeed. *Clark* v. *Stevenson*, 23 U. C. R. 525.

At a subsequent trial the defendant gave evidence tending to prove that the release had been executed, but it was held that as this was secondary evidence he was bound to get the best, and call the demandant, notwithstanding her adverse interest; and a verdict in his favour was set aside. *S. C.*, 24 U. C. R. 200.

See, also, *Ferguson* v. *Freeman*, 27 Gr. 211.

Will—*Letters Probate.*]—In an action for the recovery of land the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office with the affidavit of verification attached:—Held, that this was not proper evidence of the will, no notice having been given under R. S. O. 1887 c. 61, s. 38. *Barber* v. *McKay*, 17 O. R. 562.

Writs of Execution.]—See EXECUTION, IX. 2 b, XIII.

See, also, sub-title, I. 2.

See, also, as to proof of special matters, the specific titles.

See ARBITRATION AND AWARD, II. 5, VII.—ASSESSMENT AND TAXES, X.—BILLS OF EXCHANGE, I. 2, IV. 3, V. 2—CERTIORARI, II. 3—COVENANT, III. 3—CONTEMPT OF COURT—

CRIMINAL LAW, VI.—DEED, III. 4 (b)—DEFAMATION, VII. — DISTRESS, III. 3 (c) — DOWER, I. 3—EJECTMENT, V.—INTOXICATING LIQUORS, II. 3 (b), IV. 5 (b)—MALICIOUS PROCEDURE, I. 4, 6, II. 3—MONEY, II. 7—MUNICIPAL CORPORATIONS, XIX. 5 (e)—NEGLIGENCE, XI.—NEW TRIAL, IV.—PARLIAMENT, I. 11 (e)—PARTNERSHIP, I. 1—PATENT FOR INVENTION, IV. 3—PAYMENT, III. 9—PLANS AND SURVEYS, IV.—POST-OFFICE AND POSTAGE—PRINCIPAL AND SURETY, V. 1 —QUIETING TITLES ACT, V.—RAILWAY, XXIV. 1 (a) — REGISTRY LAWS, II. — REPLEVIN, II. 3 — SEDUCTION, I. 3 — SESSIONS, II. 5—SET-OFF, V.—SHERIFF VII. 1 (c), IX. 8 (a), XIV. 3—SHIP, II. 5 (d), V. 3, X. 2—TRESPASS, I. 2, II. 3, III. 2 (d)—TRIAL, III. 2—TROVER AND DETINUE, IV.—TRUSTS AND TRUSTEES, II. 2 (b)—WARRANTY, I. 3—WATER AND WATERCOURSES, XII. 4—WILL, IV. 1—WORK AND LABOUR, III.

EVIDENCE, CORROBORATION OF.

See CRIMINAL LAW, VI., IX. 21 — EVIDENCE, V.

EXAMINATION OF JUDGMENT DEBTOR.

See DIVISION COURTS, X.—JUDGMENT DEBTOR.

EXAMINATION DE BENE ESSE.

See EVIDENCE, VI.

EXAMINATION FOR DISCOVERY.

See EVIDENCE, VII.

EXCESSIVE DISTRESS.

See DISTRESS, III. 3.

EXCHANGE OF LANDS.

See DOWER, V.—ESTATE, VI.—SPECIFIC PERFORMANCE, V. 6.

EXCHEQUER COURT.

I. JURISDICTION, 2573.

II. PRACTICE, 2577.

I. JURISDICTION.

Civil Servant—*Superannuation.*]—Where under the provisions of the Civil Service Superannuation Act (R. S. C. c. 18), the Governor in Council exercises the discretion or authority conferred upon him by such Act to determine the allowance to be paid to a retired civil servant, his decision as to the amount of such allowance is final, and the exchequer court has no jurisdiction to review the same. *Balderson* v. *The Queen*, 6 Ex. C. R. 8. Affirmed, 28 S. C. R. 258.

Customs Laws—*Seizure of Vessel—Controller's Decision—Reference to Court.*]—The controller of customs had made his decision in respect of the seizure and detention of a vessel under the provisions of the Customs Act, confirming such seizure. The owner of the vessel within the thirty days mentioned in ss. 181 and 182 of the Act gave notice in writing to the controller that his decision would not be accepted. No reference of the matter was made by the controller to the court as provided in s. 181, but the claimant presented a petition of right and a fiat was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the controller to the court:—Held, that the court had jurisdiction. Damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the customs law, but the claimant is entitled to the restitution of the vessel. *Julien* v. *The Queen*, 5 Ex. C. R. 238.

Dominion Interests.]—The Parliament of Canada has the right to enact that all actions and suits of a civil nature at common law or equity, in which the Crown in right of the Dominion is plaintiff or petitioner may be brought in the exchequer court. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Escheat.]—A statement of claim was filed by the attorney-general of the Province of Ontario in the exchequer court of Canada, praying "that it may be declared that the personal property of persons domiciled within the Province of Ontario, dying intestate and leaving no next of kin or other person entitled thereto other than Her Majesty, belongs to the Province or to Her Majesty in trust for the Province." The Attorney-General for the Dominion of Canada in answer to the statement of claim made, prayed that "it be declared the personal property of persons who have died intestate in Ontario since Confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada." No reply was filed, and on an application for an order to fix the time and place of trial or hearing, it was held, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect. *Attorney-General of Ontario* v. *Attorney-General of Canada*, 14 S. C. R. 736.

Injurious Affection of Property by Public Work—*Retroactive Effect.*]—Held, following The Queen v. Martin, 20 S. C. R. 240, that the court has no jurisdiction under the provisions of 50 & 51 Vict. c. 16 (D.), to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which at the time of the passing of that Act was barred by any statute of limitations. *Penny* v. *The Queen*, 4 Ex. C. R. 428.

Interference with Navigation.]—An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour is a civil and not a criminal proceeding, and the exchequer court has concurrent original jurisdiction over the same under 50 & 51 Vict. c. 16, s. 17 (*d*). *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

Maritime Law — *Lien — Necessaries — Home Port.*]—A claim for money advanced to a foreign ship to pay for repairs, equipment and outfitting is a claim for necessaries, but where the work is done in the home port of the ship the court has no jurisdiction, the same coming within the exception contained in s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10 (Imp.).]—Payment by the agent of the owner satisfies and discharges any lien in respect to the original claim of workmen or supply men to the extent of such payments. *Williams* v. *The "Flora,"* 6 Ex. C. R. 137.

——— *Necessaries Supplied to Foreign Ship in Foreign Port.*] — The exchequer court of Canada, under the provisions of 24 Vict. c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada. Cory Bros v. The Mecca, [1895] P. 95, followed. Under the principles of international law, the courts of every country are competent and ought not to refuse to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14 C. C. P. (L. C.) and Arts. 27, 28 and 29 C. C. (L. C.) *Coorty* v. *The George L. Colwell*, 6 Ex. C. R. 196.

——— *Salvage.*]—A yacht, with no one on board of her broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger:—Held, that they were entitled to salvage. The plaintiffs claimed the sum of $100 for their services:—Held, that inasmuch as the right to salvage was disputed, the provisions of s. 44 (*a*) of R. S. C. c. 81, did not apply, and that the court had jurisdiction in respect of the action. *Lahey* v. *The Maple Leaf*, 6 Ex. C. R. 175.

——— *Action of Account between Co-owners.*]—The exchequer court has jurisdiction to hear and determine actions of account between co-owners of a ship. *Hall* v. *The Seaward*, 3 Ex. C. R. 268.

——— *Action by Unregistered Mortgagee against Freight and Cargo.*]—A mortgagee under an unregistered mortgage of a ship has no right of action in the exchequer court of Canada against freight and cargo; and unless proceedings so taken by him involve some matter in respect of which the court has jurisdiction, they will be set aside. *Strong* v. *The Atalanta*, 5 Ex. C. R. 57.

——— *Mortgagee's Right of Action in Case of Collision.*]—The mortgagee in possession may maintain an action for damages arising out of a collision. *Ward* v. *The Yosemite*, 4 Ex. C. R. 241.

——— *Seamen's Wages — Claim under $200.*]—In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period A. resumed possession of the vessel. Upon an action in rem for wages due to a seaman employed by the vendees which were earned during their possession of the vessel:—Held, that the amount of the claim being below $200, the exchequer court had no jurisdiction under s. 34 of the Inland Waters Seamen's Act. *The Jessie Stewart*, 3 Ex. C. R. 132.

——— *Seamen's Wages—Costs.*]—The engineer of a tug took proceedings in the exchequer court, admiralty side, on a claim for $150 wages, and arrested the ship. On the trial it was contended that the court had no jurisdiction to try a claim for less than $200, the owner being insolvent, the ship not being under arrest, and the case not referred to the court by a Judge, magistrate, or justice pursuant to R. S. C. c. 75, s. 34—the Inland Waters Seamen's Act:—Held, that the Admiralty Act, 1891, conferred upon the exchequer court all the jurisdiction possessed by the high court, admiralty division, in England, as it stood on the 25th July, 1890, the date of the passing of the Colonial Courts of Admiralty Act, 1890, and that the Admiralty court in Canada could now try any claim for seamen's wages, including claims below $200; and that s. 34 of R. S. C. c. 75, was repealed by implication (not having been expressly preserved) to the extent, at any rate, that it curtailed the jurisdiction of the admiralty court to entertain claims for seamen's wages below $200 in amount. Held, also, as to the costs of any such action, that they were in the discretion of the Judge trying the cause under rule 132 of the admiralty rules of the exchequer court of Canada. This was the practice and rule in England on July 25th, 1890, and since. Tenant v. Ellis, 6 Q. B. D. 46; Rockett v. Clippingdale, [1891] 2 Q. B. 293; The Saltburn, [1892] P. 333, referred to. *The W. J. Aikens*, 4 Ex. C. R. 7.

Patents—*Jurisdiction of the Minister of Agriculture.*]—The jurisdiction, in respect of the avoidance of patents, conferred upon the Minister of Agriculture by s. 28 of the Patent Act of 1872 is exclusive of that possessed by any other tribunal in the Dominion. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

Revenue Law — *Penalty.*] — The jurisdiction conferred upon the vice-admiralty courts in Canada by s. 113 of the Inland Revenue Act (R. S. C. c. 34) in respect of actions for penalties prescribed by such Act, is not disturbed by the Colonial Courts of Admiralty Act, 1890 (Imp.). The latter Act (s. 2, s.-s. 3) vests the jurisdiction of the vice-admiralty courts in any colonial court of admiralty, and by the Admiralty Act, 1891, the Parliament of Canada made the exchequer

court the court of admiralty for the Dominion, and by s. 9 thereof conferred upon the local Judges in admiralty all the powers of the Judge of the exchequer court with respect to the admiralty jurisdiction thereof. *The Queen* v. *The Annie Allen*, 5 Ex. C. R. 144.

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

Trade-marks.]—The questions which the court has jurisdiction to determine under the Act, 53 Vict. c. 14 (D.), are such as relate to rights of property in trade-marks, and not questions as to whether or not a trade-mark ought not to be registered, or continued on the registry, because it is calculated to deceive the public or for such other reasons as are mentioned in R. S. C. c. 63, s. 12. *The Queen* v. *Van Dulken*, 2 Ex. C. R. 304.

The court has jurisdiction to rectify the register of trade-marks in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54 & 55 Vict. c. 35 (D.), came into force. Quære, has the court jurisdiction to give relief for the infringement of a trade-mark where the cause of action arose out of acts done prior to the passage of 54 & 55 Vict. c. 26 (D.). *DeKuyper* v. *Van Dulken*, 3 Ex. C. R. 88.

See *S. C.*, 24 S. C. R. 114.

The exchequer court has no jurisdiction to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an infringement of a registered trade-mark. (2). In such a case the question is not whether there has been an infringement of a mark which the plaintiff has used in his business but whether there has been an infringement of a mark as actually registered. *DeKuyper* v. *Van Dulken*, 4 Ex. C. R. 71.

See, also, *Partlo* v. *Todd*, 12 O. R. 171, 14 A. R. 444, 17 S. C. R. 196.

II. PRACTICE.

Action to Avoid Patent—*Default of Pleading.*]—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the patent office until the expiry of thirty days after such service. *Peterson* v. *Crown Cork and Seal Company*, 5 Ex. C. R. 400.

Admiralty Action—*Statement of Claim.*] —A plaintiff's claim is confined to the particulars indorsed on the summons. *Wyman* v. *The Duart Castle*, 6 Ex. C. R. 387.

Appeal from Local Judge in Admiralty—*Interference with Finding of Fact.*]—On appeal from a judgment of a local Judge in admiralty under s. 14 of the Admiralty Act, 1891, 54 & 55 Vict. c. 29 (D.), the court will not interfere with a finding of fact by the local Judge unless it is satisfied beyond reasonable doubt that the evidence does not warrant such finding. *Landry* v. *Ray*, 4 Ex. C. R. 280.

Appeal — *Extension of Time* — *Amending Order of Reference.*]—An order of reference had been settled in such a way as to omit to reserve certain questions which the court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed and the referee's report filed. After final judgment in the action, the Crown appealed to the supreme court. Subsequent to the lodging of such appeal, an application was made to the exchequer court to amend the order of reference so as to include the reservations mentioned, or, in the alternative to have the time to appeal from such order extended. Under the circumstances, the court extended the time to appeal, but refused to amend the order of reference as settled. *Woodburn* v. *The Queen*, 6 Ex. C. R. 69.

Appeal—*Extension of Time.*]—Judgment against suppliants was delivered on the 17th January, and the time allowed to appeal by the 51st section of the Exchequer Court Act expired on the 17th February. On the 22nd April following, the suppliants applied for an extension of the time to appeal on the ground that before the judgment the suppliants' solicitor had been given instructions to appeal in the event of the judgment in the exchequer court going against them. There was no affidavit establishing this fact by the solicitor for the suppliants, but there was an affidavit made by an agent of the suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until the 27th March:—Held, that the knowledge of the solicitof must be taken to be the knowledge of the company, that notice to him was notice to the company, and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of the suppliants' manager or agent as to the state of the cause. Order refused. *Alliance Assurance Company* v. *The Queen*, 6 Ex. C. R. 126.

Appeal.]—As to appeals from exchequer court, see SUPREME COURT OF CANADA, II. 2 (a).

Co-owners — *Indorsement of Writ.*] — Semble, in an action by the managing owner of a ship against his co-owner, the indorsement on the writ need not shew that there was any dispute as to the amount involved. *Hall* v. *The Seaward*, 3 Ex. C. R. 268.

Costs—*Appeal from Registrar's Ruling.*] —See *Sundbach* v. *The Saga*, 6 Ex. C. R. 305.

Counterclaim — *Information by the Crown.*]—A substantive cause of action cannot be pleaded as an incidental demand or

counterclaim to an information by the Crown. *The Queen* v. *Montreal Woollen Mills Co.*, 4 Ex. C. R. 348.

Customs Act — *Reference.*] — Where a claim has been referred to the exchequer court under s. 82 of the Customs Act, the proceeding thereon, as regulated by the provisions of s. 183 of the Act, is not in the nature of an appeal from the decision of the minister, and the court has power to hear, consider and determine the matter upon the evidence adduced before it, whether the same has been before the minister or not. *Tyrrell* v. *The Queen*, 6 Ex. C. R. 169.

Demurrer before the Exchequer Court Act.]—Where a petition of right had been demurred to and judgment obtained on such demurrer before a Judge of the supreme court, acting as Judge of the exchequer court, prior to the passage of 50 & 51 Vict. c. 16 (D.) it was held to be a case fully heard and determined and not one coming within the class of cases referred to as being "partly heard" in s. 50 of that statute; and the Judge who heard the demurrer refused a motion to amend the petition, made after the passage of such Act, on the ground of want of jurisdiction. Semble, that the provision in s. 50 of the Exchequer Court Act, that "any matter which has been heard or partly heard or fixed or set down for hearing before any Judge of the supreme court, acting as a Judge of the exchequer court, may be continued before such Judge to final judgment, who for that purpose may exercise all the powers of the Judge of the exchequer court," is not to be construed as an imperative enactment, and does not impose the duty upon a Judge before whom a case was instituted before the Act was passed to continue to entertain the case until final judgment, nor does such provision oust the jurisdiction of the Judge of the exchequer court in respect of such matter. *Dunn* v. *The Queen*, 4 Ex. C. R. 68.

Discovery.]—The Crown held certain lands at Ottawa for the purposes of the Rideau canal. To its title to a portion of the lands was attached a further condition that no buildings should be erected on such portion. The court was of opinion that the breach of the conditions referred to, did not work any forfeiture or let in the heirs. (3 Ex. C. R. 304). On motion under leave reserved:—Held, that the heirs (the suppliants) were not entitled to discovery or to an inquiry as to the particular uses to which the Crown had put the lands in question, or as to what buildings had been erected thereon. Semble, that such a declaration and inquiry might be made in a case in which the court had jurisdiction to grant relief. *Magee* v. *The Queen*, 4 Ex. C. R. 63.

Extension of Time—*Expiration of Statutory Period for Appeal.*]—Where sufficient grounds are disclosed, the time to appeal from a judgment of the exchequer court of Canada prescribed by s. 51 of the Exchequer Court Act, as amended by 53 Vict. c. 35, s. 1 (D.), may be extended after such prescribed time has expired. 2. The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time to appeal prescribed by the statute has expired. 3. Pressure of public business preventing a consultation between the attorney-general for Canada and his solicitor within the prescribed time to appeal is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clarke* v. *The Queen*, 3 Ex. C. R. 1.

Information of Intrusion.]—An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion. *The Queen* v. *Farwell*, 3 Ex. C. R. 271.

Infringement of Patent—*Actions taken in Different Courts.*]—Where the Judge of the exchequer court was asked to grant an interim injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a Provincial court of concurrent jurisdiction which had not been discontinued at the time of such application being made, the court refused the application upon the principle that a defendant ought not to be doubly vexed for one and the same cause of action. *Auer Incandescent Light Manufacturing Company* v. *Dreschel*, 5 Ex. C. R. 384.

Intrusion—*Joinder of Claims for Mesne Profits.*]—Rule 21 of the General Rules of Practice on the revenue side of the court of exchequer in England made on the 22nd June, 1860, providing that the mode of procedure to remove persons intruding upon the Queen's possession of lands or premises shall be separate and distinct from that to recover profits or damages for intrusion, governed the practice of the exchequer court of Canada in such matters until May 1st, 1895, when a general order was passed by that court permitting the joinder of such claims. Rule 36 of the English rules above mentioned, providing that in cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown is still in force in the exchequer court of Canada. *The Queen* v. *Kilroe*, 6 Ex. C. R. 80.

Judgment by Default—*Reference to Registrar.*]—Upon a motion for judgment in default of pleading to an information by the Crown it appeared that the information, while shewing that the Crown was entitled to judgment, did not shew clearly the amount for which judgment should be entered, and a reference was made to the registrar to ascertain, upon proof, the amount of the claim. *The Queen* v. *Connolly*, 5 Ex. C. R. 397.

Motion to Re-open Trial—*Affidavit.*]—An application was made after the hearing and argument of the cause but before judgment, that the defendants be allowed to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing:—Held, that the application must be refused. Humphrey v. The Queen and DeKuyper v. VanDulken, (Audette's Ex. C. Pr. 276), distinguished. *General Engineering Co.* v. *Dominion Cotton Mills*, 6 Ex. C. R. 306.

Official Arbitrators—*Exchequer Court Act—Rule of Court—Report by Two Arbitrators.*]—By a rule of court made on 7th March, 1888, it was ordered that, unless it was otherwise specially ordered, any matter pending before the official arbitrators when the Exchequer Court Act, 50 & 51 Vict. c. 16 (D.), came into force that had been heard or partly heard by such arbitrators should be continued before them as official referees, and that their report thereon should be made to the court in like manner as if such matter had been referred to them by the court under the 26th section of the said Act. Prior to the making of this rule a claim had been referred by the minister of railways and canals to the official arbitrators for investigation and award. The claim, however, was proceeded with and heard before two of such arbitrators only, and a report thereon in favour of the claimant was made by them to the court: —Held, that the hearing of the claim by two of the official arbitrators was not a hearing within the meaning of the rule, and that judgment could not be entered on the report. *Rioux* v. *The Queen*, 2 Ex. C. R. 91.

Order after Lodging of Appeal to Supreme Court of Canada.]—After an appeal from the final judgment of the exchequer court was lodged in the supreme court, the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages:—Held, that the Judge of the exchequer court had authority to allow the appeal and it was properly before the supreme court. *The Queen* v. *Woodburn*, 29 S. C. R. 112.

Sci. Fa. to Repeal Patent of Invention—*Right to Begin and Reply.*]—Under the general order of the exchequer court of Canada bearing date the 5th December, 1892, and the provisions of s. 41 of 15 & 16 Vict. c. 83 (Imp.), the defendant in an action of scire facias to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and, if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply. *The Queen* v. *Laforce*, 4 Ex. C. R. 14.

Security for Costs.]—Where, by a letter addressed to the suppliant, the secretary of the public works department stated, that he was desired by the minister of public works to offer the sum of $3,350 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of absolute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in the exchequer court must be made within the time allowed for filing statement in defence, except under special circumstances. *Wood* v. *The Queen*, 7 S. C. R. 631.

Solicitor—*Taxation.*]—A solicitor of the supreme court of judicature for Ontario who as such does business in carrying on proceedings for a client in the exchequer court of Canada is subject to the provisions of the Solicitors' Act with regard to delivery and taxation of his bill of fees, charges or disbursements in respect of such business. Judgment below, 29 O. R. 47, reversed in part. *O'Connor* v. *Gemmill*, 26 A. R. 27.

Successive Applications for Same Relief.]—See *Attorney-General for Ontario* v. *Attorney-General for Canada*, 1 Ex. C. R. 184.

Third Party Procedure.]—In an action by the Crown upon two customs export bonds defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof:—Held, that the court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event. *The Queen* v. *Finlayson*, 5 Ex. C. R. 387.

EXCISE.

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EXECUTION.

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I. ABANDONMENT.

Debtor Allowed to Continue Business.]—In an action against a sheriff for a false return, it appeared that on the day before the plaintiffs' writ came in he received a fi. fa. at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiffs' writ he did nothing. The plaintiffs' attorney wrote twice urging him to act, and ruled him, and in February, 1866, he returned that writ nulla bona, K.'s writ having been previously renewed. The court being left to draw inferences of fact:—Held, that as a matter of fact the sheriff never seized, or that as a matter of law he abandoned the seizure. *Foster* v. *Glass*, 26 U. C. R. 277.

Debtor Allowed to Retain Possession.]—A sheriff having seized goods under execution, took a bond for the delivery thereof when required, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor, was received by the sheriff:—Held, that the second took precedence of the first. *Castle* v. *Ruttan*, 4 C. P. 252.

A sheriff seized goods under an execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested to do so. The landlord of the execution debtor having seized and sold the goods for rent due to him by the debtor:—Held, in an action of trover by the sheriff against the landlord that the sheriff had not at the time of the distress such a possession of the goods as precluded the landlord from distraining for rent. *McIntyre* v. *Stata*, 4 C. P. 248.

The sheriff seized the goods in question, but put no bailiff in possession on the defendant promising not to remove them. The defendant subsequently removed the goods, whereupon the landlord seized them for rent, on the ground that the removal was fraudulent. The sheriff then made a second seizure under the execution:—Held, that the first seizure by the sheriff had been abandoned, and that he could not retake them while under seizure for rent, as they were in custodiâ legis. Held, also, that the validity of the landlord's claim could not be decided in chambers. An interpleader order was therefore refused. *Craig* v. *Craig*, 7 P. R. 209.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized the goods under the execution of the creditors. In an action against the sheriff:—Held, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it were the sheriff was estopped by his return to the writ from raising the question:—Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment. *Duffus* v. *Creighton*, 14 S. C. R. 740.

Debtor Allowed to Sell Goods.]—A sheriff received two executions against goods, on the 18th January and 15th February, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession, and carried on his business as before the seizure. There had been a stay on this writ by the solicitor for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On the 6th March, the goods, consisting of the whole of the execution debtor's stock-in-trade, were sold by the execution debtor to the plaintiffs, who removed them to their own place of business. On 22nd March, the sheriff seized all the goods then in the plaintiffs' possession, which he had received from the execution debtor, as also certain goods of the plaintiffs' which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiffs. The sale to the plaintiffs was found to be bonâ fide, and for value, and without notice of the executions. In replevin for the goods:—Held, that the sheriff was entitled to the goods of the execution debtor then in plaintiffs' possession: but not to the goods taken by the sheriff in lieu of those sold by the plaintiffs; that there was no abandonment of the executions, nor any such conduct on the part of the sheriff or the execution creditor as to estop them from asserting that the executions were in force. On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods:—Held, under a counterclaim setting up this undertaking the sheriff was entitled to recover the value of the goods sold by the plaintiffs after the 22nd March, and before the issue of the writ of replevin. *Patterson* v. *McKellar*, 4 O. R. 407.

Inventory without Possession.]—The bailiff, having merely made an inventory of the goods seized under a fi. fa. goods, leaving no one in possession:—Held, that they were not in custodiâ legis, and therefore could not be held against the landlord's claim for rent. *Hart* v. *Reynolds*, 13 C. P. 501.

Machine Seized but not Removed.]—Under an execution against one R., the plaintiff's son, the bailiff wrote "seized" on part of a sewing machine belonging to R., but then on the premises of one S., which could not be moved owing to the roads being blocked with snow, and he went to the plaintiff's premises, where the other part of the machine was, and told the parties that he seized it. He did nothing further for four months, when he removed the machine a few days before he advertised it for sale. R. made no objection to the sale, which was made to S. with the full privity of R. Subsequently the plaintiff purchased it from S., R. having offered, as an inducement, to give him certain parts of the machine which he had concealed from the bailiff. After the purchase R. had, with the plaintiff's permission, the use of the machine. Some time afterwards R. made a chattel

mortgage of the machine to the defendant:—Held, that the seizure was valid, and that there was no evidence of an abandonment; but that even if R. had had the right to insist that there had been an abandonment, he had clearly waived it, and had authorized the purchaser, S., to transfer an absolute title to the plaintiff. *Hincks* v. *Sowerby*, 4 A. R. 113.

Renewal of Writ.]—Taking a writ from the sheriff for renewal is not an abandonment. *Rowe* v. *Jarvis*, 13 C. P. 495; *Muir* v. *Munro*, 23 U. C. R. 139; *Mencilly* v. *McKenzie*, 3 E. & A. 209.

Sheriff Given Discretion.]—It appeared that the plaintiff's attorney in the execution had directed the sheriff not to sell the goods of L., but to levy upon another defendant in the suit; and that that defendant having remonstrated and urged him to sell, he telegraphed to the attorney to know if he should do so, and in answer, was told that he must act as he thought fit, according to his own judgment:—Held, that this answer was an abandonment of the first direction. *Boulton* v. *Smith*, 17 U. C. R. 400.

Sheriff Lending Chattel.]—A chattel was seized by the sheriff, and lent by him before the return of the writ:—Held, no abandonment. *Hamilton* v. *Bouck*, 5 O. S. 664.

Special Facts.]—Held, that under the evidence stated in this case, the sheriff could not be said to have abandoned the seizure under a fi. fa. goods. *Walton* v. *Jarvis*, 14 U. C. R. 640.

Held, under the facts set out in this case, that there was no reasonable ground to presume an abandonment of the execution against lands. *Mitchell* v. *Greenwood*, 3 C. P. 465.

In an action against the sheriff for a false return:—Held, that the long delay in respect of the writ of H. over which the plaintiffs claimed priority, in the sheriff's hands, from 1859 to 1862, was not, under the circumstances stated in this case, in law an abandonment, although it was evidence thereof. *Mein* v. *Hall*, 13 C. P. 518.

II. CREDITORS' RELIEF ACT.

Assignment for Creditors Intervening between Executions.] — Creditors whose executions or certificates under the Creditors' Relief Act are placed in the sheriff's hands after the execution debtor has made a general assignment for the benefit of his creditors are not entitled to share, under that Act, in the proceeds of goods seized by the sheriff under prior executions before the assignment was made, the proceeds being insufficient to pay these prior executions. Roach v. McLachlan, 19 A. R. 496, applied. *Breithaupt* v. *Murr*, 20 A. R. 689.

Attachment of Debts.]—Section 37, s.-s. 3, of the Creditors' Relief Act must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under s.-s. 1 of s. 37; and, to entitle him to such order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick. And where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in court awaiting the result of litigation between the assignee and the attaching creditor, two executions against the debtor came into the hands of the sheriff of the county in which the insurance company in whose hands the moneys were when attached had its head office:—Held, that the moneys had ceased to be the property of the debtor, and, even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions. Semble, also, that the provisions of s.-s. 3 of s. 37 should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt. *Re Thompson*, 17 P. R. 109.

Attacking Validity of Judgment.]—One creditor cannot attack the judgment of another, and object to his sharing, pursuant to the Creditors' Relief Act, in the distribution of moneys levied by the sheriff under executions in his hands, on the ground that the note on which such judgment was recovered was misdescribed, and the date of its maturity was misstated in the writ of summons, in order to obtain judgment earlier than could otherwise have been done; the debtor not consenting or objecting to the recovery. *Bowerman* v. *Phillips*, 15 A. R. 679.

When the debt is bonâ fide, another creditor cannot object to the judgment merely because there was a defence which the debtor might have set up to the particular action. Glass v. Cameron, 9 O. R. 712; Macdonald v. Boice, 12 Gr. 48, distinguished. *Ib.*

Whatever powers the Creditors' Relief Act may give to a creditor to contest the claim of another, it does not extend to the impeaching of a judgment by a summary proceeding before the county Judge. *Ib.*

Certificate of Claim—*Contestation.*]—Although, under the Creditors' Relief Act, a creditor who does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the moneys realized, and is therefore under s. 10 of the Act, entitled to contest the certificates of claim of other creditors, for in case of success there may be a surplus available for him, or at least the liabilities of the common debtor will be reduced. *Bank of Hamilton* v. *Aitken*, 20 A. R. 616.

Chattel Mortgage Intervening Between Executions.] — The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario, on the 6th December, 1884. The sheriff seized the defendant's goods on the 8th December. The defendant made a mortgage of his goods to D. on the 9th December. B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee D. paid to the sheriff the

whole amount of the first execution, $115, specially appropriating the payment to that execution:—Held, that the money paid to the sheriff was not levied by him within the meaning of the Creditors' Relief Act, 43 Vict. c. 10 (O.), and that the first execution creditor was entitled to the whole of it. *Davies Brewing and Malting Co.* v. *Smith*, 10 P. R. 627.

Chattel Mortgage — *Wages.*] — Executions against goods in the hands of a sheriff subsequent to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption, and are not entitled, under the Creditors' Relief Act, to share with executions prior to the giving of the mortgage. The fact that in such a case the subsequent executions are on judgments recovered for wages gives them no priority under the Wages Act, R. S. O. 1887 c. 127, s. 3, and they can take nothing until the prior executions and the mortgagee are paid in full. *Roach* v. *McLachlan*, 19 A. R. 396.

Claim under Chattel Mortgage—*Claim under Execution Subsequently Obtained.*] — Certain goods of the defendant seized by a sheriff under the plaintiffs' execution were claimed by a chattel mortgagee, whereupon an interpleader issue was directed. The goods were sold under the interpleader order by the sheriff, who deducted his fees from the proceeds, and by consent retained the residue in his hands pending the result of the issue, entering it in his books as held under the Creditors' Relief Act. The claimant never delivered any issue, and abandoned the interpleader proceedings. He obtained judgment against the defendant, and, within thirty days of the entry in the sheriff's books, placed an execution in the sheriff's hands:—Held, that the claimant was entitled to participate in the proceeds, and was not barred of his rights as an execution creditor because, before he had attained that status, he had asserted a right in a different capacity. Whatever might have been the effect, had his claim been insisted upon, of s. 4, s.-s. 3, of the Creditors' Relief Act, R. S. O. 1887 c. 65, none should follow the fact that a claim was made and abandoned before it became necessary to contest it. *Wait* v. *Sager*, 14 P. R. 347.

Creditor's Costs.]—The creditor under whose execution an amount in the hands of a sheriff for distribution under the Creditors' Relief Act, 1880, is levied, which is insufficient to pay all claims in full, is not entitled to priority of payment of the costs of obtaining a judgment and execution. *Porteous* v. *Myers*, 12 A. R. 85.

Division Court Execution.]—On the return of nulla bona to a division court execution, the plaintiff, under 57 Vict. c. 23 (O.), amending the Division Courts Act, issued out of said division court an execution against lands to the sheriff of another county, but before the sheriff had taken any steps to enforce it, the defendant paid to him the amount thereof, with the request that it should be applied on plaintiff's execution. At the time of such payment there were other executions in the hands of the sheriff against the goods and lands of the defendant:—Held, that the Creditors' Relief Act applied to the moneys so received by the sheriff. *In re Young* v. *Ward*, 27 O. R. 588.

Fund in Court.]—Since the coming into force of the Creditors' Relief Act of 1880, 25th March, 1884, execution creditors who obtain stop orders on funds in court, do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order, there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Dawson* v. *Moffatt*, 11 O. R. 484.

The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale, after payment of the mortgage debt, interest, and costs. *Harvey* v. *McNeil*, 12 P. R. 362.

Semble, in the case of foreclosure, the old form of decree giving execution creditors as subsequent incumbrancers liberty to redeem according to their priorities, is no longer applicable. *Ib.*

Where the surplus proceeds of a mortgage sale were paid into court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale:—Held, following Dawson v. Moffatt, 11 O. R. 484, and having regard to the provisions of s. 24 of the Creditors' Relief Act, R. S. O. 1887 c. 65, that the fund in court should be paid to the sheriff for distribution in accordance with the provisions of that Act. *Re Bokstal*, 17 P. R. 201.

Interpleader Issue.]—The plaintiffs obtained execution against one D., under which a seizure was made, when the defendants and another person made claim to the goods under a chattel mortgage, in consequence of which the usual interpleader order was issued, and default having been made in payment into court, or giving security for the appraised value of the goods, the same were sold and the proceeds paid into court. The trial of the issue resulted in favour of the claimants, but on appeal the claim of the defendants was disallowed, and the demand of the other claimant was paid. Before the trial took place, the defendants placed an execution for the amount of their demand in the sheriff's hands against the goods of D. When finally disposing of the matter, the Judge of the county court directed that the money in court should, after payment of certain costs, be paid out to the plaintiffs and defendants ratably, according to their respective claims under the Creditors' Relief Act, 43 Vict. c. 10 (O.). The plaintiffs thereupon appealed, and the court being equally divided the appeal was dismissed with costs. *Reid* v. *Gowans*, 13 A. R. 501.

A sheriff had seized goods under writs of fi. fa. in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into court, which was done. After the claim of the chattel mortgagee had been barred, a question arose as to the distribution of the money in court:—Held, that the seizure under the writs, together with

the conversion into money by the sheriff under the order of the court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff, in the sense of s. 5 of the Creditors' Relief Act, 1880, and therefore that the money in court should be distributed ratably, according to the provisions of that Act: but:—Held, also, upon a liberal construction of s. 35 of 49 Vict. c. 16 (O.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant. *Levy* v. *Davies*, 12 P. R. 93.

Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor, which were claimed by D., whereupon an interpleader summons was obtained by the sheriff and an order was made barring the claimant, without any issue being directed. This order did not state that the parties consented to a summary disposal of the matter, and the facts did not clearly appear. The sheriff proceeded and sold the property, and made an entry under the Creditors' Relief Act. The appellants and several other creditors delivered certificates to the sheriff within the proper time, who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him, the county court Judge gave the whole fund to the plaintiffs, under s.-s. 4, s. 3 of the Creditors' Relief Act. An appeal from such order was dismissed, the court being equally divided. *Bank of Hamilton* v. *Durrell*, 15 A. R. 599.

Partnership and Individual Assets.]—The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class, and not to alter the legal effect of the executions themselves, or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy. There were in the sheriff's hands executions: (1) against R. alone; (2) against R., J. J., and G. J., on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine, purchased for the purpose of being used in another partnership business, carried on by them quite distinct from that partnership to which the horse belonged: and (4) against G. J. and R., on a joint note in which R. was surety only for G. J. The horse was seized and sold:—Held, that under an execution against three, the joint or partnership property of two may be levied, and the proceeds of this sale were distributable ratably among the executions (2), (3), and (4). Proceedings against partnership property under a separate execution against one of the partners considered. *Re McDonagh* v. *Jephson*, 16 A. R. 107.

Receiver.]—The provisions of the Creditors' Relief Act are not to be extended to cases not actually provided for by that Act, and therefore the appointment of a receiver may properly be made for the benefit of the plaintiff alone. *McLean* v. *Allen*, 14 P. R. 84.

Sheriff's Duty as to Entry.]—Held, that the word "forthwith," contained in s. 4 of the Creditors' Relief Act, R. S. O. 1887 c. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay." Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was held to be not reasonable. *Maxwell* v. *Searfe*, 18 O. R. 529.

Staying Proceedings to Enable Creditors to Rank.]—After a judgment had been set aside for irregularity, several creditors of the defendants obtained judgments against them, and placed writs of fi. fa. in the sheriff's hands, under which he sold the defendants' goods. Upon a motion by the plaintiffs, made in their own action, and also in the several actions in which judgments had been obtained, for an order directing the sheriff to pay the proceeds of the sale into court, instead of making the usual entries under the Creditors' Relief Act, in order to preserve the priority of the plaintiffs' judgment, in case it should be restored upon appeal:—Held, that there was no power, upon the plaintiffs' application, to interfere with the sheriff's proceeding upon writs of fi. fa. regularly in his hands. *Mason* v. *Cooper*, 15 P. R. 418.

III. Equitable Execution.

1. *In General.*

Alias Writ while Action Pending.]—A fi. fa. lands was placed in the sheriff's hands, and, before the return day, the plaintiffs filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit sheriff returned the writ "no lands," and the plaintiffs thereupon delivered an alias writ to the sheriff:—Held, that the plaintiffs had not thereby lost their right to proceed with the suit in equity. *Stevenson* v. *Franklin*, 16 Gr. 139.

Equitable Interest.]—Where a writ of fi. fa. or sequestration is placed in the sheriff's hands, it forms a lien on defendant's equitable estate from the date of such delivery, and not merely from the date of the plaintiff's filing a bill to enforce the same. *Moore* v. *Clark*, 11 Gr. 497.

Imperial Act—*Charging Order.*]—The Imperial statute, 1 & 2 Vict. c. 110, if in force in this Province, authorizes the issuing of a charging order against stocks standing in the name of a debtor "in his own right or in the name of any person in trust for him," but does not apply where such stocks have been fraudulently assigned in order to avoid execution. *Caffrey* v. *Phelps*, 24 Gr. 344.

Interest before Patent.]—The interest of a debtor in land, bought from the Crown, but not fully paid for at his death, and not patented, is available in equity for his creditors; and their right is not destroyed by a friend of the heirs paying the purchase money, and procuring the patent in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Gr. 309.

Interest in Debtor.]—P. being in insolvent circumstances, and unable to obtain in his own name a lease of certain real estate which he had previously had a lease of, procured one S. to apply for and obtain from the

owner of the property a lease to S., under an agreement that P. should continue to work the same as a nursery, and from the profits reimburse S. certain advances and also pay a debt due by P. to him, and that P. should retain any balance for his own benefit. On a bill filed by a creditor of P. seeking to have S. declared a trustee for P., and to have his interest sold:—Held, that although there was no resulting trust, nor any trust manifested in writing, still that P. had such an interest under the lease as could be reached in this court by an equitable execution on a proper case being made for such relief; and to enable the plaintiff to make such a case leave was granted to him to amend, with liberty to the defendants to speak to the cause after the amendments made. *Toms* v. *Peck*, 12 Gr. 345.

Interest in Land—*Writ of Fi. Fa.—Declaratory Judgment.*] — The testatrix bequeathed to her executors a sum of money in trust to be expended in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged, or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. She also directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, "the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable." The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared that they stood seized of it upon the trust and for the purposes and subject to the provisions contained in the will. In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment, or for a receiver to receive the rents and profits:—Held, that the plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without having a fi. fa. lands in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action. Held, also, that if the directions of the will were effectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable. Held, also, that the plaintiff had no locus standi to claim a declaration as to the right of the judgment debtor in the lands. Bunnell v. Gordon, 20 O. R. 281, followed. *Thomson* v. *Cushing*, 30 O. R. 123. See the next case.

Interest in Land—*Writ of Fi. Fa.*]—In an action by a judgment creditor for a declaration of the judgment debtor's interest in certain lands held by trustees for him under the provisions of his mother's will and for equitable execution or equitable relief:—Held, that the plaintiff could not succeed, as his execution was not in the sheriff's hands when this action was commenced, and leave to amend so as to claim "on behalf of himself and all other creditors" was refused, as his action was not a class action. Decision below, 30 O. R. 123, affirmed. *Thomson* v. *Cushing*, 30 O. R. 388.

No Fi. Fas. in Sheriff's Hands.]—Plaintiff claimed a debt of $200 from the defendant. Defendant did not appear. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plaintiff, the other outstanding in other hands. On application of plaintiff for judgment for $200 and interest, and for a decree for sale of the equity of redemption:—Held, on the authority of Karr v. Styles, 26 Gr. 309, that the plaintiff could have judgment as asked, notwithstanding that in this case there were no fi. fas. in the sheriff's hands. *Johnson* v. *Bennett*, 9 P. R. 337.

Pleading.]—Where a suit is brought for equitable execution against lands, in aid of a judgment at law, the bill must shew that an execution at law has been placed in the hands of the sheriff. *Shea* v. *Denison*, 14 Gr. 513.

Sale Subject to Wife's Life Estate.]—An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage settled certain lands (the subject of the suit) in trust to the use of the wife for life, with power of sale to the trustee, to be exercised with the husband's consent. The legal estate was in one R., who had a primary charge on the premises. Under these circumstances it was decreed that the plaintiff was entitled to redeem R.: that the wife's estate was exempt from every charge other than that of R.: that of this charge she must either keep down the interest or pay a proportionate share of the principal: that she was entitled to a provision out of her life estate: that subject to her interest, the property, on R. being paid, should be sold; and an inquiry was directed as to other judgments, in order to a proper application of the proceeds. *Pemberton* v. *O'Neil*, 2 Gr. 263.

Time for Action.]—Equitable interests cannot be reached by an execution creditor unless he commences a suit or takes some other step for the purpose during the currency of the writ. *Wilson* v. *Proudfoot*, 15 Gr. 103.

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2. *By Appointment of Receiver.*

General Rule.]—In the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles, and in that sense only can a receiver be said to be ex debito justitiæ whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor, or of any one else, and the court will not appoint a receiver by way of equitable execution upon the ground that it will do no harm unless there is reason to suppose that there is something to receive in which the plaintiff can be interested. *Smith* v. *Port Dover and Lake Huron R. W. Co.*, 8 O. R. 256, 12 A. R. 288.

Under the Judicature Act the court has power to award equitable execution after judgment in any and every case where it is just and convenient to do so. Where writs of execution had issued, but had not become

exigible against the lands (subject to mortgages) of a judgment debtor possessing no personalty, and who was collecting the rents and paying other creditors, a receiver of the property was appointed by way of equitable execution to collect the rents subject to the rights of the mortgagees, and to apply them for the benefit of creditors under the Creditors' Relief Act. In such a case the receiver should be an officer of the court. *Kirk* v. *Burgess*, 15 O. R. 608.

Administration Action by Receiver.] —The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful. A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status. *Mones* v. *McCallum*, 17 P. R. 102. See the next case.

A receiver appointed by the court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. Decision below, 17 P. R. 356, reversed. *Mones* v. *McCallum*, 17 P. R. 398.

Administrator ad Litem—*Ex Parte Order —Administration—Advertisement for Creditors.*]—By an ex parte order of the high court, after judgment for the plaintiff, the defendant having died, the plaintiff was appointed receiver of the interest of the defendant in an estate, another person was appointed administrator ad litem of the defendant's estate for the purposes of the action only, and added as a defendant, and a reference was directed for administration. Afterwards, letters of administration of the estate of the defendant were granted by a surrogate court to a trusts company:—Held, that the property to which the defendant was entitled at the time of his death never vested in the administrator ad litem, because of the limited character of the administration granted to him; but vested in the company upon the grant to them, and they were bound to administer the estate, paying the debts ratably. The company were "parties" affected by the ex parte order, within the meaning of rule 538, and were entitled to move to vacate it. That order was based upon the assumption that the plaintiff was the only creditor of the defendant, and that the plaintiff could not be, and no one else was likely to be, appointed administrator. The order would not have been made had it been known, as was the fact, that any other creditor existed, for the plaintiff had acquired no lien or priority, by reason of a former receiving order obtained by him in respect of his judgment against the defendant, upon the property not come to the hands of the receiver. The referee, in proceeding under the ex parte order, was wrong in not issuing an advertisement for creditors; he omitted to do so because of the mistaken notion that the plaintiff was entitled to the whole estate, it being less than the amount of his judgment. *McLean* v. *Allen*, 18 P. R. 255.

Claim against Crown—*Distribution of Fund—Creditors' Relief Act—Undertaking.*] —The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was voted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant:—Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right. Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant. Willcock v. Terrell, 3 Ex. D. 323, and Manning v. Mullins, [1898] 2 I. R. 34, followed. The fact that the Crown is the debtor does not stand in the way of the court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor. Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment. *Stewart* v. *Jones*, 19 P. R. 227.

Ex Parte Order—*Costs.*]—After judgment a receiver may be appointed ex parte in case of emergency or where there is danger apprehended in the disposal of property. Re Potts, [1893] 1 Q. B. at p. 662, and Minter v. Kent, &c., Land Society, 11 Times L. R. 197, referred to. And where ex parte orders were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—Held, that the disposition of the costs should not be reviewed on motion to continue the receiver. McLean v. Allen, 14 P. R. 84, distinguished. *Stark* v. *Ross*, 17 P. R. 237.

Foreign Debtor.] — The jurisdiction of the court was exercised on behalf of an execution creditor by way of equitable execution, to make the sheriff receiver of the moneys secured by a mortgage of land in his county, held by the execution debtor, who was resident out of the Province. *Parent* v. *Lortie*, 7 C. L. T. Occ. N. 195.

Forum—*Amount of Claim—Other Relief Open.*]—A motion for the appointment of a receiver by way of equitable execution is properly made in court, notwithstanding the language of the O. J. Act, s. 17, s.-s. 8, and rule 399, and the applicant will not be restricted to the costs of a chambers motion. *Kincaid* v. *Kincaid*, 12 P. R. 462.

A judgment for $212.60 is not too small to justify the judgment creditor in moving for a receiver. *Ib.*

It is no answer to such a motion that the judgment creditor could probably make the amount of his judgment out of the defendant by the sale under common law process of other property of the defendant than that sought to be reached by the appointment of a receiver. *Ib.*

Interest in Trust Estate—*Necessity for Fi. Fas.—Attaching Orders.*]—The interest of a debtor in a trust estate consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under rule 370 O. J. Act, relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, debitum in præsenti solvendum in futuro, which is capable of attachment; moneys which may or may not become payable by a trustee to his cestui que trust are not debts. The case of Leaming v. Woon, 7 A. R. 42, is not to be followed, being founded on Re Cowan's Estate, 18 Ch. D. 638, which is now overruled by Webb v. Stenton, 11 Q. B. D. 530. Judgment below, 15 O. R. 66, reversed. The proper course in such a case is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of fi. fa. against goods or lands. *Stuart* v. *Grough*, 15 A. R. 299.

After an order to pay over had been made upon a garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this the garnishees subsequently without further compulsion or threat of execution paid the money to the attaching creditor without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so:—Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them (otherwise than by paying it to the receiver), without leave of the court. *Ib.*

The effect of the appointment of a receiver upon the rights of an attaching creditor considered. Hawkins v. Gathercole, 1 Drew. 12; Ames v. Birkenhead Dock Co., 20 Beav. 332, acted on. *Ib.*

Judgment for Costs—*Assignee of Judgment—Residuary Legatee and Executor.*]—Under rule 935 an order to attach debts may be founded on a judgment for costs only. Troutman v. Fisken, 13 P. R. 153, distinguished. Under the same rule an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment. An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him. Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the court; and the way to bring them before the court is by administration proceedings. Quære, whether the assignee of the judgment would be entitled to administration. The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee. *McLean* v. *Bruce*, 14 P. R. 190.

Life Insurance—*Subsequent Declaration by Insured for Benefit of his Wife and Children.*]—An order was made, after judgment in an action, appointing a receiver and for the sale by him of a policy on the life of the defendant for $1,000 which would be fully paid up in ten years, and enjoining the defendant from dealing with the policy. Notwithstanding this, the defendant made an assignment or declaration for the benefit of his wife and children, under R. S. O. 1887 c. 136, s. 5:—Held, that the order for sale was improper. Per Boyd, C.—No order to sell should have been made against the will of the beneficiaries under the assignment, and quære, if there was jurisdiction to make any such order. If the beneficiaries failed to pay the accruing premiums, it might then be proper, as the receiver had no funds wherewith to pay them, to negotiate with the company for the surrender of the policy. Stokoe v. Cowan, 29 Beav. 367, doubted. Per Robertson, J.—It was competent for the defendant at any time, even after the receivership order and injunction, to make the declaration for the benefit of his wife and children, and the plaintiff could not interfere with the rights of the beneficiaries under it at the maturity of the policy, even supposing their rights to be limited to the residue after payment of the plaintiff's execution, which semble they were not. Per Meredith, J.—Whether there was power to make the order to sell or not, it should not have been made in this case, it not being shewn to be necessary, having regard not only to the plaintiff's interests, but to those of other parties in the subject matter. *Weekes* v. *Frawley*, 23 O. R. 235.

Life Policy—*Security for Money.*]—The plaintiffs, judgment creditors, were held entitled to a receivership order in respect to the defendant's interest in a fully paid up life policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the bonus additions. A paid up policy is a "security for money" within R. S. O. 1897 c. 77, s. 18, the Execution Act. *Canadian Mutual Loan and Investment Co.* v. *Nisbet*, 31 O. R. 562.

Order of Master of Titles.]—Upon the proper construction of s. 92 of the Land Titles Act, R. S. O. 1897 c. 138, a person entitled to payment of costs under an order of a master of titles made by virtue of s. 91, can have "execution issued" by the proper officer, upon the order and certificate of the master, without any order of the high court directing or permitting it; but the words of the section do not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution." And, even if an application to the court were necessary in order to have "execution issued," these words would not include the appointment of a receiver. In re Shephard, 43 Ch. D. 131; Croshaw v. Lyndhurst Ship Co. [1897] 2 Ch. 154; and Norburn v. Norburn, [1894] 1 Q. B.

448, followed. *Re Craig and Leslie*, 18 P. R. 270.

Other Remedy Open.]—An order for a receiver should not be made in respect of a fund which may be reached by garnishing process. *Millar* v. *Thompson*, 19 P. R. 294.

Pending Action—*Unliquidated Damages.*]—A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action. *Central Bank* v. *Ellis*, 27 O. R. 583.

Salary.]—Judgment creditors on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a schoolmaster:—Held, that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all. Kincaid v. Kincaid, 12 P. R. 462, distinguished. *Trust and Loan Co.* v. *Gorsline*, 12 P. R. 654.

Share in Estate in which Execution Debtor is Administrator—*Injunction.*]—At the instance of execution creditors, a receiver was appointed to receive the debtor's share of his deceased wife's estate, of which he was the administrator; and an injunction was granted restraining him from transferring, incumbering, or dealing with his share. *Smith* v. *Egan*, 17 P. R. 330.

Taxes—*Rents.*]—See *Re Denison, Waldie* v. *Denison*, 24 O. R. 197.

Will—*Action for Construction.*]—A receiver appointed by way of equitable execution to receive the share of a judgment debtor under a certain will, applied for an order for leave to bring an action in the name of the debtor for construction of the will. The receiver had not requested the debtor to bring the action, and upon the application the latter expressed his willingness to do so and to proceed without unnecessary delay:—Held, that the receiver would have been entitled to the order if the debtor had refused to bring the action or had delayed unreasonably. No order was made, but leave was reserved to the receiver to apply again if the debtor did not proceed with diligence. *McLean* v. *Allen*, 14 P. R. 291.

Will—*Beneficial Interest—Security.*]—Motion by the plaintiff to continue an order for the appointment of a receiver by way of equitable execution, and motion by the defendant to discharge the order. The interest of the defendant in the property sought to be realized was acquired under a will devising an interest to him during his life for the support and maintenance of himself and his children, with remainder to the heirs of his body or to such of his children as he might devise the same to. The property in question consisted of real as well as personal property:—Held, that the defendant was entitled under the will to a beneficial interest which should be applied in payment of his debts; but it could not be decided upon this motion whether his creditors were entitled to the whole or only to a portion. 2. That as the rights of the receiver were limited to receiving those moneys which were the absolute property of the debtor free from any trust, it was not improper to make the appointment of the receiver without security. 3. That the provisions of the Creditors' Relief Act form an exception to the general rule and are not to be extended to cases not actually provided for by that Act; and therefore the appointment of the receiver was properly made for the benefit of the plaintiff alone. 4. That costs should not have been awarded against the defendant upon an ex parte motion. 5. That it is proper to appoint the receiver in the action in which judgment had been recovered. *McLean* v. *Allen*, 14 P. R. 84.

Will—*Interference with Discretion of Executors.*]—The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum. An order was made in a division court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof. Prohibition was granted against the enforcement of this order:—Held, following The Queen v. Judge of County Court of Lincolnshire, 20 Q. B. D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory. *Re McInnes* v. *McGaw*, 30 O. R. 38.

Will—*Maintenance.*]—The testator bequeathed to J. E. B. and his wife B. J. B. certain real and personal estate, upon the following trust: "In the first place, to and for the support and maintenance of himself and his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them; secondly, for the support, education, and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. B. and B. J. B. Power was given to the defendant and his wife jointly during their lives, and to him if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages, and all other securities, and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly, and to the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as remained unexpended and unappropriated in carrying out the trusts, between the said children and their said heirs, if any, in such manner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof, if they should see fit so to do, or to convey or make over to any of them by way of advancement any portion of the same to become theirs absolutely:—Held, that the gift was for the benefit of the defendant J. E. B. and his wife jointly, and that his interest could not be attached by an execution creditor. Held, also, that the defendant had no estate in the lands corresponding to an estate at law; at most he had but a charge upon an income arising out of a mixed fund, the amount of which was in

the discretion of the trustees, and the case in this aspect was within the rule in Gilbert v. Jarvis, 16 Gr. 265. The object of an equitable execution is to impose on the equitable interest the liability which would attach at law on a corresponding legal interest. Godden v. Crowhurst, 10 Sim. 655, considered and followed. Buchanan v. Brooke, 24 Gr. 585, overruled. *Fisken* v. *Brooke*, 4 A. R. 8.

Will — *Maintenance.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

Will—*Right to "a Home"—Interest in Land.*]—A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were living upon the land at the time of the making of the will and at the death of the testator, when there were two dwelling-houses thereon. Afterwards the trustee and the nephew's father-in-law, at their expense, improved and altered the property so that the number of houses was increased to seven. The nephew lived with his family in one and received the rents of the others. In an action by judgment creditors of the nephew and his wife seeking the appointment of a receiver to receive the rents in satisfaction of the judgment:—Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of the plaintiff's claim. Allen v. Furness, 20 A. R. 34, distinguished. *Cameron* v. *Adams*, 25 O. R. 229.

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3. *Summary Application.*

Costs.]—Where an order was made for the sale of defendant's equitable interest in certain land, under the A. J. Act, R. S. O. 1877 c. 49, s. 11, the costs of the application were directed to be taxed, and inserted in the indorsement as part of the costs to be levied under the writ of fi. fa. *Watts* v. *Hobson*, 7 P. R. 334.

Forum—*Form of Order Nisi.*]—On an application by a judgment creditor under the A. J. Act 1873, s. 36, to sell an equitable interest in land, an order nisi should issue returnable before a Judge in chambers. Form of order given. *Wark* v. *Moulton*, 7 P. R. 144.

Interest under Agreement to Purchase.]—Con. rule 1008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances," is not limited to cases of equitable interests arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land. A reference was directed to ascertain what interest the debtor had in the land in question. Wood v. Hurl. 28 Gr. 146, not followed owing to the change in the law by Con. rule 5. *Peters* v. *Stoness*, 13 P. R. 235.

IV. Exemptions.

Boat.]—A boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt. *Daragh* v. *Dunn*, 7 L. J. 273.

Chattel Ordinarily Used in Debtor's Occupation.]—Tools and implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used. An execution creditor was held entitled, therefore, to garnish the price of a baker's waggon sold by the execution debtor a few days after he had abandoned the occupation of baker and had entered upon the occupation of laundryman. *Wright* v. *Hollingshead*, 23 A. R. 1.

Crown—*Absconding Debtor.*]—23 Vict. c. 25, exempting certain articles from seizure, does not bind the Crown. Semble, that the statute does not apply where the debtor has absconded, leaving the goods with his family. *Regina* v. *Davidson*, 21 U. C. R. 41.

Deciding as to Exemptions.]—Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with. *Field* v. *Hart*, 22 A. R. 449.

Effect of Chattel Mortgage.]—In an action against division court bailiffs for selling under execution a horse which was exempt, it appeared that at the time of the seizure and sale the horse was included in a chattel mortgage given by the plaintiff to one M.:—Held, that defendants could not set up the right of the mortgagee as a defence. *McMartin* v. *Hurlburt*, 2 A. R. 146.
See Owens v. *Bull*, 1 A. R. 62.

Free Grant Lands—*Debt Incurred before Location.*]—An execution against the lands of a patentee under the Free Grants and Homesteads Act, R. S. O. 1887 c. 25, on a judgment for a debt incurred before location of the lands, does not operate as a charge against the lands when sold by his devisee, even after the expiry of twenty years from the date of the location. *Re Beatty and Finlayson*, 27 O. R. 642.

Free Grant Lands—*Mortgage to Locatee.*]—The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. 1887 c. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, he taking

back mortgages to secure the purchase money:—Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of s. 29, s.-s. 2. The exemption extends to the land or any part thereof or interest therein so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him quâ locatee. The word "interest" used in the sub-section does not extend to the chattel interest of a mortgagee. *Cann* v. *Knott*, 19 O. R. 422, 20 O. R. 294.

Horse.]—A horse ordinarily used in the debtor's occupation, not exceeding in value $80, is a "chattel" within the Act, and is therefore not liable to seizure. *Davidson* v. *Reynolds*, 16 C. P. 140.

Insurance.]—A judgment creditor cannot obtain by receiving order money payable to his debtor in respect of insurance upon exempted chattels. The money takes the place of the chattels and is subject to the same protection. *Osler* v. *Muter*, 19 A. R. 94.

Interpleader—*Sheriff.*]—A sheriff sued in the county court by an execution debtor for $100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alledged to be exempt, cannot obtain in that court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption. Judgment below, 21 O. R. 624, reversed. *In re Gould* v. *Hope*, 20 A. R. 347.

Invalid Bill of Sale.]—An execution debtor can do as he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor. *Field* v. *Hart*, 22 A. R. 449.

Sale under Second Writ — *Right to Proceeds.*]—In an action against the sheriff and his sureties, for not paying over moneys levied under a fi. fa., it appeared that certain goods of one H. had been seized by the sheriff at the plaintiffs' suit, and claimed by the debtor's brother under a sale, which the plaintiffs alleged to be fraudulent. The debtor also claimed exemption for $60 worth, under 23 Vict. c. 25, and these latter goods the sheriff sold under a subsequent execution, the debt for which that judgment was recovered, having been contracted before the 19th May, 1860, as appeared by an exemplification of the judgment. The plaintiffs alleged that these goods were not subject to that writ, there being no certificate indorsed upon it under 24 Vict. c. 27, s. 2:—Held, that the plaintiffs could have no claim on such goods or their proceeds, for they were exempt from their writ under 23 Vict. c. 25, and even if not subject to the other execution the sheriff was responsible to the execution debtor, not to the plaintiffs, for the proceeds. Semble, however, that the want of the certificate was immaterial, as the statute does not make it the only mode of proving when the debt was contracted, and here that was shewn by the exemplification. *Michie* v. *Reynolds*, 24 U. C. R. 303.

V. Practice.

1. *Amendment of Writs.*

Plaintiffs, without having previously issued process, on 3rd October, 1857, took a confession of judgment, and neglected to file it, or a copy of it, within a month, as prescribed by the statute. On 11th February, 1858, they entered judgment. On 24th October, 1858, issued a fi. fa. goods; had same returned nulla bona. On 10th August, 1861, issued a fi. fa. lands. Had same renewed 10th August, 1862. On 2nd February, 1863, amended the indorsement of levy on writ, and afterwards obtained a summons for leave to amend the indorsement on writ of fi. fa. lands in the hands of the sheriff, by increasing the amount indorsed, or for a new writ of fi. fa. lands:—Held, that so long as the confession was open to the objection of not having been filed within the month, and so not valid to support the judgment, the amendment could not be allowed. Semble, if relief could have been afforded to plaintiff, it could only have been by making the other execution creditors of defendant and the sheriff parties to the summons. *Rigney* v. *Durie*, 9 L. J. 185.

An order was made by the master in chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally, and also amending the writs of fi. fa. in the sheriff's hands so as to be conformable with the judgment as amended. The order was made nunc pro tunc upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force, and that the effect of the amendment was to give plaintiffs' writ priority, the master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out:—Held, on appeal, that though the M. Co. were strangers to the action in which the amendments were made, they had a locus standi to apply to have same set aside. *Glass* v. *Cameron*, 9 O. R. 712.

A fi. fa. may be amended so as to relate to the day of entering the judgment. *Andruss* v. *Page*, Tay. 348.

Original fi. fa. amended by making it a testatum, and new original allowed to be sued out. *Fisher* v. *Brooks*, 3 O. S. 143.

Fi. fa. lands amended after sale under it. *Fleming* v. *Executors of Wilkinson*, T. T. 1 & 2 Vict.

To support a sale of lands under a fi. fa., the writ must correspond with the judgment; but the amendment thereof, even after sale, will cure the defect. *Helm* v. *Crossin*, 17 C. P. 156.

On a judgment in assumpsit a fi. fa. was issued in debt and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given a deed, under which the plaintiff claimed. It was objected that the sale was void, having been made under an erroneous writ, but:—Held, the objection could not be entertained. *Doe d. Elmsley* v. *McKenzie*, 9 U. C. R. 559.

A fi. fa. directed to no one is void, and cannot be amended. *Wood* v. *Campbell*, 3 U. C. R. 269.

The declaration set out a writ of ven. ex., reciting that the sheriff had been commanded to make of lands, &c.; his return, that he had taken lands which remained unsold, &c., and commanding that he should sell the said lands, &c. Plea, nul tiel record. The exemplification produced correctly set out the writ, reciting the sheriff's return, that he had taken goods, which said goods remained unsold, and commanding him to sell the lands: —Held, not amendable, the error being in a material part of the writ itself, not in the declaration. *Brown* v. *Carroll*, 9 U. C. R. 314.

An execution against the goods of a deputy sheriff may be directed to the sheriff of the county in which the deputy resides, and ought not to be directed to a coroner of that county. In such a case plaintiff was allowed to withdraw his writ of execution, and amend by directing it to the sheriff and not to the coroner. *Gordon* v. *Boaler*, 6 L. J. 112.

The statement in a fi. fa. lands of the true amount of debt and costs was amended on plaintiff's application on payment of costs, and a similar amendment was allowed in a ven. ex. lands and fi. fa. residue. *Watts* v. *Little*, *Watts* v. *Loney*, 6 L. J. 233.

Fi. fa. amended, together with judgment roll, by making it to levy of defendant's goods instead of testator's. *Purdie* v. *Watson*, 3 P. R. 25.

One of the defendants, Edmund M., correctly styled in the summons, was by mistake named in the judgment roll and execution as Edward M.:—Held, amendable. *McKenzie* v. *McNaughton*, 3 P. R. 35.

Amendment of an alias fi. fa. lands issued without authority, refused, it appearing that before argument the original writ had been returned and filed, and that nothing had been made thereunder, nor any levy made. *Smith* v. *Smith*, 4 P. R. 354.

The ven. ex. recited a seizure of goods under a fi. fa. lands, and commanded a sheriff to sell lands:—Held, clearly amendable. *Chambers* v. *Dollar*, 29 U. C. R. 589.

The plaintiff, as official assignee, sued defendant, as administrator, on a promissory note payable to W. or bearer. Defendant pleaded plene administravit præter goods not sufficient to satisfy a judgment outstanding. Plaintiff replied, confessing the plea, and prayed judgment and his damages, &c., of assets quando. The pleadings were thus entered on the roll, together with a second prayer of judgment for plaintiff's debt, &c. Then followed the judgment as for damages, and a suggestion that intestate died seised of lands, &c., and a prayer that the amount recovered might be levied of the lands. A fi. fa. against goods issued on 19th February, as for damages recovered, which was returned no goods, and on the 20th February, a fi. fa. lands issued, which spoke merely of the amount recovered. There had been no order of reference to the master to ascertain the amount, nor any assessment by a jury, nor any sci. fa. to inquire as to goods:—Held, on application to set aside the judgment and writs, that the judgment was a final judgment, and that no reference or assessment was requisite. *Mason* v. *Babington*, 17 C. P. 149.

Held, that the writ against goods, on a judgment of assets quando, was irregular, there having been no writ of sci. fa. or revivor; but that, notwithstanding, the writ against lands was not irregular, as the record shewed there were no goods. *Ib.*

Held, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and the discrepancies between debt and damages were mere defects in form, and amendable. *Ib.*

Quære, whether any suggestion of lands at all was requisite. *Ib.*

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2. *Issuing Execution.*

(a) *In General.*

Alias Writ—*Execution Stayed by Error.*]—Where, with a view of giving defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt, as the only proper mode of staying the execution, which receipt the sheriff had stated in the return of the writ of fi. fa., the court ordered an alias to issue. *Hinnerley* v. *Gould*, Tay. 143.

Alias after Ven. Ex.]—It is an irregularity only, and not a nullity, to issue an alias after a return of "goods on hand" to the original fi. fa., and a ven. ex. upon it, on which the sheriff returns "that the goods had been exhausted by prior writs;" and the irregularity is waived by delay in the application against it. *Commercial Bank* v. *McDonell*, 1 U. C. R. 406.

Assignment of Dower.]—A writ of assignment of dower is a writ of execution within s. 249 of the C. L. P. Act, and may therefore be tested on the day on which it is issued. *Fisher* v. *Grace*, 28 U. C. R. 312.

Clerical Errors.]—In a fi. fa. goods and the indorsements thereon the plaintiffs were styled defendants, and vice versâ, the words being transposed throughout, and the christian names of the defendant were also transposed: —Held, clearly irregular. *Davidson* v. *Grange*, 5 P. R. 258.

Concurrent Writ.]—The costs of a concurrent writ will not be disallowed unless it be shewn that it was issued merely to make additional costs. *McKellar* v. *Grant*, 3 L. J. 14.

Coroner.]—The plaintiff, as coroner, sued upon a note made by defendant, payable to B. or order, alleging that while it remained unpaid, one M. recovered a judgment against B., C., and D., and issued a fi. fa. directed to the plaintiff, under which he seized the note. Defendant pleaded, that after the making of the note, and before this suit, B. being the owner and holder of said note, delivered it to C. to receive the amount thereof, and to pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the Judge of the county court as to the debts due them, &c., and the note was

then filed in the court of common pleas; that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others in collusion with him, and the plaintiff, at the commencement of this suit was the holder of the said note by fraud:—Held, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vict. c. 57, s. 22. Plea bad, as shewing no defence. *Brown* v. *Gordon*, 16 U. C. R. 342.

Crown—*Fine.*]—The Crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *Desjardins Canal Co.*, 29 U. C. R. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the Crown not being bound by 43 Geo. III. c. 1. *Ib.*

Death of Defendant.]—A fi. fa. lands tested after the death of defendant is void. *McCarthy* v. *Low*, 2 O. S. 353.

But if tested in the lifetime of the debtor it may be taken out and executed after his death. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510.

Held, that the death of a defendant after the placing of an execution against goods in the sheriff's hands, did not make it necessary to revive the judgment against his executors or administrators to make valid the seizure under the writ, of goods which were owned by the defendant at the time of his death. *Turner* v. *Patterson*, 13 C. P. 412.

Death of Plaintiff.]—Where a plaintiff in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under 17 Car. II. c. 8. No execution, however, can issue in the name of plaintiff's executor without reviving the judgment. *Proctor* v. *Jarvis*, 15 U. C. R. 181.

Death of Plaintiff after Verdict and before Judgment — *Assignment of Verdict.*]—In an action for malicious prosecution the jury found a general verdict for the plaintiff with damages. The defendant moved to set aside the verdict, and his motion being dismissed, gave security for the purpose of an appeal, after which the plaintiff assigned "the verdict or judgment" to his daughter, and died about three months later. No judgment had been entered, nor was there any order or direction of the Judge for the entry of judgment. By an ex parte order, made on the application of the next friend of the plaintiff's daughter, after his death, the assignment to her was recited, and it was ordered that the action should stand revived in her name:—Held, that the action could not be revived or continued by or against the daughter, she not being the assignee of a judgment, and the cause of action not being one capable of being assigned to her so as to sue for it in her own name; and the defendant's appeal could not be heard in the absence of the legal personal representative of the plaintiff. Semble, the assignee of a judgment debt may obtain an order to enter a suggestion reviving the action for the purpose of issuing execution in his own name. Philips v. Fox, 8 P. R. 51, referred to. *Blair* v. *Assclstine*, 15 P. R. 211.

Duplicate.]—An original fi. fa. with the sheriff's return thereon, having been lost, the plaintiff was allowed to issue a duplicate, to obtain a return for warranting an alias. *McEwen* v. *Stoneburne*, T. T. 7 Wm. IV.

Enforcing Decree.]—Where a decree ordered B. to give A. a note as the price of certain railroad iron to be forthwith delivered to B. by A., the quantity and weight thereof to be ascertained by the master, and the price adjusted accordingly; and also, in another clause, ordered A. to deliver to B. selected rails up to a certain value, and B. forthwith to give A. a note for the value thereof, and that A. should thereupon enter into a certain covenant in regard to them; and that in default of delivery of the said notes the amounts should become immediately due from B.:—Held, not a decree within R. S. O. 1877 c. 63, s. 72, on which a fi. fa. could, on such default, be issued ex parte on merely filing an affidavit, but that a reference was necessary. *Bickford* v. *Pardee*, 15 C. L. J. 49.

Excessive Fees.]—Ten dollars is an excessive indorsement on a fi. fa. goods for the expense of the writ, and the moment a writ so indorsed is handed to a sheriff the party aggrieved can apply to have a reference to the master to reduce the amount, and make the attorney in default pay the costs, even though the attorney accepts a less amount, which the debtor tenders to him, as sufficient. *Corbett* v. *Wallbridge*, 2 C. L. J. 331.

Execution after Discharge from Custody.]—A fi. fa. may issue against goods, although defendant may be discharged from prison for not having been regularly charged in execution. *Dorman* v. *Rawson*, Tay. 278.

Execution in Assignor's Name after Assignment.] — A. obtains a judgment against B. on his bond, and after this assigns the judgment to C. for valuable consideration. C. having issued a writ against B.'s lands in the name of A., the court refused to set the writ aside on the application of B. *Commercial Bank* v. *Boulton*, 6 U. C. R. 627.

Executor or Administrator.]—Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Bockmer*, 26 O. R. 191.

From what Office.]—It is irregular to issue execution out of the office of a deputy clerk of the Crown, in which there have been no previous proceedings in the cause, or in which there is no judgment entered. *Dalrymple* v. *Mullen*, 1 P. R. 327, note.

A rule nisi for a mandamus was discharged with costs. The rule discharging the rule nisi with costs was issued, and costs thereupon taxed in the principal office in Toronto. Afterwards the party entitled to the costs filed the rule in the office of a deputy clerk of the Crown, and issued a fi. fa. goods from that office:—Held, that the writ should have been issued in Toronto. *In re Judge of County of Elgin*, 8 L. J. 70.

Indorsement to Follow Judgment.]—In taking out a fi. fa. against executors for costs, the costs directed to be levied must follow the judgment; and where the sum indorsed on the fi. fa. is not warranted by the judgment, it will be referred to the master to tax the proper costs, and to reduce the indorsement accordingly. *Gore Bank* v. *Gunn*, 1 C. L. Ch. 140.

In an action on a bail bond,—Held, that the indorsement on the writ of execution being stated to be for a less sum than that mentioned in the judgment, was no ground of special demurrer. *Easton* v. *Longchamp*, 3 U. C. R. 475.

Judgment against Deputy Sheriff.]—An execution against goods of a deputy sheriff may be directed to the sheriff of the county in which the deputy resides, and ought not to be directed to a coroner of that county. In such a case, the plaintiff was allowed to withdraw his writ of execution and amend by directing it to the sheriff, and not the coroner. *Gordon* v. *Bonter*, 6 L. J. 112.

Judgment against Executor.]—A judgment against an executor to recover de bonis testatoris, will warrant an execution against testator's lands, on the return of nulla bona. *Doe d. Jessup* v. *Bartlet*, 3 O. S. 206.

Judgment for Recovery of Land—*Writ of Possession—Ouster—Fresh Writ.*]—Where the plaintiff had been put in possession of land under a writ of possession, which was thereupon returned by the sheriff as executed, and the defendant, less than a year afterwards, regained possession and kept the plaintiff out, no change having occurred in the title in the meantime:—Held, that the plaintiff was entitled to a new writ of possession. *Proctor* v. *Weller*, 3 C. L. T. 551.

Motion to Set aside Judgment—*Execution Issued before Revivor.*]—After judgment pronounced by the court upon default of defence the plaintiff died, and the defendant desiring to have the judgment set aside and be let in to defend, issued a præcipe order under rule 622 reviving the action in the name of the executor of the plaintiff's will:—Held, that rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained. Arnison v. Smith, 40 Ch. D. 567, distinguished. Curtis v. Sheffield, 20 Ch. D. 398, and Twycross v. Grant, 4 C. P. D. 40, followed. After the death of the plaintiff and before the order of revivor the solicitor who had acted for her issued a writ of hab. fac. poss. upon the judgment, without the leave required by rule 886:—Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219.

Nova Scotia Practice.]—See *Archibald* v. *Hubley*, 18 S. C. R. 116.

Order under C. S. U. C. c. 24.]—To obtain an order for execution under C. S. U. C. c. 24, s. 19, the service of the summons must be personal, or leave must be obtained to make it in some other manner. *Clifton* v. *Durand*, 3 P. R. 60.

Order of Court of Another Province.]—Execution may be issued under s. 85 of the Winding-up Act, R. S. C. c. 129, upon the order of a court of another Province, without making such order a rule of court, or obtaining the direction of a Judge, upon the mere production to the officer of the high court of a properly certified copy of such order. Re Companies Act and Hercules Ins. Co., 6 Ir. R. Eq. 207, followed. Re Hollyford Copper Mining Co., L. R. 5 Ch. 93, and Re City of Glasgow Bank, 14 Ch. D. 628, not followed. In such cases the settled practice of the high court is to have the order entered in the proper book as a judgment or order. *Re Dominion Cold Storage Co., Lowrey's Case*, 18 P. R. 68.

Part of Debt Made.]—Where part of a debt has been levied under a fi. fa., and the writ returned, either a fi. fa. residue or an alias may issue. The former is the more correct; but if the latter be issued, it must, on the face of it, agree with the judgment. The indorsement must be according to the true amount to be levied. *Lee* v. *Neilson*, 3 L. J. 72.

Partner.]—The plaintiffs recovered judgment against the defendants, sued as a partnership firm, by default of appearance, after service of the writ of summons upon M., a member of the firm, and then moved under rule 876 for leave to issue execution upon such judgment against D., as a member of the firm who had appeared. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the master in chambers that he was a general partner, and he made the order asked for:—Held, that the admissions of D. in his cross-examination justified the order under rule 756 and avoided the necessity of sending an issue to be tried under rule 876:—Held, also, that rule 756 was applicable at this stage of the cause, i.e., after judgment obtained without pleadings. *Tennant* v. *Manhard*, 12 P. R. 619.

Partner—*Determining Liability.*]—Where an application is made under rule 876 for leave to issue execution, upon a judgment against a firm, against an alleged member of the firm, who has not admitted that he was and has not been adjudged to be a partner, and who was not served as a partner with the writ of summons, and who disputes his liability, there is no power in the court or a judge, under rule 756 or otherwise, to summarily determine the question of his liability; but an issue must be directed. Tennant v. Manhard, 12 P. R. 619, overruled. *Standard Bank* v. *Frind*, 14 P. R. 355.

Payment for Certificate.]—A plaintiff cannot levy on a fi. fa. the amount paid by him for a certificate of judgment. *Hutchins* v. *Baby*, 2 P. R. 126; *Wilt* v. *Lai*, 1 C. L. Ch. 216; *McKellar* v. *Grant*, 3 L. J. 14.

Pluries Writ—*Delay.*]—A pluries fi. fa. issued by the deputy clerk of the Crown of an outer county, in which the papers of the cause had been filed, judgment having been entered in the office at Toronto:—Held, regular. Held, also, that if such writ were irregular, a levy having been made under it on the 20th December, this application on

the 10th February, would be too late. Held, also, that the fact of a deputy clerk of the Crown not having transmitted the original fi. fa. to Toronto, could not prejudice the plaintiff. *Gore Bank* v. *Gunn*, 1 P. R. 323.

Reducing Levy.]—The court will not interfere on a strict legal ground only to reduce the sum indorsed to levy on a fi. fa. *Maitland* v. *Secord*, Dra. 456.

Return by Mistake.]—Issue of second fi. fa. goods, the first having been returned, "money made" by mistake. *Ross* v. *Jones*, 2 L. J. 68.

Second Writ before Return of First.]—A fi. fa. having been issued, the plaintiff, after the return day, but before the return, took out a second writ for the full amount, directed to another sheriff. The first writ was afterwards returned, £10 levied, and goods on hand for the residue; and a ven. ex. issued upon it:—Held, that the plaintiff should have procured a return of the first before issuing the second writ, and should have issued it only for the residue; and that the fact of the indorsement on the second writ having been lessened, could not cure the irregularity. *McMurrich* v. *Thompson*, 1 P. R. 258.

Sheriff Becoming Director in Defendant Company.]—Held, that a writ of fi. fa. against a railway company, which was directed to a sheriff before he became a director in the company, was properly directed to, and returnable by, him, and his becoming a director before the return of the writ did not invalidate it. *Smith* v. *Spencer*, 12 C. P. 277.

Stranger to Judgment.]—The court will not order that execution shall issue on a judgment for the benefit of a stranger to the judgment. *Gamble* v. *Bussell*, 5 O. S. 339.

Time for Return.]—A fi. fa. goods might be made returnable with an interval of several terms. In this case it was issued on the 18th July, 1854, returnable on the first day of Trinity term, 1855. *Foster* v. *Smith*, 13 U. C. R. 243.

See DIVISION COURTS, VII.

(b) *Goods and Lands.*

A fi. fa. issued before the return of the execution against goods, is only an irregularity, and a purchaser at sheriff's sale cannot be affected by it. *Doe d. Spafford* v. *Brown*, 3 O. S. 92.

It is irregular to issue a fi. fa. goods after a levy on a writ against defendant's lands, which has not been returned, and a judgment creditor who is prejudiced may set such writ aside. *Stevens* v. *Sheldon*, T. T. 3 & 4 Vict.

A return of a fi. fa. goods in the county where the venue is laid, is sufficient to warrant a fi. fa. lands to any other county, without a writ against goods there also; but both writs cannot run together in the same county. In this case a fi. fa. goods had issued both to Wentworth, where the venue was, and to Hastings. That to Wentworth was returned nulla bona, and the plaintiff then issued a fi. fa. lands to Hastings, where the writ against goods was still current, and a seizure had been made under it:—Held, that the fi. fa. lands was irregular, and must be set aside. *Oswald* v. *Rykert*, 22 U. C. R. 306.

Held, affirming the last case, that the issuing of a fi. fa. lands and alias fi. fa. goods concurrently was objectionable; but that the latter, not having been acted on, could be abandoned, and the fi. fa. lands retained. *Ontario Bank* v. *Kerby*, 16 C. P. 35.

Plaintiffs issued writs of fi. fa. goods, and on the same day placed them in the hands of sheriffs of different counties. Within three weeks the writs were at the request of the plaintiffs' attorney, and with the consent of H., one of the defendants, returned nulla bona, the other defendant, as it was believed, having no goods, and the goods of H. being claimed by another in privity with him. On the return of these writs, fi. fas. lands and alias fi. fas. goods were on the same day issued and placed in the sheriff's hands. Subsequently the alias fi. fas. goods were withdrawn, the fi. fas. lands being left in the sheriff's hands:—Held, that although the same rule applies in the case of two defendants, as in the case of one, that the goods (of both) must be exhausted before the lands are resorted to, and each has, therefore, as great an interest in the due execution of a writ against the goods of his co-defendant as against his own, before the lands are touched; yet, in this case, H. could not, by reason of his consent thereto, complain of the return nulla bona as to himself; nor could he complain of the same return as to his co-defendant, because the latter had no goods which could apply to the writs; while the latter could not object to the return as to H., because, it was alleged, the goods of H. were claimed by another under a title from him, and it was not reasonable that the plaintiffs should contest this claim, particularly as the property appeared to be small, when there was a probability of realizing their claims by a sale of the lands after the expiration of the usual time. *Ib.*

Observations on the inconvenience of the procedure here, by two writs of execution, in order to reach lands, and probable intention of 5 Geo. II. c. 7, with reference thereto. *Ib.*

A plaintiff cannot at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon. The plaintiff issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April, 1865, was returned nulla bona, with the consent of one of the defendants, and on that day fi. fas. against lands issued to the same and to other sheriffs, and an alias fi. fa. goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf of the two defendants, and of the Bank of British North America, to whom they had given a mortgage of lands on the 17th May, 1865, the objections being that there had been no proper issue and return of the writs against goods, and that the writs against lands and goods were concurrent:—Held, that the return of nulla bona, if any of the defendants had goods, could be only an irregularity, against which the bank could not move, nor the defendant who had consented to it; but,—Held, also, that as the alias writ against goods issued on the same

day as the writs against lands, and had been acted upon, the latter writs were under the circumstances illegal, and must be set aside:—Held, also, that the mortgage to the bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff. *Ontario Bank* v. *Muirhead, Ontario Bank* v. *Kerby*, 24 U. C. R. 563.

Semble, that one of several defendants may insist that the goods of the others shall be exhausted before a writ issue against his lands. Quære, whether this application could have been entertained on the part of the bank. Semble, not. *Ib.*

Held, affirming 7 O. R. 215, following Doe d. Spafford v. Brown, 3 O. S. 95, and Ontario Bank v. Kerby, 16 C. P. 35, decided under 43 Geo. III. c. 1, that the issue of an execution against lands before the return of an execution against goods is, under R. S. O. 1877 c. 66, an irregularity only, and not a void proceeding, the provision of both statutes being in effect the same. *Ross* v. *Malone*, 7 O. R. 397.

(c) *Time.*

Alimony—*Master's Report.*]—Where a reference is directed to the master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. Lewis v. Talbot Street Gravel Road Co., 10 P. R. 15, approved and followed. *Boeck* v. *Boeck*, 16 P. R. 313.

Costs.]—Plaintiff recovered a verdict, but delayed for some months in seeking to enforce it. He then, notwithstanding the repeated offers of defendant's attorneys to pay the debt and costs when taxed, immediately after taxation entered judgment, and without notice to defendant put a fi. fa. in the sheriff's hands to levy on his goods forthwith, which was done. Some items were subsequently struck off the bill on revision. On an application by the defendant for relief, it was held, that the plaintiff's conduct was vexatious and oppressive, and an abuse of the process of the court; and it was ordered that defendant should be discharged from the fi. fa. upon payment of the judgment, less the costs struck off on revision, and the costs of the fi. fa. and part of the interest. *Anon.*, 4 P. R. 242.

A party who has to pay costs on a final judgment on verdict, nonsuit or demurrer, or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them, nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment. *Coolidge* v. *Bank of Montreal*, 6 P. R. 242.

It is irregular to take out a fi. fa. the instant costs have been taxed, without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Ch. Ch. 94.

The word "immediately" in rule 863 means "instanter;" and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation. *Clarke* v. *Creighton*, 14 P. R. 34.

See COSTS, V. 1.

Default Judgment.]—A fi. fa. issued on a judgment on a specially indorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and if knowingly issued, an abuse of the process of the court. *Randall* v. *Bowman*, 1 C. L. J. 158.

An execution issued on the same day that a judgment in default of appearance, contrary to order 9, rule 4, is signed, is an irregularity only, and not a nullity. *Macdonald* v. *Crombie*, 2 O. R. 243.

Immediate Execution.]—Under 16 Viet. c. 175, a county court Judge could certify for immediate execution in cases sent down to him by writ of trial, as well as in other cases. *Riach* v. *Hall, Patterson* v. *Hall*, 11 U. C. R. 356; *McKay* v. *Hall*, 4 C. P. 145.

So also in a superior court case taken down for trial to a county court under 23 Viet. c. 42, s. 4. *Gildersleeve* v. *Hamilton*, 11 C. P. 288.

Judgment More than Twenty Years Old—*Statute of Limitations.*]—The limit of twenty years being fixed by R. S. O. 1887 c. 60, s. 1, after which, in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution. An issue directed under rule 886, to try the question of liability upon a judgment more than twenty years old, is an action within the meaning of R. S. O. 1887 c. 60, s. 1, and the Statute of Limitations would be a good defence. *Price* v. *Wade*, 14 P. R. 351.

Limitation of Time.] — Before 20 Viet. c. 57, s. 10, it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary also to return and file it within that time. *Hall* v. *Boulton*, 3 P. R. 142.

Quære, whether there is any period fixed by the statute beyond which the court may not have the power to allow execution to be issued. *McCullough* v. *Sykes*, 11 P. R. 337.

Mutual Insurance Company.]—As to the time of issuing execution against mutual insurance companies. *See Lawson* v. *Canada Farmers' Mutual Ins. Co.*, 8 A. R. 613, reversing *S. C.*, 9 P. R. 185, and overruling *Lount* v. *Canada Farmers' Ins. Co.*, 8 P. R. 433.

Report.]—When a decree ordered payment forthwith after the making of a report, an execution issued before the report had been filed was set aside with costs:—Semble, the report did not require confirmation under the decree. *Jellett* v. *Anderson*, 8 P. R. 387.

Revivor.]—A writ of execution may be sued out at any time within six years from

judgment without a revivor, and if during the six years it is sued out, returned and filed, the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed; that is, such writ will support a subsequent writ issued after that period without a sci. fa. or revivor. *Jenkins* v. *Kerby*, 2 C. L. J. 164.

See sub-title VII.

3. *Renewal.*

Effect.]—The taking a writ from the sheriff for renewal, is not an abandonment, giving priority to other writs then in his hands, but the replacing the writ in his hands upon such renewal, gives it the same position as it held previous to the removal of it, the question of the object of such removal always being a matter of fact for decision upon the circumstances. *Rowe* v. *Jarvis*, 13 C. P. 495; *Muir* v. *Munro*, 23 U. C. R. 139.

Failure to Return Renewal to Sheriff.]—Con. rule 894 providing for the renewal of writs of execution necessarily intends the removal in each case of the writ out of the actual possession of the sheriff for the purpose of such renewal. This is an exception to the general rule, and the time during which a writ may for the purposes of renewal be kept out of the hands of the sheriff without interference with the right of priority is commensurate with the time reasonably necessary to effect the renewal; but the exception cannot be made to extend so as to cover mistakes, never so honestly made, the consequence of which is a failure to replace the writ in the hands of the sheriff for so long a period as six or seven months. And where H. placed a writ of fi. fa. lands in the hands of a sheriff in November, 1883, and renewed it from year to year till October, 1886, when he removed it for the purposes of renewal only, and by mistake did not replace it till April, 1887:—Held, that he had lost his priority over L., a mortgagee, whose mortgage was registered against the land of the execution debtor in July, 1885; and it made no difference that no new rights had in the meantime intervened. *Re Hime and Ledley*, 13 P. R. 1.

See Baby v. *Gehl*, 18 O. R. 132.

Number of Renewals — *Former Practice.*]—See *Neilson* v. *Jarvis*, 13 C. P. 176; *Miller* v. *Beaver Mutual Fire Insurance Association*, 14 C. P. 399.

Time.]—The day of the teste of a fi. fa. lands is inclusive; so that a writ issued on 16th May, 1861, expires on the 15th May, 1862, and a renewal on the 16th May, 1862, is too late. *Bank of Montreal* v. *Taylor*, 15 C. P. 107.

Where shortly before the return day of a fi. fa. lands, the plaintiff obtained it from the sheriff for renewal, and did not return it for fifteen days, when a year from the teste had expired:—Held, not an abandonment of the plaintiff's rights under the execution. *Mencilly* v. *McKenzie*, 3 E. & A. 209.

Writ of Assistance.]—The application of R. S. O. 1877 c. 66 is not limited to purely common law actions pending in the common law courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance in execution of a decree of the court of chancery for the recovery of land, is a writ of execution within the meaning of s. 11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed. *Adamson* v. *Adamson*, 12 P. R. 21.

Writs Received too Late.]—Writs of execution were issued on the 12th December, 1881, in Toronto, and forwarded to the sheriff of an outer county. On the 9th December, 1882, the plaintiff wrote to the sheriff to forward the writs for renewal, and on the 11th December telegraphed him to the like effect and he replied that he had just mailed them. On the same day the plaintiff filed a præcipe requiring the renewal. The writs were received on the 12th December. On an application for an order for leave to renew nunc pro tunc it was held that the delay was not the fault of the sheriff or other officer of the court, and that there was no power to make the amendment. *Lowson* v. *Canada Farmers' Mutual Ins. Co.*, 9 P. R. 309.

VI. Priority.

Administration of Deceased's Assets.]—Where certain creditors of a deceased insolvent sued his executor, recovered judgment, and sold his real estate, and got paid in full:—Held, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ under 29 Viet c. 28. *Bank of British North America* v. *Mallory*, 17 Gr. 102.

The plaintiff and another bought from the testator's executors and trustees certain real and personal estate. The real estate was subject to a mortgage, which the vendors agreed to pay; the purchasers paid their purchase money, but the vendors applied the same to pay other debts of the testator and left the mortgage in part unpaid; the plaintiff, having bought out his co-purchaser, filed a bill against the executors. A decree by consent was made giving the plaintiff a lien on the testator's assets, ordering the defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and inquiries usual in an administration suit. The estate was insufficient to pay all the creditors. Before the making of the decree a creditor of the estate had obtained judgment against the executors, and the sheriff seized and sold goods of the testator in their hands:—Held, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry* v. *Sharp*, 18 Gr. 16.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority, nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Meyers* v. *Meyers*, 19 Gr. 185.

Artisan's Lien — *Manufacture of Bricks on Property of Another Person—Possession.*]—The plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained and was in possession of

the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard, who, immediately after such seizure, made an assignment for the benefit of creditors:—Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance. *Roberts* v. *Bank of Toronto*, 25 O. R. 194, 21 A. R. 629.

Assignment for Creditors.]—A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shewn:—Held, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—Semble, that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper* v. *Dixon*, 10 A. R. 59.

Assignment for Creditors — *Purchase Money of Land Sold under Mortgage.*]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. 1887 c. 124, before certain prior execution creditors had established their claims in the master's office to the balance of purchase money, after satisfying the amount of the mortgage:—Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

Assignment for Creditors — *Loss of Lien.*]—The lien of a plaintiff for costs by virtue of sec. 9 of R. S. O. 1887 c. 124, under an execution in the sheriff's hands against an insolvent at the time of an assignment by him for the benefit of creditors under that statute, is not superseded by such assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien:—Held, per Armour, C.J., that he is not entitled to rank on the insolvent's estate as a preferential creditor. Per Street, J.—That even if so entitled, it could only be on the net funds available after payment of the proper charges incurred in the management of the estate. *Gillard* v. *Milligan*, 28 O. R. 645.

Claims between Tenants in Common.]—The plaintiff was tenant in common with the defendants, and was proved to have received more than his proper share of the rent. The defendants claimed against the plaintiff's share of the land for the excess of the rent received by the plaintiff. There were executions in the sheriff's hands and the execution creditors had come in under the decree in the cause:—Held, that the defendant's claim being simply for a debt for which an action might be brought, there was no actual charge until a judgment was obtained. That the execution creditors did not lose their priority by coming in under the decree, and were entitled to have it maintained. And that the case was not varied by some of the defendants being infants. *McPherson* v. *McPherson*, 10 P. R. 140.

Contesting Priority.]—A. obtained a judgment against B. and registered the same, and obtained fi. fas. against lands, kept them in force and filed a bill on the judgment before the Act abolishing registration of judgments. C. had obtained judgment against B. and registered it, but subsequently to A. C. filed his bill to set aside a prior sale made by B. to D., not making A. a party. A decree was pronounced in his favour sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party, and have his priority declared in such suit:—Held, that he could not by petition make himself a party to that suit, and that his remedy, if at all, was by bill. Quære, had he any remedy at all. *City Bank* v. *McConkey*, 3 C. L. J. 125.

Delay in Enforcing.]—On the 23rd July, 1868, M. recovered judgment against J. for $2,023.51, and issued a fi. fa. against goods, the execution of which was delayed until the end of the following month by an application to amend. On the 3rd October, 1868, J. gave plaintiff a chattel mortgage, which was registered the 6th October, payable a year after date. J., with the plaintiff's consent, continued his business, and had sold a large part of the chattels when the plaintiff (in January, 1869), came to take possession. Thereupon the sheriff, whose previous action under the fi. fa., if any, did not appear, but who had no authority for the delay, seized and sold the remaining goods, when plaintiff brought trover against him, plaintiff, and defendant in the execution, and another who had joined in indemnifying the sheriff, contending that the delay in executing the fi. fa. gave his chattel mortgage priority. The jury gave a verdict for $1,510 against the sheriff, and in favour of all the other defendants. This verdict being inconsistent with any view of the facts, and exorbitant in amount, was set aside; costs to abide the event. *McGivern* v. *McCausland*, 19 C. P. 400.

Devisee and Executor.]—A purchaser at sheriff's sale of lands sold on an execution against a devisee, takes in preference to a purchaser on a subsequent execution, though prior judgment, against the executor of the testator. *Doe d. Auldjo* v. *Hollister*, 5 O. S. 739.

Direction not to Advertise.]—The county of Elgin having a writ in the sheriff's hands against the lands of L. prior to the plaintiffs' writ, passed a resolution requesting the warden to notify their solicitor not to enforce such execution until further instructions, and the resolution was sent to the solicitor. In May, 1862, the sheriff, being about to advertise, went to the solicitor, and was told by him that he need not advertise under the county's writ. He therefore advertised L.'s lands in the Gazette and a local paper, under other writs, making no mention of it. After three weekly insertions, he was directed by the solicitor to advertise upon it, and thereupon added a note to the local advertisement, stating that the proceeds of the sale would

also be held liable to satisfy this writ, but made no change in the Gazette:—Held, that from the time of the direction to the sheriff not to advertise, which was the same in effect as a direction to stay on a writ against goods, the county's writ was not in the sheriff's hands to be executed; that it had therefore lost its priority; and that the subsequent order to proceed could not restore it. The omission of the writ from the advertisement would alone have been immaterial, as the seizure and sale have relation to all the writs in the sheriff's hands for execution. *Bank of Montreal* v. *Munro*, 23 U. C. R. 414.

Direction not to Press.]—Although the fact of a party not pressing a pluries fi. fa. in the sheriff's hands, coupled with the undoubted fact that he had placed the original writs there not to be executed, is evidence on which a jury may find that the later writ has also been delivered to the sheriff not to be acted on, and has therefore lost its priority; yet, the jury having found otherwise, the court would not interfere with the verdict, as it could not be said that there was no evidence to support it. *Kerr* v. *Kinsey*, 15 C. P. 531.

Two executions against lands were in the hands of the sheriff, and the sheriff had advertised a sale under the first writ. On the morning of the intended sale the sheriff was directed not to proceed with it, and accordingly the sale did not take place:—Held, that the first execution was thereby postponed to the second; the direction to the sheriff being peremptory, although it was given for no fraudulent purpose, and although in giving it there was no intention of abandoning the seizure. *Trust and Loan Co.* v. *Cuthbert*, 13 Gr. 412.

Direction not to Sell.]—Where writs of fi. fa. goods were placed in the hands of a sheriff by several plaintiffs, with directions to levy, but not to sell unless another execution was delivered to him; and having received another execution returnable the same term as the former executions, he returned it nulla bona, and sold under the first:—Held, that the sheriff was liable for a false return, the directions by the first execution creditors being fraudulent as to the subsequent creditors, and the first executions thereby losing their priority. *Ross* v. *Hamilton*, E. T. 3 Vict.

A fi. fa. placed in the sheriff's hands with instructions not to sell until another writ comes in, is not in his hands to be executed, and will not bind the goods, either against a subsequent execution or a bonâ fide purchaser for value. *Foster* v. *Smith*, 13 U. C. R. 243.

Division Court Execution.]—Held, in an action for a false return to a writ of fi. fa. goods, that under s. 266 of the C. L. P. Act, when a writ has issued against the goods of a party from a superior court, and a warrant of execution against the goods of the same party from the division court, the right to the goods seized is to be determined by the priority of the time of delivery of the writ or warrant to the sheriff or bailiff respectively, and not by the priority of seizure:—Held, also, that the right acquired by such prior delivery, which in this case was to the division court bailiff, was not, under the evidence set out in the case, defeated by his omission to indorse on the warrant, as required by the same section, the time of such delivery. *McDougall* v. *Waddell*, 28 C. P. 191.

See DIVISION COURTS, VII.

Extension of Time to Sell.]—Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the Insolvent Acts, the conditions of the agreement having been so far performed:—Held, that the writs were not in the sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the sheriff took priority. *In re Ross*, 3 P. R. 394.

Fraction of Day.]—In determining the priority of writs, the court will look to the fraction of a day. *Beckman* v. *Jarvis*, 3 U. C. R. 280.

See Converse v. *Michie*, 16 C. P. 167.

Irregular Renewal.]—An alias fi. fa. at the suit of B. was received by the then sheriff, F., on the 26th September, 1861, and having been renewed was returned on the 7th September, 1863, goods on hand 1s. and nulla bona as to the residue. This return was made at the request of B.'s attorney, although there had been no seizure, as the attorney doubted whether the fi. fa. could be renewed a second time. On the 22nd a ven. ex. and fi. fa. residue was delivered to the same sheriff, and remained with him until his removal from office on the 10th March, 1864, when defendant was appointed, but no transfer of the writ to him by indenture was made until the 9th May following. On the 15th April, 1864, the plaintiff's fi. fa. came in, and soon after the debtor's interest in certain crops was sold, and the proceeds paid over by defendant to B., who indemnified him. The plaintiff thereupon sued the sheriff for falsely returning his writ nulla bona, contending (among other things) that the return to B.'s alias fi. fa. being false to B.'s knowledge and procured by him, the ven. ex. and fi. fa. founded upon it were void. There was no evidence of any fraud; and it appeared that B.'s writ had been placed and continued in the sheriff's hands for execution. The reason assigned for the long delay in acting upon it was that the debtor's goods had been sold under execution in 1861, and were supposed to be exhausted:—Held, that B.'s writ had priority, for the return, though not true in fact, bound the late sheriff and B., and could not prejudice the plaintiff. *Robinson* v. *Waddell*, 24 U. C. R. 488.

Judgment Set aside.] — The plaintiff, on the 14th April, 1864, gave defendant a fi. fa. against G., S., and L., the defendant then having a writ against G. and L. at the suit of Hingston, and one against G. alone, at the suit of F. On the 20th he received a writ against L., at the suit of Harty. G., S., and L. carried on business as G. & Co., each living at a different place, and S. having authorized L. to act for her in the partnership by power of attorney. The plaintiff's judgment and Harty's were both for partnership debts. On the 5th February, 1864, the

firm made an assignment to E., in trust, to pay all their creditors equally. He sold the goods, and on the 14th April, 1864, paid the proceeds to the defendant, who gave a receipt for it, "to be applied to executions in my hands against G. and G. et al." E. had previously telegraphed to the plaintiff's attorney for instructions as to whether he should pay this money to the sheriff, and being told to pay him, he did so, and took the receipt, not being aware at the time of any execution but the plaintiff's. On the 20th April, 1864, Harty notified defendant not to pay over the money, as the plaintiff's judgment was invalid, and on the 19th September following, the plaintiff's judgment and execution, and all proceedings subsequent to appearance, were set aside. The plaintiff again proceeded with the action, and on the 4th December, 1864, placed another fi. fa. in defendant's hands, which he returned no goods, having paid over the money to Harty before the plaintiff had recovered judgment. The plaintiff having sued defendant for not levying, and for money had and received:—Held, that he could not recover; that as to the first count, the execution defendants had nothing in defendant's hands during the currency of the plaintiff's writ, for if the assignment to E. was valid, their estate had vested in him, and if void, they had through E. paid over the money to defendant, who received it as sheriff for the purpose mentioned in his receipt: and as to the second count, defendant was entitled to apply this money as specified in his receipt, and was not bound to wait until an execution came to him against all the members of the firm. *Clark* v. *Corbett*, 27 U. C. R. 161.

Lunacy.]—The common law right as to the priority of an execution creditor of a lunatic who has an execution in the hands of a sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant*, 28 Gr. 457.

Mortgagee Paying Execution.]—A mortgagee paying off a prior execution has a lien therefor against subsequent executions. *Trust and Loan Co.* v. *Cuthbert*, 14 Gr. 410.

North-West Territories Act.]—The provisions of s. 94 of the Territories Real Property Act (R. S. C. c. 51) as amended by 51 Vict. c. 29 (D.), do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens, and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers. *Jellett* v. *Wilkie*, *Jellett* v. *Scottish Ontario and Manitoba Land Co.*, *Jellett* v. *Powell*, *Jellett* v. *Erratt*, 26 S. C. R. 282.

Rent—*Distress.*]—See DISTRESS, II., III., 10.

Second Seizure.]—It is not illegal for a sheriff, having withdrawn from the custody of goods under a fi. fa., again to take possession during the currency of the writ; and a second seizure under such writ prior to the receipt of another execution gives the first writ priority. *Gates* v. *Smith*, 13 C. P. 572.

Sequestration — *Prior Judgment Creditor.*]—B. was a registered judgment creditor of M., after whose death T. obtained a decree for a debt due to M.; T. issued a sequestration for this debt. Under the sequestration lands were seized and let under the authority of the court to tenants:—Held, that B.'s charge having the priority over T.'s, B. was entitled to set aside the leases on paying the tenants for their labour in putting in fall crops and preparing the land for fall and spring crops, and to have the land sold free from the leases. *Meyers* v. *Meyers*, 19 Gr. 541.

Several Writs.]—It is a matter of indifference under what writ a sheriff seizes and sells the property of a debtor, such seizure having relation to all the writs at the time in his hands. He must appropriate the money according to the priority of the writs. *Rowe* v. *Jarvis*, 13 C. P. 495.

VII. SETTING ASIDE AND STAYING.

Attaching Order.]—A sheriff's return to a writ of fi. fa. goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute:—Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons; the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into court. *Genge* v. *Freeman*, 14 P. R. 330.

Decree for Sale in Other Proceedings.]—The solicitor of a mortgagee, in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest. The decree was subsequently set aside, and a decree nisi directed to be drawn up, directing inter alia a sale of the mortgaged premises, and that all judgment creditors should be served with the decree, and made parties to the suit. Notwithstanding that the solicitor, who was also a judgment creditor of the mortgagee, proceeded to sell the mortgaged premises under execution on his judgment. The court restrained the solicitor and ordered him to pay costs of the application. *Goodwin* v. *Williams*, 5 Gr. 178.

Delay in Issuing.]—Where the plaintiff had obtained judgment ten years before, and two or three years afterwards had fled from the Province charged with a criminal offence, and a writ of execution was issued on the judgment without any leave of the court, or notice to the defendant, the court stayed the proceedings. *Hobson* v. *Shand*, 3 U. C. R. 74.

Dispute as to Forbearance.]—Where judgment was, on 28th December, 1860, recovered by plaintiff against defendant for

£2,486 14s. 8d. debt, and afterwards defendant made large payments of money to plaintiff, part of which plaintiff alleged he received upon an agreement to pay 12½ per cent. interest for forbearance, which agreement defendant denied, and the facts admitted between the parties went far to establish some such agreement or arrangement, a summons obtained by defendant (who sought to have all interest in excess of six per cent. applied in reduction of the judgment debt), calling upon plaintiff, among other things, to shew cause why all proceedings should not be stayed on a fi. fa. against the goods of defendant, then in the hands of the sheriff, was discharged with costs. *Freeland* v. *Brown*, 9 L. J. 289.

Effect of Insolvency Proceedings.]—The plaintiff issued a fi. fa. lands on the 7th June, 1865, and renewed it from time to time until 4th June, 1867. On the 30th March, 1867, defendant obtained his discharge in insolvency. Plaintiff had proved his claim for the full amount of the judgment in the insolvent court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so. The court set the fi. fa. aside with costs. *Dickinson* v. *Bunnell*, 19 C. P. 216.

Execution Issued too soon.]—A fi. fa. issued on a judgment on a specially indorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and, if knowingly issued, an abuse of the process of the court. *Randall* v. *Bowman*, 1 C. L. J. 158.

Defendants, who were in business, knowing that the writ had been irregularly issued, said on the day after the issue of execution that they would not mind the issue of the writ if they were only allowed to keep their store open for the remainder of the week, to which the sheriff assented and made arrangements for so doing:—Held, not to be a waiver of the irregularity in the issue of the execution. *Ib.*

Quære, can debtors, who, being unable to pay their debts in full before the issue of execution, called a meeting of their creditors with a view to an assignment under the Insolvent Act, waive an irregularity in the issue of execution, whereby one of their creditors gains an advantage over the general body of creditors. Five days after the execution, and four days after the conversation above mentioned, the debtors made an assignment for the general benefit of creditors under the Insolvent Act:—Held, that the assignee in conjunction with the debtors, was the proper party to move to set aside the execution. *Ib.* *See Macdonald* v. *Crombie*, 2 O. R. 243.

Injunction.]—By an agreement between plaintiff and defendant, defendant was to procure goods, or guarantee the payment of goods to be obtained and sold by plaintiff for their joint benefit, in certain proportions; and the plaintiff, to indemnify defendant against all loss, executed a confession of judgment, to be acted upon only in default of plaintiff meeting the payment of such goods. The plaintiff made default, and defendant entered up judgment and sued out execution. The court dissolved an injunction which had been issued, although upon the agreement it was doubtful whether a partnership had not been created between the parties; but defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon, the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. *Watt* v. *Foster*, 4 Gr. 543.

Issue out of Hours.]—The court refused a rule to set aside a fi. fa. because issued by the officer at his own house before office hours. *Rolker* v. *Fuller*, 10 U. C. R. 477.

Levying against One Defendant.]—The court will not restrain a plaintiff from levying the whole of his debt on one of several defendants. *Zavitz* v. *Hoover*, M. T. 2 Vict.

Refusal to control the plaintiff or his attorney, or the sheriff, so as to require them to proceed upon a fi. fa. against the goods of several defendants in succession, first exhausting the goods of one, and then levying on another. *Commercial Bank* v. *Vankoughnet*, 1 C. L. Ch. 260.

Oral Agreement not to Enforce.]—The court will not stay proceedings on a fi. fa. goods taken out under a cognovit, because there was an oral agreement when the cognovit was given that the plaintiff would only resort to lands. *McPherson* v. *Sutherland*, Tay. 422.

Order for Costs — *No Notice of Taxation*]—The defendant obtained an order dismissing the action with costs for non-prosecution, upon notice to the plaintiff, who did not appear upon the motion. The defendant did not serve the plaintiff with a copy of the order, and went on and taxed his costs, without notice to the plaintiff, and issued execution for the amount taxed:—Held, no ground for setting aside the execution that the order had not been served before the taxation. Hopton v. Robertson, 23 Q. B. D. 126*n*., distinguished. Held, also, that the absence of a notice of taxation was not an irregularity entitling the plaintiff to set aside the execution, but only to a retaxation of the costs. Lloyd v. Kent, 5 Dowl. 125, followed. *Cranston* v. *Blair*, 15 P. R. 167.

Peculiar Value of Goods.]—Where a bill is filed to restrain the seizure of the goods of A. on an execution against B., on the ground that the goods have a peculiar value which damages would not compensate, there should be distinct and precise allegations of the necessary facts; and a general allegation that the damage will be irreparable is not sufficient, on demurrer. *Gartshore* v. *Gore Bank*, 13 Gr. 187.

Proceeding after Return Day.] — Where a fi. fa. is in itself regular, the court will not set it aside because the sheriff did not take any proceedings under it during its currency, but advertised lands after the return day thereof. *Morrison* v. *Rees*, 1 P. R. 25.

Proceeding against Goods and Lands.]—A judgment creditor issued at the same time, and placed in the hands of the sheriff alias fi. fas. against goods and fi. fas. against lands. The sheriff, by direction of the creditor, seized goods, and the writs against

goods were, before sale, withdrawn; meanwhile the debtor had conveyed his land in trust for creditors. An injunction was granted at the instance of the grantee to restrain a sale under the writs against lands until the hearing. *Paton* v. *Ontario Bank*, 12 Gr. 366, 13 Gr. 107.

Proving Claim in Insolvency.]—The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month an attachment in insolvency was issued by defendant against plaintiff. The decree dismissed the plaintiff's bill with costs, in October, 1874. The defendant proved against the estate for the costs of the suit, but did not take his dividend, and took no further steps to recover his claim until after the order for discharge of plaintiff (25th May, 1877), when he issued execution. On the application of the plaintiff the Judge in chambers refused to set aside the execution, holding that defendant was entitled to issue it, and that the proving against the estate for the costs when the claim was not legally provable, did not operate as an estoppel in pais between the plaintiff and defendant. *Stevenson* v. *Sexsmith*, 8 P. R. 286.

Refusal to Assign Judgment.]—An execution at law against the lands of M., at the suit of K., was in the sheriff's hands, under which certain lands in the county of Oxford were advertised for sale. The Bank of British North America, who were registered judgment creditors of M., but subsequent to K., offered R., the assignee of K.'s judgment, to pay the same if he would assign it, but the assignee refused to do more than discharge the judgment. The Bank of British North America then filed their bill against M. and R., praying to redeem R. and foreclose M., and moved for an injunction to restrain the sale by the sheriff. The court held a prior judgment creditor bound to submit to be redeemed by a subsequent judgment creditor, and to assign the judgment, and ordered that upon payment to R. (if he would receive and assign K.'s judgment) of the amount of that judgment and subsequent costs, and if not, then upon payment into court of the same amount, an injunction should issue to restrain the sale by the sheriff. *Bank of British North America* v. *Moore*, 8 Gr. 461.

Relief in Equity.]—Where a rule for setting aside a fi. fa. against lands was discharged at law under a material error as to the facts:—Held, no bar to relief in equity at the suit of the debtor's grantee of the lands. *Paton* v. *Ontario Bank*, 13 Gr. 107.

Revivor.]—After the death of the plaintiff and before the order of revivor the solicitor who had acted for her issued a writ of hab. fac. poss. upon the judgment, without the leave required by rule 886:—Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219.

Set-off.]—Quære, as to the power of the court or a Judge to delay plaintiff's proceedings on an execution, in order to enable defendants to institute an action, and to acquire a position in which they may apply to set off the judgment to be recovered by them against plaintiff's judgment. Semble, there is no authority for such a course. *Lynch* v. *Wilson*, 9 L. J. 242.

Striking out Words.]—Writs of fi. fa. were set aside, the words "executors of the last will and testament of J. A. deceased," having been struck out without authority after the issuing of the writs. *Kirkpatrick* v. *Harper*, 13 C. L. J. 325.

Subsequent Creditor Applying.]—An irregular execution will not be set aside at the instance of a subsequent execution creditor. *Perrin* v. *Bowes*, 5 L. J. 138; *Farr* v. *Arderly*, 1 U. C. R. 337; *Parker* v. *Howell*, 7 L. J. 209.

Supersedeas.]—The plaintiff, on the sale of certain land to the defendant R., left in her hands a sum of $200 of the purchase money as security against an execution in another action then in the hands of a sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action and on doing so gave a bond with sureties conditioned to pay the debt and costs:—Held, that the perfecting and allowance of such security operated as a writ of supersedeas of the writ of execution, not as a stay thereof merely; and that the plaintiff was therefore entitled to recover the balance of the purchase money from R. *O'Donohoe* v. *Robinson*, 10 A. R. 622.

Technical Objection.]—The court will not set aside an execution upon the ground that the action was commenced in debt and the cognovit given in assumpsit. *Brown* v. *Waldron*, Tay. 494.

Undue Harshness.] — The court or a Judge may at any time interfere, as exercising the powers of the court of exchequer, to restrain undue harshness or haste in the execution of a writ issued for the Crown, although what is complained of may be strictly authorized. *Regina* v. *Desjardins Canal Co.*, 29 U. C. R. 165.

Variance.]—Where in an action against an absconding debtor proceedings had been carried to judgment and execution against his lands, and he moved to set aside the execution for a variance between it and the judgment, and the plaintiff was allowed to amend:—Held, that he was afterwards too late to object to irregularities in earlier proceedings in the cause, as he should have brought them forward on his first motion. *Dougall* v. *Lewis*, T. T. 5 & 6 Vict.

See sub-title V.

VIII. Writ against Goods.

1. *Operation and Effect.*

Assignment before Sale.]—A., the assignee of leasehold property, assigns to B., upon the understanding that he is to hold the property only as his agent till his return from the United States. A. returns, and directs B. to assign the same to C., which he does. D. having an execution against the goods of A., purchased A.'s interest in the lease at the sheriff's sale:—Held, in ejectment by D. to recover possession from C., that A. had no estate which could be sold by

the sheriff, and that a verdict should be entered for the defendant C. *Doe d. Simpson v. Privat*, 5 U. C. R. 215.

Attached Goods.]—Goods in the hands of a division court clerk under an attachment are not protected against an execution issuing from a superior court before the attaching creditor has obtained his judgment. The sheriff, therefore, is justified in seizing such goods, but quære, if the seizure were illegal, whether an action on the case would lie at the suit of the attaching creditor against the sheriff and the plaintiff in the execution. *Francis v. Brown*, 11 U. C. R. 558.

Bank Stock — *Execution in Quebec.*]—Upon an application of a bank, whose head office was in Ontario, under s. 25 of the Bank Act of 1871, 34 Vict. c. 5 (D.), for an order adjudicating and awarding shares:—Held, that an execution from the superior court of Montreal might be validly executed by a sworn bailiff of that court, instead of by the sheriff, and the bailiff might fulfil the duty imposed on the sheriff, under s. 19 of the Bank Act. *In re Bank of Ontario*, 44 U. C. R. 247.

Held, that a sale in execution in Montreal might be made of shares of a bank whose head office was in Toronto. *Ib.*

Chattels Lent by Lessor to Lessee.]—A. demised to B. for a term, with a clause of forfeiture in case the term should be taken in execution, and at the same time delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease, signed by A., stating that he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family. On an interpleader between A. and C., who had seized the chattels under an execution against B.:—Held, 1. That the memorandum formed no part of the lease, but operated only as a license to use, which was revocable; 2. that even if the chattels had been included in the lease, they could not have been sold; 3. that at the most B.'s interest in the chattels was incidental to the term and to his enjoyment thereof, and that therefore neither the goods themselves, nor B.'s interest therein, could be sold separately from the term; 4. that if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels. *Muckleston v. Smith*, 17 C. P. 401.

Choses in Action—*Time.*]—Writs of execution only bind moneys, choses in action, or securities for money, from the time of seizure by the sheriff, and not from the time either of the issue of the writs or delivery thereof to the sheriff. *McDowell v. McDowell*, 10 L. J. 48, 1 Ch. Ch. 140.

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

Crops.]—A party purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field. *Haydon v. Crawford*, 3 O. S. 583.

Semble: That in order to maintain a title as vendee at a sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale and before the return of the writ. *Ib.*

Quære, is the sale by a sheriff of a crop of wheat ready for harvest not the sale of an interest in lands, requiring a writing under the Statute of Frauds; and if not—still, to satisfy the statute and make the sale legal, should there not be proof of the delivery of the wheat, or payment of the price? *Ib.*

A. and B. contracted with C. to put in the crops on a certain farm, and to do all the necessary farm work thereon for the whole season, and for which they were to have one-half of the crops for that year. Under the contract A. and B. sowed a quantity of wheat, and B. having absconded, his interest in the wheat while growing was sold under an execution issued on a judgment obtained in the division court against B. at the suit of D., who became the purchaser thereof. A. subsequently sold all his interest and that of B. in the wheat to C., who harvested it. D. having brought an action of trover to recover the one-quarter of the quantity of the wheat, claiming to have become the owner of that portion of it by purchase at sale on the writ of execution from the division court:—Held, that as between A. and B. the contract was joint, and that trover by D. for the one-quarter sold to him under the execution against B. was not maintainable. *Park v. Humphrey*, 14 C. P. 209.

Though a sale of land may be fraudulent as against creditors, still where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labour and means had been contributed by the vendee alone:—Semble, that the crops were the sole property of the vendee as against the execution creditor. *Kilbride v. Cameron*, 17 C. P. 373.

Crops are seizable under a division court execution. *McDougall v. Waddell*, 28 C. P. 191.

Growing crops sown by the person in possession and intended to be reaped at maturity, being fructus industriales, are chattels seizable under execution, and the ownership of them is not an interest in land within s. 4 of the Statute of Frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act because they are chattels independently of the form of the agreement to transfer them, and of the period before or after severance at which the property in them is to pass to the purchaser. *Cameron v. Gibson*, 17 O. R. 233.

Deceased Debtor.] — Upon an action brought by a sheriff upon a mortgage seized by him under an execution in a suit, Smith v. Lawrence, the mortgage being made by B. (the defendant) to Lawrence:—Held, that a judgment creditor may take the goods of a deceased debtor in the hands of the executor upon a fi. fa. against goods if the judgment was recovered within a year before the debtor's death; and that a plea admitting the death of a testator subsequent to the

issuing of a ven. ex. and fi. fa., and while it was in force, but claiming that by the death the property seized became vested in the personal representatives of the deceased, and was not therefore liable to seizure, was bad. *Smith* v. *Bernie*, 10 C. P. 245.

Enforcing after Sheriff's Withdrawal.]—Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt; and, therefore, the withdrawal of the sheriff does not preclude further action upon the writ. *Gouge* v. *Freeman*, 14 P. R. 350.

Equity of Redemption in Chattels.]—As to the sale of an equity of redemption in a ship. See *Bethune* v. *Corbett*, 18 U. C. R. 498.

Where a mortgaged vessel had been sold under a fi. fa., and the purchaser brought replevin:—Held, that he acquired no right, the equity of redemption not being saleable, and that the defendant must succeed on a plea denying the plaintiff's property, though he shewed no connection with the mortgage. *Scott* v. *Carveth*, 20 U. C. R. 430.

Under a writ against the mortgagor of goods, the sheriff, under 20 Vict. c. 3, can only sell the equity of redemption, which will give a right to his vendee only to stand in the position of the mortgagor; he cannot sell the goods themselves and transfer the possession to the purchaser. *Squair* v. *Fortune*, 18 U. C. R. 547.

A mortgagee of chattel property having taken possession, as he alleged, under his mortgage, the sheriff seized it under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again:—Held, that there was no power to make such order. *Smith* v. *Cobourg and Peterborough R. W. Co.*, 3 P. R. 113.

Semble, that under an execution against a mortgagor of chattels the sheriff may seize goods in possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption. *Ib.*

A sheriff selling the equity of redemption in certain goods under an execution against the mortgagor, is entitled to seize the goods even if in possession of the mortgagee. *Swift* v. *Cobourg and Peterborough R. W. Co.*, 5 L. J. 253.

The word "seize" under the C. L. P. Act, 1857, s. 22, applies to the corpus of the goods seized and not to defendant's interest in them. *Ib.*

20 Vict. c. 3, s. 11 (C. S. U. C. c. 45, s. 3), authorizes the sale by the sheriff of any goods and chattels under mortgage, the effect of such sale being to convey whatever interest the mortgagor had therein:—Held, (1) that this authorized the sale under execution of a lessee's interest in land, although subject to two mortgages which were held by different parties, and although the lessee had previously parted with a portion of the property so leased; and (2) that this also authorized the sheriff to sell the interest of a debtor in stock in a warehousing company, although the same stood in the names of other persons, as to one part to secure a sum of money, and as to the other part to secure the due performance of an agreement. *Ross* v. *Simpson*, 23 Gr. 552.

Fixtures — *Mortgage of Realty.*]—The fact that fixtures affixed to the freehold in the usual way have sometimes been mortgaged as chattels, and on other occasions have passed with a mortgage of the freehold, does not render them exigible to an execution against goods if at the time of the seizure the chattel mortgages are non-existent, and a mortgage of the freehold is in existence as a first charge thereon. *Carson* v. *Simpson*, 25 O. R. 385.

Fraudulent Removal of Goods.]—A declaration charging defendant with wilfully and fraudulently taking away and secreting the goods of one F., against which goods the plaintiff had placed an execution in the hands of the sheriff, so that the sheriff could not discover the same, or levy, &c., averring knowledge of the facts in the defendant, shews a good cause of action at common law, though not under 5 Wm. IV. c. 3, s. 8. *Young* v. *Buchanan*, 6 C. P. 218.

A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution In an action therefor:—Held, that the fact that defendant removed the goods to prevent the seizure was evidence for the jury, that but for such interference they would have been seized. *Turner* v. *Patterson*, 13 C. P. 412.

In estimating the damages against defendant for such fraudulent removal, the return of the sheriff as to the amount made on the plaintiff's writ will be presumed to be correct, and if the sheriff should have applied other moneys made by him to satisfy the plaintiff's execution, the defendant must shew it. *Ib.*

Fund in Court.]—Where a judgment creditor petitioned for payment out to him, or that the sheriff might be permitted to seize, under writs in his hands, funds in court standing to the credit of his debtor, upon which a stop order had been issued before the cheque was drawn, an order was made directing a cheque to be made out in favour of the petitioner. *Re Gilchrist, Bohn* v. *Fife*, 7 P. R. 430.

Goods Held by Assignee.]—Goods in the possession of an assignee appointed under the Insolvent Act of 1875, cannot be taken in execution. *McMaster* v. *Mcakin*, 7 P. R. 211.

Goods in Custody of the Law.]—Where goods are already in the custody of the law, a fi. fa. at once attaches upon them, without an actual seizure. *Beckman* v. *Jarvis*, 3 U. C. R. 280.

Goods Sold but not Delivered.]—Under an execution delivered to him on the 16th November, the sheriff seized on the 17th; the plaintiff, another creditor, was then at the debtor's shop receiving delivery of some crockery which the debtor was selling him to satisfy his claim. These goods were proved to have been set apart for the plaintiff, and to have been marked with his mark, and one of the articles had been delivered to him in the name of the whole. Part had been removed, and the rest were detained and secured

by the sheriff. Plaintiff having brought replevin against the sheriff:—Held, that under a plea of not possessed, defendant was entitled to a verdict. *Calcutt* v. *Ruttan*, 13 U. C. R. 146.

Plaintiff, on 31st May, 1861, purchased and paid for a carriage from one F., a carriage maker, for $175, but did not remove it from the shop. Shortly after, plaintiff's wife saw another carriage in the course of building which she preferred, and it was agreed that the plaintiff should have it if he chose upon payment of an additional sum, the one first purchased to be his if he did not take the other. At the time of the sale, the defendant, as sheriff, held an execution against the goods of F., of which he (F.) had notice, and another one was placed in his hands subsequently to the sale to plaintiff. F. carried on business as usual, notwithstanding these executions, and an actual seizure did not take place till the 11th June, 1861:—Held, that the plaintiff, having left the carriage in the vendor's hands more than a reasonable time for the removal thereof, the sale came within the provisions of the Chattel Mortgage Act, C. S. U. C. c. 45, and there being no delivery, followed by an actual and continued change of possession, nor any bill of sale filed, in accordance with that Act, the property remained in F.'s hands liable to seizure. Semble, that had plaintiff removed the property at the time of sale, the sheriff could not have followed it. *Carruthers* v. *Reynolds*, 12 C. P. 596.

Increase of Cattle.]—A testator devised all his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and when received, to invest the same as they should think best, and pay the interest and produce thereof to his widow during her life, for the maintenance of herself and his children. The widow, after the testator's death, remained on his farm and in possession of the stock and personal property, some of which she sold, and the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, and while it was there, the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale; but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure:—Held, that the increase of the stock must be subject to the same rule as the stock. Semble, that the property was liable in the widow's hands to the execution, which, for all that appeared, might have been for a debt contracted for the support of herself and family. *Peers* v. *Carroll*, 19 U. C. R. 229.

Indivisible Chattel.]—See *Gunn* v. *Burgess*, 5 O. R. 685; *Re McDonagh* v. *Jephson*, 16 A. R. 107.

Landlord and Tenant—*Use of Hay on the Premises.*]—Plaintiff leased a farm as a dairy farm and a number of cows, the lease containing the following clause: "All the hay, straw, and corn stalks raised on the . . . . farm to be fed to the same cows on the . . . . farm:"—Held, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had. *Snetzinger* v. *Leitch*, 32 O. R. 440.

Married Woman's Property.]—The property of a woman married before the 4th May, 1859, without any marriage contract or settlement, is protected as against creditors of her husband whose claims were contracted after 4th May, 1859, and not otherwise. *Ramsay* v. *Carruthers*, 10 L. J. 299.

But where a seizure for debt contracted before the 4th May, 1859, was not made in the lifetime of the wife, it was held, that the property having passed by her death to the next of kin under the Statute of Distributions, was not liable to be seized by the creditors of her surviving husband. *Ib.*

His interest, however, under the statute as husband surviving, and that interest only, was held to be liable to the execution. *Ib.*

The plaintiff, who had been married in 1864, cultivated land, living upon it with her husband and working it under his advice, one-half of the land having been in 1874 devised to her by the father of her husband, the other half having been in like manner devised to her son. In an interpleader action brought by her against an execution creditor of her husband:—Held, affirming the judgment of the court below, 46 U. C. R. 52, that the plaintiff was entitled to the crops on the whole farm as against the execution creditor. *Ingram* v. *Taylor*, 7 A. R. 216.

Money and Debts.]—Semble, that books of account and open accounts cannot be seized by the sheriff, under 20 Vict. c. 57, s. 22; at least they cannot be sold or transferred, but, if seizable at all, must be held by the sheriff in security for the judgment debt, and collected as such in his own name. *McNaughton* v. *Webster*, 6 L. J. 17.

A sale of books of account by a sheriff under an execution, does not pass the property in the debts or accounts therein charged. *Ib.*

Money paid into court is not liable to seizure under execution while in the hands of the officer of the court. *Calverley* v. *Smith*, 3 L. J. 67.

A money bond for the conveyance of land is seizable on an execution under 13 & 14 Vict. c. 53, and 20 Vict. c. 57. *Regina* v. *Potter*, 10 C. P. 39.

Money made under an execution at the suit of A., cannot be retained by the sheriff as seized under an execution against A., and the court will order such money to be paid over to him, notwithstanding the seizure. *Sharpe* v. *Leitch*, 2 C. L. J. 132.

A fire policy, after a loss has taken place, and money has become payable thereon, is a specialty or security for money seizable under execution, though the amount payable has not been ascertained. *Bank of Montreal* v. *McTavish*, 13 Gr. 395.

Partial Interest.]—The sheriff under a fi. fa. may sell what the termor continues to hold under a lease, but he cannot sell part of his interest, or a part of the premises. *Osborne* v. *Kerr*, 17 U. C. R. 134.

Partnership Property.]—The sheriff on a fi. fa. against B., one of a firm, seized his share of the partnership property. B.'s partner and D. R. & Co. notified the sheriff not to sell, and before any sale had been made, D. R. & Co. placed in his hands an execution against the firm. Upon this last writ the sheriff sold the whole of the partnership effects, which realized only a small part of the claim, and to the first writ he returned nulla bona. B. had no property except his interest in the firm; and it was admitted that when the first writ was delivered to the sheriff, the partnership effects were insufficient to meet their debts:—Held, that the sheriff was not liable for a false return to the first writ, even for nominal damages. *Flintoff* v. *Dickson*, 10 U. C. R. 428.

A plaintiff suing a partner alone upon a note made in the name of the firm, and for a partnership debt, cannot under his judgment and execution against such partner sell the goods of the firm, except in cases of dormant partnership. A. having a note signed W. B. & Co., and being ignorant of the existence of any other partner, sued W. B. alone, and obtained judgment and execution, under which the sheriff seized the partnership goods. B. afterwards obtained an execution against W. B. and his two partners, who it appeared in reality composed the firm. Both claims were for partnership debts, and the property of the firm was not sufficient to satisfy either in full:—Held, that B.'s execution must prevail. *Taylor* v. *Jarvis*, 14 U. C. R. 128.

V. and J. D. being in partnership, J. D. went out, and his father D. D. took his place in the firm. About six months after this, V. assigned to D. D. all the stock in trade, but possession was not changed, nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue, to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after the plaintiffs' title accrued did not appear:—Held, that they must succeed; that they were clearly entitled to the goods themselves, for defendant as creditor of one partner could not seize them out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts. *Wilson* v. *Vogt*, 24 U. C. R. 635.

Where a sale is made under execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets after payment of the partnership debts, and that too even when the debt originally was due from the partnership to the execution creditors. *Partridge* v. *McIntosh*, 1 Gr. 50.

Quære, what course is the sheriff to pursue upon an execution against the goods of one of two partners, under the circumstances of one being a bankrupt and the other not? *O'Neil* v. *Hamilton*, 4 U. C. R. 294.

Partnership property cannot be seized under a fi. fa. against one partner, so as to interfere with the property or possession of a copartner. In an interpleader issue to try whether certain goods were the property of the plaintiff as against the execution creditor at the time of the delivery of the writ to the sheriff, it was proved that the goods originally belonged to W., who had mortgaged them to one D. W. afterwards became a partner of the plaintiff, and the goods were part of the partnership stock-in-trade. A. fi. fa. against W. was subsequently delivered to the sheriff, who made no actual seizure, merely taking a bond from D. for the safety of the goods. D. was not entitled to the possession of the goods so far as appeared, and the mortgage money was not due. The partnership was afterwards dissolved, when the plaintiff purchased W.'s interest in the goods, and the sheriff then seized them under the fi. fa.:—Held, that the plaintiff was entitled to succeed on shewing that the goods were partnership property at the time of the delivery of the writ to the sheriff. Held, also, that the plaintiff's right could not be defeated by proving title in the mortgagee. *Ovens* v. *Bull*, 1 A. R. 62.

In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree pro confesso, and during the taking of the accounts under an agreement for a continuance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant, who was not informed of these proceedings until the sheriff had seized, and was about to sell, the whole of the partnership property: — Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. 1877 c. 123, s. 8, and that the sale should be restrained:—Held, also, that the execution creditors might be made parties for that purpose on motion simply. *Young* v. *Huber*, 29 Gr. 49.

Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties which arise thereafter; and the Judicature Act has made no difference in this respect. *Harrison* v. *Harrison*, 14 P. R. 436.

R. and E. were partners in business, and became financially involved. L., R. & Co. obtained a judgment against the firm for a firm debt, and placed the execution in the sheriff's hands, with a direction to levy of the goods of R. Subsequently the plaintiffs obtained a judgment against R. and E. individually and as members of the firm, and placed their execution in the sheriff's hands. The sheriff made the greater part of the amount of the plaintiffs' execution out of the assets of the firm, and returned it "nulla bona" as to the residue, although, while the plaintiffs' execution was in his hands, he had sold the furniture of R., being his individual property, and applied the proceeds upon the execution of L., R. & Co., which was first in his hands; and notwithstanding that the plaintiff's solicitor had notified him that the plaintiffs claimed the proceeds of the furniture as applicable to their execution only:—Held, reversing 6 O. R. 644, that the plaintiffs could not recover against the sheriff for a false return; that the property of the individual partners was liable on a judgment against the firm; and that the plaintiffs were not entitled to priority over the first execution, because their judgment was against the partners as individuals as well as members of the firm. *Bank of Toronto* v. *Hall*, 6 O. R. 653.

See Re McDonagh v. *Jephson*, 16 A. R. 107.

Rent Charge.]—A rent charge issuing out of, and chargeable upon, a freehold estate, and granted to a person for his life, cannot be seized under a fi. fa. goods. *Smith* v. *Turnbull*, 5 U. C. R. 586.

Sale under Execution after F. O. S.]—The plaintiff's mortgage comprised leasehold premises held by defendant R., the mortgagor, under two distinct leases. After a decree and final order for sale the sheriff of the county in which the leaseholds were situate advertised the interest of R. in the premises comprised in one of the leases to be sold under a fi. fa. against the goods and chattels of R., and sold the interest to one W. W. afterwards obtained from the plaintiff an assignment of his mortgage, and entered into possession of the whole of the mortgaged premises, and received the rents and profits thereof, and was subsequently made a party plaintiff in this suit by order of revivor. Upon motion by R. for a subsequent account and for reconveyance by W. of the whole of the mortgaged premises upon payment of what was found due on taking the account:—Held, that the sale by the sheriff was invalid, and that R. was entitled to a re-conveyance of the whole premises upon payment of what should be found due to W. for what he had paid the sheriff and upon the mortgage. *Goold* v. *Rich*, 4 Ch. Ch. 87.

Sale by Debtor after Abandonment.]—Where personal property had been seized in execution by a sheriff and afterwards abandoned by direction of the plaintiff's attorney, and a memorandum of the suit being discharged given to defendant, but the sheriff was afterwards directed to proceed, and sold to the plaintiff in this action (the property in the meantime having been sold bonâ fide by the defendant who had left it in the possession of the defendant in this action):—Held, that no property passed to the plaintiff by the sheriff's sale, as the levy had been abandoned and a bonâ fide sale afterwards made by the execution defendant. *Gould* v. *White*, 4 O. S. 124.

Secreting Goods of Execution Debtor.]—A declaration charging defendant with wilfully and fraudulently making away and secreting the goods of one F., against which goods the plaintiff had placed an execution in the hands of the sheriff, so that the sheriff could not discover the same, or levy, &c., averring knowledge of the facts in the defendant, is good on demurrer. *Young* v. *Buchanan*, 6 P. R. 218.

Shares in Company.]—On the 9th January, the plaintiff's attorney sent a fi. fa. in Robinson v. Banks, to the sheriff, with the following letter: "Herewith you will receive fi. fa. We wish to get at two shares of Wellington Permanent Building Society stock, standing in the name of Banks and his wife. These shares, though standing in their names in a representative capacity, are nevertheless the property of the wife, and therefore of the defendant." The stock had belonged to one M., who died intestate, less than a year before, and Mrs. Banks being his only sister and next of kin, administration was granted to her and to her husband, the defendant in the fi. fa. No evidence was given of any debts due by M., and it appeared that Banks had paid an instalment on these shares. The sheriff returned the writ nulla bona. In an action against him for a false return:—Held, that stock in a building society may be taken in execution under 12 Vict. c. 23. But, held, also, that under the circumstances, this was not property belonging to Banks which the sheriff was bound to seize. *Robinson* v. *Grange*, 18 U. C. R. 260.

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder:—Held, that the provisions of C. S. C. c. 70, as well as the C. L. P. Act, ss. 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin* v. *Ottawa and Prescott R. W. Co.*, 22 U. C. R. 186.

Upon an application to compel a railway company by mandamus to register a transfer of stock, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen, and commonalty of the city of Ottawa," and by C. S. U. C. c. 54, the name of the corporation was changed to "The corporation of the city of Ottawa:"—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given. Held, also, that a demand for the transfer upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company was sufficient, the court being of opinion that service and demand upon the president were not indispensable. *In re Goodwin* v. *Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Stock was held by a resident of Kingston in the Merchants Bank, which has its chief place of business in Montreal:—Quære, whether the sheriff could seize and sell such stock, which was personal property out of the Province, merely because it might, if the directors chose, be made transferable at a branch office. *Nickle* v. *Douglas*, 35 U. C. R. 126, 37 U. C. R. 51.

Stock in an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff under C. S. C. c. 70, ss. 3, 4, and not from the delivery of the writ to the sheriff. *Hatch* v. *Rowland*, 5 P. R. 223.

Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. 1877 c. 66, by a sheriff under a fi. fa. goods, and he is entitled to an interpleader under s. 10 of the Interpleader Act, R. S. O. 1877 c. 54, where an adverse claim to the stock is advanced. *Brown* v. *Nelson*, 10 P. R. 421.

Where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken in execution, such sale, in the absence of proof of fraud or collusion, was held to be good and valid. *Connecticut and Passumpsic Rivers R. W. Co.* v. *Morris*, 14 S. C. R. 318.

A bonâ fide assignment or pledge for value of shares in the capital stock of a company

incorporated under R. S. O. 1887 c. 157 is valid between the assignor and the assignee notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in property seized can be sold under execution, the rights of a bonâ fide assignee cannot be cut out by the seizure and sale of the shares, under execution against the assignor, after the assignment. R. S. O. 1887 c. 157, s. 52, considered and construed. Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in s. 16 of the Execution Act, R. S. O. 1887 c. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares. *Morton* v. *Cowan*, 25 O. R. 529.

See Brock v. *Ruttan*, 1 C. P. 218.

Shares in Ship.]—See *Treriee* v. *Burkett*, 1 O. R. 80.

Sub-lease by Debtor after Sale.]—In debt on a lease it was proved that the plaintiff held under the last of several assignments of a yearly lease from the principal officers of Her Majesty's ordnance. A judgment was obtained against the plaintiff, and his interest in the lot sold under a fi. fa. against goods. Plaintiff afterwards demised the said lot to defendant; and, on non-payment of rent, brought his action on the lease:—Held, that the interest of plaintiff was a chattel interest, and might be sold under a fi. fa. against goods and chattels (see 7 Vict. c. 11, s. 7); and that the lease to defendant being made after such seizure and sale, the plaintiff was not entitled to recover. *Sparrow* v. *Champagne*, 5 C. P. 394.

See Division Courts, VII.

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2. *Sale.*

Claimant Bidding at Sale.]—When a sheriff, under a fi. fa., seized and sold certain goods claimed by the plaintiffs:—Held, that the fact of one of the plaintiffs having attended and bid at the sale did not estop them from complaining of the seizure of the goods. *Lines* v. *Grange*, 12 U. C. R. 209.

Collusive Purchase.]—The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money:—Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant. *Sullivan* v. *Francis*, 18 A. R. 121.

Postponing Sale — *Enforcing Conditions.*]—There were three executions in the sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows: "I agree with G. W. & C. (the plaintiffs) to pay off the principal, interest, and costs, with sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with defendant to go out to the place and postpone it, for which the defendant was to pay the expense. When the bailiff got there, the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of $45 which was paid to the defendant. The plaintiffs thereupon sued the defendant on his guarantee:—Held, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the plaintiffs were the proper parties to sue. *Guthrie* v. *O'Connor*, 36 U. C. R. 372.

Statute of Frauds.]—Where a sheriff had sold an unexpired term and certain trade fixtures under an execution at common law, but before any deed was executed by him a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract, but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff:—Held, that the contract must be in writing under the Statute of Frauds. *Witham* v. *Smith*, 5 Gr. 203.

IX. Writ against Lands.

1. *Operation and Effect.*

(a) *In General.*

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

Aliens.]—Alien friends residing in their proper country, cannot, upon a summary application to the court, be deprived, under 5 Geo. II. c. 7, of the right to an execution against the lands of their debtor:—Semble, the alienage should be pleaded in bar of execution. *Wood* v. *Campbell*, 3 U. C. R. 269.

Assignment to Pay Debts—*Resulting Trust.*]—Where real property is conveyed to trustees for sale for the satisfaction of debts, so as the sale be made within a certain period, and the sale be not made within that time, no

use results back to the grantor which can be taken in execution for his debts under the Statute of Frauds. *Doe d. Lawrason* v. *Canada Co.*, 6 O. S. 428.

Held, in a proceeding under the Act for Quieting Titles, that as regarded two assignments in trust of February, 1858, and October, 1858, set out in the case, the trust in favour of the assignors of the surplus, after paying certain specified claims, was not such a trust as enabled the sheriff to sell under s. 10 of the Statute of Frauds. To enable him to do so the trust must be a clear and simple one for the benefit of the debtor. *Re O'Donohoe*, 23 Gr. 399.

Contract to Sell Before Execution.]—Where a debtor had entered into a binding contract for the sale of his land, before execution against his land had issued:—Held, that his interest as vendor was not saleable under the execution. *Parke* v. *Riley*, 12 Gr. 69.

A. entered into a parol agreement with R. for the sale to him of certain land, received part of the price, and gave R. possession of the premises. A. subsequently assigned by parol the balance of the price to S., to whom he was indebted. P., after this assignment, delivered to the sheriff an execution against the lands of A., and became the purchaser at the sale by the sheriff:—Held, that no interest in the lands passed under the sheriff's deed. *S. C.*, 3 E. & A. 215.

Death of Debtor.] — Lands and tenements held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his executor or administrator. *Forsyth* v. *Hall*, Dra. 304.

The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. *Reid* v. *Miller*, 24 U. C. R. 610.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed* v. *Orr*, 6 A. R. 690.

Division Court Execution.]—See DIVISION COURTS, VII.

Dower—*Interest.*]—A right to dower is not saleable under execution against the lands of a dowress. Till dower is assigned, she has no estate in the land, nor even a right of entry: neither does her interest come within the meaning of C. S. U. C. c. 90, s. 5, "a contingent, or executory, or a future interest, or a possibility coupled with an interest." *McAnnany* v. *Turnbull*, 10 Gr. 298.

The question whether the right of a widow to dower, which is not yet assigned to her, is seizable under common law process, or is only so liable in equity, considered and treated of. *Williams* v. *Reynolds*, 25 Gr. 49.

Since the passing of 40 Vict. c. 8 (O.), which is retrospective in its operation, the right of a woman to dower, as well during the life of her husband as after his death, is such an interest in lands as can be sold under a fi. fa. at law. *Allen* v. *Edinburgh Life Ass. Co.*, 25 Gr. 306. See *S. C.*, 19 Gr. 248.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Woman's Property Act, 1884, was passed:—Held, reversing 6 O. R. 581, that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. 1877 c. 125, s. 3, and she not having the jus disponendi without her husband's concurrence, her interest was not liable to be sold under execution against her. *Douglas* v. *Hutchison*, 12 A. R. 110.

Elegit.]—A judgment is not a lien upon lands for the purpose of an elegit, so as to avoid the effect of a fi. fa. against lands, issued on a subsequent judgment, but placed in the sheriff's hands prior to the elegit. *Doe d. Henderson* v. *Burtch*, 2 O. S. 514.

Quære, can an elegit be issued regularly in this Province. *Ib.*

Equitable Interest of Purchaser under Contract—*Judgment against Assignee of such Purchaser.*]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands is exigible under a writ of fieri facias against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract. Re Prittie and Crawford, 9 C. L. T. Occ. N. 45, declared to have been inadvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 650.

Equity Attaching notwithstanding Executions.]—G. obtained a loan of $3,700 through R., from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for $7,500, and had paid $4,000 cash, and wanted the loan to pay the balance with, and on receipt of the loan paid W. the $3,000 which was the total purchase money for the 220 acres, and another parcel of about 50 acres, and was the full value of both parcels. G got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs it was:—Held, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the 50 acres made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid,) as the mortgagee was no party to the action. *Hamilton Provident and Loan Society* v. *Gilbert*, 6 O. R. 434.

Execution against Executor—*Testator's Debt—Heirs Bound.*]—See *Lovell* v. *Gibson*, 19 Gr. 280.

And see EXECUTORS AND ADMINISTRATORS.

Execution against Heir — *Ancestor's Debts.*]—Where a debtor dies intestate and his lands are sold under execution against his heir for the private debt of the heir and the purchaser has notice before his purchase that there are debts of the ancestor outstanding of which the creditors claim payment out of the land seized, such purchaser takes only the

beneficial interest of the heir, subject to the payment of the ancestor's debts. *Peck* v. *Bucke*, 2 Ch. Ch. 294.

Fixtures.]—A creditor having execution against lands cannot claim fixtures which do not belong to his debtor. *Brown* v. *Sage*, 11 Gr. 239.

Husband and Wife.]—The interest of a husband in the freehold estate of his wife, may be sold under a fi. fa. against lands. *Moffatt* v. *Grover*, 4 C. P. 402.

Husband and Wife—*Entireties.*]—Execution against husband and wife—Separate Estate—Tenancy by entireties. See *Griffin* v. *Patterson*, 45 U. C. R. 536.

Judgment against One of Several Executors.]—Lands may be sold on a judgment against one of several executors in the same manner as if it had been against all. *Doe d. Smith* v. *Shuter*, 5 O. S. 655.

Lands Acquired when Execution in Force.]—Lands acquired while the writ is in the sheriff's hands may be sold under it, if properly advertised, though they have not been twelve months owned by the debtor. *Ruttan* v. *Levisconte*, 16 U. C. R. 495.

Land in Debtor's Possession.]—Mere possession of land by a debtor constitutes primâ facie a seisin in fee, and such an estate cannot be sold under an execution against goods. *Doe d. Keogh* v. *Calhoun*, 1 U. C. R. 157

The sheriff could only sell the debtor's interest in possession; not a mere right of action while a third party was in adverse possession. *Doe d. Ausman* v. *Minthorne*, 3 U. C. R. 423.

Lands in Different Districts.]—Semble, that where a plaintiff has taken a fi. fa. against lands and tenements belonging to a defendant in several districts, the court would interfere to prevent more of these lands being sold than would satisfy the plaintiff's demand. *McGill* v. *McKay*, Tay. 88.

Lands Held by Heir.]—A sci. fa. will not issue against an heir under 5 Geo. II., although an execution may have issued against the goods and chattels in the hands of the administrator, and a return of nulla bona has been made. *Paterson* v. *McKay*, Tay. 43.

A judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon awarding the sale of lands of which the deceased was seised on a specified day, previous to which he had died, will not sustain a purchase; and the sheriff's deed gives no title. *Varey* v. *Muirhead*, Dra. 486.

Lands Sold before Delivery of Writ.]—The plaintiff who claimed title under a deed, made before, though registered after, the lodging of an execution in the hands of the sheriff, was:—Held, entitled to an injunction to restrain a sale by an execution creditor, of the interest which her co-defendant in the execution would have had in the land but for such deed; and it was held that she was not bound to attend the sheriff's sale, explain her interest and protest. *Russell* v. *Russell*, 28 Gr. 419.

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

Lease after Writ.]—A lease of lands made by the agent of an executor, after delivery to the sheriff of a fi. fa. lands against such executor, will only convey an interest subject to such fi. fa. *Sloan* v. *Whalen*, 15 C. P. 319.

Limitation of Actions—*Renewal of Fi. Fa.*]—The right of an execution creditor under a fi. fa. lands in the hands of the sheriff of the county in which the lands of the debtor are situate is a "lien," and the money mentioned in the writ is "money charged upon land." Taking steps to sell under such a writ is a "proceeding," and although duly renewed if the writ has been more than ten years in the sheriff's hands, and no payment or acknowledgment has in the meantime been made or given as required by s. 23 of R. S. O. 1887 c. 111, the lien is gone, and proceedings on the writ will be restrained. *Neil* v. *Almond*, 29 O. R. 63.

Mortgagee's Interest in Land.]—After a mortgage in fee has become forfeited by non-payment of the mortgage money, the mortgagee's interest in the mortgaged premises cannot be sold under an execution against lands. *Doe d. Campbell* v. *Thompson*, H. T. 6 Vict.; *Parke* v. *Riley*, 3 E. & A. 215, 231.

The statute 13 Eliz. c. 5, extends only to the assignment of such things as are liable to be taken in execution, and a mortgagee's interest is not so liable. *Lodor* v. *Creighton*, 9 C. P. 295.

Where R. assigned a mortgage to M. to secure payment of two notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a re-assignment thereof to R. until not only the amount due on the notes, but also the balance due on the mortgage was paid:—Held, that R. was entitled to a re-assignment on payment of what was due on the notes only, for his interest in the mortgage was not properly exigible by the sheriff under R. S. O. 1877 c. 66. Ross v. Simpson, 23 Gr. 552, distinguished. *Rumohr* v. *Marx*, 3 O. R. 167.

Purchaser from Crown.]—The court will, at the instance of a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold; and

order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the Crown lands department for a patent of the land, as vendee or assignee of the locatee. *Yale* v. *Tollerton*, 13 Gr. 302.

The interest of a debtor in land bought from the Crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Gr. 309.

Purchase after Writ in Sheriff's Hands.]—Where a party purchases land after a fi. fa. has been delivered to the sheriff, he holds the land subject to a right of sale under a fi. fa. by the judgment creditor. *Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449.

Rent Charge.]—Quære, does a rent charge come under 5 Geo. II. c. 7, s. 4. *Dougall* v. *Turnbull*, 8 U. C. R. 622.

A rent charge for which there is a power of distress comes under the terms lands or tenements in the fi. fa. But not a mere rent seck. *Ib.*

A rent charge upon land for the life of the grantee is seizable by the sheriff under an execution against lands. *S. C.*, 10 U. C. R. 121. See *Smith* v. *Turnbull*, 1 P. R. 38.

Restraining Debtor from Cutting Timber.]—Where a mortgagor in possession was felling timber on the mortgaged premises, the court at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the sheriff, granted an injunction to restrain future cutting by the mortgagor, his servants, agents, and workmen, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor. *Wason* v. *Carpenter*, 13 Gr. 329.

Reversionary Interest.] — A plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth $2,666) in lands, subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave defendants an option to purchase, and under its terms no rent or taxes were to be paid until the title had been quieted, or a certificate refused; and in the latter event, defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending:—Held, that if the plaintiff succeeded in the suit, the land would be subject to the debts of the plaintiff's ancestor; and if he failed, the purchase money, when payable by the lessees, would be payable not directly to the plaintiff, but to his ancestor's personal representative; and that the plaintiff had not such an interest in the property as could be directly reached by execution. *Higgins* v. *Manning*, 10 C. L. J. 135.

The interest of a reversioner may be sold during the lifetime of the tenant for life. *Doe d. Cameron* v. *Robinson*, 7 U. C. R. 335.

Testator, after giving certain lands to his children, C., W., and M., devised to his wife all the residue of his lands for life, and after her death the same to be equally divided among all his surviving children, except said C., W., and M., share and share alike. A patent was afterwards granted for the land in question, with other lands, to the executors of his will, to hold upon the trusts contained in it. Before any division, while the wife was alive, a fi. fa. issued against one of the residuary devisees:—Held, that the defendant in the writ had no interest which could be sold. *McLean* v. *Fisher*, 14 U. C. R. 617.

The purchaser at sheriff's sale of a reversion in lands mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit. *Waters* v. *Shade*, 2 Gr. 457.

Before equities of redemption were by statute made saleable under execution, a sheriff might sell a debtor's reversionary interest in the fee, subject to a lease for one thousand years. *Wightman* v. *Fields*, 19 Gr. 559.

Right to Maintenance.]—Where lands are subject to a charge for maintenance, the interest of parties beneficially interested therein, subject to such charge, is saleable under execution. *Rathbun* v. *Culbertson*, 22 Gr. 465.

Sale and Mortgage.]—Where lands are conveyed to a purchaser against whom judgments are then registered, and executions against lands in the sheriff's hands, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and executions attach before the mortgage. *Ruttan* v. *Levisconte*, 16 U. C. R. 435.

Sale before Execution.]—In ejectment, the plaintiff claimed through a deed from J. M. to J. The defendant claimed through a purchaser at sheriff's sale, under execution against J. M. at the suit of one C. The deed from J. M. to J. was made on the 4th February, 1857. C.'s judgment against J. M. was entered on 21st June, 1855, and registered on the 22nd in the registry office. On the 6th July, 1859, the sheriff sold the land under a pluries fi. fa. tested the 31st March, 1858:—Held, that the sheriff's deed could not transfer the estate previously vested in J. *Morrison* v. *Steer*, 32 U. C. R. 182.

Sale of Timber after Writ.]—Where the owner of lands sells the timber upon it, after a writ against his lands is placed in the sheriff's hands, and the purchaser cuts down and removes the timber before an injunction is obtained, he is accountable to the execution creditor for the timber so cut and removed. *Brown* v. *Sage*, 11 Gr. 239.

School Site.]—Held, that land conveyed to school trustees for the purposes of a school, could not be sold under execution against them on a judgment obtained for the money due for building the school house. *Scott* v. *Burgess School Trustees*, 19 U. C. R. 28.

Seizure.]—See *Robinson* v. *Bergin*, 10 P. R. 127.

Separate Estate.] — Quære, whether a writ of fieri facias is the appropriate remedy

for reaching the separate property of a married woman. *Douglas* v. *Hutchison*, 12 A. R. 190. See, however, *Beemer* v. *Oliver*, 10 A. R. 656, 661.

Solicitor's Lien.]—An action having been begun on the 3rd June, 1896, judgment was obtained therein on the 27th October, 1896, declaring the plaintiffs' right to an interest in certain lands. An execution against the plaintiffs' lands was placed in the sheriff's hands on the 29th April, 1897. On the 1st September, 1897, Con. rule 1129 was passed, by which the court was enabled to order that lands recovered by the exertions of a solicitor should be charged for his benefit:—Held, that the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, and the subsequent enactment of the rule did not operate to divest this charge, or to postpone the claim of the execution creditors to the subsequently acquired equity of the solicitors in respect of their costs of the action. *Taylor* v. *Robinson*, 19 P. R. 31.

Sub-division of Lots.]—Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described being sold under execution. *Rathbun* v. *Culbertson*, 22 Gr. 465.

Term for Years.]—A term for years cannot be sold under an execution against lands. *Doe d. Court* v. *Tupper*, 5 O. S. 640.

Time of Operation.]—Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. *Doe d. Auldjo* v. *Hollister*, 5 O. S. 739.

Land not being bound by a judgment for the purpose of sale, under 5 Geo. II. c. 7, but only by the delivery of fi. fa. lands to the sheriff, the time of such delivery must be proved by the purchaser under the sheriff's deed. *Doe d. Burnham* v. *Simmons*, 7 U. C. R. 196.

Where land mortgaged is sold by the sheriff under 12 Vict. c. 73, the purchaser acquires only the title of the mortgagor at the time the writ was delivered to the sheriff, not at the time of registering the judgment. *Pegge* v. *Metcalfe*, 5 Gr. 628.

Trust for Sale and Distribution.]—Trustees under the will of F. S., holding certain lands by virtue thereof on trust to sell as soon as conveniently might be after her decease, and distribute the proceeds among her children, one of whom was D. V. L., contracted to sell the said lands to one H. T. There were at the time writs of fieri facias in the sheriff's hands against the lands of D. V. L., some of which had been placed therein before the date of the said contract:—Held, nevertheless, that the said writs did not form any incumbrance on the lands in the hands of the trustees so as to prevent them conveying the same to a purchaser indefectibly, and that any share of the purchase money which D. V. L. was entitled to he would get as personal, not as real estate:—Held, also, that the purchaser was not bound to see to the application of the purchase money. *Re Lewis and Thorne*, 14 O. R. 133.

(b) *Equity of Redemption.*

Common Law Process.]—An equity of redemption of an estate of inheritance:—Held, not saleable under common law process. *Simpson* v. *Smyth*, 2 O. S. 129; 1 E. & A. 9.

Deed Absolute in Form.]—12 Vict. c. 75, making equities of redemption saleable under legal process, does not apply where the mortgage is created by a deed absolute in form. *McCabe* v. *Thompson*, 6 Gr. 175. Followed in *McDonald* v. *McDonell*, 2 E. & A. 393.

Where the interest of the debtor was a life estate, which he had conveyed away absolutely, though as a security only:—Held, that the statute for the sale of equities of redemption did not apply, the right to redeem not appearing on the face of the conveyance, and that the sale could not be supported. *Fitzgibbon* v. *Duggan*, 11 Gr. 188.

Execution not against Mortgagor.]—Upon a judgment obtained against the executors of a mortgagor, a writ against the lands of the testator was sued out, under which his interest in the mortgaged premises was sold; and afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mortgagee, all which transactions took place after the passing of 7 Wm. IV. c. 2:—Held, that the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Gr. 344.

Held, that 12 Vict. c. 73, s. 1 (C. S. U. C. c. 22, s. 257), which authorizes the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself. *Bank of Upper Canada* v. *Brough*, 2 E. & A. 95.

Held, in accordance with the last case, that an equity of redemption in lands is not saleable under an execution issued against the executor of the mortgagor. *Lowell* v. *Bank of Upper Canada*, 10 Gr. 57.

27 Vict. c. 13, after reciting that doubts had arisen as to the meaning of ss. 257, 258, and 259 of the C. L. P. Act, enacted that "whenever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators, or assigns, or persons having the equity of redemption,' were inserted immediately after such word 'mortgagor;'"—Held, that the enactment, c. 13, was a declaratory one; and where lands subject to a mortgage were sold by the sheriff under execution in a suit against the executors of the mortgagor, and conveyed by the sheriff to the purchaser in October, 1858, the court held this sale validated by the statute, and that the heirs of the mortgagor could not impeach the same. Held, also, that 27 Vict. c. 15, did not affect the question. *McEvoy* v. *Clune*, 21 Gr. 515.

Execution Prior to Mortgages.] — The owner of lands created two mortgages thereon, after which his interest therein was sold under a fi. fa. issued upon a judgment registered prior to both mortgages, for the sum of 20s., all parties being under the impression that the lands were sold subject to

the two mortgages. Subsequently the purchaser at sheriff's sale bought up the first mortgage, whereupon the holders of the second mortgage filed a bill against him, praying redemption or foreclosure, on the ground that the purchase of the equity of redemption at sheriff's sale bound him to discharge both mortgages. The court at the hearing refused this relief, and dismissed the bill; but, owing to the uncertain state of the authorities on the point as to the effect to be given to the registering of a judgment, without costs; and with leave to file a new bill impugning the sale under the fi. fa.; or a decree of redemption would be pronounced upon the submission to that effect contained in the answer, if the plaintiffs desired that relief. *Bank of Montreal* v. *Thompson*, 9 Gr. 51; 3 E. & A. 239.

A mortgage by devisees subsequent to a writ against the testator's lands in his executor's hands, being delivered to the sheriff, does not prevent the sheriff selling. *Johnston* v. *Sowden*, 19 Gr. 224.

Interest of Some of Several Mortgagors.]—Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits. *Cronn* v. *Chamberlin*, 27 Gr. 551.

Lands in Different Counties.]—Where several lots of land are mortgaged, the equity of redemption in one or some of them only cannot be sold under common law process; and, semble, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity. *Heward* v. *Wolfenden*, 14 Gr. 188. Followed in *Van Norman* v. *McCarty*, 20 C. P. 42.

Leasehold Interest.] — Quære, whether an equity of redemption in a leasehold interest is saleable under common law process. *McDonald* v. *Reynolds*, 14 Gr. 691.

Mortgagee in Possession.] — A purchaser at sheriff's sale of lands sold under a judgment and execution subsequent to a mortgage in fee by the debtor, cannot recover against the mortgagee in possession. *Doe d. Richardson* v. *Dickson*, 2 O. S. 292.

Mortgage on Part of Land.]—S., at the time of his death, owned a farm of 98 acres, 25 of which he had mortgaged. After his death his mortgagee recovered against his executor two judgments, viz., one in the county court for the mortgage debt, and one in the division court for a debt not due by S. in his lifetime, and for which, therefore, his lands were not liable to be sold. The judgment plaintiff, having transferred his division court judgment to the county court, issued executions on both judgments, under which the sheriff offered for sale the interest of S., the testator, in the 98 acres. The judgment plaintiff became the purchaser, bidding just enough to cover the amount of his two judgments and the costs, but not paying or intending to pay any money except the amount of the sheriff's fees:—Held, that by a sale of the testator's interest in the 98 acres, the equity of redemption in the 25 acres would have passed along with the legal estate in the 73 acres, under R. S. O. 1877 c. 66, s. 35; but that no real sale had taken place, and therefore the sheriff's deed, made to the judgment plaintiff in pursuance of his bid, was void. In the county court suit the summons was addressed to W. M. Platt, executor of the last will and testament of S., deceased. The particulars of claim were for $200, on a mortgage made by S. in his lifetime, &c., and the judgment was that plaintiff do recover against the said W. M. Platt, executor:—Held, that the fact that the summons was not addressed to Platt as executor, and the judgment was not expressed to be against him as executor, did not make this a judgment against him personally, and that it was sufficient to warrant an execution against the lands of the deceased. Donovan v. Bacon, 16 Gr. 472, and Wood v. Wood, ib. 471, questioned. Per Patterson, J.A.—If the sale could not have been upheld under the statute because of the legal and equitable estate being sold together yet the sale might be upheld as to the legal estate. Per Moss, C. J. O.—In such a case the sale could not be upheld in part but was void in toto. *Samis* v. *Ireland*, 4 A. R. 118, affirming *S. C.*, 28 C. P. 478.

Mortgage Prior to Judgment.] — A judgment creditor purchasing an equity of redemption at sheriff's sale, cannot set up his registered judgment against a mortgage made before the delivery of the writ to the sheriff. *Pegge* v. *Metcalfe*, 5 Gr. 628.

Quære, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts, as forming together a portion of the price of the land purchased. *Ib.*

Mortgagee Recovering Judgment on Covenant.] — Quære, whether an equity of redemption can be sold upon an execution issued upon a judgment recovered at the suit of the mortgagee, in an action upon the covenant contained in the mortgage for the payment of the mortgage debt. *VanNorman* v. *McCarty*, 20 C. P. 42.

Parties in Master's Office.] — A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding in the master's office it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency:—Held, on appeal from the ruling of the master, that it was proper to add such creditors as parties in his office. *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593.

Partnership Real Estate.]—Quære, the effect of a sheriff's sale to a subsequent incumbrancer of an equity of redemption in real estate of a partnership, where the execution was issued against all the partners; but one of the defendants had died after judgment and before execution, the judgment not having been revived, and such sale having taken place pending a suit by the first mortgagee for the foreclosure of the mortgage. *Baxter* v. *Turnbull*, 2 Gr. 521.

Purchase by Mortgagee.]—The equity of redemption in mortgaged lands was offered for sale under execution at law, and the mortgagee purchased the property for $200; but the sale proved to be inoperative:—Held, that the mortgagee could not add the amount so paid to the amount of his mortgage debt. *Paul* v. *Ferguson*, 14 Gr. 230.

Sale under Mortgage after Sale of Equity.]—Defendant, being the owner of certain property, mortgaged it to a building society. The plaintiff with two others having recovered a judgment against the defendant, sold under a fi. fa. lands the premises in question which the plaintiff purchased. Default having been made in the mortgage to the building society, they advertised and sold. Upon ejectment brought it was contended that the mortgage to, and sale by, the building society prevented the sale under the fi. fa. from operating:—Held, that the sale under the fi. fa. passed all the interest, both legal and equitable, of the mortgagor, and that as against him the plaintiff was entitled to recover. *Fisken* v. *McMullen*, 12 C. P. 85.

Surplus after Sale by Mortgagee.]—A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable:—Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest. *Glover* v. *Southern Loan and Saving Company*, 31 O. R. 552.

Term of Years.]—An equity of redemption in a term of years cannot be sold on an execution. *Doe d. Webster* v. *Fitzgerald*, E. T. 2 Vict.

A term of 1,000 years was assigned by way of mortgage, and subsequently the interest of the reversioner was sold under an execution against his lands. Upon a bill filed by the mortgagor to redeem:—Held, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem. *Chisholm* v. *Sheldon*, 1 Gr. 108.

Quære, whether a sale by the sheriff under a fi. fa. against lands of the reversioner, after a term of 1,000 years had been created by way of mortgage, carries with it the right to redeem the term. *S. C.*, 2 Gr. 178.

The question was subsequently decided in the affirmative by the court of appeal. *S. C.*, 3 Gr. 655.

Two Mortgages.]—Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process, and the purchaser paid off the prior mortgage:—Held, that the purchaser, being bound to protect the mortgagor against both the incumbrances, could not keep alive the prior as against the second mortgage. *McDonald* v. *Reynolds*, 14 Gr. 691.

In such a case the purchaser, upon the expiration of the term, obtained a new lease from the rector and created a mortgage on such new term:—Held, that such new lease was a mere graft upon the original one, and as such was subject to the mortgage which had been left outstanding; but as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority. *Ib.*

An estate subject to mortgage was devised to several parties, and after the death of the testator the party entitled to the mortgage money procured the land to be sold under execution at law:—Held, following Heward v. Wolfenden, 14 Gr. 188, that the Act authorizing the sale of equities of redemption did not apply; that the sale under execution was inoperative, and that the parties entitled to the equity of redemption had a right to redeem; but, that under the circumstances, the person representing the mortgagee was entitled to be allowed for improvements. *Shaw* v. *Tims*, 19 Gr. 496.

A debtor executed two mortgages, which were in different hands, a portion of the land comprised in one of them being comprised in the other, and his interest in all the land was sold under execution:—Held, that the sale was invalid. *Wood* v. *Wood*, 16 Gr. 471. See, also, *Donovan* v. *Bacon*, 16 Gr. 472, note.

Under C. S. U. C. c. 22, the sheriff cannot sell or convey any interest, if there is a second mortgage outstanding in the hands of different parties. *Re Keenan*, 3 Ch. Ch. 285.

Where a first mortgagee acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mortgaged premises, there being mesne incumbrances, it was held that he did not acquire the fee in the lands, the sheriff not having power to sell. *Ib.*

The principle established by the cases of Donovan v. Bacon, 16 Gr. 472, and Re Keenan, 3 Ch. Ch. 285, that the equity of redemption in mortgaged premises is not saleable under execution where the same are subject to several mortgages in the hands of several mortgagees, does not apply where the mortgages are by several owners of distinct portions of the estate, and the same are held by one and the same mortgagee, or are in the same hand. *Rathbun* v. *Culbertson*, 22 Gr. 465.

The rule laid down in *Donovan* v. *Bacon*, 16 Gr. 472, that the sheriff cannot sell under common law process the equity of redemption

in lands upon which two several mortgages have been created, was held to apply where the second mortgage was in the hands of the plaintiff, an execution creditor, who had recovered judgment in an action upon the covenant contained in such mortgage. *Kerr* v. *Styles*, 26 Gr. 309.

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2. *Sale and Subsequent Proceedings.*

(a) *In General.*

Abandonment of Execution.] — The sheriff, on the 15th April, 1835, received a fi. fa. lands, and on the 10th May, 1836, sold some of defendant's lands under it; but other portions of the land, though included in the advertisement published previously to that sale, were not sold. There being no adjournment nor postponement of the sale, nor any new advertisement, the sheriff, in December, 1838, proceeded to sell under the same writ the lands unsold in 1836; but, held, that the seizure under the writ of 1835, must be considered as abandoned, and the sale of 1838 void. *Doe d. Cameron* v. *Robinson*, 7 U. C. R. 335.

Held, that the non-adjournment of a sale advertised for 12th September, 1863, (which did not take place,) and the publication of an apparently independent notice in the following June, under the plaintiff's ven. ex., did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much upon intention. *Hall* v. *Goslee*, 15 C. P. 101.

Accepting and Rejecting Deed.]—As to the right of a purchaser at sheriff's sale to set up the deed in the first place as valid, quoad the lessor and lessee, and then to repudiate it as invalid, quoad the execution creditor. *Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449.

Acquiescence in Delay.] — A party whose lands have been sold under a fi. fa. cannot object to the sale on the ground of long delay in selling after the seizure, where such sale took place at his own instance or with his assent, and he has received the benefit of the proceeds of such sale; neither can his heir after his death. *Doe d. Harley* v. *McManus*, 1 U. C. R. 141.

Acquiescence of Debtor.]—Any want of regularity in giving public notice of an adjourned sale under a fi. fa. will not invalidate the sale where the debtor attended the sale by his agent and afterwards ratified what had been done. *Doe d. Dissett* v. *McLeod*, 3 U. C. R. 297.

Acquiescence.]—In ejectment, it appeared that the land in question was brought to sale by the sheriff under several executions against M., one of which was issued by a client of plaintiff. Plaintiff's agent attended and bid at the sale, and the land was knocked down to him at the price offered, being sufficient to cover the execution. The defendant McIntyre also offered the same price. Before the completion of the sale, however, plaintiff notified both his agent and the sheriff that an injunction had been granted by the court of chancery restraining the sale, and that if the sale were carried out he would apply to set it aside. This notice was followed by one from plaintiff's agent to the sheriff, to the effect that the latter was at liberty to convey the land entered in his name at the sale to any person he thought fit, as he relinquished all claim and interest therein. The sheriff accordingly, upon the injunction being subsequently dissolved, conveyed the land to the defendant McIntyre for the price bid by him at the sale:—Held, that in the absence of any evidence to the contrary, it must be assumed the sheriff had proceeded regularly in conveying the land to McIntyre, and that, no one appearing to be prejudiced by the transfer, the court was bound to uphold it. Held, also, that taking all the facts together —that it was the means by which his client had obtained satisfaction of his debt, and that it was made under the express authority of his agent, and so under his own authority, —the plaintiff could not be heard to impugn the conveyance to McIntyre. *Miller* v. *Stitt*, 17 C. P. 559.

And see ESTOPPEL I., 1—III. 6, 7.

Change in Counties.]—Under a fi. fa. issued upon a judgment entered in November, 1851, the sheriff of the county of Oxford, in 1853, conveyed certain lands in the township of Oakland, reciting in the deed that they had been seized in December, 1851. By 14 & 15 Vict. c. 5, which came into force on the 1st January, 1852, the township of Oakland was annexed to the county of Brant, but by the 12th clause it was enacted that all proceedings in any court at the time when the Act should come into effect might be continued to trial and judgment in such court, and such judgment might be executed as if the Act had not been passed:—Held, that under this provision the sheriff was authorized to convey as he had done. *Shenston* v. *Baker*, 12 U. C. R. 175.

Compelling Sheriff to Complete Sale.]—The court refused to interfere summarily to compel the sheriff to make a deed of a lot sold by him under execution, where it appeared that he had been advised not to complete the sale on account of an irregularity in the advertisement; and that the same land, on being again advertised and exposed to sale under a subsequent writ, brought a price far exceeding that for which it had been purchased by the applicant. *In re Campbell*, 10 U. C. R. 641.

Compelling Sheriff to Convey.]—Semble, that this court would entertain a bill to compel a sheriff to convey property sold under an execution; but the execution debtor must be made a party. *Witham* v. *Smith*, 5 Gr. 203.

Covenant Running with the Land.]—Plaintiff sued defendant on a covenant for seisin and right to convey, and defendant pleaded only that he was seised and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one McG., and that the plaintiff had previously mortgaged it to one McC., and the plaintiff's attorney, being called by defendant, swore that this suit was authorized

by the plaintiff to be brought in his name for the benefit of McG., and that he, witness, also represented the mortgagee, who was to be paid out of the verdict. The sum paid by McG., with the mortgage money, amounted to nearly the purchase money paid by plaintiff to defendant, with interest, for which the jury gave a verdict. On motion for a new trial, with leave to amend the pleadings, it was objected that the plaintiff could not recover, as the covenant running with the land had passed to McG., and that the damages were excessive; but the court refused to interfere, the verdict being just. *Campbell* v. *Burley*, 19 U. C. R. 204.

Quære, whether a purchaser at sheriff's sale requires a right to sue on covenants running with the land. *Ib.*

Defining Nature of Interest.]—Where an advertisement of the sale of lands by a sheriff under writs of execution, stated that the sheriff had seized and taken them in execution, and that they or the right and interest of the judgment debtor therein would be offered for sale:—Held, that this was sufficient, and that it was not necessary for the advertisement to define more particularly the nature of the estate or interest to be sold. *McGee* v. *Kane*, 14 O. R. 226.

Deputy-Sheriff's Deed.]—A deed executed by a deputy-sheriff, of lands sold under an execution after the death of the sheriff to whom the writ was directed, and after the appointment of a new sheriff, is void. *Doe d. Campbell* v. *Hamilton*, 6 O. S. 88.

Description in Deed Including too Much.]—A sheriff's deed, being but a completion of the sale, is only good for land actually sold. A party therefore is not estopped by it from proving by parol that portions of the land therein described as sold were not in fact sold; and if the description of the whole land in the deed be so blended together that one cannot distinguish between what was sold and what was not, the deed will be bad. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79.

The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it so that on the face of the deed no parcel could be distinguished from the rest, and allowed to pass alone:—Held, that he must be considered as any other person having a power to execute; that he could not be regarded as functus officio by the execution of the first deed, which was wholly void; and that he might, therefore, in 1849, make a deed of the part actually sold. Quære, whether the debtor having a title to all the land conveyed, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone. Quære, also, whether the proper course would not have been to apply to the court to set aside what had been done under the execution. *Doe d. Tiffany* v. *Miller*, 10 U. C. R. 65.

District Court—*Transcript.*]—See *Daby* v. *Gehl*, 18 O. R. 332.

Doubt as to Interest Sold.]—In an action against the sheriff for a false return to a fi. fa. lands it appeared that defendant, after the receipt of the plaintiff's writ, received another writ, at the suit of one S., and under this seized land owned by the debtor, and upon which S. had a mortgage for rent, S.'s judgment being for arrears of rent secured by such mortgage. S. bought the land for the amount of his judgment, and paid the sheriff's fees. At the trial, however, it did not appear whether defendant sold only the equity of redemption, or the debtor's interest in the land, exclusive of the mortgage. The court set aside a verdict for defendant, and granted a new trial with costs to abide the event. *Young* v. *Baby*, 4 C. P. 537.

Dower.]—The dower of a wife is not barred by the sale in execution of her husband's estate. *Walker* v. *Powers*, M. T. 4 Vict.

Effect of Deed.]—The sheriff's deed is not to be considered as a mere release in the strict sense of the term. *Doe d. Dissett* v. *McLeod*, 3 U. C. R. 297.

Error in Advertisement.]—The sheriff, under a fi. fa. against one S., advertised for sale all his interest in an unexpired lease of the premises occupied by K. as a livery stable, on Main street, between James and Hughson streets. (Main street ran east and west, James and Hughson streets north and south.) K. was then no longer living on any part of the land so leased, but he had occupied a piece of about thirty feet frontage out of eighty feet which the lease covered. At the sale, as the weight of evidence shewed, and the jury found, the sheriff sold all S.'s interest in the lease, it being his impression that it covered eighty feet, and that K. was in possession of the whole. A few days afterwards, finding that there was a dispute as to what had been sold, the sheriff advertised another sale of all the remaining interest of S. in the lease; but, having taken advice, he abandoned this sale, and afterwards conveyed to defendant, the purchaser at the sale, all the term of S. in the premises mentioned in the lease. In the meantime, however, S., assuming that only what K. was formerly in possession of had been or could be sold under the advertisement, conveyed to defendant all the land mentioned in the lease, except that; and the plaintiff brought trespass against defendant, who claimed the whole of the land leased under the sheriff's sale and conveyance. The jury found for the defendant:—Held, that it was properly left to the jury, on evidence of what took place at the sale, to say what land was actually sold: that it was the sale, not the advertisement, which must govern; and that the second advertisement could have no legal effect. If the advertisement had clearly referred only to what K. was then occupying, (which it was held not to do), but the sheriff had put up and sold the whole interest under the lease, the lease, and not the advertisement, would still have governed, for the sheriff's advertisement cannot be treated as an auctioneer's printed terms of sale in ordinary transactions; his power to convey depends upon what the debtor owns, and what he actually sells, and not on the accuracy of his advertisement. *Osborne* v. *Kerr*, 17 U. C. R. 134.

Held, that it was immaterial that the sheriff's deed was not made until after the debtor had assigned to the plaintiffs, it being part of the execution. *Ib.*

Errors or defects in the advertisements, either in the Gazette or local paper, of a sale of land under execution, will not affect the purchaser's title even if he be one of the execution creditors. *Paterson* v. *Todd*, 24 U. C. R. 286.

In ejectment upon a sheriff's deed for land sold on execution, it appeared that the sale had been duly advertised in a local paper for three months before the 27th August, 1864; and that an advertisement incorrect in some particulars had been inserted in the Gazette of the 11th June, 1864, and four next numbers, the errors being corrected in the sixth insertion—all these advertisements being of a sale on the 27th August. On the 1st October following, and in the five next numbers, the sale was advertised in the Gazette for the 12th November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court-house, it was not shewn to have continued there for three months:—Held, that these advertisements could not be considered a compliance with the statute C. S. U. C. c. 22, s. 267, but that the defects would not affect the purchaser's title. *Ib.*

Error in Judgment.] — Held, that a judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon awarding the sale of lands, of which the party deceased was seised on a specified day, previous to which he died, could not sustain a purchase, and that a sheriff's deed under such judgment and fi. fa. could give no title. *Varey* v. *Muirhead*, Dra. 486.

Expired Writ.]—A sale of lands under a fi. fa. which has expired, is void. *Doe d. Burnham* v. *Simmonds*, 9 U. C. R. 436.

A fi. fa. lands having been lodged in the sheriff's office, was allowed to expire without anything being done under it, either by seizing or offering for sale the lands of the debtor. Afterwards, a new sheriff being appointed, this with other process was handed over to him, and he proceeded formally to offer for sale the lands of the execution debtor, and made a return of "lands on hand for want of buyers;" whereupon the plaintiff sued out a ven. ex. and fi. fa. residue, under which the lands which had been previously offered for sale were sold, and a conveyance thereof made by the sheriff. Upon a bill filed by another judgment creditor, the court below set aside this sale, and ordered the deed to be cancelled; the ven. ex. and fi. fa. residue being, under the circumstances, absolutely void; which decree was affirmed on appeal. *Gardiner* v. *Juson*, 2 E. & A. 188.

Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what had been commenced while it was in force. *Doe d. Greenshields* v. *Garrow*, 5 U. C. R. 237.

A fi. fa. lands had been renewed on the 24th August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by plaintiff's attorney to the sheriff, and the latter on the same day sent the usual advertisement thereof to the Canada Gazette and a local paper. On the 2nd September following, it appeared in a local paper, and in the Gazette on a subsequent day:—Held, that the writ was spent, and that the lands could not be legally sold under it. *Reynolds* v. *Streeter*, 3 P. R. 315.

The defendant in ejectment claiming through a sheriff's sale under execution, it appeared that a fi. fa. lands issued 6th September, 1866, and was returned 17th October, 1867, lands on hand for $81, and no lands for the residue; but nothing had been done and no lands advertised under it. On the same day a ven. ex. and a fi. fa. residue was delivered to the sheriff, who advertised as if under the original writ, and sold the lands in question on the 2nd May, 1868. There was a mortgage upon it, which defendant, the purchaser, paid off on the same day, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due; not such a certificate as is provided for by the C. L. P. Act, s. 258, on sale under execution of a mortgagor's interest:—Held, that the sale could not be supported, for the original writ had expired with nothing done under it, and the ven. ex. and fi. fa. residue had not been a year in the sheriff's hands before the sale; and moreover he had assumed to act under the original fi. fa. and ven. ex. and not the fi. fa. residue. Semble, that the want of proper advertisements would not have avoided the sale. *Lee* v. *Howes*, 30 U. C. R. 292.

The expiration of a fi. fa. lands before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the commencement of the advertisement is. In this case, where lands had been advertised under other writs, the plaintiff's fi. fa. being at the time in the sheriff's hands:—Held, that although the sale under the writs so advertised neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement, and that the return of "lands on hand" to this writ after its expiry, was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a ven. ex. to sell the lands then in his hands. *Hall* v. *Gosler*, 15 C. P. 101.

Lands were sold under a fi. fa. lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal:—Held, that no renewal was proved, and the sale was invalid. Subsequently, an ordinary writ of fi. fa. lands was issued on the judgment, a sale was made and a deed to the plaintiff executed by the sheriff:—Held, that the fact of an ordinary fi. fa. lands being issued instead of an alias fi. fa., and the advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of the defendant's lands, would not of itself invalidate the sale. *Daby* v. *Gehl*, 18 O. R. 132.

In 1886, one of the defendants commenced an action against the present plaintiff and others, to set aside the sheriff's first deed, which was dismissed for want of prosecution:—Held, that the said defendant was not thereby estopped from setting up the invalidity of the sheriff's sale. Held, also, that,

under the circumstances, the defendants could not set up that the proceedings under the expired writ constituted a payment of the execution debt. *Bank of Upper Canada* v. *Murphy*, 7 U. C. R. 328, distinguished. *Ib.*

Fraudulent Title.]—P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth $6,000, subject to incumbrances amounting to $3,500 and interest. One of the mortgages was in favour of the defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages, P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default was made in payment of M.'s mortgage, who recovered judgment, on which he sued out execution, and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to $20. The cestuis que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court, however, refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a sheriff's sale. *Parr* v. *Montgomery*, 27 Gr. 521.

Inadequacy of Consideration.]—Where an execution creditor purchased property at sheriff's sale at one-sixth of its value, the court held that effect could only be given to such a transaction as a security for the debt and costs, and not as an absolute purchase. *Kerr* v. *Bain*, 11 Gr. 423.

Where property worth £1,500 had been sold at sheriff's sale for £90, in consequence of the title being disputed, the court refused to give effect to the sheriff's deed as an absolute purchase. *Chalmers* v. *Piggott*, 11 Gr. 475.

The plaintiff having purchased at sheriff's sale, for a small sum, the interest of his debtor in property which the debtor had previously mortgaged for a large sum, the validity of the mortgage or the amount due upon it being doubtful, the court declined to enforce the purchase as absolute; but, the plaintiff submitting to have his deed from the sheriff treated as a security for his debt, the court made a decree on that footing. *Malloch* v. *Plunkett*, 11 Gr. 439.

Inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a sheriff under execution. The rule could only be applied in an extreme case. *Laing* v. *Matthews*, 14 Gr. 36.

A sheriff, in obedience to a ven. ex., in November, 1849, exposed for sale, by auction, and sold to the attorney of the plaintiff in the writ, for £70, a farm of 150 acres, variously estimated as worth £2 10s. and £5 per acre; but which was subject to three rights of dower, two of the dowresses being young women. In April, 1867, the party claiming under the purchaser filed a petition under the Act to quiet his title. The devisee of the execution debtor opposed the certificate on the ground of improper conduct in the matter of the sale by the sheriff, evidenced by the gross inadequacy of consideration. The referee of titles reported in favour of the claimant; and, on appeal, both parties desiring an adjudication on the facts appearing in the affidavits and proceedings before the referee, the court affirmed the finding of the referee and dismissed the appeal with costs. *Ib.*

The sheriff at a second sale, under another small execution, offered for sale a farm, and it was purchased by a person who had purchased one-half of the farm at the former sale, at one-sixteenth of the value of the farm. Before conveyance one of the legatees filed his bill to restrain the carrying out of this sale; and it was held that he was entitled to the relief prayed. *Jones* v. *Jones*, 15 Gr. 40.

Inception of Proceedings.]—A fi. fa. against lands was returnable on the 15th September, 1863; the advertisement of sale was first published after that date; while the writ was current, the sheriff had told defendant that he had the execution and that the land would be sold unless he paid; the sheriff was also on the lands more than once before the writ expired, but he did not go to make a seizure:—Held, that there had been no inception of the execution during its currency. *Bradburn* v. *Hall*, 16 Gr. 518.

Injunction to Restrain Sale.]—Although plaintiffs had been guilty of great delay in applying to the court for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an inquiry, the court granted the writ on an interlocutory motion; the plaintiffs undertaking to proceed to an examination of witnesses within one month after answer filed and to the hearing of the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, and paying interest from the time the sale was to have taken place until the time of making the decree in the cause, in the event of the sale failing to realize enough to pay the full amount of the claim under the execution. *Canada Permanent Building Society* v. *Bank of Upper Canada*, 10 Gr. 205.

Invalid Sale.]—The equity of redemption in mortgaged premises was sold under execution at law, and a conveyance thereof executed by the sheriff purporting to convey the same to the purchaser, who subsequently paid off the mortgage, obtained from the mortgagee a statutory discharge thereof, which he caused to be registered, and went into possession of the mortgaged property. In a proceeding at law, the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he had assumed to sell:—Held, that the purchaser was entitled to restrain ejectment brought by the mortgagor. *Howes* v. *Lee*, 17 Gr. 459. See *S. C.*, at law, *Lee* v. *Howes*, 30 U. C. R. 292.

The principle on which an equity of redemption is founded is relief against forfeiture; and the equity is not to be allowed where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued. *Skae* v. *Chapman*, 21 Gr. 534.

Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds; but for seventeen years before the filing of a bill to redeem, sales and re-sales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected; some burnt down; new buildings put up; houses built for one purpose altered to suit other purposes; other changes and improvements thereon made; fields and common being converted into sites for shops, hotels, a bank and other places of business, and into gardens and yards; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim, and made defendants to the suit, numbered nearly one hundred:—Held, that redemption would be inequitable, and the bill was dismissed with costs. *Ib.*

The effect in such a case of 36 Vict. c. 22 (O.), giving a lien for improvements, remarked upon. *Ib.*

Interest Sold not Defined.]—Where a sheriff offered for sale the interest of the debtor in certain lands, not stating what it was, although the means of ascertaining it were convenient, and the interest itself was actually known to the judgment creditor, and partially known to the sheriff, but not mentioned to the audience, the sale was set aside, because of the uncertainty of the interest or estate put up for sale. *Fitzgibbon* v. *Duggan*, 11 Gr. 188.

Irregularities—*Fraud.*]—A third person who purchases and gets the sheriff's deed is not affected by irregularities on the part of the sheriff, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud. *McDonald* v. *Cameron*, 13 Gr. 84.

If the execution creditor purchases as either principal or agent, and it appears that he or his attorney interfered with the conduct of the sale by the sheriff, and that through such interference the sale was not properly advertised or conducted, and took place under circumstances of disadvantage to the debtor, the sale cannot be maintained except as a security for the debt, provided it is questioned without delay, and before the property has passed into the hands of a third party. *Ib.*

Irregularities Anterior to Judgment.]—The purchaser's title to land under a sheriff's sale is prima facie good when the sale is made upon a legal writ, and a defendant seeking to defeat the sale on the ground of any defect anterior to the writ, must shew clearly and conclusively that there are those defects. *Doe d. Boulton* v. *Ferguson*, 5 U. C. R. 515.

The title of a purchaser at sheriff's sale is not liable to be defeated by irregularities in the proceedings anterior to the judgment. So long as the judgment subsist in full force, it supports the execution, and the execution supports the sale. *Ib.*

Irregularity in Writ.]—On a judgment in assumpsit a fi. fa. was issued in debt, and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given the deed, under which the plaintiff claimed:—Held, that the sale was not void as having been made under an erroneous writ; and, quære, whether it would have been voidable if moved against at the time of making the application to amend. *Doe d. Elmsley* v. *McKenzie*, 9 U. C. R. 559.

M. devised lands to his two sons, John and James, and died in 1834. The will was registered in 1852, soon after James came of age, the title having been a registered one since 1833. In 1850, John, the eldest son and heir-at-law of M., conveyed the south half of the land to defendant, who registered his deed the same year. In 1856, the other half was sold to defendant under an execution against the executors, obtained on their confession. In ejectment by James:—Held, that it was no objection that the fi. fa. goods had not been returned before the fi. fa. lands issued; and that the executors had accepted office by giving the confession. *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

Irregular Ven. Ex.]—Defendant in ejectment claimed under a sheriff's sale. It appeared that a fi. fa. was returned lands on hand, and a ven. ex. issued, to which there was a return of lands sold for £41, and no further lands; but this last part was of no effect, there being no fi. fa. residue. An alias ven. ex. then issued, instead of an alias fi. fa., and under this the land in question was taken and sold:—Semble, that such sale could not be supported. *Chambers* v. *Dollar*, 29 U. C. R. 599.

In ejectment, where defendant claimed under a sheriff's deed on an execution against lands, it appeared that a fi. fa. was returned lands on hand, and a ven. ex. issued, to which there was a return that the sheriff had made £41, and no further lands; an alias ven. ex. then issued, reciting a fi. fa. lands and a return thereto of goods on hand for want of buyers, and commanding the sheriff as he had before been commanded, to sell the lands by him in form aforesaid taken. The sheriff, afterwards, in 1854, executed a deed reciting that he had seized this land in question under the alias ven. ex., and sold it to S., to whom he conveyed: — Held, that the sale could not be supported, and that the sheriff's deed passed nothing, for the proceedings shewed that this land had not been seized or advertised up to the return of the first ven. ex., and there was no fi. fa. lands which could warrant the second ven. ex. *Chambers* v. *Unger*, 25 C. P. 180.

Judgment Irregular to Purchaser's Knowledge.]—In ejectment, a sheriff's deed of the same land to one B. was produced by defendant, from which it appeared that the sheriff under a fi. fa. lands against defendant, as executor, and his wife (the widow of the testator), as executrix of the testator, sold to B., who conveyed to defendant. The judgment upon which the writ issued had been obtained upon a cognovit in an action by one Buell against defendant and his wife, as executor and executrix; but defendant and his wife were not the executors appointed by the will, of which defendant was aware, as he

had the will in his possession:—Held, that this deed could not defeat the plaintiff's right to recover. *Hamilton* v. *Lightbody*, 21 C. P. 126.

Lands Charged with Legacies.]—A testator charged several legacies on his real estate, which, subject thereto, he devised one-half to R., and one-half to G., his sons. Executions against the testator's lands, in the hands of his executor, to the amount of $131, and against the lands of the devisee R., to a larger amount, were placed in the hands of the sheriff, and the sheriff put up the half devised to R., under all these writs; it brought $1378; and the sheriff, after paying the small executions, applied the balance to the executions against R.:—Held, that it was wrong to sell under the executions against the executor more than was enough to pay those executions; that the effect of the sheriff's course was to apply the property of the legatees to pay the debt of another person, R.; and that the sale did not deprive the legatees of their charge; but R. having assented to the sale, the same was not disturbed so far as it affected his interest. *Jones* v. *Jones*, 15 Gr. 40.

Misdescription in Advertisement and Deed.]—Defendant on the 13th October, 1852, granted the land in question to one S., to hold to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be complete and ended, but not to be underlet to any person except to the family of the said S., for any period during the said term. A yearly rent of £55, and 50s. per acre for land cleared, was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be void. The lessee entered, and on 1st April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant, and the sheriff afterwards, under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it in the advertisement and deed as a term with fifteen years yet to run, at a rent of $100 a year:—Per Robinson, C.J., the sheriff's deed was inoperative, owing to the misdescription of the interest which S. held in the land, and of the amount of rent. *Dalye* v. *Robertson*, 19 U. C. R. 411.

Mode of Sale.]—The statutes 43 Geo. III. c. 1, and 2 Geo. IV. c. 1, s. 20, clearly contemplate a public sale in regard to lands, and that has always been the course both with respect to lands and goods. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79, 88.

Necessity for Deed—*Neglect to Advertise.*]—It seems that a conveyance from the sheriff by deed under seal is necessary to complete a vendee's title to lands sold, under the provisions of 5 Geo. II.: that the return upon the fi. fa. cannot be considered as a mode of giving such title, nor can such vendor take a title by act and operation of law alone: that a neglect on the part of the sheriff to advertise the property sold would not defeat the vendor's title; and although the land may be knocked down to the agent of a firm, the deed of conveyance may be afterwards made by request of the other partners to any individual of the firm. *Doe d. Moffat* v. *Hall*, Tay. 510.

Omission to Advertise.]—The omission to advertise at all, where there is no uncertainty as to what has been sold, though it may give a right of action against the sheriff, will not affect the validity of the sale. *Osborne* v. *Kerr*, 17 U. C. R. 134, 141; *Lee* v. *Howes*, 30 U. C. R. 282.

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

Pleading.]—The declaration (which is set out in substance in the report) was held insufficient:—1st. Because there was no averment that the sheriff seized before the return of the writ of fi. fa. against lands: 2nd. that it not appearing that the said rent was anything more than a mere rent-seck, it would not be liable to seizure under a fi. fa. lands. *Dougall* v. *Turnbull*, 8 U. C. R. 622.

Quære, does a rent charge come under 5 Geo. II. c. 7, s. 4. *Ib.*

Where a title is pleaded by purchase at sheriff's sale under a fi. fa., the judgment supporting such fi. fa. should be set out, and it should be averred that the sheriff seized while the writ was in force. *McDonell* v. *McDonell*, 9 U. C. R. 259.

Preventing Competition.]—A creditor obtained judgment against his debtor's executors, and issued thereon execution against the lands of the deceased, which had been devised to a minor. The creditor interfered to prevent competition at the sale, and then bought the property at one-half its value:—Held, that his purchase was not maintainable in equity. *In re Davis*, 17 Gr. 663.

Proving Valid Judgment.]—Held, that the defendant in this case, claiming under a sheriff's deed upon a sale under a fi. fa. lands, who had purchased the judgment in the court

of requests, at whose instance the action on it was brought, and who had purchased the land in question under an execution in that action, was bound to shew a judgment to warrant such execution. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 386.

Purchase in Trust.]—A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment. An execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations; the mill and mill premises to an infant, on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and he should hold the same for the several owners. Accordingly, he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there and preventing any competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and the mill premises, which the purchaser retained, and occupied and improved during the minority of the devisee, who on his attaining his full age demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court, under the circumstances, held the plaintiff entitled to redeem the mill premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol. *McGill* v. *McGlashan*, 6 Gr. 324.

Quebec Law—*Prior Sale.*]—See *Dufresne* v. *Baron*, 16 S. C. R. 596.

Relief in Equity.]—Where a rule for setting aside a fi. fa. against lands was discharged at law under a material error as to the facts:—Held, no bar to relief in equity at the suit of the debtor's grantee of the lands. *Pelton* v. *Ontario Bank*, 13 Gr. 107.

Restraining Completion of Sale.]—The court will, after a sale of lands under an execution, prevent an assignment by the sheriff to the purchaser, where good cause is shewn for requiring their interference. *Bank of Upper Canada* v. *Miller*, H. T. 3 Vict.

Reversal of Judgment.]—After land has been sold upon a writ valid upon the face of it, though the judgment may be reversed for error appearing upon the record, yet the defendant in the execution can only be restored to the money not the land. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510.

Satisfaction of Debt.]—Where the execution creditor had been paid his debt in full in 1840, by the assignee of the sheriff's vendee of land sold under a fi. fa. lands—the court, upon the facts given in the report, set aside an order in chambers, obtained by the attorney for the assignee, and as if at the instance or with the consent of the execution creditor, for the issuing a fi. fa. lands in 1849 against the execution debtor, holding that it was not competent for the execution creditor at that distance of time to elect to consider his debt unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privity with his debtor. *Bank of Upper Canada* v. *Murphy*, 7 U. C. R. 328.

Setting aside Sale.]—The court refused to interfere equitably to set aside a sheriff's sale and covenant for the payment of the purchase money entered into thereon. *Wood* v. *Leeming*, Tay. 463.

Where an application was made to set aside a sale of land by a sheriff and delay the execution of a conveyance to his vendee, and notice of the motion and rule had been given to the sheriff and plaintiff's attorney, but not to the vendee, the court refused to interfere. *McGillis* v. *McDonald*, E. T. 3 Vict.

The court has authority to declare void a sale of lands by a sheriff. *McGill* v. *McGlashan*, 6 Gr. 324.

The court of chancery will, in a proper case, set aside a deed for lands improperly sold by the sheriff under common law process, and will not leave a party to the remedy at law alone. *Campbell* v. *Smith*, 10 Gr. 206.

Sheriff's Duty as to Advertising.]—A sheriff having a writ against lands for execution, should make reasonable inquiries as to what property the execution debtor has, and his interest in it; he should not advertise more of the estate than he finds the debtor is interested in, and if he knows what the debtor's interest is, he should give such statement of it in the advertisement as a provident owner would; and in regard to these matters he is not justified in acting irregularly by the instructions of the plaintiff's attorney, against his own judgment. *McDonald* v. *Cameron*, 13 Gr. 84.

Sheriff's Knowledge as to Lands.]—The plaintiff in an execution against lands, is expected to point out to the sheriff the property of the debtor, but his not doing so does not relieve the sheriff, if by reasonable inquiries he could have ascertained the fact. Where the deputy-sheriff had notice of the debtor owning lands, it was held notice to the sheriff, although the latter had no personal knowledge on the subject, and he was held liable in an action for a false return. *Hutchings* v. *Ruttan*, 6 C. P. 452.

Sheriff out of Office.]—Semble, to support a sale by an ex-sheriff out of office, it must appear that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of it, and only followed up such step after leaving the office. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79. See, also, *Campbell* v. *Clench*, 1 U. C. R. 267.

Held, that the facts in this case, as stated in the report, constituted such an inception of execution against lands by the sheriff, during the currency of the writ and while he was in office, that a deed made under such execution by the same sheriff, after the writ was current and after he had gone out of office, passed the legal estate to the purchaser. *Doe d. Tiffany* v. *Miller*, 6 U. C. R. 426.

Held, also, that the conduct of the execution debtor, also stated in the report, shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of the lands as he did. *Ib.*

The above decision commented upon and adhered to. *Doe d. Springer* v. *Miller*, 10 U. C. R. 57.

Held, that the deed in question in this case having been executed by the sheriff out of office, but in completion of the sale made by him whilst in office, was valid under s. 269 of C. S. U. C. c. 22. *Miller* v. *Stitt*, 17 C. P. 559.

Sheriff Purchasing.]—A sheriff cannot in any manner become the purchaser of property sold under an execution. *Doe d. Thompson* v. *McKenzie*, M. T. 2 Vict.

Sub-division of Lots.]—Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described, being sold under execution; and the purchaser at sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding the sheriff's deeds, so far as they concern the village lots, do not comply with the provisions of the Registration Acts of 1846, 9 Vict. c. 34, and 1868, 31 Vict. c. 20 (O.), the latter of which prohibits the registration of deeds of any portions of lots so laid out, unless they conform to the plan of the property registered under such Act. *Rathbun* v. *Culbertson*, 22 Gr. 465.

Surplus.]—Where lands have been sold by a sheriff under a fi. fa. upon a judgment against an executor or administrator, the heir-at-law is entitled to recover the surplus from the sheriff. *Ruggles* v. *Beikie*, 3 O. S. 276, 347.

Time for Sale under Alias.]—Held, conforming to previous decisions, that where a fi. fa. against lands had been in the sheriff's hands for twelve months, and returned, nothing having been done upon it, the sheriff might sell under an alias issued thereon without waiting for a year from its receipt. *Campbell* v. *Delihanty*, 24 U. C. R. 236; *Nickall* v. *Crawford*, Tay. 277; *Rattan* v. *Levisconte*, 16 U. C. R. 495.

Too Much Sold.]—The fact that the whole of a farm may have been sold for a debt, which probably might have been satisfied by the sale of part, is no ground to invalidate the sale. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510.

Vendor's Lien.]—See *Strong* v. *Lewis*, 1 Gr. 443; *Van Wagner* v. *Findlay*, 14 Gr. 53; *Patterson* v. *Smith*, 42 U. C. R. 1; *Kennedy* v. *Bateman*, 27 Gr. 380.

Writ Directing Levy of Amount beyond Jurisdiction.]—It is no objection to a sale under a fi. fa. from a district court that the writ directs a sum beyond the jurisdiction to be levied, which is stated in the writ to have been recovered for damages and costs. *Doe d. Hagerman* v. *Strong*, 4 U. C. R. 510.

Quære, would the writ and sale be void if it had been stated in the writ that a sum exceeding the jurisdiction had been recovered for damages only. *Ib.*

(b) *Ejectment by Purchaser.*

Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an expired Crown lease, sold as belonging to B. by assignment:—Held, that after proof of the exemplification of the lease, the judgment, fi. fa., and sheriff's deed, a notice to produce the original lease and assignment, without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B.; and that as A. shewed no title, nor that he had ever been in possession, the same presumption should be made in favour of the purchaser as if he had been left to contend with the debtor himself. *Doe d. McGuire* v. *Dennis*, 2 O. S. 589.

A debtor in possession after a sheriff's sale is quasi tenant at will to the purchaser, and cannot dispute his title; and a third person defending as landlord, but shewing no privity with the debtor, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself. *Doe d. Armour* v. *McEwen*, 3 O. S. 493.

A purchaser of lands on an execution, is entitled to recover in ejectment against the debtor or his representative, without proof of the debtor's title, or that he was in possession of the premises. *Doe d. Fisher* v. *Chesser*, 5 O. S. 144; *Moran* v. *Patton*, 10 U. C. R. 640.

But if the tenant in possession do not claim under the execution debtor, the debtor's title must be proved. *Doe d. Crew* v. *Clark*, M. T. 4 Vict.

A purchaser at a sheriff's sale is not held to stricter proof of title against the servant of the execution debtor in possession, than he would be against the debtor himself. *Doe d. Lyon* v. *Lege*, 4 U. C. R. 360.

Where the only question is, whether the defendant at the time of the sale had possession under the execution debtor or not, the title of the debtor need not be shewn. *Doe d. Russell* v. *Hodgkiss*, 5 U. C. R. 348.

A. purchased at sheriff's sale, and got a deed on the 26th September, 1845. B., the execution debtor, went into possession of the land sold as devisee under his father's will, who died in 1835. B. on the 28th September, 1842, leased the land to C. for three years, who enjoyed it for a year, when B. having absconded from the Province, D., his brother, purchased the tenant's interest, and went into possession. Upon the tenant quitting the place, he took from D. a written undertaking to save him harmless against B. B., in February, 1847, made a deed of the land to his brother, who was then in possession, for the consideration expressed of £100. The deed was registered in July, 1847. The

sheriff's deed to A. was not registered:—Held, in ejectment by A. against D., that upon these facts D.'s possession at the time of the sheriff's sale was the possession of B., the execution debtor, through his tenant C., and that therefore A. was entitled to recover. *Doe d. Russell* v. *Hodgkiss*, 5 U. C. R. 348.

The sheriff's deed is primâ facie evidence that the writ was delivered to the sheriff and the lands seized and sold under it. *Doe d. Spafford* v. *Brown*, 3 O. S. 90; *Mitchell* v. *Greenwood*, 3 C. P. 465.

In ejectment by the sheriff's vendee for land sold in execution, the writ of execution is sufficiently proved by its award on the roll, without producing the writ itself. *Doe d. Stocking* v. *Watts*, H. T. 6 Vict.

The plaintiff, a purchaser at sheriff's sale, produced the sheriff's deed, under which he had held possession by his tenants for several years. The defendant, being the heir of the defendant in the original suit, entered, and on action brought, objected that there were goods of his ancestor which might have been seized, and that the plaintiff had not proved a fi. fa. goods returned nulla bona:—Held, that these objections were properly overruled. *Doe d. Meyers* v. *Meyers*, 9 U. C. R. 465.

P. brought ejectment for land in B.'s possession. B. thereupon attorned to P., and continued in possession. The sheriff afterwards, on an execution against P.'s lands, received by him (the sheriff) before the attornment, sold and conveyed the land to D., who then brought ejectment against B.:—Held, that B. was in privity with P., and bound by the sale:—Held, also, that the levy was sufficient, though the sheriff had not made an entry on the land:—Held, also, that as between the parties, proof of the fi. fa. against P.'s lands, without proof of the judgment, was sufficient. *Douglass* v. *Bradford*, 3 C. P. 459.

Where ejectment is brought on a sheriff's deed against a stranger to the execution debtor, it is necessary to prove the judgment on which the execution issued; but quære, where the judgment debtor is the tenant in possession, and a stranger to the judgment and to the tenant comes in to defend—whether any more need be proved against such defendant than would have been required against the actual tenant; or whether an application must be made under 14 & 15 Vict. c. 114, s. 2, to strike out his defence. *Perry* v. *Piquott*, 12 U. C. R. 372.

In ejectment, claiming under a sheriff's sale on an execution against executors obtained on their confession:—Held, no objection that the writ against goods had not been returned before the fi. fa. lands issued, nor that the executors had not proved the will, for by confessing judgment they accepted the office. Held, also, that the court could not go behind the judgment even if there was anything to impeach it, which did not appear. *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

In ejectment against defendant claiming under a sheriff's deed:—Held, that the fact that the writ against lands appeared by the deed to have been issued on the same day as that against goods was no objection. *Eades* v. *Maxwell*, 17 U. C. R. 173.

Where the plaintiff in an action buys in the defendant's land under the execution, and brings ejectment upon the sheriff's deed, it is not necessary for him to shew, in proving his case at first, that a fi. fa. issued within a year after the judgment, or that an execution against goods was taken out. *Delisle* v. *Dewitt*, 18 U. C. R. 155.

In ejectment, the plaintiffs claimed title under a sheriff's deed, purporting to be a conveyance of the land under a ven. ex.; the deed, however, only recited in an informal manner the ven. ex., not referring to the fi. fa. goods or lands, and no evidence was given to prove the lapse of the year required by law before such sale could take place:—Held, that under the deed as proved the court could not presume the sale to be regular, and a verdict for the plaintiff was ordered to be set aside. *Roe* v. *McNeil*, 13 C. P. 189.

Held, following Delisle v. Dewitt, 18 U. C. R. 155; Roe v. McNeil, 13 C. P. 189; and Fields v. Livingstone, 17 C. P. 15, that in ejectment under a sheriff's deed, by the execution creditor (the vendee of the sheriff), against the debtor, the plaintiff need not prove the judgment, but may rely on proof of the sheriff's deed and sale by him under the fi. fa. lands. Doe d. Bland v. Smith, 2 Stark. 199, referred to. *Ralston* v. *Hughson*, 17 C. P. 364.

In ejectment, upon a sheriff's sale under a fi. fa., brought against an alleged tenant of the executor of the debtor, no evidence need be given of the title of the executor, or of his testator. Such tenant cannot, after judgment by default against his landlord, as executor, set up the defence that the latter was not executor. *Sloan* v. *Whalen*, 15 C. P. 319.

Held, in ejectment by the sheriff's vendee of land, under a sale on a fi. fa., that the production of the ven. ex. under which the sale took place, and of the sheriff's deed, which recited the fi. fa., was sufficient primâ facie evidence to enable the plaintiff to recover against the judgment debtor. *Low* v. *Hicks*, 21 C. P. 115.

In ejectment the plaintiffs claimed under a deed from the sheriff. Defendant J. D., by leave of the court, defended as landlord of H., the other defendant, and besides denying the plaintiff's title, claimed under a deed from M. D. to P. D. The plaintiffs proved judgments and executions against P. D. and M. D., and a sheriff's deed thereon on 3rd January, 1873, to F., who conveyed to the plaintiffs in 1874. H., being called by the plaintiffs, proved that he occupied under P. D., under a lease made by him on 7th January, 1873, and that P. D. had been on the lot several years; but a deed was proved from M. D. and P. D. to defendant J. D., dated and registered in 1858:—Held, that this deed shewed title out of P. D., the execution debtor, under whom the plaintiffs claimed, at the time of the judgment and execution; that the defendant J. D. was entitled to set up such defence; and that it was necessary for the plaintiff to rebut the title thus shewn. *Jex* v. *Hicks*, 39 U. C. R. 606.

The sheriff's deed was not produced, and after giving evidence of a search, which the court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment, and of the fi. fa. goods returned

nulla bona, and he produced the fi. fa. lands found among the papers of the sheriff, since deceased, with a memorandum annexed, written and signed by the sheriff, stating that this lot had been sold at sheriff's sale, 11th December, 1824, for £125, to M., who had paid the sheriff's fees. The Gazette containing the advertisement of the sale of this lot on that day under the execution, was also produced. A memorial was then produced from the registrar's office of a deed dated the 16th December, 1830, by which the sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed till eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it: — Held, that the sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed. Variances between the amounts in the judgment and fi. fas. were held immaterial, as they could not avoid the sale. *Fields* v. *Livingston*, 17 C. P. 15.

Although a sheriff's deed relates back to the day of sale, for the purpose of defeating intermediate conveyances, still the vendee cannot bring ejectment until the execution thereof. *Gardiler* v. *Beaton*, 12 C. P. 519.

X. Writ of Extent.

Danger of Loss.]—A writ of extent having been issued on behalf of the Crown, on affidavits not distinctly stating that the debt was in danger, but shewing the exact state of the affairs of the debtor; upon motion to set aside the same:—Held, that the insolvency of defendants was plainly inferable from the facts stated in the affidavits, and the rule was therefore discharged. *Regina* v. *Port Whithy, &c., Road Co.*, 13 C. P. 237.

Debt and Procedure.]—Held, 1. That a debt whereon to found a writ of extent may be found on inquisition without viva voce testimony. *Regina* v. *Reiffenstein*, 5 P. R. 175.

2. That an affidavit of danger is sufficient, if it satisfy the Judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted. *Ib.*

3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the Crown on the 20th July, the inquisition being filed and a writ of extent issuing on the 21st of July. *Ib.*

4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the Crown, and not a private person, is the plaintiff. *Ib.*

Evidence on Inquisition.]—On the taking of an inquisition before the sheriff of the county of Ontario, a debt by H. for the sum of £245 10s. 6d. was proved at the date of the writ: and on the day of the inquisition H. appropriated the moneys belonging to the defendants in his hands, in certain payments on behalf of the defendants, which was proved. H.'s counsel, (though not stating he was appearing in his behalf) desired to cross-examine the witnesses and to put the question to one of them, "How much does the said H. now owe the company?" which the sheriff refused to allow. On application, on this ground, to set aside the inquisition so far as H. was concerned in finding him indebted in the amount above mentioned:—Held, that the question after the evidence as stated was given, was asking the witness to draw a conclusion of law upon the facts already proved: and that the refusal to allow it was no ground of objection. *Regina* v. *Port Whithy, &c., Road Co., In re Huston*, 13 C. P. 318.

New Writ—*Form of Affidavit.*]—A writ of extent was set aside by Judge's order, and it was ordered that another writ might issue upon the fiat for, and tested as of the date of, the former writ:—Held, that such order was unobjectionable. *Regina* v. *McNabb*, 30 U. C. R. 479.

Held, also, that the affidavit set out in the report of this case, upon which the writ issued, was sufficient, and that defendant was sufficiently shewn by it to be a debtor to the Crown. *Ib.*

Payment to Debtor after Notice.]—A road company, being indebted to the Crown, a writ of extent was issued on the 18th December, 1862, and was placed in the hands of the sheriff on the 19th, and notice thereof was given by the sheriff to defendant, directing him not to pay over any moneys. The inquisition began on the 23rd. On that day, before the proceedings commenced, defendant, who was indebted to and an officer of the company, paid over what he owed them in payment of the debts of the said company, chiefly to their officers:—Held, 1. That from the facts of the case collusion might be inferred: 2. that even if the money had been paid before the inquisition began, still the writ would prevail, for the inquisition as a judicial act would take effect from the earliest moment of the day on which it began. *Regina* v. *Huston*, 13 C. P. 488.

Postmaster's Bond.]—The Post Office Act of 1867, 31 Vict. c. 10, s. 89 (D.), does not take away from the Crown the remedy by extent upon a bond given by a postmaster. *Regina* v. *McNabb*, 30 U. C. R. 479.

Poundage.] — Poundage is recoverable from the defendant upon a writ of extent. *Regina* v. *Patton*, 9 U. C. R. 307.

Other expenses attending the execution of the writ may also be recovered on application to the court or Judge in chambers. *Ib.*

Property Omitted.]—Where in the execution of a writ of extent the counsel for the Crown, considering the property returned by the finding of the jury to be ample to cover the Crown debt, designedly omits property sold before the execution of the writ by the Crown debtor to bonâ fide purchasers for value, and on an application subsequently made to quash that writ of extent and issue a second writ of the same teste as the former writ, in order to seize and make contribute the last mentioned property, there was no reason suggested for allowing the application but the fact that the Crown debtor appeared from the books of the county registry office to have been possessed of other property than that returned, the application was refused. *Regina* v. *Merrigold*, 7 L. J. 18.

Ship—*Assignment by Debtor.*]—Where the Crown pursues its remedy by writ of extent

against the owners of a ship, it can only take under the writ of extent the property of the debtor at the time of the issue of the writ. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect of the res. *The Queen* v. *The City of Windsor, Symes* v. *The City of Windsor*, 5 Ex. C. R. 223.

See Clarkson v. *Attorney-General of Canada*, 16 A. R. 202.

XI. Writ of Sequestration.

Appeal.]—Where an injunction is ordered at the hearing of a cause and the parties enjoined give the security required by R. S. O. 1877 c. 38, s. 26, pending an appeal to the court of appeal, all proceedings to enforce the injunction are by virtue of s. 27 of that Act thereupon stayed, and a writ of sequestration cannot therefore be obtained pending the appeal on the ground of non-compliance with the injunction. Dundas v. Hamilton and Milton Road Company, 19 Gr. 455, followed, and preferred to McLaren v. Caldwell, 29 Gr. 458. *McGarvey* v. *Town of Strathroy*, 6 O. R. 138.

Common Law Judgment.]—Held, that a writ of sequestration could not issue under rule 339, on an ordinary common law judgment for a debt recovered before the passing of the Judicature Act, it not being an order for payment of a specific sum, and no day named for payment in it. *London and Canadian Loan and Agency Co.* v. *Merritt*, 32 C. P. 375.

The property sought to be sequestered, was property in the hands of five trustees under a will. Two of the trustees, one of whom was the judgment debtor and took a life interest in part of the property, resided within the jurisdiction, the other trustees resided out of the jurisdiction in St. John, N.B.:—Held, that service of a notice of motion founded on such writ of sequestration on such non-resident trustees was sufficient, though a judgment or decree founded upon it would not avail the plaintiffs in the courts of New Brunswick. *Ib.*

Semble, that under a writ of sequestration a debtor's choses in action can be reached. *Ib.*

Disobeying Mandamus.]—Attachment not sequestration is the proper remedy for disobeying a mandamus. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 82.

Notice.]—On moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient. *Cook* v. *Credit Valley R. W. Co.*, 8 P. R. 167.

Order Subsequent to Judgment.]—The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a Judge in chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made a writ of sequestration issued accordingly:—Held, that though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the Judge's order was a judgment for disobedience of which the writ might issue, and that the writ was regularly issued. *London and Canadian Loan and Agency Co.* v. *Morphy*, 10 O. R. 86.

Sale of Seat on Stock Exchange.]—Defendants were members of the Toronto stock exchange (a corporation), and had seats at the stock board thereof, shewn to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the exchange by any member, wishing to sell his seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the stock exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident, doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five, to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of $4,000 to the exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to forty, whereof thirty-three were taken up by the thirty-three members of the exchange. The sequestrator having applied for an order under the writ of sequestration to sell the defendants' seats at the exchange:—Held, that although such seats were the property of the debtors and should be saleable under process, and the court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the seats; yet that inasmuch as the court could not control the exercise of the ballot by the members of the exchange, no effectual order for sale of the seats could be made; the application was refused, without costs. Remarks on the desirability of legislation to extend the operation of the writ of sequestration to meet such cases. *London and Canadian Loan and Agency Co.* v. *Morphy*, 10 O. R. 86.

On the argument in appeal it was made to appear that M. had paid off the judgment of the plaintiffs, and was carrying on the appeal for the purpose of obtaining the seat owned by N. This court, under the circumstances, and aside from the fact that the ultimate completion of title to a purchaser could only be effected by the contingent co-operation and assent of the stock exchange, as provided by its by-laws, affirmed the judgment appealed from without prejudice to any right M. might have to procure himself to be substituted for the plaintiffs. *S. C.*, 14 A. R. 577.

XII. Writ of Venditioni Exponas.

Goods.]—Neither a sheriff nor his deputy can justify an entry, seizure, and sale of a defendant's goods under a ven. ex. *Stull* v. *McLeod*, T. T. 3 & 4 Vict.

Quebec Law.]—Sheriff's sale under ven. ex. Proces verbal, what it should contain.

Art. 638, C. C. P. See *Montreal Loan and Mortgage Co.* v. *Fauteaux*, 3 S. C. R. 411.

Sale after Return Day.]—The sheriff may sell under a ven. ex. after the return day. *Bank of Upper Canada* v. *Macfarlane*, 4 U. C. R. 396.

Time for Return.]—A ven. ex. against lands having but a few days between the teste and return is irregular, although the statutes respecting the teste, delivery, and return of the fi. fa. may have been complied with. *Armour* v. *Jackson*, Tay. 115.

But it need not have three months between its teste and return. *Landrum* v. *Macmartin*, 1 U. C. R. 394.

Nor, under 43 Geo. III. c. 1, need there be a year. *Doe d. Dissett* v. *McLeod*, 3 U. C. R. 297.

XIII. Miscellaneous Cases.

Acknowledgment of Levy.]—Acknowledgment of levy given by execution debtor—Effect of. See *Lossing* v. *Jennings*, 9 U. C. R. 406.

Action against Sheriff — *Set-off.*] — Where, in an action by an executrix against a sheriff for money had and received to her use as executrix on a writ of fi. fa. against one D., which when produced recited a recovery by the plaintiff executrix against D. for not performing certain promises and undertakings made to the plaintiff and for her costs, &c., the defendant offered to give in evidence a set-off against the plaintiff in her own right:—Held, that it was inadmissible, the plaintiff claiming in her representative character, although the writ of fi. fa. was informally worded. *Devlin* v. *Jarvis*, E. T. 3 Vict.

Action for Surplus.] — In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought. *Ruggles* v. *Beikie*, 3 O. S. 276.

Audita Querela.]—The court refused to grant this writ where the applicant had no other privity with the judgment than as alienee of the land taken in execution, and had acquired his interest after execution issued. *Beard* v. *Ketchum*, 8 U. C. R. 525.

Co-defendants—*Contribution.*] — One of several defendants in assumpsit who has paid the whole amount of the damages under an execution, is entitled to recover contribution from the other defendants; and in an action for such contribution, the regularity of the judgment in the original action cannot be questioned; and it is not necessary to shew any notice of execution, nor demand of the money, before action brought. *Woodruff* v. *Glassford*, 4 O. S. 155.

Crown.]—The Crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *Desjardins Canal Co.*, 29 U. C. R. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the Crown not being bound by 43 Geo. III. c. 1. *Ib.*

Death of Sheriff.]—Held, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a fi. fa., his personal representative and not his successor in office, is entitled to execution. *Dickenson* v. *Harvey*, 6 P. R. 170.

Evidence.]—In trespass for taking goods:—Held, that a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record. *McCrae* v. *Osborne*, 6 O. S. 500.

Exigent.]—A writ of exigent ordered upon the application of the prosecutor, without its being applied for by the attorney-general. *Rex* v. *Elrod*, Tay. 120.

Indemnity on Abandoning Seizure.]—When a sheriff, having seized goods of sufficient value to satisfy the plaintiff's execution, abandons them on being indemnified he should not get the benefit of any doubt which may be raised as to their realizing enough if sold. *Donnelly* v. *Hall*, 7 O. R. 581.

Indemnity to Bailiff.]—Plaintiff declared on a special agreement not under seal, that in consideration that the plaintiff, then a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty; that he did afterwards sell, and that several persons claimed the goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay, yet that defendant refused to indemnify. A verdict having been found for the plaintiff:—Held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out to be a legal execution of the process, and therefore that the agreement was not illegal. *Robertson* v. *Broadfoot*, 11 U. C. R. 407. See *Wallace* v. *Gilchrist*, 24 C. P. 40.

Insurance Policy—*Condition as to Seizure.*]—As to what constitutes a valid seizure under a condition in a policy of insurance, providing that if the insured property should be levied upon or taken into possession or custody under any legal process the policy should cease to be binding. See *May* v. *Standard Fire Ins. Co.*, 5 A. R. 605.

Justifying Seizure under Another Right.]—The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods:—Held, that the mortgagee could not justify the seizure under the mortgage. *Dedrick* v. *Ashdown*, 15 S. C. R. 227.

Lease of Goods—*Trespass.*] — A. leases goods to B., which the sheriff seizes under an

execution against B., but does not sell or remove:—Held, that if any trespass was committed by the seizure, B. should sue, and not A. *Henderson* v. *Moodie*, 3 U. C. R. 318.

Maliciously Issuing Execution.]—See *Tuckett* v. *Eaton*, 6 O. R. 486.

Married Woman—*Execution against Husband.*]—In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S. 5th ser. c. 94, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was alleged that the husband's name was Daniel. The jury found that he was well known by both names, and that A. had acquired the goods seized from her husband after marriage, which would not make them her separate property under the Act:—Held, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify the execution without shewing the judgment: Hannon v. McLean, 3 S. C. R. 706, followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. *Crowe* v. *Adams*, 21 S. C. R. 342.

Mortgage—*Power of Sale—Notice of Sale.*]—In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act, execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served. *Re Abbott and Metcalf*, 20 O. R. 299.

Sheriff's Negligence — *Third Person's Right to Complain.*]—Quære, whether, under the facts stated in this case, the plaintiffs could have sustained an action against the sheriff for disobeying instructions, as regards the seizure under fi. fa., they not being parties to the suit. *Boulton* v. *Smith*, 17 U. C. R. 400.

Specific Instructions to Seize.]—The defendants, who lived in Hamilton, had a claim against W. at Ingersoll, and thinking he was carrying on business on his own account issued a writ therefor through their solicitors C. & B., which was served by C., who went to Ingersoll under special instructions from defendants to do so, and to take such steps as he might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ, who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff, who accordingly notified C. & B. C. & B. refused to accept this, and wrote to the sheriff in effect that he had acted improperly in not seizing the goods, on ex parte statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure:—Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were acting under special instructions from the defendants to take such proceedings as they might think best, the latter were liable to the plaintiff. Smith v. Keal, 9 Q. B. D. 340, distinguished. *Wilkinson* v. *Harvey*, 15 O. R. 346.

Surety for Mortgagor—*Sale of Equity of Redemption.*]—One C. gave a mortgage, on which a covenant by one S. was indorsed as security for the interest. C. having made default, the mortgagees recovered judgment on the mortgage, and under a fi. fa. lands sold C.'s equity of redemption. S. having been called upon under his covenant, his executor sued C., the mortgagor, in this action, for indemnity:—Held, that under the facts as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, nor of defendant's liability to indemnify his surety. *Stewart* v. *Clark*, 13 C. P. 203.

A. made a mortgage of lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one-half of the principal and interest. To an action brought on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees:—Held, 1. That the plaintiffs, as devisees of Z., were assignees of the mortgage within 12 Vict. c. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime: 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and, semble, that the defendant instead of setting out the facts, might have pleaded payment in the ordinary form; 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers; 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore that the second plea (which was demurred to) shewed a good defence. *Woodruff* v. *Mills*, 20 U. C. R. 51.

Trespass.]—In trespass for taking goods, defendant justified as sheriff's bailiff, under a warrant to make of defendant's goods a sum recovered for costs in case, and the warrant produced was for damages and costs in assumpsit:—Held, a fatal variance. *Boyle* v. *Garner*, T. T. 3 & 4 Vict.

Void Proceedings.]—Courts of equity cannot, any more than courts of law, on the footing of want of notice of illegality, give effect to proceedings which, on principles of the

common law and under Acts of parliament, are utterly void. *Gardiner* v. *Juson*, 2 E. & A. 188.

Writ in Evidence.]—It is not necessary that a writ of fi. fa., which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence, and if lost and unenrolled, evidence may be given of it. *Sayles* v. *Donovan*, 15 C. P. 121.

Held, that the issuing of the writ of execution may be entered on the roll at any time, though no return may then have been made to it. *Ib.*

Quære, whether the production of a writ of execution against the goods of defendant is sufficient for all purposes to shew the plaintiff in such writ to be his creditor. *Kissock* v. *Jarvis*, 6 C. P. 393.

Writs Sent by Mail.]—Parties sending writs to the sheriff by mail which require immediate attention, must run the risk of his delay in sending to the post office. *Robinson* v. *Grange*, 18 U. C. R. 260.

See BANKRUPTCY AND INSOLVENCY, I. 6, V. 3, VI. 6—COMPANY, VII. 6—DIVISION COURTS, VII.—DOWER, VIII.—EJECTMENT, VI. 6—FIXTURES, I.—MALICIOUS PROCEDURE, III. 1 (c)—QUIETING TITLES ACT, V. 2—SHERIFF, IX.—TRESPASS, I. 6.

EXECUTION CREDITOR.

See NOTICE OF ACTION, I.

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EXECUTORS AND ADMINISTRATORS.

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I. ADMINISTRATION.

1. *Against and by Whom and in What Cases.*

(a) *In General.*

Assignee of Judgment—*Creditor of Legatee.*]—Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the court; and the way to bring them before the court is by administration proceedings:—Quære, whether the assignee of the judgment would be entitled to administration. *McLean* v. *Bruce*, 14 P. R. 190.

Charity—*Attorney-General.*] — The attorney-general is a necessary defendant to a bill filed to administer an estate, and declare a legacy for religious purposes void. *Long* v. *Wilmotte*, 2 Ch. Ch. 87.

Debtor to the Estate.]—Although the general rule is, that in an administration suit a debtor to the estate is not a proper party in the absence of collusion or insolvency, it is not limited to these cases, but applies equally when the creditor has obtained property from an executor acting hastily, improvidently, or contrary to his duty, which is known to such creditor. *Bank of Toronto* v. *Beaver and Toronto Mutual Fire Insurance Co.*, 26 Gr. 102.

See *Irwin* v. *Bick*, 6 P. R. 183.

Defendant Insisting on Administration.]—A bill was filed praying a declaration of the true construction of a will, and for an administration of the estate. The bill was

taken pro confesso against some of the defendants. At the hearing, the plaintiff wished to abandon the prayer for an administration, but one defendant, who was a legatee, objected, contending he was entitled to a decree for administration as prayed:—Held, that he was so entitled. *Woodside* v. *Logan*, 15 Gr. 145.

Devisee of Trustee.]—One devisee of a trustee against whose estate a suit is brought sufficiently represents those interested in the estate. *Tiffany* v. *Thompson*, 9 Gr. 244.

Doubtful Claim.]—An application for an administration order was made within a year from the death of the testator, by a legatee who claimed to be also a creditor of the estate, but whose claim, as such, had always been disputed by the executors and was only supported by the uncorroborated affidavit of the claimant. The court, under the circumstances, refused the application with costs. *Virian* v. *Westbrooke*, 19 Gr. 461.

Heir-at-Law.] — In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party. *Fenny* v. *Priestman*, 1 Gr. 133.

Heir-at-Law—*Creditors.*]—In a suit to administer the estate of a testator, the heir-at-law ought to be a party. *Tiffany* v. *Tiffany*, 9 Gr. 158.

But when the personal representative filed such a bill against the devisee, alleging that no lands had descended, as to which the answer was silent, and the objection was not raised at the hearing, the court, under the circumstances, made a decree in the absence of the heir. *Ib.*

The other creditors need not be made parties to such a bill, but the heirs-at-law must. *Ib.*

Infant Applicant.]—An infant, moving by his next friend, can properly make an application for an administration order. *Re Hill*, 10 C. L. T. Occ. N. 87.

Judgment Creditors.]—Judgment creditors under 13 & 14 Vict. c. 63. See *Gillespie* v. *Van Egmondt*, 6 Gr. 533.

Legatee.]—Legatees are not necessary parties defendant in an administration suit. *Harrison* v. *Shaw*, 2 Ch. Ch. 44.

Legatee—*Time.*]—A suit against an administrator by a person entitled to a legacy or distributive share of the estate, cannot be brought before the expiry of a year after the death of the intestate. *Slater* v. *Slater*, 3 Ch. Ch. 1.

Lunatic's Estate.]—The control of the court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy. Under such circumstances the committee of a lunatic took, under authority of the court, proceedings for the administration of the estate of a deceased lunatic, by applying for an administration order, which was granted; the proceedings being directed to be as inexpensive as possible. *Re Brillinger*, 3 Ch. Ch. 290.

Married Woman—*Chose in Action*—*Demurrer.*]—The bill for the administration of the estate of G. E. alleged that G. had appointed his brother J. E. his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to J. would seem best; the will giving J. power to sell the realty. J. E. proved the will of G., and shortly after his death made his own will by which he purported to dispose of G.'s estate, the validity of which the bill impugned, and C. S. D., a married daughter of G., was made a defendant, the bill alleging her to be the wife of S. H. D. J. E. made an appointment under G.'s will, whereby C. S. D. became entitled to a portion of the estate. The defendant demurred on the ground that S. H. D. should have been a party:—Held, that the interest of C. S. D. was merely a chose in action not reduced into possession by her husband, in respect of which she might be sued as a feme sole, and therefore the demurrer was overruled with costs, following Lawson v. Laidlaw, 3 A. R. 77. *Sweetwright* v. *Legs*, 28 Gr. 498.

The bill in this case distinctly charged that the defendant had misapplied the moneys of the estate of G. mixing them with his own, and employing them for his own purposes, a demurrer ore tenus that G.'s estate was not properly represented, on the ground that one executor could not represent the estates of both G. and J., was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer. *Ib.*

Mortgagees of Devisee.]—Where a devisee of land subject to a charge mortgaged the devised property, the mortgagees were held to be proper parties to a suit for the realization of the charge. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

Next Friend of Infants.]—An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson, Lloyd* v. *Tichborne*, 9 P. R. 89.

Next of Kin—*Heirs*—*Infants*—*Dispensing with Service.*]—Where the usual decree for administration is obtained by one of an intestate's next of kin, the master is not to make the other next of kin parties in his office, but is to see that all have been served with an office copy of the decree under the 6th general order of June, 1853, before he reports, and generally speaking, before he proceeds with the reference. *English* v. *English*, 2 Gr. 441.

In such a case the court may dispense with service of the decree on any of the next of kin who are out of the Province; and the application for this purpose may be made ex parte. *Ib.*

So, when the decree is for the administration of real estate, all the heirs must be served with an office copy of the decree, but are not to be made parties or served with the proceedings in the master's office, though any of them may by notice require to be so served, if they desire it. *Ib.*

The rule is the same when some of the next of kin or heirs are infants. *Ib.*

Partner.]—Under an administration decree a creditor claimed by virtue of a partnership with the testator. It was objected

that the establishment of his claims involved taking the partnership accounts, and they could not be gone into under the decree. The master held that the claim could be entertained, and directed that a third partner, who was a stranger to the suit, should be served with an office copy of decree, and notified of the proceedings to take the partnership accounts. *Kline* v. *Kline*, 5 Ch. Ch. 157.

Person Advancing Money to Pay Debts.]—Where the plaintiff had, at the request of the mother and natural guardian of infant heirs, advanced money to pay debts of their ancestor to save the costs of suits thereafor:—Held, that he was entitled to sustain a suit for administration as a creditor. *Glass* v. *Munsen*, 12 Gr. 77.

Person Concurring in Breach of Trust.]—Where a trustee commits a breach of trust the person participating is not a necessary party to a suit for the general administration of the trust estate. *Tiffany* v. *Thompson*, 9 Gr. 244.

Personal Representative of Legatee.]—An order may be obtained under the general orders for the administration of the personal estate of the testator by the personal representative of a legatee as well as by the legatee himself. *Simpson* v. *Horne*, 28 Gr. 1.

Real Estate—*Insufficiency of Personal Estate.*]—Upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be appointed, where the plaintiff does not allege in his bill, and clearly prove, the insufficiency of the personal estate to pay debts, and does not pray for the application of the realty or the rents and profits thereof to that object. *Sanders* v. *Christie*, 1 Gr. 137.

Real Estate—*Devisees—Executors.*]—On application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; and the order asked for was granted, with a direction that an office copy of the decree should be served on each of the parties interested in the real estate under the will. *Stewart* v. *Hunter*, 14 Gr. 132.

Receiver of Legatee's Share.]—A summary order was made for the administration of the personal estate of a testator. The order was not entered as a judgment, as it should have been by rule 583, owing to a mistake of an officer of the court. A company, who were execution creditors of one of the legatees and devisees of the testator, obtained an order appointing the company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of the testator, but received no notice of the proceedings under the administration order. The company, however, were informed of the proceedings, and upon an ex parte motion procured the administration order to be properly entered as a judgment, and then applied for the carriage of the proceedings under it:—Held, that the status of the company was not that of assignee of the legatee, but only of a chargee or lienholder upon the fund or property to which the legatee was entitled; and that the company would not have been entitled in the first instance to ask in invitum for a summary order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the company in order that they might be bound by what was done. *Re Murphy, Murphy* v. *Niven*, 11 P. R. 321.

A receiver, appointed as the company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action. *Ib.*

Receiver of Legatee's Share.]—The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful. A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status. *Munro* v. *McCallum*, 17 P. R. 102. See the next case.

A receiver appointed by the court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. Decision below, 17 P. R. 356, reversed. *Munro* v. *McCallum*, 17 P. R. 398.

Small Claim.]—The court refused to make a decree for the administration of an estate, at the instance of a legatee, whose claim, including interest, amounted to only $28; and that although it was alleged there were other legacies remaining unpaid, amounting in the aggregate to a considerable sum. *Reynolds* v. *Coppin*, 19 Gr. 627.

Small Estate.]—The facts, that an estate is small, that no imputation is made against the executors, and that it is unadvisable to incur legal expenses, are no answer to a motion by a legatee against the executors, for the usual administration order. *In re Falconer*, 1 Ch. Ch. 273.

In the case of small estates an administration suit can only be justified where every possible means of avoiding the suit had been exhausted before suit brought. *McAndrew* v. *LaFlamme*, 19 Gr. 193.

Where a next friend had filed a bill for a minor without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs. *Ib.*

When one of the executors swore that the personal estate had not exceeded $50, the court, before it would make an administration order, required the applicant to file an affidavit stating that he had reason to believe, and did believe, that the proceedings would shew a substantial balance of personal estate to

be divided among the legatees. *Foster* v. *Foster*, 19 Gr. 463.

Time—*Special Circumstances.*]—An order for the administration of an estate of a deceased person was refused, on the ground that twelve months had not elapsed from the death of the deceased, no special circumstances being shewn. *Grant* v. *Grant*, 9 P. R. 211.

(b) Personal Representative's Application or Joinder.

Deficiency of Assets.]—The fact of there being a deficiency of assets in an intestate's estate, by which all creditors become entitled to share pari passu, is sufficient to justify an application by an administrator for an administration order, notwithstanding that the estate consists solely of personalty. *Swetnam* v. *Swetnam*, 10 C. L. J. 135.

An administrator is entitled ex parte to an administration order, where the liabilities of the estate exceed the assets. *Re Hallett*, 10 C. L. J. 249.

An administration order will not be granted at the instance of an administrator on a deficiency of assets, on the ground that the debts are within the jurisdiction of the division courts, to which the A. J. Acts do not apply, as a plea of plene administravit would defeat the action. *Marsh* v. *Marsh*, 7 P. R. 129.

The plaintiff, the administrator, as a creditor, was held entitled to the order, but the debts amounting to about $300 only, and the estate to $700, consisting of funds in court, the accounts were directed to be taken before the referee. *Ib.*

Effect of Administration of Justice Act.]—Since the A. J. Act an executor or administrator is not entitled to come to the court for the purpose of administering the estate of the deceased, even where the personal assets are insufficient for the satisfaction of the debts. *Re Shipman, Wallace* v. *Shipman*, 24 Gr. 177.

Executor not Proving Will.]—An administration order applied for against a person named as executor in the will but who had not taken out letters probate, was refused, there being no duly appointed personal representative before the court. *Outram* v. *Wyckhoff*, 10 C. L. J. 135, 6 P. R. 150.

Infant Executor.]—Administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian are invalid. *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475.

The provisions of the rules and general orders as to service in case of infancy apply whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity. *Ib.*

Legatee out of Jurisdiction.]—Where one of the legatees was absent from the jurisdiction, and the executors had been unable to discover him, this was held a sufficient ground for the executors obtaining an administration of the estate. *In re Wade, Dee* v. *Wade*, 18 Gr. 485.

No Personal Representative.]—Semble, that administration of an estate will not be ordered by the court where no legal personal representative has been appointed or dispensed with, though an executrix de son tort is before the court. *Re Colton, Fisher* v. *Colton*, 8 P. R. 542.

The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him:—Held, that the suit was improperly constituted, as the father's personal representative was not before the court. *Hughes* v. *Hughes*, 6 A. R. 373.

See Re Kirkpatrick, Kirkpatrick v. *Stevenson*, 10 P. R. 4.

Personal Representative also a Creditor.]—The personal representative may file a bill as a creditor simply upon the testator's estate against a devisee of lands under the will, after the personal estate is exhausted, and obtain a decree as an ordinary creditor. *Tiffany* v. *Tiffany*, 9 Gr. 158.

A judgment debtor having died intestate, the creditor administered to his estate, and thereupon, without suing out execution against lands, filed a bill against the real representatives of the intestate for relief under 13 Eliz.:—Held, that the peculiarity of his position as both creditor and personal representative, did not entitle him to relief in the court of chancery, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree for administration was made on terms as to costs. *Duffy* v. *Graham*, 15 Gr. 547.

Representatives of Deceased Executors.]—The bill shewed that the testator had appointed four executors, three of whom died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate, a demurrer one tenus on the ground that the representatives of such deceased executors should be parties, was overruled with costs. *Webster* v. *Leys*, 28 Gr. 471.

Testator out of Jurisdiction.]—Where a testator dies out of the jurisdiction of the court an administration order will not be granted, unless it is clearly shewn that there are no personal assets here in respect of which ancillary letters probate could be obtained. *Re Armour, Moore* v. *Armour*, 10 P. R. 448.

Two Executors Named—*No Proof of Disclaimer.*]—A testator devised his real estate to two persons as his executors, but only one of them proved the will. An application, by a person claiming to be a legatee and creditor, for an administration order was dismissed, the executor who had proved the will having alone been served with notice, and it not being shewn that the other executor had renounced or disclaimed. It was also not shewn that the legacy to the applicant had vested, or that he was a creditor of the testator. *Re Pettee, McKinley* v. *Beadle*, 6 P. R. 157.

Two Executors—*One not Served.*]—On an application for an administration order it

appeared that two executors had proved the will, but only one had been served with notice of the application, the other being out of the jurisdiction. An order was refused until the absent executor should be served. *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R. 188.

Trustees or Executors.]—Trustees and executors stand in a different position from creditors or cestuis que trust as to the right to have the estate administered in the court, and cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose. *Cole* v. *Glover*, 16 Gr. 392.

See, also, *McGill* v. *Courtice*, 17 Gr. 271.

Unnecessary Application.]—Although the court can protect the estate of a testator by charging the executor with the costs of a suit for administration unnecessarily brought by him, it will refuse an application for administration made by the executor if no sufficient ground exists for it. *Barry* v. *Barry*, 19 Gr. 458.

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2. *Practice and Procedure.*

(a) *In General.*

Account with Rests—*Appeal.*]—The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the court to determine on the propriety of his decision. Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case. *Sieeewright* v. *Legs*, 1 O. R. 375.

Accounting for Timber Cut.]—Under the ordinary administration decree in respect of a testator's real and personal estate the master may take an account of timber cut with which the defendants are chargeable. *Stewart* v. *Fletcher*, 18 Gr. 21.

Adding Party.]—In an administration suit the referee has no power to make an order allowing a person claiming title adversely to the heirs, to be made a party in the master's office, with a view of establishing a claim there. *Re Tobin, Tobin* v. *Tobin*, 7 P. R. 67.

Allowances to Administrator—*Creditors' Right to Complain.*]—A decree, as drawn up in an administration suit, directed the administrator to be charged with an occupation rent, "and that he should be allowed the various claims and allowances set up and asked for by his answer," the result of which was the allowance to him of several sums which, as against creditors, seemed to be improper, and the assets proved insufficient for payment of creditors in full. The court at the hearing on further directions gave liberty to the creditors who complained of such allowance, to rehear the cause, in order that the decree might be varied so as to give them an opportunity of disputing the claim, so set up by the administrator, in the master's office. *Willis* v. *Willis*, 20 Gr. 396.

Amendment of Clerical Error.]—On application for an administration order an amendment was allowed where an unimportant mistake had been made in the name of the intestate, which had misled no one, and the right person had been served; and an enlargement to answer the proceedings when amended was refused. *Re Fraser, Fraser* v. *Fraser*, 2 Ch. Ch. 457.

Assignment for Creditors—*Rehearing.*]—In a suit for the administration of a debtor's estate under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause. *Mulholland* v. *Hamilton*, 12 Gr. 413.

Certificate of Default.]—A certificate given by a master that certain accounts filed under his order are not sufficient in substance and form, comes within G. O. 642, and cannot be enforced by attachment until confirmed by the lapse of a month. *Foster* v. *Morden*, 9 P. R. 70.

Claim by Next of Kin of Deceased Legatee.]—A claim by the next of kin of a deceased legatee, cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship between debtor and creditor, between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

Commission to Prove Applicant's Status.]—After notice of motion served for an order to administer the estate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate. *Farrell* v. *Cruikshank*, 1 Ch. Ch. 12.

Concurrent Applications.]—A creditor of an intestate served notice of motion for an administration order under G. O. 638, on the intestate's widow and administratrix. The widow then served a similar notice upon the heirs of her husband, and filed affidavits alleging a deficiency of the personalty to pay debts, and that creditors were suing; and also filed a consent of the adult heirs to an order in her favour. The master at Chatham granted an administration order to the widow, and, on appeal, it was held that he was right. *Re Draggon, Draggon* v. *Draggon; Re Draggon, Abell* v. *Draggon*, 8 P. R. 330.

Conduct of Proceedings.]—No one has a special right to the conduct of proceedings in the master's office upon a reference under an administration order, but ceteris paribus it will be committed to those who have the greatest interest in conducting them properly and economically. *Perrin* v. *Perrin*, 3 Ch. Ch. 452.

Where an order for administration had been granted to a devisee who was also a creditor of the estate to a large amount,

but did not state that fact when applying for administration, his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party interested under the will. *Ib.*

Conduct of Reference.]—An accounting party should not have the carriage of the proceedings in the master's office, especially where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order. Such an order, obtained ex parte on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the court. The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor. *Re Curry, Curry* v. *Curry*, 17 P. R. 69.

Consolidation of Motions.]—An application to consolidate two motions for administration and partition pending before a local master should be made to him and not to a Judge in chambers. *Lambier* v. *Lambier*, 9 P. R. 422.

Construing Will without Administration.]—Where a party, in addition to a declaration of the true construction of a will, is entitled to ask as consequential relief the administration of the estate, the case is within general order 548, and the court will make a decree declaring the proper construction of the will, without directing the administration of the estate. *Murphy* v. *Murphy*, 20 Gr. 575.

Creditor—*Resort to Real Estate.*]—Upon a creditor's bill a receiver of the rents and profits of the testator's real estate will not be granted where the plaintiff does not allege in his bill and clearly prove the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application of the realty or the rents and profits thereof, to that object. *Sanders* v. *Christie*, 1 Gr. 137.

Where in a creditor's suit to administer the estate of a deceased debtor to whose estate administration ad litem had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them pro confesso, and did not appear at the hearing, the court made the usual decree, without requiring a general administration to be first obtained. *Dey* v. *Dey*, 2 Gr. 149.

Delay in Issuing Order.]—In 1855 a motion was made, upon notice, for an administration order, under the orders of 1853, and no step since taken. An application now made in 1859, in chambers for a direction that the registrar should draw up the order, was refused. After such a lapse of time all parties must be served with notice. *In re Forrester, Messnier* v. *Forrester*, 1 Ch. Ch. 29.

Dower—*Payment before Sale.*]—In an administration suit the testator's widow agreed that the real estate should be sold free from her dower, and the master, by his report, approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price; the widow, therefore, petitioned for payment of a small sum towards the allowance that might be made to her in lieu of dower; the creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed. *In re Thompson, Biggar* v. *Dickson*, 1 Ch. Ch. 323.

Estate in Hands of Trustees.]—Where in a suit against executors a decree was made referring it to the master to administer the estate, the master was not required to take any account of such portions of the estate as were left to trustees to be administered. *Clouster* v. *McLean*, 10 Gr. 576.

Executor Suffering Judgment by Default.]—Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor notwithstanding allowed a creditor to recover a judgment against him by default:—Held, that the executor, on obtaining an administration order, was not entitled to an injunction against proceeding on the judgment. *Doner* v. *Ross*, 19 Gr. 229.

Ex Parte Proceedings.]—Although proceedings in the master's office may under the general order be taken ex parte against a defendant who has allowed a bill to be taken pro confesso against him, that mode of proceeding is irregular when an administration order has been obtained upon notice filed without bill. *Jackson* v. *Matthews, In re Pattison*, 12 Gr. 47.

Filing Affidavit.]—On an application under order 15 of June 2nd, 1853:—Held, that the notice of motion must shew that an affidavit has been filed. *Re Hamilton*, 2 C. L. J. 48.

Foreign Claimants—*Security.*]—Parties residing out of the jurisdiction who come into the master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees, Urquhart* v. *Toronto Trusts Co.*, 10 P. R. 425.

Forfeiture of Legacy.] — A testator, after appointing executors, and expressing full confidence in them, provided "that in case any of the legatees offer obstructions to the proceedings of my said executors in the fulfilment of the powers hereby conferred," then that such persons should suffer the penalty of "being debarred of all claims to any part or portion of my estate, under any pretence whatsoever, in the same manner as if he, she, or they, had actually predeceased me without issue; and such shall be, and are hereby declared to be debarred therefrom accordingly, any law or practice to the contrary notwithstanding:"—Held, in an administration suit by a legatee against the executors, on the application of other legatees, made parties in the master's office, that an inquiry might properly be directed, whether any of the legatees had forfeited his or her share under the above provision. The original decree not containing such a clause of inquiry, was amended in that respect on motion, after the master's report. *Miller* v. *McNaughton*, 9 Gr. 545.

Form of Report—*Further Directions.*]—In a creditors' suit, the plaintiff having the carriage of the decree must see that the master's report states the priorities of the creditors. Creditors who have proved debts in the master's office, but are not parties to the cause, should not be served with notice of the hearing on further directions. *Lavin* v. *O'Neill*, 13 Gr. 179.

Form of Report.]—It is not proper, in a report in an administration suit, to append to the report a copy of the will. *McCargar* v. *McKinnon*, 15 Gr. 361.

Forum.]—The jurisdiction in chambers to grant administration orders, applies only to simple cases of accounts, and the Judge or master in chambers may take the administration accounts in chambers without referring them to the master's office. But to all such references Chancery Order 220 applies. *In re Munsie*, 10 P. R. 98.

Further Evidence.]—Where in an administration suit an alleged creditor was examined before the master, but failed to establish his demand, the court on affirming the master's finding refused a reference back in order to afford the party an opportunity of calling other evidence to establish his demand. *Re Ritchie, Sowery* v. *Ritchie*, 23 Gr. 66.

Infants' Maintenance.]—Infant children of an intestate obtained an administration order against their mother, the administratrix, and the master found as proper to be allowed for their maintenance a sum to meet which the personal estate was inadequate, and on further directions a sale was asked of the realty to satisfy the sum so allowed. The court refused to sanction such a sale, being satisfied that the suit had been instituted for that purpose merely, and was an indirect way of doing what ought to be done under the provisions of 12 Vict., and the order of this court made to carry that Act into effect; and as the report furnished only a small part of the information which would necessarily be laid before the court under the Act and order referred to. *Fenwick* v. *Fenwick*, 20 Gr. 381.

Where the court is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Vict., and the orders of this court made to carry out the same, the question of maintenance, past as well as future, can properly be dealt with, inasmuch as a great deal of the information required by the statute and orders referred to can be obtained in taking the accounts in such suit; but where such a suit was instituted by a party asking for maintenance out of the corpus of the estate, the court as a check upon such suits refused to make any direction as to maintenance. *Goodfellow* v. *Rannie*, 20 Gr. 425.

Interest.]—Interest held to be allowable on a preferred debt consisting of drafts and promissory notes from the date until paid and pending suit. *City Bank* v. *Maulson*, 3 Ch. Ch. 334.

Local Master.]—The jurisdiction of local masters in administration suits, under G. O. Chy. 638, is not interfered with by rule 422, O. J. Act, the practice in such matters being preserved intact by rule 3, O. J. Act. In such matters there is power to direct service to be made out of the jurisdiction. *Re Allan, Pocock* v. *Allan*, 9 P. R. 277.

Master's Jurisdiction.]—The jurisdiction of the master's office is not co-extensive with that of the court in inquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the court to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the courts, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. The plaintiffs when taking accounts before the master under the ordinary chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—Held, 1. That the master had no jurisdiction under such order and on oral pleadings to adjudicate upon the validity of the will; 2. that even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate. *In re Munsie*, 10 P. R. 98.

In proceeding to take the accounts under an ordinary chambers order for administration, certain unsecured creditors and the administrator sought to impeach the validity of certain warehouse receipts assigned to the plaintiffs by the testator in his lifetime, and on which he had received advances. It was held that as the court takes possession of the estate for the purposes of administration, the master's office possesses all the powers requisite for the administration of the assets, and had therefore jurisdiction to try the question. And that in the case of a creditor's administration reference, any creditor had a right to resist or attack the claims of any other creditor sought to be proved in the master's office. *Merchants Bank* v. *Monteith*, 10 P. R. 458.

No Specific Prayer for Administration.]—If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim, upon facts stated in the bill allo intuitu, a relief entirely foreign to the scope of the bill. The bill, which was filed against the executors of a testator, his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money:—Held, that the plaintiff was not entitled to an administration decree. *Gaughan* v. *Sharpe*, 6 A. R. 417.

Paying Applicant's Claim.]—In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditor's claim and costs. The right to do so is not confined

to the personal representative. *Fitten* v. *Dawson*, 3 Ch. Ch. 461.

Personal Service of Direction.]—G. O. Chy. 201 and 296, are still in force in the chancery division. Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts before a day named pursuant to the direction of the master:—Held, that personal service upon the defendant of the master's direction and of the notice of motion to commit was not necessary. *Re Harnden, Harnden* v. *Harnden*, 11 P. R. 35.

Place of Reference.]—The testator lived and died in the county of S.; the defendant executor lived there; and one of the two parcels of land which made up the real estate of the testator was in that county. The other and smaller parcel of land was in the county of Y., and the plaintiff's solicitors practised there:—Held, that the reference should be to the master at the county town of S. *Re Armstrong, Armstrong* v. *Armstrong*, 18 P. R. 55.

Place of Reference—*Conduct of Reference.*]—An appeal from the order of the master in chambers, changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of the reference to the defendants the executors, instead of the plaintiff, was dismissed with costs:—Held, that the reference in administration actions should primâ facie be to the place where the person whose estate is to be administered resided. G. O. Chy. 638 governs the case, and the practice laid down in Macara v. Gwynne, 3 Ch. Ch. 310, is inapplicable. *Thompson* v. *Fairbairn*, 10 P. R. 533.

During the argument before the master, and on the appeal, the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiff:—Held, that the solicitor could not obtain the conduct of the reference unless by a substantive application. The appeal was dismissed, without prejudice to a substantive application. *Ib.*

Proving Claim After Time.]—Incumbrancers, a company, duly notified in a creditor's suit to come in and prove their claim in the master's office under the decree, neglected to do so, relying upon a supposed remedy at law. They were accordingly foreclosed by the decree upon further directions, and subsequently an assignee of their claim, the legal remedy having proved illusory, applied to be allowed to prove the claim notwithstanding the foreclosure and the lapse of more than two years. The application was granted, as it appeared that no other rights had intervened, that no other incumbrancers would be prejudiced, and that the only opposition to the motion was on the part of the debtor. The application, under the circumstances, was held to be properly made in chambers; but that if the claim had been adjudicated upon, on the merits, the motion should have been made in court. *Cameron* v. *Wolfe Island Co.*, 6 P. R. 91.

A creditor who had not come in pursuant to advertisement, was allowed to do so after the master had reported as to the debts, and after a decree on further directions, but he was required to pay all costs of his application. *Andrews* v. *Maulson*, 1 Ch. Ch. 316.

Proving Status of Personal Representative.]—Notice of motion for an order to administer the estate of a deceased intestate, having been served on his widow as administratrix, the application was refused, there being no evidence that letters of administration had been granted to her. *In re Marshall, Fowler* v. *Marshall*, 1 Ch. Ch. 29.

On an application by a creditor for an administration order, under order 15, only a certified copy of the will, shewing the defendant to be executor, was produced:—Held, that although strict proof of the claim as required in the master's office is not necessary, primâ facie evidence of the applicant having a right to administration of the estate must be furnished; and the motion was refused with costs. *In re Clarke*, 2 Ch. Ch. 57.

In moving for an administration order the letters of administration should be produced. *Re Israel*, 2 Ch. Ch. 292.

But where the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof. *Re Bell, Bell* v. *Bell*, 3 Ch. Ch. 397.

Where a bill is filed against the estate of an intestate, alleging that letters of administration have been granted to the defendant, such allegation is sufficiently established by shewing at the hearing of the case that the defendant has obtained letters of administration, although the grant thereof may have been made subsequently to the filing of the bill and the putting in of the answer, and although the defendant has taken the objection by way of defence in answer. *Edinburgh Life Assurance Co.* v. *Allen*, 19 Gr. 593.

Rights of other Creditors—*Statute of Limitations.*]—A decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running in favour of debtors to the estate. *Archer* v. *Severn*, 12 O. R. 615.

A decree for administration is for the benefit of all the creditors, so where a person had obtained an administration order upon a claim of a firm of which he was a member, but which was disallowed by the master, and also upon a claim obtained in a manner savouring strongly of champerty, but another creditor had established a claim under the order:—Held, that the order could not be set aside. *Re Cannon, Oates* v. *Cannon*, 13 O. R. 70.

O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed. O. thereupon redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations. *Re Cannon, Oates* v. *Cannon* (2), 13 O. R. 705.

Sale under Fi. Fa. after Proof in Master's Office.]—A creditor having proved his claim in the master's office, afterwards proceeded to sell under a fi. fa. Upon application of a co-defendant the sale was restrained with costs. *Cahuac* v. *Burie*, 9 Gr. 485.

Set-off.]—In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made, of which the defendant had notice before defence. The set-off was held bad under 27 Vict. c. 28, s. 28, and also because of the administration order. *Monteith* v. *Walsh*, 10 P. R. 162.

Summary Application while Action Pending.]—An administration order was granted by a local master under G. O. 638, while a suit was pending for the construction of the will of the testator, in which administration was asked, and in which the executors were charged with misconduct, and before a year had elapsed since the death of the testator. Upon appeal, proceedings before the master were stayed, and special directions given as to the administration as set forth in the order on appeal. *Heywood* v. *Sivewright*, 8 P. R. 79.

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

Two Estates.]—Where the plaintiff was a beneficiary under the wills of I. and T., and the estate of I. had claims upon the estate of T., and the executors of I. were the administrators with the will annexed of the estate of T., an order was granted for the administration of the estate of I., and the proceedings were consolidated with those under an order already obtained for the administration of the estate of T. *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283.

Unreasonable Delay.]—Where the plaintiff unreasonably delays in carrying on a creditor's suit, the court will give the carriage of the decree to another creditor upon his indemnifying the plaintiff against future costs. *Patterson* v. *Scott*, 4 Gr. 145.

Wilful Neglect and Default.]—Where an order for administration of an estate is granted upon application of a party interested in the estate adverse to the executor, the decree will not direct an inquiry as to wilful neglect and default. *Harrison* v. *McGlashan*, 7 Gr. 531.

But where an executor or administrator applies for such order, the account will be directed to be taken of what he has received, or what but for his wilful default he might have received. *Ledgerwood* v. *Ledgerwood*, 7 Gr. 584.

(b) *Action or Summary Application.*

Claim under Contract of Suretyship.]—When a claim against a deceased person's estate is one arising out of a contract of suretyship, the court will not, unless by consent of all parties, make an administration decree except on a bill filed. *Re Colton, Fisher* v. *Colton*, 8 P. R. 542.

The principal and surety being here the plaintiff and defendant respectively, Re Colton, 8 P. R. 542, which decides that in a case of principal and surety a summary application to administer under G. O. Chy. 638, is improper, was held not to apply. *Re Allan, Pocock* v. *Allan*, 9 P. R. 277.

Discretion to Refuse.]—There is now a discretion under rules 946 and 954, in dealing with applications for administration orders, and the Judge or officer is not obliged to grant a summary order unless it appears that some good result will follow. Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute. Where a husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that moneys of hers went into the account and that both drew from it indiscriminately:—Held, that she was entitled as survivor to the whole fund. *Re Ryan*, 32 O. R. 224.

Doubtful Claim.]—In an administration matter under G. O. Chy. 648, 649, the plaintiff claimed to be a creditor of the estate, by reason of the support and maintenance by him of the testator's wife in England during the testator's lifetime:—Held, that the plaintiff's claim should be supported by viva voce evidence, and an action was directed to be entered. *Groom* v. *Burlington*, 9 P. R. 298.

Fraud Charged—*Examination.*]—If in an administration suit fraud is charged in the pleadings, it may be proper for defendants to examine the plaintiff thereupon in order to disprove the charge, even though they succeed in the objection, that a proceeding by bill was not necessary. *McMillan* v. *McMillan*, 8 C. L. J. 285.

Misconduct Charged.]—Where the executors are charged with misconduct, a bill must be filed; an order for administration cannot be obtained on summary application. *Re Babcock's Estate*, 8 Gr. 409.

Under an administration order granted by a local master pursuant to G. O. Chy. 638, 639, he may investigate questions of wilful default and misconduct arising upon the accounts, and if he refuses, the plaintiff should appeal. If an action is commenced the extra costs must be borne by the plaintiff. When the misconduct is such as would entitle a plaintiff at the outset to apply for an injunction or receiver, an action should be brought. *Sullivan* v. *Harty*, 9 P. R. 500.

Personal Representative also a Creditor.]—A creditor recovered judgment against his debtor, who having afterwards died intestate, the creditor had himself appointed administrator of his estate, and thereupon, without suing out execution against

lands, filed a bill against the real representatives of the intestate for relief under 13 Eliz. :—Held, that the peculiarity of his position as both creditor and personal representative did not entitle him to relief in this court, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree for administration was made, with such costs as would have been incurred in taking out the ordinary administration order, the plaintiff paying to the defendants their costs of answer and of the hearing. *Duffy* v. *Graham*, 15 Gr. 547.

Real Estate.]—An administration of the real estate may only be had in a very special case, but should be sought by action and not summary application. *Re Armour, Moore* v. *Armour*, 10 P. R. 448.

Refusal to Account.]—More than a year after the grant of the probate to the sole executrix named in the will of the testator, three legatees applied summarily for an administration order, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before the death and as executrix, denying that any sum was due by her to the estate: —Held, that the legatees were entitled to the usual administration order, under which the master could make all the necessary inquiries: and were not driven to an action for administration. *Re Bagwell, Anderson* v. *Henderson*, 17 P. R. 100.

Special Circumstances.]—An administration order was refused where the grounds on which it was claimed were properly the subject for a bill. *Cameron* v. *Macdonald, In re Macdonald*, 2 Ch. Ch. 29.

Special Claim for Allowances.]—The order (15) providing for the administration of the estate without bill, applies to simple cases only, and under it the court will not grant an order containing special directions to inquire as to what should be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of infant children. *Barry* v. *Brazill*, 1 Ch. Ch. 248.

Special Claim for Support of Deceased's Wife.]—Where, on a motion for an administration order, it appeared that the application was by a party claiming for the support and maintenance of the wife and children of the deceased, and the questions raised were substantially the same as would be raised had the suit been brought by the wife for alimony, the court refused the order, and directed a bill for the purpose to be filed, and made the costs of the application costs in the cause. *In re Foster, Griffith* v. *Patterson*, 20 Gr. 345.

Substantial Preliminary Question.]—Where on an application for an administration order, it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered; and the court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in chambers without first directing such issue, the parties are held to have waived such preliminary question, and cannot raise it in taking the accounts under such order in the master's office. *In re Munsie*, 10 P. R. 98.

Validity of Award in Question.]—Where a married woman applied, as devisee and legatee, for an administration order, by motion, without bill, and it appeared that an award had been made, professing to determine all matters between the executor and the legatees, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied :—Held, that the validity of the award could not be tried on the motion, and that a bill must be filed: more especially as other legatees, not parties to the motion, were interested in maintaining the award. *Nudell* v. *Elliott*, 1 Ch. Ch. 326.

Wilful Default Charged.]—The plaintiff was an executor as well as a creditor, and was charged with wilful default:—Held, that inquiry as to such default could be made under the order of reference (form No. 171, O. J. Act). *Re Allan, Pocock* v. *Allan*, 9 P. R. 277.

(c) *Commission and Costs.*

Action by Creditor after Administration Order.]—The court, in making an order to stay the proceedings of a creditor who had instituted proceedings at law to recover his demand after an order for the administration of the estate had been obtained in the court, ordered the creditor to receive his costs; the creditor and his attorney in the action both swearing that at the time of suing out the writ they were not aware of the pendency of the administration, and there being no reason to doubt the *bona fides* of their conduct, although it was shewn that a year before they had been notified of the administration order. *Re Henderson, Henderson* v. *Henderson*, 26 Gr. 297.

Appeal—*Allotment of Commission.*]—Objection to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given. *Dodge* v. *Clapp*, 8 P. R. 388.

Appeal—*Disbursements.*]—Where a master in his discretion fixes the commission to be allowed to parties under G. O. 643, and settles the disbursements in the suit, there is an appeal to a Judge in chambers from his finding. The disbursements should still be submitted to the master in ordinary for revision like other bills of costs. *Campbell* v. *Campbell*, 8 P. R. 159.

Beneficial Proceedings.]—Where there is a deficiency of assets in an administration suit, so that the claims of creditors cannot be paid in full, costs of proceedings which have been instituted for and have resulted in a benefit to the estate generally will be ordered to be paid thereout, as between solicitor and client. *Re Hirons, Foster* v. *Hirons*, 26 Gr. 211.

Division of Commission.]—In partition and administration suits, the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by and the responsibility imposed upon them. *Dodge* v. *Clapp*, 8 P. R. 388.

Experts — *Journeys—Attendances — Service of Warrants — Proceedings Connected with Sale—Special Items.*]—The general orders 240, 482, and 541, do not authorize the master in proceedings in his office to employ the services of experts; but where, in an administration suit, the master had, with the consent of the creditors, employed an expert, the court held that the creditors could not afterwards object to the allowance of the sum paid to such expert. Where, in such a suit, the plaintiffs had incurred the expense of several journeys to examine the books of the estate:—Held, that as these journeys had been made and the expenses incurred without the consent of the creditors, the only persons really interested in realizing the estate, the charge could not be allowed to the plaintiffs on taxation. Notice being all that is required to be served on creditors whose claims are disputed, charges for service of warrants were disallowed. So also was a fee paid to a counsel in the United States, notwithstanding that his services had been beneficial to the estate. The solicitor of the plaintiffs was allowed his charge for comparing the deeds of property sold to purchasers under the decree, it being the duty of the vendor's solicitor to see that the engrossed deed agrees with the draft. Where the master had exercised his discretion in making an allowance to a solicitor for services in respect of incumbrances, the court refused to disturb his ruling. Instalments of purchase money (not the deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him into court:—Held, that he was not entitled to any remuneration from the estate for such services, it being the duty of the purchasers to pay these moneys into court. A sum of money paid to the local master for going out of the Province to take evidence was disallowed, as it was not shewn that the creditors had desired it. Certain disbursements for the proving of which an affidavit had been made, were disallowed on taxation:—Held, that the charge for preparing the affidavit was also personally disallowed. *Re Robertson, Robertson* v. *Robertson*,, 24 Gr. 555.

Motion for Distribution.]—On a motion for distribution under the report of the master, an application was made on behalf of the plaintiff for the allowance of a lump sum for the costs and disbursements of the motion. The Judge in chambers made the usual order, and declined to allow any sum for costs and disbursements, over and above the amount found in the report. *Re Fleury, Fleury* v. *Fleury*, 9 P. R. 87.

Necessary Party.]—Where in an administration suit instituted by a creditor of a deceased debtor, it is necessary to make the heir-at-law a party defendant, he is entitled to be paid his costs, as between solicitor and client, in priority to all other claims, although the estate may be insufficient to pay the debts proved against it. *Hartrick* v. *Quigley*, 21 Gr. 287.

No Assets.]—In case a creditor brings an administration suit after being informed that there are no assets applicable to the payment of his claim, if the information appear to have been substantially correct, he may have to pay the costs of the suit. *City Bank* v. *Scatcherd*, 18 Gr. 185.

On what Calculated.]—The commission in lieu of taxed costs, under G. O. Chy. 643, is to be calculated on the gross amount accounted for by the accounting party, and not merely on the net amount found in his hands on the footing of the accounts. *Re Brown, Brown* v. *Brown*, 19 C. L. J. 367.

Proceeding at Law.]—The fact that a creditor of an estate has proceeded at law after a decree for administration has been obtained, is not sufficient to deprive him of his costs, either at law or of a motion in this court to restrain his action. *Re Langtry*, 18 Gr. 530.

Property Subject to Mortgage.]—Where in an administration suit property sold subject to a mortgage:—Held, that the commission in lieu of costs should be upon the amount realized by the sale—that is, upon the actual value of the interest of the intestate in the property in question, not upon the whole purchase money. *Re McColl, McColl* v. *McColl*, 8 P. R. 480.

Scale of Costs.]—Where creditors whose claims in the aggregate were under $200 obtained the usual administration order, and it was shewn that the value of the estate including lands was under $800, and although the real estate which it was necessary to sell to satisfy such claims was incumbered by mortgage to an amount which together with these claims exceeded $200, it was held that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the county court; and the plaintiffs were refused their costs. *In re Scott, Hetherington* v. *Stevens*, 15 Gr. 683.

Scale of Costs.]—An administration suit by a person interested to an amount less than $200 in an estate which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, it was:—Held, not to be within the equity jurisdiction of the county court. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

See COSTS, VI.

Solicitor's Lien — *Jurisdiction of Referee.*]—A referee, before whom administration proceedings are taken, has no authority to make an order depriving a solicitor of his lien for costs on a fund in court on the ground that adverse parties had a prior claim on such fund for costs which said solicitor's client had been personally ordered to pay, the administration order not having so directed the referee, and there being no general order permitting such an interference with the solicitor's primâ facie right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

Solicitor Named by Master—*Creditors' Liability for Costs.*]—During a reference in an administration suit the master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim in answer to the statutory advertisement for creditors, but did not prove their claim before the master. The nomination of the one solicitor for the unsecured creditors was an ex parte proceeding, of which the bank were not notified till a year afterwards:—Held, that in the absence of contract or of an order of the master made under conditions contemplated by G. O. Chy. 218, the solicitor could not

recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors in contesting the claims of the secured creditors:—Held, also, that the doctrine of ratification by silence or inaction did not apply to a case like this. Hall v. Laver, 1 Ha. 571, followed. *Re Monteith, Merchants Bank* v. *Monteith*, 12 P. R. 288.

Taxed Costs—*Local Master's Power.*]—A local master has no jurisdiction to make an order under Con. rule 1187 allowing the parties to an action or proceeding for administration and partition taxed costs instead of the commission provided for by the rule, "unless otherwise ordered by the court or a Judge." This was an action in which a judgment for partition and administration was pronounced by a Judge:—Held, that more especially in this case a local master had no power to interfere, for by ordering taxed costs instead of commission he was varying the judgment. *Hendricks* v. *Hendricks*, 13 P. R. 79.

Taxed Costs or Commission—*Quantum.*]—In an administration suit in which the estate was insolvent, the total assets being $72,000, the liabilities $138,475, and the creditors 180 in number, and in which the commission of the solicitor who acted for all parties, was allowed by the master, under G. O. Chy. 645, at $895, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. *In re Stuebing, Anthes* v. *Dewar*, 10 P. R. 236.

The scope of the G. O. Chy. 643 is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. *Ib.*

A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra is a low and inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. *Ib.*

Semble, that, in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the master note it in his book, at the earliest stage possible in the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *Ib.*

See Wright v. *Bell*, 15 C. L. T. Occ. N. 193.

Unnecessary Action.]—Where a plaintiff files a bill for an administration decree in a case in which the decree would have been made on notice, without a bill, he is not entitled to the increased costs thereby occasioned. *Sovereign* v. *Sovereign*, 15 Gr. 559.

In an administration suit the plaintiff, in the absence of misconduct, is not justified in filing a bill instead of issuing a summons merely, and does so at the risk of costs. *Eberts* v. *Eberts*, 25 Gr. 565.

See also, *Re Allenby and Weir*, 13 P. R. 403, 14 P. R. 227; *McAndrew* v. *LaFlamme*, 19 Gr. 193; *Sullivan* v. *Harty*, 9 P. R. 500.

Unnecessary Affidavits.]—A motion for an administration order was refused with costs, on the ground that no personal representative of deceased was a party. Affidavits had been filed in answer to the motion on the merits:—Held, that the costs of only so much of these affidavits should be allowed as would be equivalent to a demurrer. *Irwin* v. *Bick*, 6 P. R. 183.

Unnecessary Parties.]—Where unnecessary parties were made to an administration suit, the court refused to burden the estate with any of the extra costs thereby occasioned. *Rodgers* v. *Rodgers*, 13 Gr. 457.

In a suit by a residuary legatee for the administration of an estate the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the master's office. To entitle them to such costs some sufficient reason must be shewn for their being represented by a separate solicitor. *Gorham* v. *Gorham*, 17 Gr. 586.

Unnecessary Proceedings.]—When it appeared that the administration proceedings had been instituted without any shew of reason, or proper foundation for the benefit of the estate, and that they had not, in their results, conduced to that benefit, the plaintiff was ordered to pay the costs of all parties. *Re Woodhall, Garbutt* v. *Hewson*, 2 O. R. 456.

In an administration action commenced by writ, the plaintiff was allowed upon taxation only such costs as would have been taxed had he begun his proceedings by a summary application under rule 965. The defendant claimed to have taxed to him and set off his additional costs incurred by reason of the less expensive procedure not having been adopted. He had not in the action admitted the right of the plaintiff to an account, but had pleaded a release, and had not objected to the procedure adopted:—Held, that the defendant's additional costs had not been incurred by reason of the plaintiff's improper or unnecessary proceedings, but by his own conduct in not admitting the right to an account, and in not objecting to the plaintiff's manner of proceeding at the earliest possible stage; and the case therefore did not come within rule 1195. Semble, it would have been proper to raise the question at the hearing; but the taxing officer had jurisdiction under rule 1195, without an order, to "look into" it. *Moon* v. *Caldwell*, 15 P. R. 159.

See COSTS, I. 6.

See, also, sub-title III.

II. ADMINISTRATOR AD LITEM.

General Rule.]—It is competent to the court, on a proper case being made, to appoint or dispense with an administrator ad litem, and then to direct an account, but to justify such an order it should appear not only in general terms that the estate was small, but a statement shewing the nature

and amount of the personal estate ought to be produced and verified. *Re Colton, Fisher* v. *Colton*, 8 P. R. 542.

It is not intended by con. rule 311 that the business of the surrogate court should in a large measure be transferred to the high court; the intention is, to provide for necessities arising in the progress of an action, where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the person who may require the appointment to be made. Under the circumstances of this case an application for the appointment of an administrator ad litem was refused. Re Chambliss, 12 P. R. 649, distinguished. *Meir* v. *Wilson*, 13 P. R. 33.

Administration.] — A bill was filed against an executrix de son tort, charging that she had sold the personal estate of the deceased and applied the proceeds in the purchase of certain lands, and praying that she be declared a trustee thereof for the next of kin, and, if necessary, that the estate of deceased be administered. An application was made under consolidated order 56 for the appointment of some person to represent the estate in the suit, on the ground that there was no personal estate outstanding, and the appointment in this way would save expense. The motion was dismissed, it being—Held, that the deceased was not interested in the matters in question in this suit, and therefore the case was not within the provisions of consolidated order 56; and no account having been taken of the personal estate it could not be said that the personal representative of the deceased would be merely a formal party, for a balance might be found due from the defendant to the estate, which it would be the duty of the personal representative to administer. *Leonard* v. *Clydesdale*, 10 C. L. J. 307.

Held, that the court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative under R. S. O. 1877 c. 49, s. 9, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section. *Hughes* v. *Hughes*, 6 A. R. 373.

Bringing Actions.]—Declaration on the common counts by plaintiff as administrator of one W. Defendant pleaded that a suit was and is pending in the court of chancery concerning the validity of W.'s will, and that in this suit, the court of chancery did appoint the plaintiff, during the pendency of said suit, to be administrator of W., in pursuance of the statute in that behalf, subject to the control of said court, and ordering the plaintiff, as administrator, to act under the directions of said court. And defendant averred that the plaintiff never obtained the authority or direction of the court to bring this suit; and that, save as aforesaid, the plaintiff is not the administrator of W.'s estate and effects. To this the plaintiff replied that in two suits named, pending in chancery, the plaintiff was appointed by the court administrator pending these suits, with all the powers of a general administrator, under which authority he now brings this action:—Held, on demurrer to the replication, that as it appeared from the pleadings that the plaintiff was not a general administrator, but only pendente lite, the declaration should have alleged his authority to be so limited, and that the suits during whose pendency the plaintiff was administrator were still pending, and in this respect the declaration was bad, and that part of the plea traversing the plaintiff being a general administrator was good. Held, also, that the plaintiff having, under C. S. U. C. c. 16, s. 54, all the rights of a general administrator, might sue without the prior leave of the court, and that that portion of the plea alleging the want of such leave was therefore no defence. Held, also, that the replication, in alleging that the plaintiff was a general administrator during the pendency of the suits, was good. *Haldan* v. *Smith*, 25 C. P. 349.

Deceased Depositor.] — The plaintiff claimed from the defendant a sum of money, part of which had been deposited by E. P., and part by the plaintiff herself, but all in the name of E. B., who was a non-existent person. E. P. died intestate before this action was brought, and no letters of administration to his estate having issued, the plaintiff applied under con. rule 311 for the appointment of an administrator ad litem. The court refused to make an appointment. Meir v. Wilson, 13 P. R. 33, approved of and followed. *Ford* v. *Landed Banking and Loan Co.*, 13 P. R. 210.

Devolution of Estates Act—*Real Estate.*]—Rule 311, though in existence, as s. 11 of 48 Vict. c. 13 (O.), before the passing of the Devolution of Estates Act, may be applied as to realty falling under the operation of that Act. If it appears that there is no personalty, or personalty of such trifling amount as will not suffice to answer the claims made in respect of the deceased's real estate in respect of which litigation has been brought or is impending, administration ad litem may be granted under the rule, limited to the real estate in question. An application for the appointment of an administrator ad litem is properly made before action. *Re Williams and McKinnon*, 14 P. R. 338.

Form of Order.]—In framing an order under con. rule 311 appointing an administrator ad litem it is not sufficient that the order state "it is ordered that A. be and he is hereby appointed administrator ad litem to the estate of B.;" the order is really a grant of administration, and should contain the particulars mentioned in rule 48 of the surrogate rules; and if such is the fact, should also, in view of R. S. O. 1887, c. 50, s. 58, state that the administration is of the real and personal estate. *Cameron* v. *Phillips* (*No. 2*), 13 P. R. 141.

Insolvent Estate.]—An order had been made for administration, and accounts taken under it, and the master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent. The court therefore, under order 56, appointed as administrator ad litem the person who had been guardian of the infant heirs of the intestate, on the application for the administration order, he having also been solicitor for the administratrix in her lifetime. *Re Tobin, Cook* v. *Tobin*, 6 P. R. 40; 9 C. L. J. 391.

Issuing Execution.] — An administrator pendente lite has no power to issue execution where the executors have proved the will. *Haldane* v. *Beatty*, 13 C. L. J. 200.

Liability to Account.] — Pending proceedings in the suit of Wilson v. Wilson, to set aside the will of T. W., the defendant H. was appointed administrator pendente lite:—Held, that an administrator pendente lite is amenable to a suit in equity; and that H. was liable to account to the plaintiffs. Held, also, that the plaintiffs were right in not having proceeded by petition in the suit of Wilson v. Wilson, in which J. W. was not a party, and C. B., though a party, did not represent the beneficiaries under the first will. Held, also, that the bill could not be sustained as against D., who was H.'s solicitor in the former suit, for if H. had improperly paid him costs out of the estate, H. was liable, but there was no privity between D. and the plaintiffs. *Beatty* v. *Haldan*, 4 A. R. 259.

Mortgage Action.]—C. joined his wife in executing a mortgage on her land to a company, covenanting for payment, and then died intestate. The company, being about to begin an action to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration had been taken out:—Held, that it was proper to appoint an administrator ad litem under con. rule 311. *Re Chambliss and Canada Life Assurance Co.*, 12 P. R. 649.

In a mortgage action in which a foreclosure only was sought it was stated that the lands were not equal in value to the mortgage debt. The mortgagor being dead and having left no estate whatever except the equity of redemption sought to be foreclosed, the executor named in the will of the mortgagor, which had not been offered for probate, was appointed administrator ad litem without security, under con. rule 311. *Cameron* v. *Phillips*, 13 P. R. 78.

Necessity for General Administration.]—Where in a creditor's suit, to whose estate administration ad litem had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them pro confesso, and did not appear at the hearing, the court made the usual decree, without requiring a general administration to be first obtained. *Dey* v. *Dey*, 2 Gr. 149.

Plaintiff Dying Pendente Lite.]—The original plaintiff having died pendente lite and an order having been obtained to continue the proceedings in the name of an administrator ad litem:—Held, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered. Held, also, that the administrator ad litem was not entitled to be paid the residue of the fund; but as to this liberty to apply was granted. *McCardle* v. *Moore*, 2 O. R. 229.

Referee's Jurisdiction.] — A motion made under R. S. O. 1877 c. 49, s. 9, to appoint an administrator ad litem of the estate of a deceased person may be made before the referee, as this section merely extends a jurisdiction already possessed by him under G. O. 56. *Collver* v. *Swayzie*, 8 P. R. 42.

Substantial Interest — *Revivor.*] — The court will not appoint an administrator ad litem of a deceased party to the suit where the deceased had a substantial interest in the suit. The suit must be revived. *Bank of Montreal* v. *Wallace*, 1 Ch. Ch. 261.

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

III. Costs.

Action against Executor without Demand for Account.]—Where an executor, by his misconduct in the management of the estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case, the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of shewing that his dealings were correct, the court refused the costs of the suit to either party up to the taking of the accounts, but directed the executor to pay the subsequent costs. *Simpson* v. *Horne*, 28 Gr. 1.

See Erskine v. *Campbell*, 1 Gr. 570.

Action for Mortgage Account.]—In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of $10 was found in his favour. Plaintiff having made certain charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him; and certain special matter pleaded by the defendants being found against him:—Held, neither party entitled to costs. *Beatty* v. *O'Connor*, 5 O. R. 747.

Action for Receiver.] — Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver on the ground of the executor having become embarrassed, and of his misconduct, and the circumstances were such as to justify alarm on the part of the cestui que trust, the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Bald* v. *Thompson*, 17 Gr. 154.

Action to Pass Accounts.]—An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them. And if it should appear that his conduct has been malâ fide or unreasonable, he will be ordered to pay defendant's costs. *White* v. *Cummings*, 3 Gr. 602.

Administration Action.]—Under an administration order obtained by a creditor, the executors admitted a certain sum in hand, part of which they objected to pay into court,

on the ground that it had been paid by them to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the master's office:—Held, that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these inquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character. *Re Babcock's Estate*, 8 Gr. 409.

A testator devised his real estate to his widow, and in the event of her re-marriage to h's children. The widow afterwards filed a bill against the executors, charging mal-administration, which was wholly disproved; and the master having found that the personal assets were insufficient to discharge the remaining liabilities, the court directed the executors to receive their costs out of the estate; that a competent portion of the real estate should be sold; and that the testator's children should be made parties to the suit in the master's office for the purpose of retaking the accounts, if desired by the guardian, they not being bound by the accounts already taken; and, under the circumstances, refused the widow her costs. *Norris* v. *Bell*, 9 Gr. 23.

A retaining fee paid by executors to their solicitor in an administration suit may be a reasonable disbursement. *Chisholm* v. *Barnard*, 10 Gr. 479.

Attacking Plaintiff Made to Pay Costs.]—One of several children of an intestate instituted proceedings against her mother, the administratrix, and the administrator of the estate, seeking an account of the personalty, and also of the rents and profits of the real estate, which it was proved had been received by the administratrix alone, none having been paid to the administrator. The accounts taken in the master's office shewed that in respect of the personal estate the personal representatives had properly expended $400 more than they had received; and that the administratrix had expended the rents so received by her in supporting the plaintiff and the other children of the intestate; and that all the parties interested therein, other than the plaintiff, had released the plaintiff from all liability in respect thereof; which release the plaintiff had also promised to join in, but subsequently refused to execute. The court, under the circumstances, though it could not deprive the plaintiff of her share of the rents, ordered her to pay the administrator his costs of suit; and also to pay to the administratrix her costs, less so much thereof as was occasioned by her resisting the claim of the plaintiff to the rents. *Parsill* v. *Kennedy*, 22 Gr. 417.

Bona Fide Defence.]—Where executors in good faith unsuccessfully defended a suit on a note given by their testator, the court, in pronouncing a decree against them, declared them entitled to deduct their costs as between solicitor and client, out of their testator's estate. *McKellar* v. *Prangley*, 25 Gr. 545.

Executors having omitted to set up the defence that they had fully administered or had not assets to pay any balance that might be found due, petitioned to have the decree rectified so as to exempt them from liability for a greater amount than the assets come to their hands; the court made the order as asked, but, under the circumstances, directed the executors to pay the costs of the application. *Ib.*

Breach of Trust.]—An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach. *Wiard* v. *Gable*, 8 Gr. 458.

Claim not Allowed—*Books not Kept.*]—An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs. An executor took out an administration order for the purpose of establishing a claim which he made against the estate, and of having it paid by sale of the realty; but he failed to prove his claim, and, on the contrary, a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor:—Held, that he should pay the costs of the suit. *Sullivan* v. *Sullivan*, 16 Gr. 94.

Construction of Will.]—See COSTS, IV. —WILL, IV.

Costs and Expenses of Administration.]—Executors are usually entitled to their costs, as between solicitor and client, out of the estate; and if the executors, in addition to the costs of the suit, have incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the court, but not otherwise, an inquiry will be directed, and the master will be authorized to include them in his account. *Story* v. *Dunlop*, 13 Gr. 375.

Costs of Other Litigation.]—In an administration suit it appeared that the stepfather of one of the children of the deceased, who had the care of the child, had been sued for the child's board while at school, his mother being a creditor of the estate, and neither she nor her husband having any funds to pay for such board, while there were funds applicable thereto:—Held, that the stepfather should be allowed the costs of such suit. *Menzies* v. *Ridley*, 2 Gr. 544.

In an administration suit the widow of the testator had made a claim for dower, which had been allowed, and upon an appeal from that decision the court of appeal reversed the judgment of the court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of appeal. The appellants having paid their own costs of the appeal, the court upheld the finding of the master in allowing them such costs out of the estate. *Ib.*

Defending Action.]—An order for partition or sale of the estate of one M., deceased, was made under G. O. 640 by a local master. In proceeding under that order the master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration, and for defending an action in the court of common pleas, brought by W. M., a defendant in this suit, and entitled to a share of the estate, against the administratrix. The master allowed the claim, and W. M. appealed, on the ground that neither the deceased nor his estate was indebted to M. & M. and that they were not entitled to prove as creditors in this cause:—Held, that she was justified in defending the suit, and the appeal was dismissed. *McKay* v. *McKay*, 8 P. R. 334.

Disallowance of Executor's Claims.]—The report in an administration suit, found £1403 chargeable against an executor. Of this sum £1247 was for the price of land, claimed and received by the executor, the testator's son, as heir, and his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit, when the purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34. Under the circumstances the executor was allowed his costs, as of an administration suit, out of the estate; and was not charged with interest on the balance in his hands, which he was required to pay into court within a month after deducting therefrom his share of the estate as legatee. *Blain v. Terryberry*, 12 Gr. 221.

Disallowance of Part of Costs.]—The executors in this case were held entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the inquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate. *In re Honsberger, Honsberger v. Kratz*, 10 O. R. 521.

Disputing Claims.]—In an administration suit, the executors were charged with so much of the expenses of the reference as was incurred in the master's office in establishing charges which they disputed. *Stewart v. Fletcher*, 18 Gr. 21.

Executor Acting without Proving Will.] — Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred. *Sunley v. McCrae*, 2 Ch. Ch. 231.

Executor Applying Unnecessarily for Administration.]—Where an executor obtained the usual order for the administration of his testator's estate, and upon the hearing upon further directions no reason was shewn for invoking the aid of the court, and the guardian for the infants did not object in any way to the course taken by the executor, the court refused both parties their costs. *Springer v. Clarke*, 16 Gr. 664.

Executor's Misconduct.]—Where a bill was filed against an executor and trustee for administration, and praying a receiver on the ground of the executor becoming embarrassed, and having lately sold a valuable farm belonging to the estate to his own son at an undervalue, without advertising the same, or communicating with the cestui que trust under the will, and of his having taken a mortgage for the payment of the purchase money in his own name individually and not as trustee, and the circumstances justified alarm on the part of the cestui que trust, the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Bald v. Thampson*, 17 Gr. 154.

Where the only important difficulties in the administration of an estate were created by a large claim of the executors which they failed to make good, and a claim of their father's which he had made by their persuasion and against his own wish, and the executors had more money in their hands than was required to pay all other claims against the estate, they were charged with the costs of an administration suit brought by a creditor. *McGill v. Courtice*, 17 Gr. 271.

Where the executor had power under a will to sell real estate for payment of debts and legacies, and there was more than enough in money to pay the debts, the court considering a suit for administration unnecessary, refused the executor the costs, and his commission. *Graham v. Robson*, 17 Gr. 271.

Failure to Establish Will—*Costs of Person Named as Executor.*]—Where the person named as an executor in a written instrument failed, in the final result of this action to establish it as the last will of the testator, and the court of last resort refused to order that his costs incurred therein should be paid out of the estate:—Held, that the court of first instance could not make an order for payment, out of moneys paid into that court by the administrators pendente lite, of these costs as costs of the litigation, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because he never was an executor. *Purcell v. Bergin*, 16 P. R. 301.

Groundless Charges of Misconduct.]—Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby unnecessary costs and trouble, the court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit. *Rosebatch v. Parry*, 27 Gr. 193.

Where the plaintiff charged improper conduct against the administratrix, which was not sustained in evidence, he was ordered to pay all costs other than of an ordinary administration suit. *Hodgins v. McNeil*, 9 Gr. 305.

A legatee filed a bill against executors and another person, between whom and the executors, it was charged improper dealings had taken place with the estate. The charges so made were not sustained in evidence, and the plaintiff was therefore ordered to pay the costs of the defendants to the hearing, and allowed only costs of and subsequent to decree; and cross-charges of improper conduct having been brought against the plaintiff by other legatees made parties to the suit, and not substantiated, the costs incurred in resisting such charges were directed to be paid by the parties making them. *Miller v. McNaughton*, 11 Gr. 308.

Imperfect Accounts.]—In a suit for administration it appears that the personal representative had kept very imperfect accounts

of the estate, and that those brought into the master's office had been made up partly from scattered entries and partly from memory:—Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate. *Killins* v. *Killins*, 29 Gr. 472.

Improper Conduct.]—Where executors had improperly dealt with a portion of the funds of the estate, by allowing one of their number to retain it in his hands at a low rate of interest, the court refused their costs prior to decree. *Ashbough* v. *Ashbough*, 10 Gr. 433.

Costs given to plaintiff under special circumstances, notwithstanding fraud was charged against executors, which was not established. *Ib.*

Improper Management.]—Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample. *Kennedy* v. *Pingle*, 27 Gr. 305.

Infant's Action.]—An infant is incapable of bringing suits in his own name, or of making himself or the estate he assumes to represent liable for the costs of such suits. *Merchants Bank* v. *Monteith*, 10 P. R. 334.

Insolvent Estate—*Administrator's Status.*]—The administrator is a necessary party to an administration suit, and as such, should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent, the creditors are the persons really interested in the litigation, and it is for them, and not for the administrator, to take active steps by way of appeal to reduce the claims of secured creditors. The administrator is entitled to attend upon such appeals, and to tax a watching brief, but not such costs as if he were the principal litigant. *Re Monteith Merchants Bank* v. *Monteith*, 11 P. R. 361.

Just Allowance—*Unsuccessful Litigation—Advice of Court.*]—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate, and being unsuccessful, were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts. Where it is plain that a dispute can be settled only by litigation, it is not necessary for a trustee to ask the advice of the court before defending. *In re Williams*, 22 A. R. 196.

Liability of Estate for Costs of Administrator's Action.]—Where an administrator brought an unfounded action against the testator's widow, which she was put to costs in defending:—Held that her only remedy for such costs was against the administrator personally, not against the estate. *Rodgers* v. *Rodgers*, 13 Gr. 457.

Litigation with Third Persons.]—In litigating with third persons, executors are, with respect to costs, in the same position as parties who litigate in their own right. *Great Western R. W. Co.* v. *Jones*, 13 Gr. 355.

Misconduct of Legatee—*Charging Costs on Share.*]—The plaintiff wished to administer to the estate of his brother in the county of Westmoreland and Province of New Brunswick, but was unable to give the necessary administration bond until the defendant W. and one J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but the plaintiff would not assist them in doing so. In passing the accounts of the estate in the probate court of Westmoreland county, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due to several claimants were settled by the court. Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally the plaintiff filed a bill to compel the defendants to pay him his portion of the estate, with $1,000 which he claimed as commission, and also to hand over to him the shares of the next of kin. A decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs, as between solicitor and client, which could be retained out of the plaintiff's share of the estate. *O'Sullivan* v. *Harty*, 10 A. R. 76, 11 S. C. R. 322.

Moderation of Costs.]—Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the master may, without taxing the bill, moderate it by deducting charges which appear not to be proper. *McCargar* v. *McKinnon*, 17 Gr. 525.

Moderation of Costs Paid by Executor.]—Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings:—Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors. Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation. *Re Hague, Traders Bank* v. *Murray*, 12 P. R. 119.

Mortgage Action—*Personal Order.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

Neglecting to Prepare Accounts.]—Where the executors, by neglecting to prepare accounts or afford information reasonably

called for by the legatees, had given rise to the suit, they were charged with the general costs thereof, less certain costs occasioned by unfounded claims set up by the bill. *Smith* v. *Roe*, 11 Gr. 311.

Out of Estate.]—Where an executrix appealed against the master's report, and the appeal was allowed without costs:—Held, that she could not, on further directions, claim the costs of the appeal out of the estate. *Story* v. *Dunlop*, 13 Gr. 375.

Personal Liability.] — Executors employing an attorney, are personally responsible to him for the costs. *Dickson* v. *Crooks*, M. T. 4 Vict.

A trustee or executor stands in the same position as any other litigant with respect to costs. *Smith* v. *Williamson*, 13 P. R. 126.

Where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the holder of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with the moneys of the defendant, and took the conveyance in his own name, and that the defendant was the true owner of the land:—Held, that the fact that there was no declaration of trust in favour of the defendant, and that the evidence in the hands of the administrator tended to shew that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for costs; which were given to the defendant against both plaintiffs. *Ib.*

Plaintiff Claiming too Much.] — The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income, and for administration. The master reported a balance of income in the hands of the executors, being an amount charged against them for interest upon moneys retained by them and not invested according to the terms of the will; but the conduct of the executors was otherwise proper:—Held, that if the question of the liability of the executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was unnecessarily sought by bill and granted, no costs should be awarded for or against the executors. *McCardle* v. *Moore*, 2 O. R. 229.

Reserving Costs.] — On the opening of the pleadings charging an executor with misconduct, the plaintiff offered to accept a reference to take accounts. The court, in the absence of evidence shewing whether or not the plaintiff was justified in making the charges, reserved the general costs of the suit, as well as the additional costs caused by the filing of the bill. *Eberts* v. *Eberts*, 25 Gr. 565.

Resisting Doubtful Claim.] — The court, although it considered the plaintiff entitled to be paid his demand, thought the executor, under the peculiar circumstances, was justified in having resisted payment without the sanction of the court, and that in the administration of the estate the executor would be entitled to be paid his costs of litigation. *Griffith* v. *Paterson*, 20 Gr. 615.

Retaining Costs out of Plaintiff's Share.]—A bill had been dismissed with costs to be paid by the plaintiff. Two of the defendants were administrators, and as such had funds in their hands to which the plaintiff was entitled as one of the heirs and next of kin of the intestate. The defendants had been unable to obtain the costs by fi. fa. and filed a petition asking to be allowed to retain the funds in the hands of the administrators:—Held, that the court had no control over the funds, and the petition was dismissed with costs. *Black* v. *Black*, 1 Ch. Ch. 360.

Reversed Decree.]—Executors will be ordered personally to repay costs paid to them or their solicitor under a decree which is afterwards reversed. *Davidson* v. *Thirkell*, 1 Gr. 284.

Solicitor Executor — *Costs—Remuneration.*]—On the passing of executors' accounts, one of the executors being a member of the firm of solicitors who acted for the estate, the bill of costs of the executors' solicitors' firm was objected to on the ground that an executor can make no profit out of the estate:—Held, that the solicitors' bill of costs might be allowed as part and parcel of the remuneration. *Re Leckie*, 36 C. L. J. 136.

Specific Performance.]—A purchaser of real estate paid a portion of the purchase money during the lifetime of the vendor, and after his decease paid the balance to his personal representatives. None of the heirs-at-law were infants, but they refused to execute a conveyance to the purchaser, who filed a bill against the real and personal representatives for specific performance. The conduct of the personal representatives was shewn to have been correct, and the court, in making the decree asked, ordered the plaintiff to pay the personal representatives their costs; but gave the plaintiff his costs of suit against the heirs-at-law; not against the estate of the vendor. *Addaman* v. *Stout*, 13 Gr. 692.

Quære, where it is clear that a purchaser of real estate has paid all his purchase money, whether it is necessary, in a suit for specific performance against the heirs-at-law of the vendor, to make the personal representatives parties to the bill therefor. *Ib.*

In such a case it would seem sufficient to add the personal representatives as parties in the master's office. *Ib.*

Suit Recklessly Instituted.]—The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the surrogate court—and her husband, alleging certain acts of misconduct, which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party. *Hutchinson* v. *Sargent*, 17 Gr. 8.

Unauthorized Investments.] — It was shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers:—Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree. *Killins* v. *Killins*, 29 Gr. 472.

Unsuccessful Defence of Validity of Will.]—M. H. proved a will as executrix; afterwards a subsequent will was found dated about a time when the testator was in a weak state of health, both physical and mental. A suit was brought by S. H., the executor in the later will, against M. H. to set aside the first and establish the second will, which was successful, and in which M. H. was ordered to pay costs:—Held, that M. H., in an action for an account of her dealings with the estate, having a fair question for litigation in endeavouring to uphold the first will, was entitled to the costs thereof out of the estate. *Hill* v. *Hill*, 6 O. R. 244.

Unnecessary Proceedings.]—Where a legatee filed a bill charging the executors with neglect and improper conduct in the management of the estate, all the charges being shewn to be groundless, the executors having managed the estate to the best of their ability, and the case in reality being such as should have been proceeded with by a summary application for an administration order, the court, on further directions, ordered the next friend of the plaintiff to pay the executors their costs up to the hearing; not the costs of the decree, or of taking the accounts, or of subsequent proceedings, but directed the plaintiff to pay her own costs thereof. *Moodie* v. *Leslie*, 12 Gr. 537.

See sub-title I. 2 (c).

See, also, COSTS, II. 6, IV.

IV. EXECUTOR DE SON TORT.

Administrator Appointed.]—An action will not lie against one as executor de son tort, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased. *Armstrong* v. *Armstrong*, 44 U. C. R. 615.

Foreign Executors.]—Debt against defendants as executors of J. S., on a judgment recovered against him. Pleas, ne unques executors, and plene administraverunt. It appeared that the testator, who had formerly lived in St. Lawrence county in the United States, and in this Province, died on his return from California, leaving a will, but appointing no executors. Defendants had obtained administration with the will annexed from the surrogate court of St. Lawrence county, being the proper tribunal there, and having duly administered all the assets (the greater part being appropriated to a debt due to one of the administrators,) had obtained their discharge. No assets were shewn in this country, and no intermeddling by the defendants here. The evidence was conflicting as to whether testator's domicile was in this Province or in St. Lawrence county, but the jury found that it was in St. Lawrence county; and a verdict was rendered for defendants:—Held, that such verdict was right. *Jessup* v. *Simpson*, 14 U. C. R. 213.

Payments to.]—Payments made to an executor de son tort form no defence to an action by the rightful executor. *Hunter* v. *Wallace*, 13 U. C. R. 385.

Proof.]—Whether a party has made himself an executor de son tort is a mixed question of law and fact. The jury must find the facts if disputed, and the court are to say whether those facts create an executorship. *Haacke* v. *Gordon*, 6 U. C. R. 424.

Revivor.]—An action commenced against an intestate may be revived under C. S. U. C. c. 22, s. 134, and continued against his executor de son tort. *Keena* v. *O'Hara*, 16 C. P. 435.

This question cannot be raised under a plea of ne unques executor. *Ib.*

Sale of Real Estate.]—Real estate cannot be sold in this Province under an execution obtained against an executor de son tort. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 586; *Weatherell* v. *Bates*, 15 U. C. R. 391; *Graham* v. *Nelson*, 6 C. P. 280.

Sale of Reversion.]—The sale of a reversion in a term of years under a fi. fa. on a judgment against an executor de son tort, is a valid sale as against a rightful administrator; and, semble, it is not necessary that the executor should have been in actual possession in respect of the term. *Bain* v. *McIntyre*, 17 C. P. 509.

Selling Goods of Deceased Person.]—The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor de son tort. The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title; such person, though he may not be able to establish his claim of title completely in every respect, is not liable to be charged as an executor de son tort. *Merchants Bank* v. *Monteith*, 10 P. R. 467.

Set-off.]—In an action by a creditor against an executrix de son tort, she cannot set off a debt due from the plaintiff to her testator. Held, also, that she may be sued as executrix, and on her defending as such the plaintiff may reply that she is executrix de son tort. *Cameron* v. *Cameron*, 23 C. P. 289.

Specific Performance.]—In proceeding against the heir-at-law of a purchaser, in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased is a necessary party to the suit, and without one the suit is defective, though an executor de son tort is a defendant, and though no administration had been taken out before the filing of the bill. *O'Neal* v. *McMahon*, 2 Gr. 145.

Statute of Limitations.]—An executor de son tort cannot, by giving a confession of judgment, or making payments on account of a debt or by any other act of his, give a new starting point to the Statute of Limitations as against the rightful administrator, or the parties beneficially interested in the estate. *Grant* v. *McDonald*, 8 Gr. 468.

What Constitutes.]—A party may make himself an executor de son tort by answering as executor to any action brought against himself, or by pleading any other plea than ne unques executor. *Haacke* v. *Gordon*, 6 U. C. R. 424.

See, also, *Jessup* v. *Simpson*, 14 U. C. R. 213.

V. LETTERS PROBATE AND LETTERS OF ADMINISTRATION.

1. *In General.*

Action to Impeach Will.]—A bill impeaching a will of which probate had been granted to the plaintiff by the surrogate court stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will. The wills disposed of both real and personal estate:—Held, that whether the will had been proved in common form or in solemn form, the court of chancery had jurisdiction to try its validity. *Perrin* v. *Perrin*, 19 Gr. 259.

Ancillary Probate—*Surrogate Court.*]—A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. c. 9 (O.). *In re Maclaren*, 22 A. R. 18.

Collateral Attack on Probate.]—The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper surrogate court. The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will:—Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of letters probate, issued by a surrogate court having jurisdiction, and when the person on whose death the letters probate were issued is really dead, it must be done in an independent proceeding with the proper parties before the court. Irwin v. Bank of Montreal, 38 U. C. R. 375, followed. Quære, whether the application must be to the surrogate court or not. *Book* v. *Book*, 15 O. R. 119.

See *Eades* v. *Marshall*, 17 U. C. R. 173.

Contention as to Grant—*Removal to High Court.*]—The legislature has intended that only those causes in which disputed questions of law or fact arise should be removed to the court of chancery, and not contentions as to whom administration should be granted. *In re Beckwith*, 5 L. J. 256.

The 36th section of the Surrogate Act provides for an appointment of an administrator pendente lite when the cause is reserved by the Judge for argument in term. *Ib.*

Where the validity of a will relating to both real and personal estate was in dispute, the personal property being worth at least £2,000, and it was sworn and not denied that the questions to be determined were of such importance that they could be more effectually tried and disposed of in the court of chancery than in the surrogate court, an order for removal was made. *Re Eccles*, 1 Ch. Ch. 376.

The personalty of a person who died since the Devolution of Estates Act was less than $2,000, but her whole estate, including land, was more than that sum:—Held, that a contest as to the grant of probate of her will could not be removed from a surrogate court to the high court; for the words "personal estate" in s. 31, s-s. 2, of the Surrogate Courts Act, R. S. O. 1887 c. 50, mean personal estate proper, notwithstanding that by the Devolution of Estates Act, R. S. O. 1887 c. 108, the whole estate is now to be administered as personalty. *Re Nixon*, 13 P. R. 314.

Upon an application by certain of the next of kin of an intestate, under s. 31 of the Surrogate Courts Act, R. S. O. 1887 c. 50, to remove from a surrogate court into the high court a cause in which a contention arose as to the grant of administration, it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one; that the next of kin opposed the petition; that neither widow nor next of kin could, unaided, supply the necessary security; and that there were no creditors:—Held, that the jurisdiction to award grant, being of a discretionary kind, could be better exercised by the surrogate Judge, and the cause should not be removed. The personal disqualification of a surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the high court; for he can call in the aid of a neighbouring county Judge. Where the assets are separable, administration may be granted quoad, i. e., to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin. *Re McLeod*, 16 P. R. 261.

Creditor—*Foreign Administration.*]—One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R. and with his consent, applied here for letters of administration to be granted to him by the surrogate court. E., however, residing at Toronto, and as next of kin to B., also applied here for administration to B.'s estate. S. now applied to have the matter transferred into the high court, or for a writ of prohibition to the surrogate Judge preventing him granting letters to E., and a mandamus ordering him to grant them to S.:—Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the court in Maine, the status of the creditor who obtained administration there, or of his appointee, was not such as to compel the surrogate Judge here to pass over the next of kin. The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. 1877 c. 46, ss. 32, 36, do not better the claim of a creditor. Browne v. Phillips, Ambl. 416, followed. Re Hill, L. R. 2 P. & D. 89, distinguished. *Re O'Brien*, 3 O. R. 326.

Crown—*Administration—Setting Aside Probate.*]—Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the attorney-general on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding. Such an action under the statute R. S. O. 1887 c. 59 is not for the purpose of escheating, but to protect the property for the benefit of those who may be entitled. *Regina* v. *Bonnar*, 24 A. R. 220.

English Probate.]—Probate of a will granted by the court of Canterbury, gives no

title to an executor to sue for a cause of action accruing in this country, the testator having died here. He must produce letters testamentary from the proper authority in this Province. *White* v. *Hunter*, 1 U. C. R. 452.

Establishing Lost Will.]—A will was prepared and sent to testator, and was subsequently seen, signed by him, in the hands of his wife, by the father of the residuary legatee and devisee, who read it over, and immediately on his return home made a pencil jotting of the names of the executors as well as of the several bequests other than the provision for the wife: and five days before his death the testator told him that his will was still in existence, and that he had given it to a person, whom he refused to name, to have a codicil prepared, and a second memorandum was made by him from the words of the testator, of the contents of the will, which agreed substantially with the first. After testator's death no trace of the will could be discovered. The court made a decree establishing the will, and directing probate to be granted to the executors named therein. *Bessey* v. *Bostwick*, 13 Gr. 279.

Where, in consequence of the state in which a testator left his papers, a reasonable doubt was created as to his having left a will, the costs of the parties necessary to discuss the question of "will or no will?" were ordered to be borne by his estate. *S. C.*, 14 Gr. 240.

Executor of Executor—*Special Direction.*]—L. appointed M. and K. executors and trustees of his will for the management of his property thereby bequeathed (which was personalty) and the payment of the legacies: and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint R. to be one of the trustees." M. proved the will; after his death K. renounced:—Held, that M.'s executor did not represent the testator L.: and that R. was entitled to probate. *In re De Lavonde*, 19 Gr. 119.

See also *Bloomfield* v. *Brooke*, 8 P. R. 266, 16 C. L. J. 145.

Foreign Letters of Administration—*Administrators Describing Themselves as Executors.*]—In an action on a note indorsed to the plaintiff, in the State of New York, by the administrators of the payee, to prove the administrators' authority, an exemplification of letters of administration was put in, granted by the surrogate court of the county of Otsego, in New York, where the payee had died, and purporting to be signed by the surrogate, who certified it to be a copy of the original record of the letters, and a seal was affixed described as his seal of office. Attached to this was a certificate under the great seal of the State of New York, purporting to be signed by the governor, verifying the signature and office of the surrogate Judge, and the seal of his court:—Held, sufficient. Held, also, immaterial that the administrators had added to their names "executors" instead of "administrators," the addition being surplusage. *Hard* v. *Palmer*, 21 U. C. R. 49.

Foreign Probate.]—An American probate of the will may be received as corroborative evidence of the representative character of the executor. *Sloan* v. *Whalen*, 15 C. P. 319.

Foreigner Dying in Itinere.]—The law of England as to granting probate or administration, is the law to be administered by our probate and surrogate courts. Where a party domiciled in New York died suddenly in itinere in the county of Wentworth, in this Province, having trifling personal effects of less value than £5:—Held, that the surrogate court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted only to an inhabitant of this Province. *Grant* v. *Great Western R. W. Co.*, 7 C. P. 438; affirmed on appeal, 5 L. J. 240.

The deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in this Province; the plaintiff (his widow) obtained letters of administration from the surrogate court of York:—Held, the grant of letters by the surrogate court of York was valid and effectual, and,—Semble, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked. *Jennings* v. *Grand Trunk R. W. Co.*, 15 A. R. 477.

Foreign Mortgagee.]—Where a person, resident in a foreign country, dies possessed of mortgages on land situate in the Province, the surrogate court of the county where the land lies may grant administration where the surrogate court of no other county has jurisdiction. *In re Thorpe*, 15 Gr. 76.

Fraudulent Administration.]—One L., who died in 1870 in Ireland, had deposited money at the branch of defendants' bank in Cobourg in 1869. Letters of administration were granted on 25th April, 1872, by the probate court of the district registry at Ballina in Ireland, to J. G., at whose house L. died, who represented himself to be his cousin-german and only next of kin. An exemplification thereof was recorded in the superior court of Montreal, and on this the bank, in September, 1872, paid over the amount to G.'s attorney in Montreal, who handed to the bank the receipt which he had obtained from G. It appeared, however, that G. had obtained the administration by fraud, not being L.'s next of kin. In August, 1872, administration was granted by the court of probate in Ireland, at Dublin, to the plaintiff, L.'s brother, and in May, 1872, the plaintiff notified defendants' manager at Cobourg not to pay over any money except to himself. The evidence shewed that the probate court at Ballina had power to grant the administration, and by C. S. L. C. c. 91, the administrator of any one dying abroad is recognized and has the same power in Lower Canada as in the country where he was appointed or resides:—Held, 1. That the Ballina administration, though obtained by fraud, was valid until revoked by some expressed judicial act, and was not revoked by the mere issue of the Dublin grant. 2. That by the law of Lower Canada J. G. was entitled under that grant to receive payment in Montreal. 3. That although the money was payable at Cobourg, defendants paid it rightfully at their head office at Montreal. 4. That defendants were bound to pay it on demand made under the Ballina grant, notwithstanding the notice served on them. 5. That it was a payment made in Montreal in good faith to the ostensible creditor, under articles 1144 and 1145 of the L. C. Code Civile. *Irwin* v. *Bank of Montreal*, 38 U. C. R. 375.

Remarks upon the necessity for some amendment of the law, in order to prevent the obtaining of letters of administration by fraud and without giving security. *Ib.*

Infant Executor.]—A grant of probate to an infant executor along with an adult is not a nullity. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 382.

The 6th section of 38 Geo. III. c. 87 (Imp.), prohibiting the grant of probate to infants under the age of twenty-one, is in force in Ontario, either as a rule of decision in matters relating to executors and administrators, (R. S. O. 1877 c. 40, ss. 34 and 35) or as a rule of practice in the probate court of England (R. S. O. 1877 c. 46, s. 32). *Merchants Bank* v. *Monteith*, 10 P. R. 334.

An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in, such infant. *Ib.*

Letters Issued by Wrong Court.]—Action on a note made by defendant, payable to B., and indorsed by B.'s administrator to plaintiff:—Held, no ground for impeaching the indorsement of the administrator, that the debtor at the time of the intestate's death resided out of the jurisdiction of the surrogate court by which the letters of administration had been granted. *Wright* v. *Meriam*, 6 O. S. 463.

Where to an action on a note brought by an executor, the defendant pleaded that at the time of the testator's death the defendant resided in the London district, and that therefore the letters testamentary granted by the surrogate court of the home district were void, and the plaintiff demurred, the court gave judgment against the demurrer. *King* v. *Claris*, H. T. 2 Vict.

Limited Administration.]—The surrogate courts here can grant limited administrations, as the probate court in England can. *In re Thorpe*, 15 Gr. 76.

See Conron v. *Clarkson*, 3 Ch. Ch. 368.

Lower Canadian Will.]—A will devising lands in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the court of King's bench there, and copies thereof directed to be made and given to the parties legally entitled thereto:—Held, that an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such. *Patulo* v. *Boyington*, 4 C. P. 125.

Mandamus to Compel Grant of Administration.]—A mandamus was directed to issue to compel the Judge of the surrogate court of the county of Wellington, to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed all necessary papers), notwithstanding that in an issue directed out of the said surrogate court a jury had found against the will. It appeared that the present applicant was no party to that issue, and that since the trial of it the high court had held in favour of the will:—Held, that this was not a case for an appeal from the refusal to grant administration under s. 31 of the Surrogate Courts Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration, which no one was doing here. Semble, that the high court has jurisdiction to declare a will valid. *Dickson* v. *Monteith*, 14 P. R. 719.

Probate as Evidence.]—Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's death as well as of the will. *Davis* v. *VanNorman*, 30 U. C. R. 437.

Revocation of Letters of Administration—*Surrogate Court.*]—The high court of justice for Ontario has no jurisdiction to revoke the grant by a surrogate court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Several Executors—*Probate to One.*]—An action can be maintained by two or more executors for the goods of a testator where probate is only issued to one, or goods taken out of the possession of one of them, possession of one being possession of all. *Bryce* v. *Beattie*, 12 C. P. 409.

Two Testamentary Papers Treated as One Will—*Surrogate Court Fees—Trust Estate.*]—A testator executed two testamentary papers on the same day, the one as to his individual estate, the other as to property held in trust:—Held, that they were to be admitted to probate as making together the last will of the testator. Held, also, that the statute imposing fees of $1 and 50 cents respectively per $1,000, did not apply to the trust estate. *Re Reid*, 32 C. L. J. 200.

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2. *Renunciation.*

Disclaimer.]—A disclaimer as executor by one of two executors and devisees in trust, does not prevent the trust estate from vesting. *Doe d. Boyer* v. *Claus*, 3 O. S. 146.

Executor Sued after Renunciation.]—Where an executor, who has renounced probate of the will, is made defendant to a suit, the bill will be dismissed, as against him, with costs. *Stinson* v. *Stinson*, 2 Gr. 508.

Forfeiture of Bequest.]—Renunciation by executor held a forfeiture of bequest in his favour. *Paton* v. *Hickson*, 25 Gr. 102.

Form of Renunciation.]—A written renunciation, though not sealed, made before the surrogate, and produced from his office, is sufficient to entitle the remaining executors to act under 21 Hen. VIII. c. 4. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224.

Liability notwithstanding Renunciation.]—Where executors named in a will renounce probate, what acts or dealings will, notwithstanding, render them liable as having assumed the duty of executors, considered. *Vannatto* v. *Mitchell*, 13 Gr. 665.

Three persons were named as executors. They declined to prove the will, and renounced probate, but expressed their willingness to assist the family with their advice, and accordingly assisted in preparing a list of debts due by the estate, and of the assets and value thereof. On being spoken to by a creditor, one of them stated that they had been named as executors; assured the creditor that he was all right, and that there was enough to pay the debts; another of them subsequently wrote

to the widow stating that he and the other parties named "were in Port Hope yesterday, and after legal advice on the subject, have relinquished all further action on the will"—Held, that these facts did not show such a dealing with the estate as would render the parties liable as executors, in opposition to their renunciation. *Ib.*

Release by Executor.]—A release by an executor who is also a trustee does not amount to a relinquishment of the trust. Doe d. Boyer v. Claus, 3 O. S. 146, approved. *Doe d. Berringer* v. *Hiscott*, 6 O. S. 23.

Withdrawing Renunciation.]—Under C. S. U. C. c. 16, s. 1, the renunciation of probate by one of two or more executors is final, and cannot be recalled on the death of the acting executor or executors. *Allen* v. *Parke*, 17 C. P. 105.

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3. *Rights before Grant.*

Action before Grant of Administration.]—Since the Ontario Judicature Act the rule in equity prevails as opposed to that at law, that letters of administration when obtained relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before the trial. *Trice* v. *Robinson*, 16 O. R. 433.

The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action. Trice v. Robinson, 16 O. R. 433, distinguished. *Chard* v. *Rae*, 18 O. R. 371.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the court to ascertain whether an action was begun in time by a properly constituted plaintiff. *Ib.*

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1888, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At the time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. 1887 c. 60, s. 1:—Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed. Semble, that an objection raised at the trial that L. was not before the court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors. *Ib.*

Executors Defending before Probate.]—Executors having defended an action on a note as executors and judgment having been recovered against them as such, they were held to have accepted office; want of probate was immaterial and the sheriff's sale on such judgment was valid. *McDonald* v. *McDonald*, 17 A. R. 192.

Executor's Powers before Probate.]—An executor, without proving the will, has power to do almost all acts incident to his office. *Robinson* v. *Coyne*, 14 Gr. 561.

See Bryce v. *Beattie*, 12 C. P. 469.

Judgment before Probate.]—The title of an executor being derived from the will and not from the probate, the court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump* v. *Bradley*, 15 Gr. 30; and see *Manderville* v. *Nicholl*, 16 U. C. R. 609.

Payment of Legacy.]—See *Ross* v. *Ross*, 4 Ch. Ch. 27.

Promise to Pay Made before Administration.]—An express promise to pay made to a third party may enure to the benefit of an administrator de bonis non with the will annexed, though at the time of such promise he had not obtained letters of administration. *Beard* v. *Ketchum*, 6 U. C. R. 470.

Relation Back of Administrator's Title.]—The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration. *Deal* v. *Potter*, 26 U. C. R. 578.

Held, that the grant of letters of administration had relation back to the death of the intestate, so as to enable the administratrix to sue upon a contract made by her before such grant, for the sale of the good-will of the intestate's business as a surgeon and physician. *Christie* v. *Clark*, 16 C. P. 544, 27 U. C. R. 21.

Statute of Limitations—*Acknowledgment.*]—An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations. *Robertson* v. *Burrill*, 22 A. R. 356.

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4. *Succession Duty and Surrogate Fees.*

Court Fees on Grant.]—See *In re Dallas*, 29 U. C. R. 482.

Residue—*Pro Ratâ.*]—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided pro ratâ among the legatees:—Held, that it was the duty of the executors to deduct the succession

duty payable in respect of the pecuniary legacies before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. Where the residue of an estate is directed to be divided pro ratâ among prior legatees they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Share in Partnership.] — For the purpose of taking out probate and paying the fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the share of the deceased, undiminished by the debts and liabilities of the firm. *In re Surrogate Court of Wentworth and Kerr*, 44 U. C. R. 207.

Trust Estate.]—See *Re Reid*, 32 C. L. J. 200.

See also, REVENUE.

VI. LIABILITIES.

1. *In General.*

Account Stated — *Debt of Testator.*]—See *Watkins* v. *Washburn*, 2 U. C. R. 291.

Building — *Want of Repair—Damages—Law of Quebec.*]—See *Ferrier* v. *Trepannier*, 24 S. C. R. 86.

Collector of Taxes.]—The testator, having been appointed by the finance committee of the district council to collect the wild land tax:—Held, that his representatives were liable to the council for money received by their authority and not paid over. *Municipal Council of Lincoln, Welland, and Haldimand* v. *Thompson*, 8 U. C. R. 615.

Contract of Testator.]—Upon an action brought against executors for the board and education of testator's daughter, an oral contract, at the most for three years, was proved with the testator, and plaintiff's knowledge of his death was shewn by charges made in the plaintiff's account:—Held, that the contract not being a binding one upon the testator if alive, his executors were not liable on it. *Institute of Ladies of the Sacred Heart* v. *Matthews*, 10 C. P. 437.

Covenant.] — Where executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, &c., in the deed, for good title:—Held, that they were personally liable, and that the grant by them as executors could not control their express covenant. *McDonald* v. *McDonell*, 6 O. S. 109.

Covenant of Testator.] — See *Lee* v. *Lorsch*, 37 U. C. R. 262.

Death of Surety.] — The executors of sureties are liable for the defalcation of the principal, committed after the death of their testator, and even after notice that they would not be liable. *Regina* v. *Leeming*, 7 U. C. R. 306.

Devastavit—*Ca. Sa.*]—The court allowed a judgment on a sci. fa. against an administrator to be amended in the name of the intestate, by making it correspond with the original judgment against him. On a return of devastavit a ca. sa. does not issue as a matter of course, without inquiry. *Willard* v. *Woolcott*, Dra. 201.

Devastavit—*Evidence.*] — In an action of debt against an administrator to make him personally liable upon a judgment recovered by default against the goods of the intestate, alleging waste:—Held, that the record of the judgment in the first action and the writ of fi. fa. thereon, and the sheriff's return of nulla bona, were sufficient primâ facie evidence to shew a devastavit, and that the production by defendant of writs of fi. fa. against the intestate's goods, with the sheriff's return of feci thereon, without proving the judgments on which they were founded, was not sufficient evidence to shew that the intestate's estate had been exhausted. *Wilson* v. *Andrew*, 6 C. P. 428.

Enforcing Agreement to Make a Will.] — An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. *Roberts* v. *Hall*, 1 O. R. 388.

See, also, CONTRACT, IV. 1.

Fraudulent Judgment against Testator.]—See *Schroeder* v. *Rooney*, 11 A. R. 673, Cassels' Dig. 403.

See also, FRAUD, IV., 1.

Goods Supplied to Executors.] — A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors:—Held, that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally. *Campbell* v. *Bell*, 16 Gr. 115.

Infant—*Devastavit.*]—An infant, whether executor or executor de son tort, is not liable for a devastavit. *Young* v. *Purves*, 11 O. R. 597.

Infant—*Liability to Account.*]—In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will and had taken possession of the personal estate, and who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition:—Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Gr. 247.

Intestate's Fraud.] — In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase; the assignment was made absolute in form so as to deceive and defraud other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees. Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendors in respect of the contract, obtained an award of $1,000 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,000:—Held, that the plaintiff was entitled to such payment; that in view of the fraud and trust, the lapse of time was

no defence, and that a bill against the assignees by the creditor, instead of by the administrator, was proper. *Gillies* v. *Haw*, 19 Gr. 32.

Misappropriation by Agent.] — When a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him, and to take all due precautions and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Law* v. *Gemley*, 18 S. C. R. 685.

Mortgage — *Release of Purchaser of Equity of Redemption.*]—The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect of the mortgage. Judgment below, 30 O. R. 684, affirmed. *Higgins* v. *Trusts Corporation of Ontario*, 27 A. R. 432.

Negligence—*Agent's Fraud.*]—Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands:—Held, that the executors were protected by the Trustee Limitation Act, R. S. O. 1897 c. 129, s. 32. Held, also, that payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, did not keep alive the right of action against the executors. Judgment below, 30 O. R. 532, reversed. *Clark* v. *Bellamy*, 27 A. R. 435.

Promissory Note.]—Action against J. S. M. and J. his wife, M. N., and W. N., as makers of four notes signed "The executors of the estate of the late W. N., per pro. J. S. M." M. N. was called as a witness by plaintiffs, and proved that J. S. M. had managed the affairs of the estate since testator's death, and she had left it to him to do what he thought best in winding it up; but she said she never gave him power to make her personally liable, and that she knew nothing of these notes:—Held, that though M. might have sufficient authority as regarded the estate, he clearly had none to bind defendants personally, as they were sued. *Gore Bank* v. *Meredith*, 26 U. C. R. 257.

The plaintiffs sued defendant, an executor of E., as indorser of three notes payable to "the executors of the late E." two being indorsed "J. M. B., agent of the executors of the late E." and the third "the executors late E., per pro. B." B. held a power of attorney from the executors, by which they as executrix and executors authorized him (among other things) for them as such to make and indorse all such notes as might be requisite in the management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, indorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties. M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no inquiries as to the extent of B.'s authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The court being left to draw inferences of fact, and the question being the personal liability of the defendant:—Held, 1. That the indorsements were sufficient in form; but, 2. that not being for the purposes of the estate they were not within the authority given to B., the extent of which it was plaintiffs' duty to ascertain; and a nonsuit was ordered. Quære, as to the effect of a power given by an executor. Semble, that it may authorize the attorney to charge him by acceptances, &c., in his own right, for otherwise it would be illusory, but only for the payment of testator's debts. *Gore Bank* v. *Crooks*, 26 U. C. R. 251.

See as to Quebec law, *Lionais* v. *Molsons Bank*, 10 S. C. R. 526.

See, also, BILLS OF EXCHANGE, VIII. 3.

Quebec Law—*Transfer — Administration —Trustee—Agent—Nullity—Art.* 1484 *C. C.*] —See *Guertin* v. *Saunterre*, 27 S. C. R. 522.

Quebec Law—*Debat de Compte—Interest —Prescription.*]—See *Darling* v. *Brown*, 2 S. C. R. 26.

Scotch Contract.]—Where in assumpsit on a contract against executors they pleaded that the cause of action accrued in Scotland, against their testator and one A. jointly; that A. was still living; and that by the law of Scotland, where the contract was made, if one of the parties to a joint contract die, his personal representatives are discharged, — the plea was held bad on a general demurrer, as by our statute 1 Vict. c. 7, the law here is different, and the lex loci contractus applies only to the contract, not to the remedy. *Gilmore* v. *Crooks*, H. T. 6 Vict.

Taxes.] — Where executors and devisees in trust of land were assessed as owners:—Held, that they were properly so assessed, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 U. C. R. 276.

Testator's Fraud.]—G. having dissolved partnership with M., by the terms of the dissolution held certain land subject to a lien of $525, to be paid by M. M. then arranged a sale to C. for $2,250, intending to defraud any company who would lend $1,125, on the security of the land (it being really worth about $6000), and drew up a receipt for $1,150, representing that sum as being part payment of the consideration money, which G. signed. G. subsequently executed a conveyance with $2,250 inserted as the consideration, and deposited it with his solicitor as an escrow, to be delivered up on payment of his $525 lien. It appeared G. had since died, and S. was appointed his administrator. M. and C. by means of an over-valuation and certain misrepresentations, one of which was the production of G.'s receipt, obtained a loan of $1,125 from the plaintiffs to C., and out of the proceeds paid S. the $525, and obtained the deed. At the trial it was shewn that the plaintiffs

were aware of the death of G. before they acted on or even knew of the existence of his receipt, and that S. knew nothing of the transaction except that he was entitled to the lien for $525:—Held, that the plaintiffs could not recover against S. as representative of G., for no cause of action existed against G. at the time of his death, and S. had done no wrong. *Hamilton, Provident and Loan Society* v. *Cornell*, 4 O. R. 623.

In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate. *Ib.*

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2. *Acts of Co-executor.*

Allowing Co-executor to Receive Purchase Money.]—By his will the testator empowered his executors, if required, to sell a parcel of his lands to pay off "debts or incumbrances" against his estate. The land was sold by the executors, all of whom in some degree acted in their executorial capacity or as trustees, but by tacit consent, one of them took the actual management of the estate and received the moneys arising from it, including the proceeds of the said sale, which he misappropriated. An executrix joined in the conveyance to the purchaser for the sake of conformity, but did not receive any of the purchase money, nor was there any evidence that she knew a balance remained in the hands of her co-trustee after satisfying the "debts or incumbrances," or that he was misapplying it:—Held, that under these circumstances, the executrix was not responsible to the estate for the misappropriation by her co-trustee. Held, also, that even if she had been liable for the principal money so misappropriated, she would not have been for the interest, inasmuch as the principal never came into her hands. McCarter v. McCarter, 7 O. R. 243; Burrows v. Walls, 5 DeG. M. & G. 233; Rodbard v. Cooke, 25 W. R. 556; and Cowell v. Gatcombe, 27 Beav. 568, distinguished. *Re Crowter, Crowter* v. *Hannan*, 10 O. R. 159.

Allowing Solicitor to Receive Purchase Money.]—Three executors under a will sold certain real estate of the testator. One of them who was entitled to the annual income of the proceeds thereof, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums, $980 and $1,580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded causing a loss to the estate of $1,960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default:"—Held, that all three were equally liable and must make good the amount to the estate, the rule being when one or more of several trustees acts or act in getting in and dealing with the trust funds, an inactive trustee is accountable therefor equally with the others, if having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter* v. *McCarter*, 7 O. R. 243.

Breach of Trust by One Executor—*Notice—Inquiry.*]—After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing quâ trustee and not as executor, to shift the burden of proof. Ewart v. Gordon, 13 Gr. 40, discussed. W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same:—Held, reversing 19 A. R. 447, and restoring 19 O. R. 426, and 20 O. R. 382, that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds. *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Cognovit by One.]—One of several executors cannot bind the others by a cognovit, and a judgment entered on such a confession was set aside as against all. The drawer of a bill accepted by the testator having joined in a confession thus given, the court refused to set aside the judgment as against him. *Commercial Bank of Canada* v. *Woodruff*, 21 U. C. R. 602.

Executor Discharging his own Mortgage.]—One of two executors was indebted to the estate on a mortgage to the testator of which his co-executor was aware, but took no steps to compel payment, and the mortgagor as executor executed a discharge under the statute, and registered the same:—Held, that the co-executor was liable to make good any loss occasioned thereby. *McPhadden* v. *Bacon*, 13 Gr. 591.

Quære, whether the discharge of mortgage, to be valid, did not require the signature of both executors. *Ib.*

See Beaty v. *Shaw*, 13 O. R. 21, 14 A. R. 610.

Executor of Executor — *Receipt of Money.*]—J. B. sr. and S. D. of Montreal, had been executors of C. B., who died in Montreal about 1844. S. D. proved the will in Ontario. The plaintiffs (two infants) were solely entitled under this will. J. B. sr. died in Montreal in 1869. T. B. and J. B. jr. were his executors, and both proved the will in Ontario, but T. B. alone acted as executor, J. B. jr. having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. B. and J. B. jr. were each entitled to a one-third share under the will of J. B. sr. A suit was brought for the administration of both estates, and a receiver appointed. In taking the accounts before the master S. D.'s attendance was dispensed with, as it appeared that none of the

assets of C. B.'s estate in Ontario had come to his hands. The master found T. B. and J. B. jr., who did not appear or file any accounts, indebted to the estate in about $51,000. In default of evidence to shew that any of the assets come to their hands formed part of C. B.'s estate, the master further found that the whole formed part of J. B. sr.'s estate. The decree ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B. sr. T. B. having died, the suit was revived. J. B. jr. applied to the court for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executors. Leave was given him to surcharge and falsify. J. B. jr. now distinguished the assets of the two estates, and sought to be relieved from liability as to the estate of C. B., on the ground that he was not executor of that estate; as to the J. B. sr. estate, he also sought to be relieved in several respects:—Held, that T. B. and J. B. jr. did not, by proving the will of J. B. sr. become executors of C. B., as J. B. sr. was not the sole or surviving executor of C. B.:—Held, that J. B. jr. was liable for the moneys of J. B. sr.'s estate, come to the hands of T. B., whether before or after the proving of the will, or before or after the power of attorney. *Bloomfield* v. *Brooke*, 8 P. R. 266, 16 C. L. J. 145.

Misappropriation of Funds.]—H. and C. were appointed executors. H. took upon himself the actual management of the estate with the knowledge and consent of, but not under any express agreement with, C. H. applied a sum of money to his own use, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other:—Held, that C. was not liable for the sum appropriated by H. *King* v. *Hilton*, 29 Gr. 381.

Mortgagor also Executor of Mortgagee.]—A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor. The mortgagor afterwards agreed with B., the owner of other property, for an exchange free from incumbrances, and that B. should pay $2,000 for the difference in value. The mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,000, no part of which, however, was payable. B. satisfied the $1,000, partly in money paid to the mortgagor, partly by a debt owing to B. by the mortgagor, and partly by moneys which had theretofore been lent by B. for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for $1,000 in full. The contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:—Held, that the contemporaneous payment was a valid payment pro tanto, the same having been made with the assent of the co-executor; but that the estate of the co-executor was not bound by the receipts indorsed on the mortgage; and that B. was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan. *Bacon* v. *Shier*, 16 Gr. 485.

Payment of Mortgage to One Executor.]—Five executors and trustees took an assignment of a mortgage to two of their number, which described them as executors and trustees under the will, but contained no further reference to the will. The agent for the five thereupon gave notice to the mortgagor that the assignment had been made to the executors:—Held, that he was justified in assuming that the assignment was made to the executors as such; and payments to one of them made bonâ fide were held valid. *Ewart* v. *Dryden*, 13 Gr. 50.

Payment of Purchase Money to One Executor.]—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Gr. 55.

Where such a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized. *Ib.*

Unauthorized Investments.]—A testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed them to be guided entirely by the judgment of C. as to the sale, disposal, and re-investment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. C. having made unauthorized investments of these moneys which proved worthless, the master charged his co-trustee B. with the amount thereof:—Held, that even if at the suit of creditors B. might have been chargeable, yet as against legatees he was exonerated. *Burritt* v. *Burritt*, 29 Gr. 321.

Using Money.]—Where one of two executors who was entitled under the will of his testator to a large sum charged on the real estate, but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same:—Held, that they were both equally liable to account for the whole of the principal sum and interest with rests. Re Crowter, Crowter v. Hinman, 10 O. R. 159, distinguished. *Archer* v. *Severn*, 13 O. R. 316.

Waste by Co-Executor.]—Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. *Sovereign* v. *Sovereign*, 15 Gr. 559.

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3. *Interest.*

General Rule.]—The principle upon which an administrator should be charged with interest on funds belonging to the estate considered and acted on. *McLennan* v. *Heward*, 9 Gr. 178.

An administrator de bonis non having obtained a decree against the representatives of a deceased administrator for an account of

his dealings with the estate:—Held, that he was entitled to charge the representatives with interest, &c., in the same manner, and to the same extent, as one of the next of kin might have done. *Ib.*

The principle upon which the court acts in charging executors with interest is not that of punishment, but of compensating the cestui que trust, and depriving the trustee of the advantage he has wrongfully obtained. *Inglis* v. *Beatty*, 2 A. R. 453.

The English rules regulating the award of interest against executors and trustees may be approximated in this Province, (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of six per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures, with the profits, or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during the period was; but the notes and mortgages held by the executors bore interest for the most part at six per cent. The master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the master it was:—Held, that the interest should be charged at six per cent.; but that the awarding of compound interest was opposed to the spirit of the decision in Inglis v. Beatty, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors. *In re Honsberger, Honsberger* v. *Kratz*, 10 O. R. 521.

Appeal as to Interest.]—Leave to appeal from a report was refused with costs, where it appeared that the object of the appeal was to fix executors with interest upon a sum which they had invested, and upon which a loss occurred. *Coates* v. *McGlashan*, 2 Ch. Ch. 218.

Compound Interest.]—An executor will not necessarily be charged with compound interest in all cases except those in which there is a mere neglect to invest. *Inglis* v. *Beatty*, 2 A. R. 453.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many years, without objection from those interested under the will, and it did not appear that he had used the money in trade:—Held, that under the circumstances he was only chargeable with simple interest. *Ib.*

Discretion as to Investing.]—Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court:—Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a-half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him:—Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Spratt* v. *Wilson*, 19 O. R. 28.

Goods Taken by Executors at Undervalue.]—The goods of the testator were, by arrangement between the executors, taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.99. On an appeal from the master's report charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Gr. 153.

Legacy Paid under Special Agreement.]—By an agreement entered into between the executors of an estate in Lower Canada and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy until suit brought therefor without an express promise; and the legatee referred to having sued there for the legacy, alleging an express promise by both executors, and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred, the court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Gr. 518; 8 Gr. 220.

Misconduct.] — Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands. *Sovereign* v. *Sovereign*, 15 Gr. 559.

Neglect and Default.]—Although the court will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest on those sums. *Vanston* v. *Thompson*, 10 Gr. 542.

Rate of Interest.]—Although the rule is, that executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator, come to their hands; still, where such moneys had, before the repeal of the usury laws, been invested in first class security at the rate of six per cent. per annum, the court, on appeal from the master's report, considered the executors were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys and re-invest the same at the rates which the evidence shewed money could have been loaned at. *Smith* v. *Roe*, 11 Gr. 311.

Rests—*Costs.*]—In a suit against an executor for an account, the court, under the special circumstances, charged the executor with the costs of the suit, and with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests. *Erskine* v. *Campbell*, 1 Gr. 570.

Rests.]—An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at six per cent. *Wiard* v. *Gable*, 8 Gr. 458.

Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use; the court ordered the account to be taken against him with annual rests. *Ib.*

Retaining Moneys.]—A legatee gave to a creditor an order on the executors for payment of her share of the estate, which order was accepted by them, and certain payments made on account. The executors denied having funds in their hands sufficient for the payment of the order and properly applicable thereto; but on taking the accounts in this court it appeared that since 1860 the executors had had sufficient funds for that purpose. On a petition filed by the creditor, the court, under these circumstances, ordered the amount in court to be paid out to him, and directed the executors to pay the costs of the application and to make good to the legatee the interest accrued since 1860, until the executors paid the money into court. *Sovereign* v. *Freeman*, 25 Gr. 525.

The executors retained in their hands a sum of $1,100 to meet claims against the estate, and were not called upon to pay it into court:—Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it. *Thompson* v. *Fairbairn*, 11 P. R. 333.

Held, that the executors in this case should be charged with interest upon the residue in their hands from the time when it might properly have been distributed, or appropriated, down to the time of its actual payment, or if not yet paid down to the present time. *Bous' House of the City of Hamilton* v. *Lewis*, 4 O. R. 18.

Using Funds.]—Where part of the money of the estate had been loaned by the executors to themselves, they were charged with a higher rate of interest thereon than six per cent. *Smith* v. *Roe*, 11 Gr. 311.

The widow of an intestate married again, and allowed her husband to use the moneys of the estate in her hands:—Held, that she was liable to pay interest at six per cent. only. *Fielder* v. *O'Hara*, 14 Gr. 223.

See also the next sub-title.

VII. Powers, Rights, and Duties.

1. *In General.*

Administrator de Bonis non.]—Quære, whether an administrator de bonis non can call in question the administration of his predecessor in office. *Tiffany* v. *Thompson*, 9 Gr. 244.

Administrator Obtaining Deed.]—Where A., having only a bond for a deed, and not having paid all the purchase money, conveyed in fee to B., and died, and B. went into possession and continued for several years, when A.'s administrator obtained a conveyance in fee to himself from the person who had given A. the bond:—Held, that the administrator was guilty of a fraud, and that his title could not prevail against B. *Doe d. Dobie* v. *Vanderlip*, 5 O. S. 85.

Assignment of Mortgage.]—An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix. *Yarrington* v. *Lyon*, 12 Gr. 308.

Assignment of Mortgage by One Executor.]—A. and B., executors and trustees under a will with power of sale, sell and take a mortgage to secure purchase money, they being in the recital named as executors. B., without the knowledge or consent of A., assigns the mortgage and appropriates the consideration money to his own use:—Held, that no estate passed under the assignment, except so far as the trust estate might be found debtor to B.; and also, that as between the contending equities of the trust estate and the assignee, the maxim qui prior est in tempore potior est in jure would apply in favour of the trust estate. *Henderson* v. *Woods*, 9 Gr. 539.

Carrying on Business.]—A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business. *Smith* v. *Smith*, 13 Gr. 81.

Discretion as to Maintenance.]—A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the court where there is no charge of fraud, or the like, against the executors. *Foreman* v. *McGill*, 19 Gr. 210.

Distress for Rent.]—See *Nicholl* v. *Cotter*, 5 U. C. R. 564.

Emblements.]—A testator had sown a quantity of grain which was in the ground after his decease. One of the next of kin sought to charge the executors with the value thereof, but the land on which it was, having been devised to the widow for life, it was:—Held, on appeal, that she, not the executors, was entitled to the emblements. *Cudney* v. *Cudney*, 21 Gr. 153.

Executor Discharging his own Mortgage.]—H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due by him to the estate, executed a mortgage to W. W. died intestate, and F., five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, purporting to do so as sole surviving executor, and then conveyed the estate to M.:—Held, affirming 13 O. R. 21, that the act of F., in executing such discharge, had not the effect of releasing the land from the mortgage. *Beaty* v. *Shaw*, 14 A. R. 600.

See McPhadden v. *Bacon*, 13 Gr. 591.

Executrix of Person in Possession of Goods.]—Certain goods of testator were left in the house, where the plaintiff, his daughter, and her mother continued to live and use them for about a year, until the mother died, when defendant, who had been living elsewhere, took possession of the house, with these things, and refused to deliver them up to the plaintiff as the mother's executrix:—Held, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrong-doer; that as her mother's executrix she had no title; and that she therefore could not recover for them. *McCrary* v. *McCrary*, 22 U. C. R. 520.

Executors also Trustees.]—Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time. *Ewart* v. *Gordon*, 13 Gr. 40.

See Cumming v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Foreign Administrator—*Indorsement of Note.*]—Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in the State of New York, having the note then in his possession there:—Held, that his administrators appointed in that State might indorse the note so as to enable the indorsee to sue upon it in this country, without their having administered here. *Hard* v. *Palmer*, 20 U. C. R. 208.

Declaration on a promissory note made by defendant, payable to P. or order, on demand, averring the death of P., and that J. P. and C. P. were duly appointed his administrators, and duly indorsed to the plaintiff; that when the note was made, and from thence to his death, P. resided in the State of New York; that the plaintiff at the time of the indorsement to him, and from thence hitherto, lived there also; and that at the death of said P. the note was in the said State. Plea, that the note was made at Kingston, in the united counties of F., L., and A., in Upper Canada; that defendant at the death of said P., and before and at the time of the making of said note had, and still has, his domicile there; that said note at the death of said P. was bona notabilia in said united counties; that said appointment of J. P. and C. P. as administrators was made only by a tribunal of said State, and that they were never appointed by the proper authority in Upper Canada:—Held, on demurrer, that the plea shewed no defence. *Ib.*

Foreign Administrator—*Settling Claims.*]—Powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, considered. *Grant* v. *McDonald*, 8 Gr. 468.

Injunction awarded at suit of the heir to restrain execution against the lands of a deceased person in the hands of his administrator, the defendant having administered to the estate in England only, and there being at the time no Canadian administrator. *Ib.*

Foreign Administrator—*Release of Mortgage.*]—A foreign administrator cannot effectually release a mortgage on land in this Province. *In re Thorpe*, 15 Gr. 76.

Indorser of Note Executor of Holder.]—A. makes a note payable to B. or order; B. indorses to C., who indorses to D.; D., the holder, dies leaving B. one of the executors; the executors of D. sue C.:—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against the subsequent indorser. *Jenkins* v. *McKenzie*, 6 U. C. R. 544.

Investments.]—Where a testator authorized his executors to invest the surplus of his estate in public securities:—Held, that municipal debentures were not thereby authorized. *Ewart* v. *Gordon*, 13 Gr. 40.

Life Insurance—*Infants.*]—Moneys payable to infants under a policy of life insurance may, when no trustee or guardian is appointed under ss. 11 and 12 of R. S. O. 1887 *c.* 136, be paid to the executors of the will of the insured as provided by s. 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

Limitation of Actions—*Acknowledgment in Writing—Agent of Executor.*]—The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. 1897 *c.* 146, s. 1, as would revive the liability; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts. Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—Held, that this was not such a recognition as amounted to a promise or undertaking to pay. *King* v. *Rogers*, 31 O. R. 573.

Limited Appointment.]—Where an executor is appointed for a limited period or until the happening of some event, his power ceases with the occurrence of such event. *Conron* v. *Clarkson*, 3 Ch. Ch. 368.

Maintenance—*Fund in Hands of Administrator.*]—Where an infant's fund is in court or under the control of the court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion. But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate. And a summary application by the guardian of infants for payment to him or into court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed,

where it was opposed by the administrator. Re Wilson, 14 P. R. 261, distinguished. Re Lofthouse, 29 Ch. D. 921, followed. *Re Coutts*, 15 P. R. 162.

Payment out to Administrator—*Infants.*]—Money in court belonging at the time of her death to an intestate was paid out to her administrator notwithstanding that infants might be or might become entitled to it or a share of it. Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

Payment out to Administratrix—*Infants.*] — The administratrix of a deceased party who had died before the Devolution of Estates Act came into force was allowed to take out of court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payment of debts, &c. Hanrahan v. Hanrahan, 19 O. R. 536, followed. *Re Parsons, Jones* v. *Kelland*, 14 P. R. 144.

Pledging Mortgage.]—In detinue for a mortgage, it appeared that the plaintiff and his father were executors and trustees under the will of one C., the plaintiff being also residuary legatee; and that in April, 1864, the plaintiff, who was then residing in England, having written to his brother to send him some money, the brother, who had access to or possession of the mortgage as agent of the father, since deceased, procured a loan for the plaintiff from the defendant of £25 stg., on his depositing the mortgage with defendant as collateral security, not only for this amount, but for a further sum of $270, previously obtained by the brother, and then due, shewing defendant C.'s will, and promising to notify plaintiff of the deposit and obtain his consent thereto. The plaintiff was so notified but did not repudiate the transaction, either prior to his return to Canada, in 1867, or until the autumn of 1875, when he served the defendant with a demand, and in May, 1876, commenced this action:—Held, that the plaintiff could not recover, for under the circumstances he must be assumed to have authorized the deposit, which he, as executor and residuary legatee, had power to make. *McLean* v. *Hime*, 27 C. P. 195.

See sub-title VI.

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2. *Compensation.*

General Rule.]—The rate of compensation to executors or trustees should depend upon the amount passing through their hands, and the time and labour spent by them. In this case, a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received but not expended, having been allowed, an appeal from the master's report, on the ground of excess, was allowed. *Thompson* v. *Freeman*, 15 Gr. 384.

The right of an executor to compensation depends entirely upon R. S. O. 1877 c. 107, ss. 37, 41, and as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the Judge. The courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute. Order below, 11 P. R. 272, reversed. *Re Fleming*, 11 P. R. 426.

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

Administration Proceedings.] — The taking of administration proceedings does not deprive executors of their functions or even suspend them, and a reasonable allowance should be made for moneys received pendente lite. *In re Hounsberger, Hounsberger* v. *Kratz*, 10 O. R. 521.

Administration Proceedings — *Acting under Solicitor's Advice.*]—Executors claimed compensation in respect of receipts amounting to $29,000, and of disbursements amounting to $5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff, amounting to $4,684.47, which was carried out in pursuance of an agreement made by the solicitors and sanctioned by the master. It also appeared that the plaintiff's solicitor collected and handed over to the executors $2,400, and also made a payment to them of $10,000 for which he was personally liable:—Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced from $1,193 to $440, nothing being allowed in respect of the item of $4,684.47, one per cent. in respect of the items of $2,400 and $10,000, two and a-half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer. *Thompson* v. *Fairbairn*, 11 P. 333.

Amounts not Received.] — A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. *Bald* v. *Thompson*, 17 Gr. 154.

Balance Found against Executor.]—The fact that, on an account being taken in the master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. 1877 c. 107, s. 41. *Sievewright* v. *Leys*, 1 O. R. 375.

Balance Found against Executor—*Large Estate.*]—Where the personal estate not specifically bequeathed came to the hands of certain executors and trustees, was $41,818.99, of which they expended $25,100.93, and the rents and profits of real estate that came to their hands were $4,051.90 of which

they expended $3,816.91, and there appeared a large number of items on each side of the account, over 300 on one side, and over 400 on the other, and it appeared that there had been a good deal of labour, care, and trouble, in the management of the estate:—Held, that five per cent. on the total sum thus come to their hands was not excessive to be allowed as compensation, although $16,983.05 of the estate moneys remained in their hands with which they were chargeable. *Archer* v. *Severn*, 13 O. R. 316.

Bequest to Executors of Part of Residue.]—Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation:—Held, that in this case, the executors were entitled to compensation, notwithstanding a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will. *Boys' Home of the City of Hamilton* v. *Lewis*, 4 O. R. 18.

Carrying on Business.]—Where the executors carried on testator's business for some years through an agent, one of the executors visiting the place occasionally to supervise the business generally:—Held, that a commission on the moneys received from this source was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor; and that not illiberally. *Thompson* v. *Freeman*, 15 Gr. 384.

The rule laid down in the last case followed, and executors held entitled to compensation under the Surrogate Act, 22 Vict. c. 93, for services performed before the passing of the Act. *McMillan* v. *McMillan*, 21 Gr. 369.

Division inter Se.] — Held, that there was no duty cast upon the petitioner in this case which required him to act against the interests of his co-executor, nor did he incur any appreciable additional risk or responsibility, and he was therefore not entitled to a larger share of the commission awarded. *Re Fleming*, 11 P. R. 426.

Effect of Surrogate Act.]—The old rule as to compensation of trustees has only been abrogated by the Surrogate Act so far as relates to trusts under wills. *Wilson* v. *Proudfoot*, 15 Gr. 103.

Executor Holding Moneys.]—Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged by the accountant, with interest and rests, he was, notwithstanding, allowed his commission and costs of the suit. *Gould* v. *Burritt*, 11 Gr. 523.

Fixing Compensation—*Appeal from Surrogate Court Judge.*]—By virtue of R. S. O. 1897 c. 59, s. 36, an appeal lies to a divisional court from an order of a surrogate court Judge allowing compensation to an executor under the Trustee Act, R. S. O. 1897 c. 129, s. 43. *In re Alexander*, 31 O. R. 167.

Forum.]—The court will not refer it to the surrogate Judge to settle the amount of compensation or commission to be allowed to an administrator or executor, but having possession of the subject matter of litigation will finally dispose of the rights of all parties. *McLennan* v. *Heward*, 9 Gr. 279.

Gift to Administrator.]—S. assigned to defendant certain promissory notes for his sole and only use, except such as might be used in liquidation of all necessary expenses in connection with his board and funeral expenses, and by his will appointed defendant his executor. In taking the accounts in an administration suit, one of the local masters refused to allow defendant the expenses of taking out probate of the will, of advertising for creditors, of medicine and medical attendance for the testator and of a gravestone, as having been sufficiently compensated for by the notes:—Held, that he was entitled to be allowed the amounts in passing his accounts, except the sum paid for the gravestone, which was a charge properly attending the funeral, not as necessary, but as suitable and proper to be allowed as a customary mark of respect. *Smith* v. *Rose*, 24 Gr. 438.

Irregularities—*Legacies Given as Remuneration.*]—A testator gave to each of his executors a sum of $40 "in remuneration for their trouble." In carrying on the affairs of the estate one of the executors, with the knowledge of his co-executor, and without any remonstrance from him, used in his business $200 of the estate, and the other had taken a mortgage, in his own name, for $900 belonging to the estate, without executing any declaration of trust in respect thereof. Under these circumstances the court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble. *Kennedy* v. *Pingle*, 27 Gr. 305.

Large Estate.]—Where the estate was large, requiring great care and judgment in its management for a number of years, the court sustained an allowance of $1,500 to the principal executor and trustee, and $1,500 to the others jointly. *Denison* v. *Denison*, 17 Gr. 306.

Legacy as Compensation—*Abatement.*]—A legacy to executors, expressly as a compensation for their trouble, does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson* v. *Dougall*, 15 Gr. 405.

Where a legacy is given to executors as compensation, they are at liberty to claim a further sum under the statute if it is not sufficient. *Denison* v. *Denison*, 17 Gr. 306.

G. W. by will directed his executors to retain for their own use and benefit the sum of $200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will:—Held,

that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their services. Denison v. Denison, 17 Gr. 396, doubted. *Williams* v. *Roy*, 9 O. R. 534.

Semble, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the court would have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will. *Ib.*

Rate of Commission.]—Four per cent. on all transfers of stock and all moneys paid in and collected:—Held, not unreasonable. *Torrance* v. *Chewett*, 12 Gr. 407.

Receiving Rents.]—Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as a guardian of their infant children, and received the rents and profits of the real estate, all of which she duly accounted for. The master in taking the accounts allowed her compensation for the receipt and application of such rents and profits, as well as the personal estate, amounting in all to $133. On further directions the court, regarding the case as an exceptional one, refused to interfere with such allowance. *Doan* v. *Davis*, 23 Gr. 207.

An executor or administrator has no right, as such, to receive the rents of real estate; as to them, he is merely an intermeddler, and will not be entitled to any commission thereon. *Dagg* v. *Dagg*, 25 Gr. 542.

Rests—*Agent's Commission*—*Administrator's Commission.*]—Where an administrator who had acted as agent for the intestate, during his lifetime, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment as to his so using them, the court refused to take the account against the administrator with rests. The master having allowed the estate of the administrator a commission of five per cent. on moneys passing through his hands in his lifetime, the court refused on appeal to disturb such allowance. *McLennan* v. *Howard*, 9 Gr. 178.

Where the agent, after the decease of the principal intestate, had procured letters of administration to his estate, and subsequently the person who became possessed of the assets as the personal representative of the administrator refused to account, and a bill was filed to enforce it, the court, under the circumstances, there being no evidence of any improper dealing with the estate either by the administrator or those representing him, allowed the defendants a commission of five per cent. on all moneys received and paid over or properly expended by themselves or their testator, and two and a-half per cent. on all moneys received by him or them, but not yet paid over; but refused the costs of the suit. *S. C., ib.* 279.

Securities Transferred.]—Executors were charged by the master in taking the accounts in an administration suit with the sum of $9,404.42, and allowed as disbursements the sum of $8,228.77. These amounts included on both sides a sum of $3,238.25, representing securities either in the possession of the plaintiff at the time of the testator's death, or handed over to the plaintiff immediately afterwards. The master allowed the executors a commission of $400 on the total receipts, including the said sum of $3,238.25:—Held, that the executors were entitled to compensation in respect of the said sum of $3,238.25:—Held, also, that the commission allowed was not excessive. *Re Batt, Wright* v. *White*, 9 P. R. 447.

Services by Agent.]—In no case will an executor be entitled to allowance for services performed by an agent, which were so performed by him gratuitously. *Chisholm* v. *Barnard*, 10 Gr. 479.

Surrogate Judge's Order.]—Since 22 Viet. c. 93, s. 47, C. S. U. C. c. 16, s. 66, it has been the settled practice of the master here, in passing the accounts of executors, to allow them compensation for their executorship, without an order from the surrogate Judge allowing the same. Where, therefore, an executor, pending an account before the master, obtained such an order, which the master acted upon without exercising his own judgment, an appeal from the report of the master by the creditors was allowed, and the executors ordered to pay the costs thereof. *Biggar* v. *Dickson*, 15 Gr. 233.

Where a suit for the administration of an estate is pending in this court, it is improper for the surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors. *Cameron* v. *Bethune*, 15 Gr. 486.

Trustees of Real Estate.]—The rule of the court is to allow compensation to trustees of real estate under a will, as well as to executors. *Bald* v. *Thompson*, 17 Gr. 154.

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3. *Expenditure and Allowances.*

Debts Incurred by Executor.]—The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased. *Lovell* v. *Gibson*, 19 Gr. 280.

Interest on Advances.] — An executor is entitled to interest on money advanced by him, and properly expended in the management of the estate. *Menzies* v. *Ridley*, 2 Gr. 544.

Loan to Executor.] — Where advances were made by way of loan to the managing executor, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender, and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender, who had no other transactions with the estate, appeared as a creditor in several annual balance-sheets sent to the other executors by their agent, and no objection on their part was ever made; the court refused, at the instance of such executors, to order the securities to be delivered back to them, without payment of such advances. *Ewart* v. *Gordon*, 13 Gr. 40.

Maintenance.]—The widow and administratrix of an intestate got in his personal estate, occupied the real estate, received the

rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds and profits of the real estate come to her hands, must first be applied towards payment of debts, and then to reimburse her for the sums spent in the infants' maintenance. No allowance was made for her improvements, but she was not charged with any increase in rental caused thereby. *In re Brazill, Barry* v. *Brazill*, 11 Gr. 253.

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them until they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best; and when the above children shall come of age, the residue of the above property shall be given to the children in equal shares." The executors and executrix,—the widow,—having sold the real estate, (as the will empowered them to do) and applied a large portion of the proceeds in support and maintenance of the children:—Held, that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the master's office. *Grummet* v. *Grummet*, 22 Gr. 400.

Money Advanced to Pay for Land.]—The lessee of land, with the right to purchase, devised the same to his son, if it could be paid for, and if it could not, that one half should be sold, and the purchase money paid for the other half, which he gave to his son, an infant. The executor advanced out of his own moneys sufficient to pay the price of the land, and the lessors conveyed to the devisee. The personal estate being exhausted, the court, under the circumstances, directed a sale of that portion of the lot which the testator desired should be sold, if it should appear upon inquiry before the master that the payment to the lessors was for the benefit of the infant. *Lanni* v. *Jermyn*, 9 Gr. 169.

Money Paid for Partner's Interest.]—Executors became personally liable to the surviving partner of the testator for the payment of a sum supposed to be equal to his share in the estate, and he thereupon released to them all his interest in the partnership estate, which was by them wound up, and the proceeds applied in liquidation of the testator's debts. This arrangement was found beneficial to the testator's estate, and the executors were held entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation, as also the amount of commission allowed them by the Judge of the surrogate court. *Harrison* v. *Patterson*, 11 Gr. 105.

Money Paid for Taxes.]—M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes; M. afterwards died insolvent, and indebted to both estates:—Held, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Gr. 35; *S. C.*, in the court below, 16 Gr. 193.

Tombstone.]—A testator's sister erected a marble slab to his memory. His widow, the acting executrix, having in hands no funds of the estate, gave her note to the sister for the price, which was moderate in reference to the estate and degree of the deceased, but she had not paid the note, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees. The question did not affect creditors of the deceased, and it was not pretended that the estate was liable for the note or for the price of the slab:—Held, under these circumstances, that the amount should be allowed to the executrix. *Menzies* v. *Ridley*, 2 Gr. 544.

Where a testator provided for the erection "of a suitable tablet" over his grave, "not to exceed $1,500," and also of monumental tablets or stones, &c., and the erection thereof over the graves of his deceased wives, and died worth $200,000, and the executors spent $3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator:—Held, that they might properly be allowed the said sum of $3,000 in their accounts. *Archer* v. *Severn*, 13 O. R. 316.

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4. Paying Claims and Distributing Assets.

Advancement — *Hotchpot.*]—J. H. died intestate, and among his assets was a promissory note for $500 made by his son in respect of moneys received by the latter from him. The son pre-deceased J. H. and died intestate and insolvent, leaving a child, who, under the Statute of Distributions, was entitled to a one-fifth distributive share of the estate of J. H.:—Held, that the grandchild of J. H. was not bound to bring the $500 into hotchpot before sharing in the estate of J. H., and that R. S. O. 1877 c. 105, ss. 41-43, did not apply to this case. *Re Hall*, 14 O. R. 557.

Difference between the law of England and our own as to advancements to children commented on. Under our law advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. *Ib.*

Semble, that the administrator of J. H. did not properly and fully represent the next of kin entitled to share in the estate of J. H., and they would not be bound by any decision in their absence. *Ib.*

Advancing Legatee's Share.]—M., who was a merchant, by his will gave special directions for the winding up of his business and

the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," &c. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts:—Held, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques Cartier* v. *Gratton*, 30 S. C. R. 317.

Advertisement for Claims.]—Publication in the Ontario Gazette of an advertisement for creditors, pursuant to R. S. O. 1887 c. 110, s. 36, is not necessary to release executors from liability for payments made by them. *Re Cameron, Mason* v. *Cameron*, 15 P. R. 272.

Agreement to Pay for Church.]—The testator having been interested in having a place of worship completed told the building committee to collect all they could from the other members, and that he would see the building paid for; and the committee, relying on this assurance, completed the edifice, and incurred liability for the expense, and were out of pocket a considerable amount:—Held, that the executors were at liberty to discharge this sum out of their testator's estate. *Anderson* v. *Kilburn*, 22 Gr. 385.

Award and Specialty.] — Declaration against defendant, as executrix of McK., on an award made in pursuance of a bond executed by him in his lifetime, to refer certain differences to arbitration and abide by the award; averment, that the award had been made in the lifetime of the deceased; breach, that deceased had not in his lifetime, nor had defendant, as such executrix since his death, paid the sum awarded. Plea, that by covenant in the deed made by said McK. in his lifetime, he had incurred a specialty debt to one H., which was overdue, and defendant, as executrix, was bound to discharge it in preference to plaintiff's debt:—Held, on demurrer, plea bad, for the action was on a specialty, and an executrix could not plead an outstanding debt of the same degree to an action for another debt of equal degree. *McCallum* v. *McKinnon*, 16 C. P. 142.

Chattels — *Life Estate.*] — Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executors, then becomes liable for them to the person entitled in remainder. *In re Munsie*, 10 P. R. 98.

Claim Paid under Mistake of Law.]—If an administrator, on competent advice, pays a claim bonâ fide made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator de bonis non a right of action to recover it back. *Mayhew* v. *Stone*, 26 S. C. R. 58.

Compromise of Claim.]—Where a claim is made against the estate of a testator, and the executors in the bonâ fide discharge of their duty compromise the claim, it is not necessary on passing the accounts of the executors that any corroborative evidence should be adduced. *Re Robbins*, 23 Gr. 162.

An administrator with the will annexed has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased. *Irwin* v. *Toronto General Trusts Co.*, 24 A. R. 484.

Contribution from Devisees.] — After the distribution of the personal estate, and the allotment to the devisees of the real estate of a testator, an action was brought against the executors on a covenant of the testator, in which a judgment was recovered, the amount of which the executors paid out of their own money. Twenty-seven years afterwards, and after the greater number of the devisees had died, and all but one had sold their property to bonâ fide purchasers without notice, the executors, who eleven years previously had instituted proceedings in court against the heirs of that one, brought on their cause for hearing on further directions, seeking to compel them to recoup the executors. The court, under the circumstances, refused to make a decree against any one share for more than a proportionate share of the demand, leaving the executors to litigate the question with the parties liable to contribute to the payment of the debt, as, owing to their delay in suing, the obstacles in the way of the defendants recovering were quite as great as they were to the plaintiffs enforcing the claim. *Emerson* v. *Cunniff*, 26 Gr. 149.

Creditors Impeaching Judgment against Executors.]—A judgment obtained against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands. Therefore where a judgment had been obtained against the executor of H. on certain promissory notes indorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the court the judgment creditor brought the judgment into the master's office and claimed upon it, and other creditors of H. thereupon asked to be allowed to adduce evidence as against the claim, on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes upon which judgment had been obtained:—Held, that they could not be permitted to do so. Semble, such a judgment is only primâ facie evidence against heirs-at-law and devisees of the deceased. Eccles v. Lowry, 23 Gr. 167, commented on. *Re Hague, Traders Bank* v. *Murray*, 13 O. R. 727.

Creditor Overpaid — *Action by Other Creditors.*]—The effect of s. 30 of R. S. O. 1877 c. 107, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if, upon a final adjustment of the accounts of the estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors and legatees in this respect upon the same footing. *Chamberlen* v. *Clark*, 9 A. R. 273; 1 O. R. 135.

Creditor Overpaid—*Action by Administratrix.*]—An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being made against the estate, sought to recover a portion of the money back as on an overpayment:—Held, that she had no locus standi to maintain the action. *Leitch* v. *Molsons Bank*, 27 O. R. 621.

Domestic and Foreign Creditors—*Priorities.*]—In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with Ontario creditors. Re Kloebe, 28 Ch. D. 175, followed. Con. rule 271, which came into force since the above decision, and which relates to service of initiatory process out of the jurisdiction, if applicable at all to such a case, merely relates to procedure, and does not affect a proceeding in which all the parties have attorned to the jurisdiction of the court. *Milne* v. *Moore*, 24 O. R. 456.

Firm and Partner — *Double Proof.*]—The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately indorsed the note. *Re Baker, Bray's Claim*, 3 Ch. Ch. 493.

Insolvent Estate—*Ratable Distribution.*]—Where certain creditors of a deceased insolvent sued his executor, recovered judgments and sold his real estate and got paid in full:—Held, that they were still bound to account, and the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ under the Act 29 Vict. c. 28. *Bank of British North America* v. *Mallory*, 17 Gr. 102.

Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor, notwithstanding, allowed a creditor to recover a judgment against him by default:—Held, that the executor, on obtaining an administration order, was not entitled to an injunction against proceeding on the judgment. *Doner* v. *Ross*, 19 Gr. 229.

By the statute 29 Vict. c. 28, s. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors pari passu, and without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors, and execution to be issued, under which they were paid nearly in full, when by applying to the court in that action, the proper distribution of the estate would have been ordered, the court charged her, in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the court, and to this extent they were held entitled to recover their costs. *Taylor* v. *Brodie*, 21 Gr. 607.

Insufficiency of Assets—*Execution—Interest on Claims.*]—In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. Creditors who had filed bills to enforce their claims having, by order made under an administration decree, been restrained from proceeding with their own suits, and directed to prove under the administration decree, it was held that they were entitled to six years' arrears of interest computed back from the commencement of their own suits. *Meyers* v. *Meyers*, 19 Gr. 185.

Insufficiency of Assets.]—The plaintiff and another bought from a testator's executors and trustees certain real and personal estate; the real estate was subject to a mortgage which the vendors agreed to pay; the purchasers paid their purchase money, but the vendors applied the same to pay other debts of the testator, and left the mortgage in part unpaid. The plaintiff having bought out his co-purchaser, filed a bill against the executors; a decree by consent was made, giving the plaintiff a lien on the testator's assets, ordering the defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and inquiries usual in an administration suit; the estate was insufficient to pay all creditors; before the making of the decree, a creditor of the estate had obtained judgment against the executors, and the sheriff seized and sold goods of the testator in their hands:—Held, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry* v. *Sharp*, 18 Gr. 16.

Interest on Claims.]—It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

Joint and Separate Creditors.] — In the administration by the court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors. *In re Ruby, Trusts Corporation of Ontario* v. *Ruby*, 24 A. R. 509.

Land Charged with Performance of Obligation.] — Section 33 of the Act to amend the Law of Property and Trusts, 29

Vict. c. 28, which enacts that when any person, after 31st December, 1865, dies seised of land charged with the payment of any sum of money by way of mortgage, the heir or devisee shall not be entitled to have the mortgage debt discharged out of the personal estate:—Held, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money. In a case such as suggested where the statute was held not to apply, it was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate. *Slater* v. *Slater*, 3 Ch. Ch. 1.

Legacy Paid without Administration.]—Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment out of the amount to the solicitor of the legatee without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 4 Ch. Ch. 27.

Married Woman.]—Claim by married woman as executrix of her first husband against creditors of second husband—Evidence necessary to support such a claim. See *Patton* v. *Ramsay*, 10 L. J. 277.

Mortgage Debt.]—In payment of debts, a mortgage not due must be preferred before simple contract debts, and the plaintiff may shew that simple contract debts have been first paid, under the replication of assets in hand when action brought, and need not reply specially. *Forsyth* v. *Johnston*, T. T. 3 & 4 Vict.

Notice to Claimants—*Limitation of Actions.*]—A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. 1897 c. 129, to protect the executors from liability for claims not brought to their knowledge until after the estate had been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act, R. S. O. 1897 c. 119, s. 32, does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession. Judgment below, 30 O. R. 110, affirmed. After judgment had been given in the court below against the executors in this case, the Act for the Relief of Trustees, 62 Vict. c. 15 (O.), was passed:—Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 27 A. R. 423.

Notice Disputing Claim.]—Before the commencement of an action against the purchasers one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under s. 35 of R. S. O. 1897 c. 129, the Trustee Act, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator de bonis non had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred. *Goodeeham* v. *Moore*, 31 O. R. 86.

Paying Mortgage.]—Held, on facts fully stated in the report, that the administratrix, having personal assets of the testator sufficient to discharge a mortgage due by the testator, was bound in the due course of her administration to discharge said incumbrance, and that an alleged parol agreement made by her with her daughter was null and void. *Kearney* v. *Kean*, 3 S. C. R. 332.

Payment into Court.]—The testator provided that his daughter, an executrix, was to have the sole management of his estate during her life, and the executors afterwards. The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments, the court refused to order a transfer into court. *Hellem* v. *Severs*, 24 Gr. 320.

Payment into Court.]—Payment of legacies to infants into court. See *Re Parr*, 11 P. R. 301.

Payment on Notes Made without Consideration.]—Upon appeal from the order of a surrogate court upon the passing of executors' accounts:—Held, that payments made by them to the payees of promissory notes signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts to the payees, were not protected either by the primâ facie presumption of a valuable consideration raised by s. 30 of the Bills of Exchange Act, 53 Vict. c. 33 (D.), or by the provisions of s. 31 of R. S. O. 1887 c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient." *Re Williams*, 27 O. R. 405.

Payment to Guardian of Infants.]—Moneys bequeathed directly to infant legatees and which had been invested by the defendants, the executors of the testatrix, were demanded of and received from them by one F., a solicitor, who had obtained from the surrogate court his appointment as guardian of the infants. F. subsequently misapplied the moneys and absconded:—Held, reversing 11 O. R. 565, that the defendants were not liable. *Huggins* v. *Law*, 14 A. R. 383.

Payment under Invalid Grant.]—The 57th and 58th ss. of the Surrogate Act (R. S. O. 1877 c. 46), protect parties bonâ fide making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Merchants Bank* v. *Monteith*, 10 P. R. 334.

Preference—*Misapplication of Funds—Assets Quando.*]—This action was brought to contest the validity of a judgment by the Bank of Upper Canada against defendants, executors of Z., on a confession for £217,637 9s., the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared in evidence that nearly half of the judgment was for a debt due by Z. to the bank; the remainder was for debts of Z. assumed and paid by the bank at defendants' request, and for the advance of $60,000 to defendants, to enable them to complete the Sarnia branch of the Great Western Railway:—Held, that the debt on which this judgment was obtained was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. It appeared also that defendants, being trustees of the real estate, as well as his executors, had allowed out of the personalty of Z. to his widow, $60,000, to obtain a release of her right to dower in his, Z.'s lands. The plaintiffs contended that under the issue of plene administravit vel non, they were entitled to judgment to this amount:—Held, that the application of the personalty to obtain a release of dower in land was a devastavit, and a misapplication of the money, of which the Bank of Upper Canada, being interested in the estate, had the right to complain. This amount, however, was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts, held, that the verdict should be entered for defendants, and the plaintiffs were allowed to take judgment of assets quando. *Commercial Bank of Canada* v. *Woodruff*, 13 C. P. 621.

Held, that under the pleadings set out in this case, the plaintiff did not dispute defendants' right to keep the £4,000 mentioned to be applied on the Bank of Upper Canada judgment, but complained that defendants had not otherwise fully administered; and the complaint being the settlement of Mrs. Z.'s dower, which was decided in defendants' favour in Commercial Bank v. Woodruff, 13 C. P. 621, that defendants were entitled to judgment. *Hamilton* v. *Woodruff*, 14 C. P. 22.

Secured Creditor—*Hotchpot.*]—A secured creditor need not bring his security into hotchpot as a condition precedent to ranking on the estate of a deceased person, his lien being expressly preserved by the Act, R. S. O. 1877 c. 107, s. 30. *Chamberlen* v. *Clark*, 1 O. R. 135; 9 A. R. 273.

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

See Glanville v. *Strachan*, 29 O. R. 373.

Specialty and Simple Contract Debts.]—Since 29 Vict. c. 28, s. 28, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods not administered. *Parsons* v. *Gooding*, 33 U. C. R. 499.

Specialty Debt.]—S. administered to the estate of an insolvent, at the request of a simple contract creditor, and was on the following day served by the latter with a summons for his debt. He took no steps to ascertain whether there were any other debts, but allowed judgment by default, and all the chattel property of the intestate was sold under the execution:—Held, at the suit of a specialty creditor, that the administrator could not set up the defence of no notice of the specialty debt, and that the amount produced by the sale must be applied in due course of administration. *Hutchinson* v. *Edmison*, 11 Gr. 477.

Specific Legacy—*Assent.*]—Held, following Northey v. Northey, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause. *Archer* v. *Severn*, 12 O. R. 615.

Surety Paying Administrator's Debt.]—A surety for an administrator, deceased, who was indebted to the estate, on judgment being recovered against him paid the amount, and took an assignment of the administration bond to a trustee for himself. Quære, whether the debt to the surety was a specialty or a simple contract debt. *In re Whittemore, Ross* v. *Mason*, 2 Ch. Ch. 17.

Unpaid Legatee—*Contribution by Other Legatees.*]—Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of certain persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Ufner* v. *Lewis, Boys' Home* v. *Lewis*, 27 A. R. 242.

Widow Overpaid.]—Where the widow of the testator had received more than her proper share of the personal estate, the court charged her with interest on the excess. *Davidson* v. *Boomer*, 17 Gr. 509.

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5. *Realising Assets.*

(a) *In General.*

Accepting Land in Satisfaction of Debt.]—Executors in the exercise of a prudent discretion, may accept land in payment of an execution debt. *McCargar* v. *McKinnon*, 17 Gr. 525.

Advice of the Court.]—An administrator, being desirous of converting saw logs into lumber, for the benefit of the estate, an application under 29 Vict. c. 28, s. 31, was entertained, and an opinion of a Judge given in favour of the course suggested. *Re Caldwell Estate*, 2 Ch. Ch. 150.

Allowing Debt to Remain Outstanding.]—G. lent money to W. on his promissory note, and when he died held such note as security. By his will he directed his executors to get in the moneys outstanding and invest the same in such stocks as they might deem advisable. C., the executor, who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done, as stated by C., was because he could get seven and a-half per cent. interest for the estate, which was more than he could have done if he had invested in stocks. W. Bros. afterwards became insolvent and the amount of the note was lost to the estate. It was shewn that the executor was advised not to invest in stocks. In taking the accounts in the master's office, it was held that the amount of the note should not be charged against him personally; but on appeal it was held that it was a very obvious case of breach of trust which could not be excused whatever might be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at six per cent., if it was proved that he could not have invested in stocks to realize that rate. *Re Gabourie, Casey* v. *Gabourie*, 13 O. R. 635. See *S. C.*, 12 P. R. 252.

Claim against Insolvent Debtor—*Retainer of Share.*]—I. R. indorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death sixty cents in the dollar, leaving $3,500 unpaid. R., the executor of I. R., paid this. I. R., who died 1st January, 1884, left all the residue of her estate, real and personal, to be equally divided share and share alike, between J. R., J. F. and J. B. Shortly before her death I. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R. On 4th January, 1884, all persons interested in the residuary devises in the will and in the intended will signed a written agreement on the back of the latter, that they accepted the distribution of the estate of I. R. provided for in the latter, in lieu of that contained in any other will though duly executed. By his own will, executed on 13th February, 1884, J. R. directed that the estate of I. R., so far as he was interested therein, should be divided according to the agreement signed by him on 4th January, 1884:—Held, (1) that R., the executor of I. R., had the right to pay or retain out of J. R.'s share of her residuary estate the full balance which he had been obliged to pay on said accommodation notes, although J. R.'s estate was insolvent, and although the accommodation paper in question fell due after I. R.'s death. R. S. O. 1887 c. 107, s. 30, abolishing the right of retainer in case of a deficiency of assets, has reference to the debtor's estate, not to the creditor's, and where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of set-off, and this is not affected by that statute. (2.) The agreement of 4th January, 1884, was binding on J. R. and was binding on his executor and could not be impeached by his creditors. The only possible ground of complaint by creditors was that this agreement violated 13 Eliz. c. 5, but that statute is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself. *Bain* v. *Malcolm*, 13 O. R. 444.

Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death. About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. 1887 c. 124:—Held, (1) that the effect of the assignment was by virtue of s. 20, s.-s. 4, of that Act, to accelerate payment of the debt due to the estate. (2) That the executors, being also the trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees were directed to value pursuant to R. S. O. 1887 c. 124. *Tillie* v. *Springer*, 21 O. R. 585.

Collection of Debts.]—In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debt is proper to be taken into account. *McCargar* v. *McKinnon*, 17 Gr. 525.

Debt not Realized.]—Quære, whether 32 Vict. c. 37 (O.), alters the law as to the liability of executors for assets of an estate lost by their negligence; but the fact of merely allowing a debt to remain outstanding is not per se negligence. *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 261.

Where in an administration suit it was shewn that stock in a gravel road company amounting to $290 and promissory notes to the amount of $748 had been left outstanding and unrealized by the executor, and there was no suggestion that there was any danger to the fund caused thereby, and the matter in respect of which the executor was called in question was small, except the claim of the plaintiff as a creditor, in respect of which he had failed, the court, on further directions, refused relief to plaintiff, and dismissed his bill with costs, but without prejudice to his right to institute another suit in the event of any future mal-administration of the estate. *Ib.*

Direction to Release Mortgage—*Other Indebtedness.*]—A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately

on and from the said testator's death. In an action for the administration of the testator's estate, W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate:—Held, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage. *Archer* v. *Severn*, 12 O. R. 615; 14 A. R. 723.

Foreign Testator.]—Where a testator dies in a foreign country leaving assets in this Province, the court, at the instance of a legatee, will restrain the withdrawal of the assets from the jurisdiction, notwithstanding that there may be creditors of the testator resident where the testator was domiciled at the time of his death, and that there are no creditors resident in this Province. *Shaver* v. *Gray*, 18 Gr. 419.

Money Lost by Fire.]—Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost, the court held the executor guilty of a breach of trust, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest. *Lawson* v. *Crookshank*, 2 Ch. Ch. 426.

Power of Attorney to Collect Debts.]—A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate. The power was given upon an agreement that the attorney should pay himself out of any money he should receive. The appointor afterwards revoked the power, and then took out letters of administration:—Held, that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted, and with notice of the revocation, were unauthorized, and did not discharge the debtor. *Sinclair* v. *Dewar*, 19 Gr. 59; 17 Gr. 621.

Sale of Goodwill.]—Held, that although the administratrix was not bound to sell the goodwill of testator's business as a surgeon and physician, yet, having done so, the proceeds were assets, for which she must account. *Christie* v. *Clark*, 27 U. C. R. 21; *S. C.*, 16 C. P. 544.

Sale of Mortgage—*Notes for Purchase Money.*]—An executor sold a mortgage given to the testator, taking the purchaser's notes payable to himself or order:—Held, upon an issue of plene administravit, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession. *Macbeth* v. *Macbeth*, 26 U. C. R. 549.

Time for Realizing — *Collection of Debts.*]—Executors should proceed with promptitude to realize the assets; and the law presumes that, as a general rule, a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves unfortunate, they are not charged with the loss, though the court should not concur in the propriety of the course which, in the bonâ fide exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation. *McCargar* v. *McKinnon*, 15 Gr. 361.

See, also, sub-title VI.

(b) *Lands as Assets in the Hands of Executors or Administrators.*

Semble, that a fi. fa. cannot issue against lands of an intestate, as being assets in the hands of an administrator. *Doe d. Ruggles* v. *Carfrae*, Tay. 211.

The court refused to order a sheriff to refund money received by him as the price of land sold at sheriff's sale, the purchaser having been ejected, on the ground that lands could not be sold under a fi. fa. as assets in the hands of an administrator. *In re Carfrae*, Tay. 472.

Lands and tenements held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his executor or administrator. *Forsyth* v. *Hall*, Dra. 291.

Quære, whether, in order to sell the lands of a deceased debtor, against whom judgment was obtained in his lifetime, the proceedings should under 5 Geo. II. c. 7, be against his heir or personal representative. *Varey* v. *Muirhead*, Dra. 486.

Lands are assets for the satisfaction of debts in the hands of an executor, under 5 Geo. II. c. 7; and to a plea of plene administravit, the plaintiff may reply lands. *Gardiner* v. *Gardiner*, 2 O. S. 520.

Demurrer to a replication of lands, on the ground that the executors had no control over lands, or could not as executors dispose thereof:—Held, replication good. *Seaton* v. *Taylor*, 3 U. C. R. 302.

Replication of lands held bad on special demurrer. *Bowes* v. *Johnson*, 6 O. S. 158; *Ward* v. *McCormack*, E. T. 5 Vict., R. & H. Dig. 208.

Lands may be sold on a judgment against one of several executors, in the same manner as if it had been against all. *Doe d. Smith* v. *Shuter*, 5 O. S. 655.

Semble, that lands may be sold under a judgment confessed by an executor. *Doe d. Lyon* v. *Lege*, 4 U. C. R. 369.

Under 5 Geo. II. c. 7, lands are assets in the hands of executors for the payment of unliquidated damages in an action of covenant, not merely for debts. *Sickles* v. *Asselstine*, 10 U. C. R. 203.

To an action on a covenant for title by the assignee of the bargainee against the executors of the covenantor, defendants pleaded that they had fully administered all the testator's goods. The plaintiff replied lands. Defendants rejoined, that they had fully administered all the lands of the testator which had come to their hands, &c. The rejoinder was held clearly bad. The replication, being

excepted to, was upheld on the authority of Gardner v. Gardner, 2 O. S. 520. *Ib.*

An executor or administrator is not liable to have a judgment de bonis propriis entered against him on a replication of lands to a plea of plene administravit, which virtually confesses the truth of the plea. *Topping* v. *Yardington*, 6 C. P. 347.

Action against an administrator. Defendant pleaded plene administravit, to which the plaintiff replied lands. The defendant rejoined, that he could not deny but that the intestate died seised of lands; but that his heir-at-law, for a valuable consideration, conveyed all his interest to defendant: that at and before the death of the intestate one H. held a mortgage on said land for its full value, and that defendant solely to prevent costs against the estate, and without any consideration, conveyed the equity of redemption to said H.:—Held, rejoinder bad. *Levisconte* v. *Dorland*, 17 U. C. R. 437.

Declaration against administrators on a promise of intestate. Defendants pleaded a judgment recovered against them, and that they had fully administered, except goods, &c., to a small amount, insufficient to satisfy the judgment. Plaintiffs took issue on this plea, and also replied that the intestate died seised of lands, &c., which are assets in defendants' hands. Defendants confessed it to be true that the intestate died seised of the lands, and that they are such assets; nevertheless, inasmuch as defendants, as administrators, never had power to sell or apply such lands, &c., to the liquidation of any debts of the intestate, they prayed judgment if the plaintiffs should further maintain their action against them as administrators, as far as the same related to the liability of their own goods and chattels. Rejoinder held good on demurrer. *Mein* v. *Short*, 9 C. P. 244. See *S. C.*, 11 C. P. 430.

Semble, that for the purpose of enabling the creditor of an intestate to get execution against the intestate's lands on a judgment against the administrator, it is not indispensable to reply to a plea of plene administravit, or to a plea like the one in the present case, that the intestate died seised of lands. *S. C.*, 9 C. P. 244.

Action against an executrix. Plea, a covenant by testator on which £3,500 remained due; and plene administravit, except goods not sufficient to satisfy said specialty debts. Application for leave to take issue and reply lands was refused, and the case of Mein v. Short, 11 C. P. 430, referred to as to the course to be pursued. *Holton* v. *McDonald*, 12 C. P. 246.

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

Action on a judgment recovered against an executor. The declaration set out a judgment recovered, alleged the issuing of a fi. fa., and a return of nulla bona, and suggested a devastavit. Plea, that in that action defendant pleaded plene administravit: that the plaintiff replied lands, on which judgment was given that the lands were assets in the hands of the defendant as executor. The defendant then averred that the lands were sufficient, and that the plaintiff had not proceeded against them. Demurrer to pleas on the ground that, where judgment has been recovered and a devastavit is shewn, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator:—Held, that the replication of lands was a full admission of the truth of the plea of plene administravit: that the plaintiff by his replication in his former action being estopped from setting up a devastavit now, the defendant was at liberty to shew the true state of the case to save himself from personal liability; and that the replication (of lands) commonly used since Gardiner v. Gardiner, 2 O. S. 520, is both illogical and unnecessary. *Hogan* v. *Morissy*, 14 C. P. 441.

Real estate cannot be sold in this Province under an execution obtained against an executor de son tort. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 386; *Wrathwell* v. *Bates*, 15 U. C. R. 391; *Graham* v. *Nelson*, 6 C. P. 280.

Held, that the sale of the reversion in a term of years under a fi. fa. on a judgment against an executor de son tort, is a valid sale as against the rightful administrator; and semble, it is not necessary that the tort executor should have been in actual possession in respect of the term. *Bain* v. *McIntyre*, 17 C. P. 500.

Since 27 Vict. c. 15, for the purpose of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issues tried over again, it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Gr. 280. Followed in *Willis* v. *Willis*, 19 Gr. 373.

Under 5 Geo. II. c. 7, real estate in the colonies is liable to satisfy a judgment for damages in an action of covenant. *Nugent* v. *Campbell*, 3 U. C. R. 301.

See DEVOLUTION OF ESTATES ACT.

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6. *Retainer.*

Collusive Judgment for his own Debt.]—An administrator being a creditor of the intestate, in order to secure his own debt, confessed judgment to his friend the plaintiff, to whom the intestate owed nothing, with the understanding that the land in his hands should be sold under the judgment, and the proceeds paid over to him by the plaintiff. The court, on the application of the tenant of the land, set aside the judgment and execution with costs. *Bonistiel* v. *McMaster*, 6 O. S. 32.

Priority—*Payments to Creditors.*]—An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favour that will give him a right of retainer in priority to other creditors. All that he would under such circumstances be entitled to would be to stand in the place of the creditors he has paid off; and if there prove to be a deficiency of assets, he will only be entitled to be paid pro ratâ with the general creditors of the estate. *Willis* v. *Willis*, 20 Gr. 396.

Purchasing Estate.]—An executor is entitled to take the personal property at its value for a debt due by the estate to him, and his purchase at public auction of the testator's personal estate, in lieu of money due him, was held valid. *Yost* v. *Crombie*, 8 C. P. 159.

Retaining Barred Debt.]—He may retain a debt barred by the statute. Quære, where the personal estate of a testator is exhausted, can he retain such a debt out of the proceeds of real estate. *Crooks* v. *Crooks*, 4 Gr. 635.

A testator, a short time before his death in 1841, and during his last illness, signed a statement by which he acknowedged himself indebted to his father, one of his executors, in the sum of £73 8s. 5d. His will contained direct authority to his executors to sell his real estate for the payment of his debts. In 1843 the executors obtained an administration order, and the father sought to have his claims against the estate, including the amount so acknowledged, paid by a sale of the land. These claims were resisted by the widow and the heir-at-law, the testator having been in a weak and dying state when he signed the acknowledgment. The father had, until about 1861, been in occupation of the land, and a surcharge was put in against him for the rents and profits:—Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator; that the Statute of Limitations does not bar the claim of an executor against the estate of his testator; and that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim against it. *Emes* v. *Emes*, 11 Gr. 325.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the Statute of Limitations. *Kline* v. *Kline*, 3 Ch. Ch. 361.

The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Ib.*

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Gr. 385.

7. *Sale and Management of Real Estate.*

Allowing Lands to be Sold.]—Executors suffered judgment against them at law for a debt of their testator; and the lands were sold upon process issued thereon, although one of the executors owed the estate a larger amount. The court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale. *McPhadden* v. *Bacon*, 13 Gr. 591.

Contract to Buy from Administrators—*Execution.*]—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his lifetime issued execution thereon under an ex parte order therefor against the estate in the hands of the administrators:—Held, that the execution formed no charge or incumbrance on the lands contracted to be sold. Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Bachmer*, 26 O. R. 191.

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

Dealing with Real Estate without Authority.]—Where executors, without any authority, assumed to manage the real estate, they were made to account for their acts, as if they had been duly empowered as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings. *Chisholm* v. *Barnard*, 10 Gr. 479.

The testator, A. M., had been in partnership in business with one J. A., and died without any settlement of accounts, appointing A., P., and L. his executors. The testator had, besides his share of the partnership assets, a large amount of personal property, and also real estate, which he specifically devised to his four sons, then infants, and appointed A. their guardian. The executors received the rents of the real estate, and applied them to the maintenance and education of testator's children. The real and personal estate having proved insufficient for the payment of debts, the executors were held liable to account to the creditors of the testator for the rents received by them and applied to the maintenance and education of the children. *Harrison* v. *Patterson*, 11 Gr. 105.

Delay in Selling.]—Delay on the part of executors to sell lands, which by the will are saleable for payment of debts, will render the executors liable for rents and profits. *Emes* v. *Emes*, 11 Gr. 325.

Devise — *Legacy Charged on Land—Sale by Executors in Order to Pay the Legacy.*]—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended. On an application by the executors at the instance of the official guardian, it was:—Held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

Discretion as to Sale—*Interest.*]—Executors with a discretionary power to sell their testator's real estate:—Held, not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into court, pending the suit, they were charged with interest. *McMillan* v. *McMillan*, 21 Gr. 369.

Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim. In fact, according to the terms of the will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:—Held, that they were not responsible for any loss sustained by reason of the delay in selling. *Ib.*

The master by his report found that the executors had paid to some of the children of the testator, all of whom were equally entitled under the will, different amounts, and to one of them nothing, the estate proving insufficient:—Held, not a ground for appealing from the master's report, but that the question, whether the executors were estopped from denying the sufficiency of the estate to make payment to all the children equally, or whether those paid were bound to refund, was one proper to be discussed on further directions. *Ib.*

Exchange of Lands.]—An executor or administrator cannot, having regard to R. S. O. 1887 *c.* 108, s. 9, and 54 Vict. *c.* 18, s. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own. The court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

Executor's Agreement to Sell Real Estate.]—Where an executrix, jointly with one or more of those entitled to the testator's estate, and during the minority of others of them, contracted for the sale of portions of the real estate, and the purchasers made improvements, the court refused to disturb the possession of the purchasers before the time had arrived for the partitioning of the estate, and charged them meanwhile with a ground rent only, and not with the improved value. *Morley* v. *Matthews*, 14 Gr. 551

Executor Declining to Act.]—Under 21 Hen. VIII. *c.* 4, one or more of several executors has power to convey when the others decline to act. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224.

Executor of Mortgagee.]—The executor of a mortgagee had not, under *c.* 87, C. S. U. C., s. 5, any power to convey the legal estate to a person purchasing the mortgage. *Robinson* v. *Byers*, 9 Gr. 572.

Impeaching Status of Administrator.]—Ejectment. The plaintiff claimed under the grandson and heir-at-law of the patentee, F. Drouillard; defendant under his second son Dennis, to whom it was alleged that he had conveyed. The patent was for 1,200 acres, including the land in question. Dennis devised this, with other land, to his children, who by partition conveyed it to one of them, J., who afterwards devised to his brother R. R. died, and his land was sold under a judgment obtained against C., his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to the defendant:—Held, that the fact of C. being administratrix could not be impeached, so long as the letters of administration granted to her remained in force; and that she could legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud. *Bates* v. *Maxwell*, 17 U. C. R. 173.

Improvements.]—An executrix, who had an annuity charged on the income of the estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was in consequence found largely indebted to the estate:—Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate. *Morley* v. *Matthews*, 14 Gr. 551.

Inoperative Conveyance.] — In ejectment it appeared that C. died in 1851, intestate, seised of an unexpired term of years in the land, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle, J. D., for life, and then to the plaintiff, the testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards, in 1860, J. D. administered to C.'s estate, and as such administrator assigned his interest also to F., under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff; and that his conveyance as executor was therefore inoperative. *Tcahon* v. *Leamey*, 21 U. C. R. 216.

Lease after Execution.]—A lease of lands made by the agent of an executor, after delivery to the sheriff of a fi. fa. lands against such executor, will only convey an interest subject to such fi. fa. *Sloan* v. *Whalen*, 15 C. P. 319.

Mortgage—*Merger.*]—A. made a mortgage of lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the

punctual payment by the mortgagor of one-half of the principal and interest. To an action brought on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and the defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees:—Held, 1. That the plaintiffs as devisees of Z., were assignees of the mortgage within 12 Vict. c. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime; 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and, semble, that the defendant instead of setting out the facts, might have pleaded payment in the ordinary form; 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers; 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore that the second plea (which was demurred to) shewed a good defence. *Woodruff* v. *Mills*, 20 U. C. R. 51.

Renewal of Lease.]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Renunciation—*Power of Sale.*]—Where a power of sale is given to executors quâ executors, and not by name, they cannot, after they have once renounced, execute such power. *Travers* v. *Gustin*, 20 Gr. 106.

Repairs.] — The executrix under a will which was subsequently set aside, having expended $536.35 in repairs to the real estate, and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit:"—Held, that the $536.35 was properly allowed to her. *Hill* v. *Hill*, 6 O. R. 244.

Sale — *Surviving Executor.*]—Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor. The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by those Acts. *In re Koch and Wideman*, 25 O. R. 262.

Sale—*Executor of Surviving Executor.*]—A testator by his will directed his real and personal property to be sold and the proceeds to be divided and distributed, and appointed two executors to carry out his will, both of whom died before the estate was realized:—Held, that the executor of the last surviving executor of the testator's will had power to sell and convey the land. *Re Stephenson, Kinnee* v. *Malloy*, 24 O. R. 395.

Sale of Real Estate — *Mortgage for Price.*]—Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best, for the best price, and on the most advantageous terms that reasonably can be obtained for the same:"—Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees. *Re Graham Contract*, 17 O. R. 570.

Sale of Real Estate with Consent of Executors.]—A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question the title was not one which the court could force upon a purchaser. *Re MacNabb*, 1 O. R. 94.

See WILL.

Sale under Execution — *Heir not Sui Juris.*]—When an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or not competent, or not aware of the proceedings, the executors should act in the matter of the sale as a prudent owner would. *In re Davis*, 17 Gr. 603.

Sale under Mortgage.] — After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant, and died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale; the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitor's costs for doing so were charged. In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings:—Held, that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs; those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale, R. S. O. 1877 c. 103. *Beatty* v. *O'Connor*, 5 O. R. 731.

Signing Deed.] — Executors empowered under a will to sell lands, are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

Valuation of Real Estate for Division.]—A testator provided in his will that on the death of his widow, his executors should have his farm valued, and gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the executors were two. E. having made up his mind to take the farm, the executors called in his aid in nominating three valuers, and proceeded to value the farm, he being present, without notifying the other children. There was no evidence that he had attempted to influence the valuers, or that they had reached their conclusion in other than a legitimate and upright way, but certain of the children had impeached the valuation as being too low and asked for administration:—Held, that the executors, who were exercising, in some sense, judicial functions, should either have excluded all interested, or should have invited all interested to take part in appointing valuers; that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf. *Re Kerr, Kerr* v. *Kerr*, 8 O. R. 484.

Vesting of Estate—*Registration of Caution.*]—The provisions of 56 Vict. c. 20 (O.), as to registration of caution, apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of s. 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration. The provisions of 56 Vict. c. 20 (O.), are so engrafted on 54 Vict. c. 18 as to make both Acts apply to all persons dying after 1st July, 1886. In re Baird, 13 C. L. T. Occ. N. 277, reconsidered. *In re Martin*, 26 O. R. 465.

See DEVOLUTION OF ESTATES ACT.

VIII. PROCEEDINGS AGAINST AND BY.

1. *In General.*

Account Stated.]—An account stated by an executor of a debt due by his testator never before ascertained or determined, is sufficient to charge the executor as a substantive debt, without any express promise to pay. *Watkins* v. *Washburn*, 2 U. C. R. 291.

Accounts — *Acquiescence of Cestui que Trust.*]—The executor of a small estate permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852, the executor pointed out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had, was some household furniture. In 1867, the widow having set up a claim for dower rejecting an annuity provided for her by the will, the heir-at-law filed a bill against the executor for an account:—Held, that the Statute of Limitations did not bar the relief; but, inasmuch as the executor had reason to believe he would never be called on for an account, the court thought the master, in proceeding under the decree, should act liberally upon the rule of court giving the master a discretion as to the mode of vouching accounts in his office. *Walmsley* v. *Bull*, 15 Gr. 210.

Accounts—*Jurisdiction of Probate Court —Res Judicata.*]—A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the probate court. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Accounts—*Lower Canadian Trustees.*]—A bill having been filed against trustees and executors, residing at Montreal, for an account of the estate of the testator, who, at the time of his death, and for some years previously, had been domiciled there, the trustees, &c., although not obliged to do so, had appeared to and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper or Lower Canada, but which at the time of filing their answer they were not aware did exist:—Held, that under the circumstances they ought to be allowed to file a supplemental answer, for the purpose of placing the necessary facts upon the pleadings; and that the fact that such permission might enable the parties to set up a defence of want of jurisdiction in the courts of this Province, was no objection against, but rather a reason for, this permission. *Torrance* v. *Crooks*, 1 E. & A. 230.

Accounts — *Release—Law of Quebec.*]—See *Dorion* v. *Dorion*, 20 S. C. R. 430.

Administrator of Escheated Estate—*Action for Account against Deceased's Trustee.*]—C. M. died in 1869 entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. and E., in the event of either dying, his share to go to the survivor, and he appointed C. executor and guardian of D. and E. who were infants. C. forthwith took possession of the estate and managed the same for the benefit of the infants. Both D. and E. died in 1871, D. surviving E. C. afterwards, also in 1871, paid off a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagee to himself in fee. On 24th July, 1880, the plaintiffs procured a grant from the Crown under the seal of this Province, of real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on 20th October, 1880, procured letters of administration to D.'s estate:—Held, that the plaintiffs as such administrators were entitled to an account of the defendant's dealings with the real and personal estate of C. M.:—Held, also, that although the original mortgagee might, under the circumstances, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant, standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiffs, but was a trustee thereof for the plaintiffs:—Held, also, that notwithstanding Attorney-General v. Mercer, 5 S. C. R.

538, the plaintiffs' right to an account as administrator of D.'s estate was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the cestuis que trust named in the grant from the Crown, nor the attorney-general for the Dominion, were necessary parties:—Held, also, that the Statute of Limitations was no bar to the action. *Simpson* v. *Corbett*, 5 O. R. 377; 10 A. R. 32.

Administrator of Administrator.] — An administrator of an administratrix cannot represent the intestate, but an administrator de bonis non must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a fi. fa. issued on a judgment against such administrator, is nugatory. *Ingalls* v. *Reid*, 15 C. P. 490.

Admission of Assets.] — Plaintiff had sued defendant as administrator upon a special agreement by testator to take care of and re-deliver certain wheat, alleging in different counts a promise and breach of testator and defendant respectively. Defendant suffered judgment by default as to the second count, and afterwards confessed judgment as to the first. In an action of debt on the judgment, suggesting a devastavit:—Held, that the admission of assets accorded by the pleadings could not be rebutted by shewing that when the original judgment was recovered there were assets to satisfy it, but that afterwards, a sale being forced, they proved insufficient. *Walton* v. *Andrew*, 14 U. C. R. 594.

Amendment — *Changing Cause of Action.*]—In a suit by an administrator with the will annexed, upon a mortgage, the defendant produced a release for the mortgage money given by the testator in his lifetime. Thereupon the plaintiff sought to be allowed to proceed against defendant as a creditor of the estate, but as this would involve an amendment creating an entirely different record, the court refused it. *Barrett* v. *Crosthwaite*, 9 Gr. 422.

Application for Advice — *Bequest to Charities—Advertisement for Next of Kin.*]—A testator by his will directed that his executor should distribute his residuary estate amongst churches and charities, or otherwise as he might think fit. The executor advertised for heirs and next of kin of the testator without result, and then paid into court the money representing the residue. Upon a petition under R. S. O. 1887 c. 110, s. 37, for the advice of the court as to the construction of the will and as to further advertising for next of kin, the court refused to make any order in the absence of any of the heirs or next of kin. *Re Harley's Estate*, 17 P. R. 483.

Arbitration.] — An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable; but:—Held, on demurrer to the declaration set out in the report of this case, that an executor or administrator may, as such, refer to arbitration causes of action which arise in the lifetime of the testator or intestate, so as to bind the estate, and without making himself personally responsible; and, therefore, the declaration being for a breach of submission to perform the award made in pursuance of such a reference, and also on the common counts, admittedly against the defendant in her representative character:—Held, that there was no misjoinder of causes of action. *Reid* v. *Reid*, 16 C. P. 247.

Assumpsit — *Money Paid into Court.*]—Where the defendant in an action of assumpsit paid money into court, and died, and the action abated, and the plaintiff afterwards sued his executor for the same cause of action, and took the money in the former suit out of court, but proved his debt to no larger amount:—Held, that he could not retain the costs of the first action, and recover against the executors for the difference between the sum remaining and that originally paid in. *Carey* v. *Choat*, 6 O. S. 467.

The plaintiff, as administrator, sued defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. Defendant denied the promise:—Held, that if the admissions proved could be construed into an absolute promise to pay, still being made before the plaintiff had received his letters of administration, they could not support the issue raised. *Beard* v. *Ketchum*, 5 U. C. R. 114.

Quære, whether the admissions in evidence would support an absolute promise to pay, if made to the administrator himself, and if so, whether the fact of their being made to a third person instead of to the administrator, made any difference. *Ib.*

Award Fixing Executor's Indebtedness.]—One of several executors being indebted to the estate, the matter was referred by himself and his co-executors, and a large sum awarded against him:—Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, and in a suit by the executors he was decreed to pay the amount. *Koelln* v. *McKenzie*, 15 Gr. 331.

Bond.] — On a bond given to executors, they may sue either as executors or in their own right. *Davis* v. *Davis*, 5 O. S. 551.

Bond—*Demand.*]—Action on a bond that G. C., his executors, &c., should account and pay over on request. Defendant was one of three executors of G. C., but did not act in the affairs of the estate, and lived at some distance; and a request to pay over all moneys, &c., had been made upon the other two executors, but not on him. It was admitted, however, that all the executors had been sued on this bond, and served with process and declaration before the commencement of this action:—Held, that the demand was sufficient. *County of Bruce* v. *Cromar*, 22 U. C. R. 321.

Quære, whether, as a general rule, when a demand upon executors is necessary it must be made upon all. Semble, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor. *Ib.*

See BOND, II.

Cognovit.]—A. and B., executor and executrix, having given a cognovit signed as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only as such:—Held, that though the cognovit might bind them personally in its terms, a personal judgment against them must be set aside. Semble, also, that the judgment

roll, alleging "a debt due by the testator in his lifetime on an account stated, in consideration of which defendants promised to pay," would not warrant a judgment against defendants personally. *Gorrie* v. *Beard*, 5 U. C. R. 626.

Construction of Will — *Appeal.*]—Under con. rule 938 (a), an executor applied in chambers, by way of originating notice, and obtained a determination of a question affecting the rights of legatees under the will, which involved the construction of the will; but, upon appeal by residuary legatees, the order in chambers was reversed by a divisional court, which put a different construction upon the will:—Held, that the judgment of the divisional court was a sufficient protection to and indemnity of the executor, and if he sought to appeal to the court of appeal, he must do so at his own risk as to reimbursement of the costs, in the event of failure; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs. The legatees interested in the bequest then applied for leave to appeal from the decision of the divisional court, and to dispense with security. It was objected on behalf of the residuary legatees that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under con. rule 938:—Held, that the question was one which a master, in taking the accounts and making the inquiries directed to be taken and made in an administration proceeding, would have jurisdiction to deal with; and if, for the purpose of ascertaining and determining the persons to whom legacies were payable, and the amount of the legacies, it should become necessary incidentally to place a construction on the will, the master had jurisdiction to do so; and the test of jurisdiction under con. rule 938 was whether the question was one which, before the existence of the rule, could have been determined under a judgment for the administration of an estate or execution of a trust. Leave to appeal granted and the security required reduced below the usual amount. *Re Sherlock*, 18 P. R. 6.

Decription.] — As to description of representative character as executor when plaintiff or defendant. See *Caughill* v. *Teal*, 12 U. C. R. 619; *Kilborn* v. *Russ*, 28 C. P. 222.

Discontinuance.]—When a plaintiff sues two or more defendants as executors, the entering a nolle prosequi and discontinuing as to one, is not a discontinuance of the action. *Masson* v. *Hill*, 5 U. C. R. 60.

Execution against Goods.]—See *Smith* v. *Bernie*, 10 C. P. 243.

Execution against Lands.]—Injunction awarded at suit of the heir, to restrain execution against the lands of a deceased person in the hands of his administrator, defendant having administered to the estate in England only, and there being at the time no Canadian administrator. *Grant* v. *McDonald*, 8 Gr. 468.

Execution against Mortgagor's Executors.]—Upon a judgment obtained against the executors of a mortgagor, a writ against the lands of the testator was sued out, under which his interest in the mortgaged premises was sold; and afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mortgagee, all which transactions took place after the passing of 7 Wm. IV. c. 2:—Held, that under such circumstances the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Gr. 344.

See, also, *Bank of Upper Canada* v. *Brough*, 2 E. & A. 95; *Lowell* v. *Bank of Upper Canada*, 10 Gr. 57.

Executor of Executor.]—An executor of an executor represents the original testator, and is properly proceeded against on a claim against him. *Allan* v. *Parke*, 17 C. P. 105.

Form of Judgment.]—In a county court suit the summons was addressed to W. M. Platt, executor of the last will and testament of S., deceased. The particulars of claim were for $200, on a mortgage made by S. in his lifetime, &c., and the judgment was that P. do recover against the said W. M. Platt, executor:—Held, that the fact that the summons was not addressed to Platt as executor, and the judgment was not expressed to be against him as executor, did not make this a judgment against him personally, and that it was sufficient to warrant an execution against the lands of the deceased. *Samis* v. *Ireland*, 4 A. R. 118; 28 C. P. 479.

In an action of seduction, continued against the administratrix of the original defendant, who died before the trial, the administratrix denied the plaintiff's right to recover, but did not set up plene administravit, and a verdict for $500 was recovered by the plaintiff:—Held, that the judgment should be that the debt and costs should be levied de bonis testatoris; et si non de bonis propriis as to the costs only. The Judicature Act has not altered the form of the judgment in such cases. *Lince* v. *Faircloth*, 14 P. R. 253.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of plene administravit, could not have judgment of assets quando, no longer exists, and it is now proper to give a plaintiff judgment of assets quando, if his debt be established and such a judgment be desired. *McKibbon* v. *Feegan*, 21 A. R. 87.

Insolvent Act.]—Section 27 of the Insolvent Act of 1865, does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character. *In re Sharpe*, 20 C. P. 82.

Insurance Payable in Quebec.]—To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which by the terms thereof, was payable in Montreal, in the province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys:—Held, on demurrer, a good defence. *Pritchard* v. *Standard Life Assurance Co.*, 7 O. R. 188.

Judgment.]—Effect on the estate of a judgment against executor or administrator. See *Eccles* v. *Lowry*, 23 Gr. 167.

Judgment against Executors—*Indorsement of Note by Executors "Without Recourse."*]—A judgment against executors of an estate is only primâ facie evidence of its being for a debt due by the testator as regards the parties interested in his real estate who are at liberty to disprove it. In an action for administration by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by executors for the sale of personal property of the testator and indorsed "without recourse" to the plaintiff:—Held, that the indorsement of the note by the executors did not make it a debt of the testator in the hands of the indorsee. *Janson* v. *Clyde*, 31 O. R. 579.

Mesne Profits.]—An action for mesne profits may be maintained against an executrix under 7 Wm. IV. c. 3; and where the action is founded on the judgment against the casual ejector in ejectment, it is no ground of defence that although the writ of possession is tested in the tenant's lifetime, it was issued and executed after his death without a sci. fa. *Green* v. *Hamilton*, E. T. 3 Vict.

Money Had and Received.]—An action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another. Therefore where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors * * * of money, to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs, it became money had and received by the executors to the use of the plaintiffs." *Owston* v. *Grand Trunk R. W. Co.*, 28 Gr. 431.

Necessity of Proving Will.]—In ejectment, claiming through a sheriff's sale under an execution against executors obtained on their confession:—Held, no objection that they had not proved the will, for by confessing judgment they accepted the office. *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

Ne Unques.]—On a plea of ne unques executors by two, the plaintiff may have a verdict against one only. *Earl of Elgin* v. *Slawson*, 10 U. C. R. 289.

Notice of Appeal.]—By the master's report executors were found indebted to the estate, one of whom being dissatisfied with the finding of the master, gave notice of appeal to the plaintiff, but did not serve any notice of appeal on the other executor:—Held, irregular, and that a special application would be necessary to be allowed to give notice of the appeal after the regular time for so doing. The fact that the interest of the party not served was the same as the party appealing made no difference in respect to his right of being present upon the argument of the appeal. *Larkin* v. *Armstrong*, 1 Ch. Ch. 62.

Nova Scotia Law—*Actions against Administrators—Evidence of Plaintiff.*]—C. sued M. and R., M. accepted service and acknowledged amount due, but R. pleaded to the action. Before trial both defendants died. Then C. R. and R. R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased M. and R., the learned Judge ruled that the evidence was inadmissible under s. 41, c. 96 of the Revised Statutes of Nova Scotia, 4th series:—Held, that under said section in an action against administrators made parties to an action after issue joined, but before trial, the plaintiff cannot give any evidence in his own favour of dealings with a deceased defendant. *Chesley* v. *Murdoch*, 2 S. C. R. 48.

Payment by Testator on Account of Purchase Money.]—Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors, as money had and received to the use of the testator. *Innes* v. *Brown*, 5 O. S. 665.

Payment into Court.]—The referee in chambers has no jurisdiction to make an order for payment into court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry, Wright* v. *Curry, Curry* v. *Curry*, 8 P. R. 340.

Personal or Representative Capacity.]—To determine whether a demand sued for on the record is one claimed by the plaintiffs as executors or not, the test now is, would the money when recovered be assets of the estate. *Elliott* v. *Croker*, 8 U. C. R. 156.

In an action on two promissory notes against the executors of the maker they pleaded: 1. That they never were executors. 2. Plene administravit. The plaintiff obtained a verdict, and judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the defendants, his executors, if they had so much thereof, and if not, then to be levied of the proper goods and chattels of the defendants. A motion to amend the judgment by relieving the defendants from personal liability was refused with costs, for as they had denied their representative character, the plaintiffs were entitled to such judgment. *Huyck* v. *Proctor*, 10 P. R. 25.

Proof of Representative Character.]—The plaintiffs declared as executors, laying promises to the testator and to the plaintiffs after his death, and on an account stated with the plaintiffs. Defendant pleaded only the general issue, and plaintiffs proved an acknowledgment of the debt by defendant to them as executors:—Held, that it was not necessary to produce probate to prove their representative character. *Dickson* v. *Markle*, Dra. 286. See, also, *McGill* v. *Bell*, 3 O. S. 618.

Upon the issue of ne unques administrator, the plaintiff, producing such letters of administration as he has pleaded, will be entitled to succeed. If they do not give the plaintiff a right to sue, by reason of anything extrinsic, such as the place of residence of defendant, &c., the fact must be pleaded specially. Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator. *Beard* v. *Ketchum*, 5 U. C. R. 114.

Held, that the evidence given in this case was sufficient to prove executorship as against one, if not as against both defendants. *Earl of Elgin* v. *Slawson*, 30 U. C. R. 289.

Rectification of Deeds.]—Making executors parties to an action for the rectification of deeds. See *Ferguson* v. *Winsor*, 10 O. R. 13.

Retiring Executor—*Surety.*]—A mortgage of leasehold lands to secure $5,000 made by three trustees and executors under a will recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the Short Forms Act, and containing the usual covenant for payment by the mortgagors. In 1888, under the provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while $3,000 still remained due, the security being greatly diminished in value, and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors and trustees for an extension of the time for payment of the principal, which though providing for a reduction of the rate of interest, also provided for its being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved:—Held, that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired, the relationship of principal and surety was created, and, by virtue of the agreement, notwithstanding the reservation of remedies, the surety was discharged. *Canada Permanent Loan and Savings Company* v. *Ball*, 30 O. R. 557.

Sale of Land under Invalid Judgment.]—The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed* v. *Orr*, 6 A. R. 690.

Sale under Judgment against Executor—*Surplus.*]—See *Ruggles* v. *Beikie*, 3 O. S. 276, 347.

Security for Costs—*Money in Court—Motion for Payment out.*]—An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right. And an executrix resident abroad, applying for payment out of court of moneys to the credit of her testator, was ordered to give security for costs of an alleged assignee of the fund, who opposed the application. The rule as to security applies to a motion as well as to a petition. *Re Parker, Parker* v. *Parker*, 16 P. R. 392.

Service of Process.] — Where husband and wife executrix are sued, service of process on the husband only is sufficient, as well as in other cases. *Shuter* v. *Marsh*, Tay. 172.

Set-off.]—Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for $700, alleging non-payment, and on the common counts. Sixth plea, set-off on two promissory notes made by the plaintiff, payable to F. and H., and indorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff. Third replication, equitable, that the causes of action sued for accrued to the plaintiff as executor of one P., and not otherwise, for goods sold by plaintiff to defendant, which goods were assets of the estate, as will be the money sued for if recovered, and the plaintiff sues for the benefit of the estate only:—Held, that the replication was bad, for, among other reasons, the plaintiff on the transaction appearing would be personally liable. *Parsons* v. *Crabb*, 31 U. C. R. 454.

See SET-OFF.

Statute of Limitations—*Promise to Administrator.*]—In an action by an administrator, a replication of a promise to the intestate, in answer to a plea of the Statute of Limitations, is not supported by proof of a promise to the administrator. *Wright* v. *Merriam*, 6 O. S. 167.

Staying Proceedings.]—Where a plaintiff had recovered a verdict against executors, for a breach of promise of marriage made by the testator, the court would not on the ground that such an action could not lie against personal representatives, arrest the judgment. *Darcy* v. *Myers*, Tay. 89.

Surety Making Debtor Executor.]—Principal and surety—Death of the surety—Debtor appointed one of his three executors—Giving time to him—Effect of. See *Austin* v. *Gibson*, 4 A. R. 316.

Voluntary Bond.]—A judgment having been recovered against the obligor's executors on a voluntary bond in favour of a charity, and execution issued thereon against his lands, the court, at the suit of the heirs, restrained proceedings on such execution. *Anderson* v. *Paine*, 14 Gr. 110.

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2. *Administration Bond.*

(a) *Assignment of.*

The bond being conditioned to exhibit an inventory into the court of probate on the first Monday in June, and the breach being that the administratrix did not exhibit an inventory on the first Monday in the year, the

declaration was:—Held, bad, on general demurrer. *Metcalf* v. *McKenzie*, 2 U. C. R. 103.

The costs of an application in chancery under s. 82 of the Surrogate Courts Act, C. S. U. C. c. 16, for an assignment of a probate bond in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on the breach of the condition sued for. *Closson* v. *Post*, 6 L. J. 141.

An administration bond having been given to the surrogate Judge of the united counties of Huron and Bruce, and the union having been afterwards dissolved:—Held, under C. S. U. C. c. 16, ss. 63, 65, that the Judge of the senior county could not order such bond to be assigned, not having been named by the court of chancery as the Judge to whose benefit it should enure; and that the plaintiff, suing as assignee under his order, must prove such nomination. *Stapf* v. *McCarrow*, 35 U. C. R. 22.

An application for the assignment of an administration bond under the Act respecting Surrogate Courts, will not be granted without notice to the sureties. *Re Hilts*, 1 Ch. Ch. 386.

(b) *Under 33 Geo. III. c. 8.*

See Bagot v. *McKenzie*, 6 O. S. 580; *Metcalfe* v. *McKenzie*, 2 U. C. R. 103, 329; *In re Stegman*, 5 O. S. 71.

Debt on an administration bond, assigning breaches in the declaration. Pleas, 1. That after the 1st November, 1833, (the day named in the condition on which the administrators were to render their account), to wit, on, &c., and as soon as they reasonably could, the administrators rendered a just and full account, which was allowed by the Judge of the surrogate court; 2. Performance generally; 3. That on the 1st November, 1833, there was no sitting of the surrogate court to which the administrators could have rendered their account:—Held, on demurrer, pleas bad. *Earl of Elgin* v. *Crosby*, 10 U. C. R. 97.

The next of kin cannot claim substantial damages in an action on an administration bond, where no decree for distribution has been obtained, by shewing merely that the administrator has received moneys for the estate. The proper course for the defendant in such a case is, to apply to the court to stay proceedings on the bond until a decree for distribution has been obtained. *S. C., ib.* 256.

A breach, that although a large amount or value of goods, &c., of the deceased had come to the hands of the administrator, he had not well and truly administerpd the same according to law:—Held, bad: and that the only two modes in which a valid breach of a condition in the form prescribed by this Act can be assigned are, nonfeasance in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance in wasting the assets collected by conversion of the same to the administrator's own use, or some other misappropriation whereby the estate is diminished to the prejudice of those entitled. *Neil* v. *M'Laughlin*, 19 C. P. 350.

In an action on an administration bond, the want of a decree is a good plea to a breach for not distributing, but it is no ground for staying proceedings, nor is the want of a citation for an account, nor the omission to shew the receipt and misappropriation of funds. On such breach full damages may be recovered. Dictum in Earl of Elgin v. Crosby, 10 U. C. R. 256, doubted and distinguished. *Neill* v. *McLaughlin*, 4 P. R. 312.

(c) *Under Surrogate Courts Act, C. S. U. C. c. 16.*

Held, that the rules and orders referred to in s. 18 of this Act, being sanctioned by the Legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply with the statute. *Bell* v. *Mills*, 25 U. C. R. 508.

Part of the condition was, that the administrator should, when lawfully called on, make and exhibit an inventory of all the estate and effects which had or should come into his hands. The first breach alleged was, that the Judge had made an order upon him to bring in forthwith an inventory of the goods, chattels, and credits of the deceased, and that he did not make or exhibit an inventory of the goods which had come into his hands, or any inventory:—Held, that admitting the order to be too wide it was nevertheless good to the extent of the condition, and that the breach, not going beyond such condition, was also good:—Held, also, that it was unnecessary to shew the amount recoverable in respect of such breach. *Ib.*

Held, that the non-payment of the plaintiff's judgment against the intestate could not be assigned as a breach of the bond, for the Surrogate Courts Act gives no new remedy for the recovery of debts. *Ib.*

Quære, however, as to the mode of carrying out the provisions of s. 65. *Ib.*

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3. *Pleading.*

Where one of three executors is dead, and the survivors sue in right of the testator, the declaration must state that payment had not been made to the deceased executor. *Nichall* v. *Williams*, Tay. 21.

Plaintiff in his declaration described himself administrator, &c., and laid causes of action accruing to him, administrator as aforesaid, Defendant pleaded ne unques administrator:—Held, bad, on general demurrer. There was no profert of letters of administration. *Walker* v. *Covert*, 5 O. S. 58.

Where a plaintiff sues in a representative character, the cause of action must be stated to have accrued to him as such. *Ham* v. *Madden*, 5 O. S. 729.

A bill filed by A. and B. as executors of a deceased mortgagee to foreclose, did not allege that probate had issued to them:—Held, defective on demurrer. *Lawrence* v. *Humphries*, 11 Gr. 209.

A bill filed by an administrator to obtain possession of certain chattels outstanding in the hands of a third party, and for administration of the estate:—Held, multifarious,

both as against such third party and the persons interested in the estate. *Cole* v. *Glover*, 16 Gr. 392.

A plea that defendants, executors as aforesaid, submitted to arbitration, does not imply that they submitted as executors. *Bleeker* v. *Myers*, Tay. 285.

An executor is estopped from pleading plene administravit to a declaration on a sci. fa. to revive a judgment against himself. *Wood* v. *Leeming*, 2 O. S. 508.

In the concluding part of a declaration against executors, it was averred "therefore an action hath accrued to the plaintiff to demand and have of and from the defendants, executors aforesaid, &c." Demurrer, on the ground that the averment should have been "to demand and have of and from the defendants, as executors:"—Held, declaration good. *Ferrie* v. *Jones*, 5 U. C. R. 504.

Assumpsit against an executrix. Plea, plene administravit. Assets were admitted to an amount less than the claim. It was proved that testator had joined one M. in giving a note for the price of a carding machine, which M. was to hand over to him in order to save him harmless. This was not done, but after testator's death defendant got the machine from M. to hold as security against the note. It was also proved that there were crops in the ground at the testator's death:—Held, 1. That the verdict should be only for the value of the assets proved, and not for the amount of the debt; 2. That the carding machine would not form assets; 3. That the crops would be assets, in the absence of any evidence as to the contents of the will. *Fisher* v. *Trueman*, 10 U. C. R. 617.

The rule making the plea of non-assumpsit to a bill or note bad, is confined to cases where the action is between the parties to the bill or note; it does not extend to executors, &c. *Masson* v. *Hill*, 5 U. C. R. 60.

The plaintiff sued defendants as executors of the indorser of a note not due till after the decease of the testator, averring due notice to defendants of dishonour, and that by reason thereof they became liable to pay the note, and being so liable, afterwards, as executors, promised to pay on request. A plea denying the promise was held bad, as raising an immaterial issue, the promise being implied from the facts averred in the declaration and not denied in the plea. *Ib.*

Where in an action against defendant as executor, on a judgment recovered against the testator, the pleas were, that testator did not promise, and, ne unques executor, and judgment was entered on the first issue only, taking no notice of the second:—Held, that although defendant's pleading the first plea would entitle the plaintiff to succeed on the second, yet the issue should have been disposed of; and that the judgment, therefore, would not support an execution against defendant as executor. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 386.

Declaration on the common counts for goods bargained and sold to intestate; and for money paid for, and account stated with, defendant as administratrix. Plea, that after plaintiff's claim became due and before action plaintiff was indebted to S. M. and G., executors of H. G., in $800, and it was then agreed between plaintiff and intestate, in his lifetime, and said executors, that plaintiff should be credited in his account with said executors with $500, and be allowed same by them as if paid them by plaintiff, and that the intestate should become and be accepted by said executors as their debtor for the amount of said claim in lieu of plaintiff, and that plaintiff's claim against the intestate in respect of the last named sum should be discharged and satisfied; and in pursuance of said agreement plaintiff was so credited, and said intestate became and was accepted by said executors as their debtor; and plaintiff then accepted said agreement, and its performance as aforesaid, in satisfaction and discharge of his claim:—Held, plea, bad, because professing to answer the whole declaration it only answered part, and because wholly inapplicable to the causes of action against the administratrix. *Waddell* v. *Gilderslecve*, 16 C. P. 565.

Declaration against defendant as executrix of McK. on an award made in pursuance of a submission by bond. Plea, a debt overdue on covenant by McK.:—Held, plea bad; for this action was on a specialty, and an executor could not plead an outstanding debt of the same degree. *McCallum* v. *McKinnon*, 16 C. P. 142.

Declaration on a contract by testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished and not according to the specifications, &c.:—Held, declaration not bad for averring a promise by testator to perform the work, and afterwards by defendants, as executors, to finish the same, testator having died before the time for completion expired. *Leonard* v. *Northey*, 22 C. P. 11.

The declaration alleged that one S., by his will, appointed defendant his executor; and after devising his farm, directed his remaining real estate to be sold and the proceeds thereof and his money and notes to be equally divided between his three sons, of whom plaintiff and defendant were two; that defendant proved the will and became possessed of assets more than sufficient to pay plaintiff's claim under the will, and properly applicable to the payment thereof, and afterwards promised and agreed with the plaintiff that the plaintiff was entitled to receive from him $500, and stated that sum as the plaintiff's claim under the will; and thereupon, in consideration of the premises, defendant promised the plaintiff to pay, and the plaintiff agreed to accept, the said sum of $500 as and for his claim. Defendant pleaded that he did not become possessed of assets, and that he did not promise; and the jury found in his favour on the first plea:—Held, 1. that the plaintiff's claim was not a "purely money demand," to which his right was an equitable one only, under s. 2 of the Administration of Justice Act, 1873; and if it were, that that section, which did not take effect till 1st January, 1874, would not apply to this action begun on the 11th December, 1873; 2. That the allegation of defendant having assets, was material, and the verdict on the first plea was therefore a bar to plaintiff's recovery; 3. That the possession of such assets was put in issue by the denial of the

promise as alleged,—i.e., of the promise having been made in consideration of the premises. Semble, under the facts stated in the case, that the count should have averred a tender of a release, or a readiness and willingness to execute it. *Soules* v. *Soules*, 35 U. C. R. 354.

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4. *Removing from Office or Restraining from Acting.*

Duty not Wholly Performed.]—An executor cannot be removed from his position, where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duties as executor have ceased, and he has acted as trustee by investing part of the trust moneys. In re Moore, McAlpine v. Moore, 21 Ch. D. 778, distinguished. *Re Bush*, 19 O. R. 1.

Forum.]—Where a bill was filed by devisees against the executors of their testator's will, alleging the inability of the executors to attend to the trusts of the will on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead, the court dismissed the bill, on the ground that the jurisdiction to interfere in such a case belongs to the probate and surrogate courts, and not to the court of chancery; and inasmuch as the executors had been brought before the courts without any fault on their part, the bill was dismissed with costs. *Corrigal* v. *Henry*, 2 Gr. 310.

Improper Conduct—*Delay.*]—A bill was filed in 1846, by devisees against executors charging them with improper conduct in the management of the estate; and the answers were all filed within a year afterwards. No further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate. *Meacham* v. *Draper*, 2 Gr. 316.

Injunction.]—A., B., and G. were appointed executors. B. as acting executor, received a large sum belonging to his testator's estate, which he failed to account for, and a suit was commenced to administer the estate. This suit was compromised by the plaintiff therein, who was a beneficiary under the testator's will, and the co-executors, who took security for the sum found due from B., who agreed to cease all further interference with the estate, which was thenceforth to be managed by A. B. continued to meddle with the estate, whereupon A. and G. filed a bill praying for an account, and for an injunction to restrain B. from all further interference with the estate:—Held, on demurrer, that the proceedings in the former suit and its pendency were no bar to the relief sought. *Aikins* v. *Blain*, 11 Gr. 242.

Insolvency.]—As a general rule an assignment for the benefit of creditors will be taken as a declaration of insolvency, and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging mal-administration, and alleging that the executor had made an assignment for the benefit of his creditors, and was insolvent, the court upon a motion for an injunction and receiver, before answer, granted an interim injunction and receiver, notwithstanding the executor denied any mal-administration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Gr. 443.

Insolvency — *Intemperance.*] — Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but before the death of the testator became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; and the appointment of a receiver was directed. *Johnson* v. *McKenzie*, 20 O. R. 131.

Litigation between Executor and Estate—*Quebec Law.*]—See *Mitchell* v. *Mitchell*, 16 S. C. R. 722.

Relieving from Office.]—Parties named executors, whose duties in respect to the management of the estate did not commence until after the death of B. and M., proved the will, and shortly afterwards, and before the death of either of these parties, filed a bill to be relieved from the executorship. The court, under the circumstances, refused to make any order to relieve them, they having deliberately accepted the office. *Hellem* v. *Severs*, 24 Gr. 230.

Summary Application.]—The court will not upon a summary petition, or otherwise than in an action, remove a trustee or an executor in invitum. *Re Davis's Trust*, 17 P. R. 187.

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5. *Survival of Action.*

Alimony—*Costs.*]—See *Kerr* v. *Rickard*, 8 C. L. T. Occ. N. 335.

Fraud—*No Profit to Estate.*]—See *Hamilton Provident and Loan Society* v. *Cornell*, 4 O. R. 623.

Negligence.]—After the commencement of an action for injury occasioned by negligence and improper conduct of the defendant in the management of a vessel, defendant died:—Held, that the action could not be revived against his executor. *Cameron* v. *Milloy*, 22 C. P. 331.

An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death, pendente lite, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 685.

The husband of respondent was injured while engaged in his duties as appellants' employee and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death:—Held, (1) That the respondent's right of action under Article 1056 C. C. depends not only upon

the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury. (2) That as it appeared on the record that the plaintiff had no right of action the court would grant the defendant's motion for judgment non obstante veredicto. Article 433 C. P. C. (3) That at the time of the death of the respondent's husband all right of action was prescribed under Article 2262 C. C. and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Articles 2267 and 2188 C. C. *Canadian Pacific R. W. Co.* v. *Robinson*, 19 S. C. R. 292. Reversed by the judicial committee, [1892] A. C. 481.

Profits from Infringement of Patent.]—The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.:—Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death. Phillips v. Homfray, 24 Ch. D. 439, discussed, and regarded as decisive in the present case. Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different. *Leslie* v. *Calvin*, 9 O. R. 207.

Revivor.]—A bill was filed against two executors and other persons. One of the executors, against whom charges of breach of duty were made by the bill, died. A motion by the surviving defendants, including the co-executrix of deceased defendant, to compel the plaintiff to revive, or in default that the bill be dismissed, was refused:—Held, that the proper parties to make such an application were the representatives of the deceased defendant, and that the surviving defendants might move to dismiss for want of prosecution in the usual way. *Watson* v. *Watson*, 6 P. R. 220.

Sheriff—*Judgment on Seized Note.*]—See *Dickenson* v. *Harvey*, 6 P. R. 170.

See Bills of Exchange, VIII. 3—Devolution of Estates Act—Distribution of Estates—Limitation of Actions, IV. 5—Mortgage, VII. 4—Negligence, IV., V.—Parties, II. 5 — Payment, I. 3 — Scire Facias and Revivor, IV. 2—Set-off, I. 5—Will, IV. 16.

EXECUTOR DE SON TORT.

See Executors and Administrators, IV.

EXECUTORY DEVISE.

See Will, IV.

EXEMPTIONS.

See Assessment and Taxes, VII. — Distress, III. 10 (a)—Execution, IV.—Municipal Corporations, VI. — Revenue, II. 2.

EXONERATION OF MORTGAGED PROPERTY.

See Will, IV. 10.

EXPERT EVIDENCE.

See Evidence, I. 4.

EXPROPRIATION OF LANDS.

See Crown, I — Municipal Corporations, XIII.—Railways, XV. 1 (a), (b), (c), (d), (e).

EXPULSION OF MEMBERS.

See Church, I.—Company, V. 5—Insurance, V. 4—Law Society of Upper Canada—Schools, Colleges, and Universities, I. 3.

EXTENT, WRIT OF.

See Execution, X.

EXTORTION.

See Criminal Law, IX. 15.

EXTRADITION.

See Constitutional Law, I. — Criminal Law, VII.

EXTRAS.

See Work and Labour, I. 1.

FACTOR.

Controlling Sale of Output of Factory—*Mode of Sale.*]—S., a manufacturer, desiring to borrow money from M., agreed with M. in writing, that M. should have the selling of the goods manufactured at his, S.'s, factory; that S. should give M. a mortgage on the factory, and premises to secure $5,500, and interest, to be advanced by M., and should furnish to M. all the goods manufactured at the factory, and manufacture the same to the

satisfaction of M., and ship the same to M., as M. directed, at such times and in such reasonable quantities as he from time to time should direct, and should pay M. a del credere commission of seven and a-half per cent. for selling the same, and interest at eight per cent. on all moneys advanced by M. over the $5,000; and M. covenanted, as his orders were filled and the goods received, to advance in cash to S. seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to M. at such value that he, M., could sell them to the best advantage. It was agreed also, that all goods manufactured at the factory should be sold only by or through M.:—Held, that the above agreement constituted M. a factor, not a pledgee, for he had power to sell without regard to any default in payment, in the ordinary course of trade. Held, also, that M.'s authority to sell was irrevocable. Held, further, that, under the interest that M. had in the goods, and from the nature of the dealings, and arrangements of S., and M., if S. did not repay the advances made to him, or did not deliver to M. goods sufficient to keep his advances protected by a surplus of twenty-five per cent. of goods at the wholesale trade value, and it became necessary for M. to protect himself against such default, and he could not within a reasonable time have sold to customers, he could sell by auction, and was not bound to delay until private sales could be made. It appeared that certain goods not specially ordered by the plaintiff were sent to him by the defendant on some arrangement, on which he advanced seventy-five per cent., which goods were sold by him in the same manner as goods sent to fill his orders:—Held, that he had the same right to sell these goods as the goods received under the written agreement. *Mitchell* v. *Sykes*, 4 O. R. 501.

Fraudulent Pledge.]—F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J., to whom he could sell a piano, and desired them to ship one in their own name, to be subject to their order, F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F., simply to act as their agent. K. & Co. not having the piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F. on payment of freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was shipped by F. to Virginia City, Ill., and from there to F., at Toronto, under the assumed name of R., and was there pledged by F., under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by him to pay the charges as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied:—Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him:—Held, also, that F. was not an agent within the meaning of the Factors' Act, R. S. O. 1887 c. 121, ss. 2, 4, 5, so as to enable him to pledge the piano; nor, was he an agent "entrusted with the possession of goods." *Bush* v. *Fry*, 15 O. R. 122.

Partner.]—A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only. *Dingwall* v. *McBean*, 30 S. C. R. 441.

Representative Capacity.] — The defendants, as factors of one W., sold wheat to the plaintiff, who subsequently obtained an award in his favour in an arbitration on a separate transaction between himself and W., to which defendants were not parties, though they actively intervened as W.'s agents. In an action of assumpsit by plaintiff to recover a balance of account:—Held, that he was not entitled to include in his debit against the defendants the amount of the sum awarded to him as against them. *Brunskill* v. *Rigney*, 6 C. P. 509.

Sale of Goods — *Innocent Purchaser.*]—The word "agent" referred to in R. S. O. 1897 c. 150, "An Act respecting contracts in relation to goods entrusted to agents," means one who is entrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale of the property. And an agent who has obtained possession of certain lumber from the master of a vessel without authority from the owner was:—Held, not to have been entrusted with the possession, and that the owner was entitled to recover the value of the lumber from a bonâ fide purchaser from the agent who had paid the agent. *Moshier* v. *Keenan*, 31 O. R. 658.

Warehouse Receipts.] — One C. being the lessee of a coal yard and premises, assigned the property to S. & H., who agreed to receive as warehousemen therein such wood and coal as C. might deposit, and grant him warehouse receipts therefor, in consideration of which he agreed to pay them two-and-a-half per cent. on the value of such goods, and to give them a first lien therefor. C. continued to hold possession of the premises as before the assignment, no visible change being made; his sign remained up, he brought in and took out coal as he pleased, and he was to pay the rent and taxes; but S. & H. entered from time to time to see that there was enough coal to meet their receipts, and on some occasions they prevented him from moving more coal, fearing that there would not be enough for this purpose. It was expressly agreed between them that all coal taken out for which receipts had been given, should be replaced with other coal. C. having become insolvent, a question arose as between his assignee and the receipt holders, and one R., as to the right to the coal in the yard, some of it having been sent to C., the insolvent, by R., to sell for him on commission, after the receipts had been given, and were outstanding:—Held, that C. could not, under the Factors Act, C. S. C. c. 59, pledge this coal for the payment of the receipt holders; and that R. was entitled before them to so much of his coal as remained unsold. *In re Coleman*, 36 U. C. R. 559.

FACTORIES ACT.

See MASTER AND SERVANT, VI. 2.

FAIR COMMENT.

See DEFAMATION, XII. 2 (b).

FALSE IMPRISONMENT.

See MALICIOUS PROCEDURE, II. — TRESPASS, III. 2.

FALSE PRETENCES.

See CRIMINAL LAW, IX. 16.

FALSE REPRESENTATIONS.

See FRAUD AND MISREPRESENTATION, II.

FALSE TRADE DESCRIPTION.

See CRIMINAL LAW, IX. 17.

FAMILY ARRANGEMENT.

Division of Property.]—Upon the death of a life tenant the three surviving children of a deceased nephew of the testator (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside and the rents and proceeds of sales received by the brother and sister repaid to him: —Held, affirming 16 O. R. 341, that as there was no consideration therefor and no compromise or settlement of any disputed question the partition deed and other dealings could not be supported as in the nature of family arrangements. *Baldwin* v. *Kingstone*, 18 A. R. 63. Affirmed by the judicial committee, 18 A. R. Appendix.

FARM CROSSING.

See CONSTITUTIONAL LAW, II. 22—CROWN, I. 2—RAILWAY, VII. 4.

FATAL ACCIDENTS ACT.

See MASTER AND SERVANT—NEGLIGENCE, IV. 1—RAILWAY, XIII. 8.

FEES.

See ARBITRATION AND AWARD, IV.—BARRISTER-AT-LAW—COUNTY CROWN ATTORNEY —CORONER—REGISTRY LAWS, VI. 2 (*a*), (*b*) — SHERIFF, VIII. — SURROGATE COURTS, II.

FENCES.

I. IN GENERAL, 2784.

II. BOUNDARY LINE COMMISSIONERS, 2786.

III. LINE FENCES AND WATERCOURSES, 2786.

I. IN GENERAL.

Boundary Fence — *Mode of Construction.*]—The Line Fence Act, R. S. O. 1887 c. 219, s. 3, provides that "owners of occupied adjoining lands shall make, keep up, and repair a just proportion of the fence which marks the boundary between them:"—Held, per Ferguson, J., affirming the decision of Armour, C. J., that a boundary fence, under R. S. O. 1887 c. 219, should be so placed that when completed the vertical centre of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land:—Held, per Boyd, C., contra, that if the boundary line be between the posts on one side of the fence, and the scantling and boards on the other, so that there is practical equality in the amount of space occupied by the posts and that occupied by the continuous boards, and if that method is sanctioned by local usage, neither owner has legal ground for complaint. *Cook* v. *Tate*, 26 O. R. 403.

Damages for Removal.]—Action of trespass to land for removing a fence in May, 1868. The plaintiff was a tenant only, and his landlady swore that she leased the place to him in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year taxes and statute labour." There was no further evidence as to the nature of the lease or duration of the term:—Held, that the damage should not, as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession. *Fisher* v. *Grace*, 27 U. C. R. 158.

Defective Fences.] — Trespass for impounding and selling plaintiff's horses. Plea, that the horses were damage feasant. Replication, that by town meeting regulations fences should be five feet high, and that defendant's fence not being that height, but ruinous and out of repair, the plaintiff's horses escaped out of his close into defendant's close, without plaintiff's knowledge or consent:—Held, good on general demurrer. *Ives* v. *Hitchcock*, Dra. 247.

Trespass q. c. f. will lie by the owner of a close into which a neighbour's pig may break and enter, and do damage, against the owner of the pig, unless he can excuse the act for defect of fences, or upon some other special ground. *Blacklock* v. *Millikan*, 3 C. P. 34.

Ditches on Highways.]—Obligation of municipal corporation to fence ditches on highways in a dangerous condition. See *Walton* v. *County of York*, 6 A. R. 181.
See WAY, VII.

Municipal By-law.]—Cattle straying from highway on land not fenced as required by municipal by-law.—Requisites of by-law. See *Crowe* v. *Steeper*, 46 U. C. R. 87.
See, also, MUNICIPAL CORPORATIONS, III. 1.

Obligation to Fence.]—A land owner in this country must fence against cattle. *Spafford* v. *Hubble*, M. T. 2 Vict.

Declaration, that plaintiff and defendants possessed adjoining closes, and that by reason thereof it became the duty of defendants to keep in repair the division fence; and in another count it was charged, that defendants for the same reason were bound to keep in repair half of said fence:—Held, both counts bad, as shewing no facts from which the duty alleged would accrue. Quære, whether since the passing of 8 Vict. c. 20, an action like the present would lie. *Otto* v. *Pelan*, 9 U. C. R. 503.

Removal of Fences by Consent.]—Plaintiff sued defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof, and the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way to prevent horses, &c., straying therefrom; and that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter, that the lease contained covenants allowing the plaintiff to enter on the land and view the state of repair, and that defendant would repair according to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that upon the evidence, set out in the case, the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed, that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land:—Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 U. C. R. 307.
See, also, *Pickard* v. *Wixon*, 24 U. C. R. 416.

Right of Way—*Maintaining Fences and Gates.*]—The plaintiff's predecessor in title had granted to defendant's predecessor in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, and put gates at each end of it, which, after remaining many years, rotted away:—Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely on the sides of the way in question, but also at the ends of it, where they might have gates as part of the fences:—Held, also, that even if this were not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled himself to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used. *Clendenan* v. *Blatchford*, 15 O. R. 285.

II. BOUNDARY LINE COMMISSIONERS.

See Vanderlip v. *Mills*, 6 O. S. 62; *Morgan* v. *Simpson*, 6 O. S. 132; *Delong* v. *Striker*, 6 O. S. 137; *Caldwell* v. *Wright*, E. T. 5 Vict. R. & J. Dig., col. 618; *Villaire* v. *Cecille*, 6 O. S. 406; *In re Detlor*, T. T. 3 & 4 Vict. R. & J. Dig., col. 618; *Gauder* v. *Hill*, 6 O. S. 101; *Murney* v. *Markland*, 6 O. S. 220; *Delong* v. *Striker*, E. T. 3 Vict. R. & J. Dig., col. 618; *In re Boundary Line between Eastern and Johnstown Districts*, M. T. 6 Vict. R. & J. Dig., col. 618; *Havens* v. *Donaldson*, 1 U. C. R. 371; *Raile* v. *Cronson*, 9 C. P. 9; *Keeley* v. *Harrigan*, 3 C. P. 173; *Vivian* v. *Campbell*, 7 C. P. 175; *Regina* v. *Rose*, 12 U. C. R. 637; *Barr* v. *Canada Life Assurance Co.*, 26 U. C. R. 614.

III. LINE FENCES AND WATERCOURSES.

The Act 4 Wm. IV. c. 12, for regulating line fences, did not affect any agreement made between parties respecting division fences between them. *Lamb* v. *Mulholland*, 5 O. S. 109.

On the question of the sufficiency of a fence according to township regulations, where cattle are distrained damage feasant, the award of fence viewers is conclusive. *Stedman* v. *Wasley*, E. T. 4 Vict.

In an action for obstructing a drain, the jury having founded their verdict upon an award made by the fence viewers:—Held, under the facts stated in this case, that it was unnecessary to prove the regular appointment of the fence viewers; and that the award was binding under 8 Vict. c. 20. *Malone* v. *Faulkner*, 11 U. C. R. 116.

Defendants having impounded plaintiff's horses for getting into his field, the matter was referred to the fence viewers, who awarded that defendants' fence was lawful, and appraised the damage. The plaintiff replevied, and desired to prove that defendants had put up the fence higher after the horses got over, and before the award:—Held, that under the Municipal Institutions Act, C. S. U. C. c. 54, s. 360, the award was conclusive as to the legality of the fence. *Short* v. *Parmer*, 24 U. C. R. 633.

The court had no authority to set aside an award of fence viewers made under C. S. U. C. c. 57. *In re Cameron*, 25 U. C. R. 533.

The right of appeal to the Judge of the county court against an award of fence viewers, under 32 Vict. c. 46, s. 8, is not restricted to an award made under s. 6, s.s. 2, of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence viewers under C. S. U. C. c. 57, which the later Act amends, and is made part of. *In re McDonald* v. *Cattanach*., 30 U. C. R. 432, affirming *S. C.*, 5 P. R. 288.

In trespass,, defendant justified cutting the ditch complained of under an award of fence viewers, &c. The township clerk produced a copy, which he swore was a true one, of the fence viewers' award, the original being in his custody:—Held, that such copy was admissible in evidence under C. S. U. C. c. 32, s. 6, those awards being made by a statutable public officer acting in a judicial capacity, which might affect a large portion of the public, and even municipalities. Semble, that if the copy had been one delivered by the fence viewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Desbippes*, 33 U. C. R. 59.

In an action of trespass for pulling down a line fence between plaintiff's and defendant's adjoining premises in the city of Toronto, it appeared that the fence had been erected by the defendant, and was on his own land. The plaintiff had got the city commissioner to value the fence, treating it as a line fence, but no by-law was proved, the proceeding was wholly ex parte, and the award was uncertain:—Held, that this clearly could give no right. *Bragg* v. *Rogers*, 25 C. P. 156.

Quære, whether an action could have been sustained under C. S. U. C. c. 57, s. 3, if it had not been repealed by 37 Vict. c. 25 (O.) *Ib.*

See DISTRESS, I.—RAILWAY, XII. 2.

FERRY.

Action for Disturbance.]—In an action for disturbing plaintiff's ferry, it is not necessary to prove that defendant either received or claimed any hire or payment. *Burford* v. *Oliver*, Dra. 9.

If, in such action, it be shewn that the ferry is under the management of a third person, who receives the ferriage for his own benefit by agreement with the plaintiff, the plaintiff can at most recover only nominal damages. *Jones* v. *Fraser*, 6 O. S. 426.

Ferry while Bridge Impassable.]—By 38 Vict. c. 97, the plaintiffs were authorized to build and maintain a toll bridge on the river L'Assomption at a place called "Portage," and if the said bridge should by accident or otherwise be destroyed, become unsafe or impassable, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving way of said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable they were bound to maintain a ferry across the said river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of the plaintiffs' franchise and allowed it to be used by persons crossing the river:—Held, that the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but as the bridge had since been demolished the court would merely award nominal damages and costs. *Galarneau* v. *Guilbault*, 16 S. C. R. 579.

Form of Grant.]—The Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg:"—Held, a sufficient grant of of a right of ferriage to and from the two places named. *Anderson* v. *Jellett*, 9 S. C. R. 1.

Informal Authority.]—A letter from the governor's secretary, authorizing a person in the name of the government to take possession of a ferry, is not sufficient to establish his right to the ferry, so as to enable him to maintain an action for its disturbance. *Jones* v. *Fraser*, 6 O. S. 426.

International Boundary.] — The government of this country has power to grant a right of ferry on rivers separating Canada and the United States, and the grantee may maintain an action against any one who disturbs his ferry on the waters over which the British government has jurisdiction. *Kerby* v. *Lewis*, 6 O. S. 207. Approved in *Regina* v. *Dawenport*, 16 U. C. R. 411.

Interprovincial Boundary.] — The Crown has a right to grant a license of ferry across the Ottawa, between Ontario and Quebec, free from the restrictions contained in C. S. U. C. c. 46, that statute not applying to such a case. *Smith* v. *Ratté*, 15 Gr. 473, in appeal, affirming *S. C.*, 13 Gr. 626.

Lord's Day Act.] — The defendant was held liable under 8 Vict. c. 45, for plying with his steamboat on Sunday between the city of Toronto and the peninsula, persons carried between those places not being travellers within the meaning of the exception in the Act. *Regina* v. *Tinning*, 11 U. C. R. 636.

Municipal Liability in Managing.]—Liability of municipal corporation for injuries caused by negligence of officers in the management of ferry boat. See *City of St. John* v. *Macdonald*, 14 S. C. R. 1.

Municipal Tax.] — Constitutionality of statute of Provincial Legislature authorizing a municipality to impose an annual tax on "ferrymen or steamboat ferries." Construction of by-law made thereunder. See *Longueuil Navigation Co.* v. *City of Montreal*, 15 S. C. R. 566.

North- West Territories.] — The authority given to the Legislative Assembly of the North-west Territories, by R. S. C. c. 50 and orders in council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature," (and perhaps as to license for revenue) within the Territories, includes the right to legislate as to

ferries.—The town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N. W. T. c. 28) can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor in council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary. *Dinner* v. *Humberstone*, 26 S. C. R. 252.

Obligation to Furnish Accommodation.]—The omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right. *Hickley* v. *Gildersleeve*, 10 C. P. 460.

Particulars in Action.] — Particulars ordered in an action on the case for disturbing a ferry, as to the number of passengers, goods, &c., conveyed. *Ives* v. *Calvin*, 1 C. L. Ch. 8.

Revocation of Right — *Rent.*] — The Crown, on the 23rd February, 1838, granted a lease to D. of "our ferry across the river Detroit, from Windsor to Detroit," during pleasure, at an annual rent, payable on the 24th June. On the 14th March, 1843, a precisely similar lease of the same ferry was granted to B., and it was proved that from that time B. had used the ferry greatly to D.'s injury:—Held, that the second lease revoked the first; that D. was liable for rent only up to the then last yearly day of payment mentioned in his lease; and that he was not liable for the use and occupation had afterwards. *Regina* v. *Davenport*, 16 U. C. R. 411.

Sub-lease.]—The Crown grants a right of ferry to A., who leases by writing not under seal to B.—C. disturbs the right of ferry:—Held, that the right to sue is in A., and not in B. *Higgins* v. *Hogan*, 7 U. C. R. 401.

Termini Defined by User — *Interference.*]—Under the authority of a Crown license the town of Belleville executed a lease to the plaintiff granting the franchise "to ferry to and from the town of Belleville to Amelíasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing only for one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side, to a point across the bay of Quinte, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the bay of Quinte, between the township of Ameliasburg and a place in the township of Sidney, which adjoins Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore, about two miles west from the landing place of the plaintiff's ferry:—Held, reversing 27 Gr. 411, and 7 A. R. 341, that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's right. *Anderson* v. *Jellett*, 9 S. C. R. 1.

Using Boat within Ferry Limits.]—9 Vict. c. 9, s. 1, as well as the common law, authorizes a person to use his own boat within the limits of a ferry for business or pleasure, freely and without shewing his motives or occasion for allowing any person to pass in his boat, provided such person be not a traveller, and nothing be charged for carrying. *Ives* v. *Calvin*, 3 U. C. R. 464.

See CONSTITUTIONAL LAW, II. 21.

FIERI FACIAS GOODS.

See EXECUTION, VIII.

FIERI FACIAS LANDS.

See EXECUTION, IX.

FINAL JUDGMENT.

See SUPREME COURT OF CANADA, II. 7.

FINES.

See BUILDING SOCIETIES—CONSTITUTIONAL LAW, II. 19—MUNICIPAL CORPORATIONS, XV.

FIRE.

I. IN GENERAL, 2790.

II. CARRIAGE OF GOODS, 2795.

III. CLEARING LAND, 2796.

I. IN GENERAL.

Agreement to Grind Wheat.]—In consideration that the plaintiff would deliver to defendant 2,000 bushels of wheat, the defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour:—Held, that the word "therefrom" must be construed to mean thereafter, and not that the flour was to be made from the identical wheat delivered. This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill containing the wheat was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted. *Tilt* v. *Silverthorne*, 11 U. C. R. 639.

Agreement to Manufacture Lumber.]—The defendant agreed with the plaintiff to saw for him, at a certain price, whatever logs should be delivered at the defendant's mill, the plaintiff to draw away the lumber as soon as possible after it was cut; the defendant also agreed to deliver at Port Perry, within a reasonable time, any lumber cut by

him under the agreement after the first of March. Some lumber was cut before the first of March, and drawn away by the plaintiff; some was also cut after the first of March, and this was destroyed at the mill by an accidental fire in June following. The jury found that of the latter portion the defendant might have delivered about 40,000 feet before the fire:—Held, that the plaintiff was entitled to recover the value of the lumber so destroyed, which might have been delivered, and that the defendant was entitled to be paid for sawing this lumber as well as that drawn away by the plaintiff. *Schofield* v. *Town, Town* v. *Schofield*, 12 U. C. R. 439.

Building—*Partial Completion.*]—In an action for work and labour against A. and B., the plaintiff put in an agreement headed, "An estimate for the carpenter and joiner work of a brick cottage, to be done for Mr. William Walker" (defendant's father). Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were indorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was not to find materials, and no time was mentioned for completion of the work:—Held, that parol evidence was admissible to shew that defendants were liable on the contract. Held, also, that the destruction of the building by fire before the completion of the plaintiff's work could not defeat his claim for what he had already done. *Hubbard* v. *Walker*, 13 U. C. R. 205.

Chartered Steamer Injured by Fire.]—Where a defendant had agreed to return a steamer chartered by him on a certain day in good repair, "dangers of the lake excepted," it was decided that damage to the steamer by an accidental fire, not occasioned by lightning, did not excuse the charterers, as it did not come under the exception. *Larned* v. *McRae*, 1 U. C. R. 99.

Quære, whether a fire occurring in a steamer from some cause clearly connected with the use of steam, would come within such exception. *Ib.*

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

Engine and Boilers of Burnt Mill—*Fixtures or Chattels.*]—A steam saw mill having been burnt down, the engine and boilers were left, the boilers set in the brick wall of the furnace, and the engine supported by a frame which was bolted to timbers sunk in the ground. The sheriff seized both under a fi. fa. treating them as chattels, made two ineffectual attempts to sell, and returned goods on hand. On the return day of the writ they were removed by the plaintiff, who had purchased by verbal agreement from the execution debtor; but the sheriff followed, retook them as seized under the fi. fa., and afterwards sold under a ven. ex. The plaintiffs forbade the sale and brought trespass against the sheriff:—Held, while the engine and boiler remained fixed in the mill, after the fire, they partook of the realty, and could not be seized under the fi. fa. as chattels. Held, also, that the plaintiffs, having purchased them as chattels by oral sale were estopped from asserting that the execution did not attach, because they were part of the realty. *Walton* v. *Jarvis*, 14 U. C. R. 640.

C. owning land on which the building for a steam saw mill had been in part erected, mortgaged it to D., having previously executed a mortgage of it to M. Afterwards the machinery was put in; D. assigned his mortgage to H.; and the mill having been destroyed by fire, the machinery, engine, boiler, &c., were removed by C., with the assent of H., to another county, to place in a new mill, and while still detached they were seized there under an execution against the goods of C., the mortgagor. On an interpleader issue between H., as plaintiff, and the execution creditor:—Held, that the plaintiff must succeed, for the machinery, &c., were fixtures before the fire, and after it continued to be the property of the mortgagee; and though there was a prior mortgage, the execution creditor shewed no right as against H. *Harris* v. *Mallock*, 21 U. C. R. 82.

Evidence—*Sparks from Steamer.*]—In an action to recover the value of buildings destroyed by fire, started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack is admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size, if they escaped, might have been carried to the building in question, is too conjectural and speculative. *Peacock* v. *Cooper*, 27 A. R. 128.

Expropriation.]—Danger of fire to be considered in awarding compensation for lands expropriated for railways. See *Straits of Canseau Marine R. W. Co.* v. *The Queen*, 2 Ex. C. R. 113.

Fall of Wall after Fire.]—Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house:—Held, that the defendant could not shield himself under the plea of vis major, and was liable for the damage caused. *Nordheimer* v. *Alexander*, 19 S. C. R. 248.

Fire Limits—*Erection of Buildings.*]—Sub-section 10 of s. 496, Consolidated Municipal Act, 1892, which empowers the corporation of a city, town, or village to pass by-laws "for regulating the repair or alteration of roof or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner. *Quinn* v. *Town of Orillia*, 28 O. R. 435.

Fire Limits—*By-law—Right of Action.*]—Where a statute provides for the performance of a particular duty, and some one of a

class of persons, for whose benefit and protection the duty is imposed, is injured by the failure of the person required to do so to perform it, an action, primâ facie, and if there is nothing to the contrary, is maintainable by such person; but where the particular course of conduct is imperative and the non-performance is, in the general interest, punishable by penalty, an action will not lie. Where, therefore, under authority conferred by s.-s. 10, s. 496, of the Consolidated Municipal Act, 1892, a by-law was passed by a council of a city, setting apart certain areas as fire limits where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and removed by the corporation at the cost of the owner, and a penalty of $50 was imposed, the erection of a wooden building within such limits does not give a right of action to the owner of contiguous property which is injuriously affected thereby. *Tompkins* v. *Brockville Rink Co.*, 31 O. R. 124.

Fire Spreading from Stove—*Liability to Adjoining Owner.*]—Defendant occupied a stall in the market, the cellar beneath which was used by the plaintiffs to keep goods in. He went out, leaving a fire in his stove, with no one to watch it, and a block of wood too close to the stove. A fire broke out which burned through the floor, and destroyed plaintiff's goods below, and the jury found that such fire was occasioned by defendant's negligence:—Held, that it was nevertheless an accidental fire, within 14 Geo. III. c. 78, s. 85, and that defendant was not liable. *Gaston* v. *Wald*, 19 U. C. R. 586.

Innkeeper—*Neglect to Warn Guest.*]—An innkeeper—Held, not liable for neglecting to warn his guest of a fire breaking out in the building. See *Hare* v. *Henderson*, 43 U. C. R. 571.

Inquest.]—Under 20 Vict. c. 36, the coroner is made the judge of the necessity for investigation into the cause of a fire; and therefore on application for a mandamus to the treasurer to pay him his fees, it was—Held, no answer to shew that in the opinion of the reeve and others the inquiry was not called for. *In re Fergus*, 18 U. C. R. 341.

Landlord and Tenant.]—In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste. *Wolfe* v. *McGuire*, 28 O. R. 45.

Municipal Treasurer — *Destruction of Corporation Money by Fire.*]—The defendant, being treasurer of a municipality, kept his moneys in his house, there being no proper place for depositing the same provided by the municipality, and there being no bank in the county within a distance of thirty-five miles:—Held, that under these circumstances the treasurer was not liable to make good to the corporation the amount of loss sustained by the accidental burning of his house, and the destruction therein of the moneys of the municipality; and that his own statements under oath, which appeared satisfactory to the court, were sufficient evidence to exonerate him from liability. *Township of Houghton* v. *Freeland*, 26 Gr. 500.

Passenger on Train.]—Accident to a passenger on a train by car catching fire—Contributory negligence. *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456.

Quebec Law—*Landlord and Tenant.*]—To rebut the presumption created by article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (en bon pere de famille), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. *Murphy* v. *Labbé*, 27 S. C. R. 126.

Railway — *Accumulation of Weeds on Track.*]—A railway company are responsible for damages caused by fire which is started by sparks from one of their engines, in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation. *Rainville* v. *Grand Trunk R. W. Co.*, 25 A. R. 242, 29 S. C. R. 201.

See, also, RAILWAYS.

Ratepayer's Action because of Non-delivery of Hydrants.]—Contract by defendant with corporation to supply hydrants—Right of action thereon by ratepayers, whose property was burned owing to defendant's non-performance. See *Cunningham* v. *Furniss*, 4 C. P. 514.

Sheriff—*Escape.*]—In covenant against a sheriff's sureties, the breach assigned was, that the sheriff arrested the debtor in the original action on a ca. re. delivered to him, and afterwards allowed him to escape. Defendants pleaded that the gaol was accidentally destroyed by fire, and so the debtor escaped. The plea was held bad, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy. *Corkery* v. *Graham*, 1 U. C. R. 315.

Sheriff—*Goods Subject to Seizure.*]—Declaration against a sheriff for not executing a fi. fa., alleging that there were goods out of which he could have levied the money indorsed, but that he did not levy the same. Plea, that before he could by due diligence have levied the moneys, the goods were destroyed by fire:—Held, on demurrer, plea bad; for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable. *Ross* v. *Grange*, 25 U. C. R. 396.

Sparks from Railway Engine.]—See RAILWAYS.

Sparks from Steamer.]—See *Hilliard* v. *Thurston*, 9 A. R. 514, *Brown* v. *McRae*, 17 O. R. 712.

Steam Thresher—*Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned

Judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable:"—Held, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict; therefore the judgment of the court below ordering a new trial should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Storage of Wheat—*Loss by Fire.*]—See *Clark* v. *McClellan*, 23 O. R. 465.

Tug—*Proximate Cause—Reasonable Precautions.*]— The plaintiff, owner of a scow, had without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform. Owing to the negligence of the master, the plaintiff's scow caught fire from sparks emanating from the smokestack of the tug, and was destroyed:—Held, affirming 24 O. R. 500, that the defendants were liable for the negligence of the owner of the tug hired by them in so placing it as to communicate fire to the plaintiff's scow, as in doing so he was obeying the orders of the defendants' foreman, and was under his direct and personal control. Bartonshill Coal Co. v. Reid, 3 Macq. 266, followed. *Cram* v. *Ryan*, 25 O. R. 524.

II. CARRIAGE OF GOODS.

Carriers or Warehousemen.]— Flour was delivered to defendants, who were warehousemen and carriers, with directions to sell as much of it as they could during the winter, and put the remainder in transitu for plaintiff in the spring. Some sales were made before navigation opened in the spring, and an accidental fire destroyed the remainder, without any default or negligence of defendants:—Held, that as the flour at the time of the fire was in the hands of defendants as warehousemen, and not as common carriers, they were not responsible. *Thirkell* v. *McPherson*, 1 U. C. R. 318.

When a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company. *Milloy* v. *Grand Trunk R. W. Co.*, 21 A. R. 404; reversing 23 O. R. 454.

Carriage at an End.]—Defendants as common carriers undertook to carry goods of the plaintiff, who resided at Port Dover, from Buffalo to Caledonia, whence the plaintiff was to take them. Upon their arrival at the Caledonia station, the customs duties not having been paid, and no one being in readiness to receive them, they were placed in a bonded warehouse, and whilst there were destroyed by fire:—Held, that defendants were not liable, and that their duty as common carriers ceased on the deposit of the goods in the bonded warehouse. The principle of O'Neill v. Great Western R. W. Co., 17 C. P. 263, approved. *Inman* v. *Buffalo and L. H. R. W. Co.*, 7 C. P. 325.

Directions as to Carriage not Complied with—*Forfeiture of Insurance.*]—The plaintiffs, living at Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were sent in one of the mail steamers, but the captain of the "Regina" being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by railway to Sarnia, where he would taken them up on his way to Southampton. Defendants, however, shipped them from Kingston by a propeller, which was burned, with the goods on board, in the river St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was avoided:—Held, that defendants were liable on the contract for the value of the goods. *Wallace* v. *Swift*, 31 U. C. R. 523; 28 U. C. R. 503.

Imperial Act.]—The Imperial statute 26 Geo. III. c. 86, s. 2, enacting that owners of ships should not be liable for any loss or damage which may happen to any goods shipped on any such vessel by reason or means of any fire happening to such ship, is in force in this Province. *Torrance* v. *Smith*, 3 C. P. 411.

Defendants seeking to avail themselves of that Act, need not aver that they are British subjects. *Hearle* v. *Ross*, 15 U. C. R. 259.

Special Conditions.]—Carriage of goods by railway — Special conditions exempting from liability from loss by fire. See *Milligan* v. *Grand Trunk R. W. Co.*, 17 C. P. 115; *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510; *Gordon* v. *Great Western R. W. Co.*, 25 C. P. 488.

See Brodie v. *Northern R. W. Co.*, 6 O. R. 180.

III. CLEARING LAND.

General Rule—*Carelessness.*]—Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time and season, and managed with due care, he is not responsible for damage occasioned by it. The defendant, whilst harvesting in his own field, threw upon the ground a lighted match thinking he had extinguished it, and it set fire to combustible material. The defendant on afterwards discovering the fire, though he could easily have put it out, after confining it to one spot left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises, and destroyed his barn with a quantity of grain and hay. The court

considered that the principle and doctrine established in Fletcher v. Rylands, L. R. 3 H. L. 330, and Jones v. Festiniog R. W. Co., L. R. 3 Q. B. 733, applied; and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence. Gaston v. Wald, 19 U. C. R. 586, doubted. *Furlong* v. *Carroll*, 7 A. R. 145.

A man must exercise care and discretion as to the time and mode of clearing his land: and if his neighbour be injured by rashness or inconsiderateness on his part, in setting out fire for that purpose, he will be liable to him; but this is always a question for the jury, and the court refused to disturb a verdict for defendant, though the evidence would fully have warranted a different finding. *Wilkins* v. *Roe*, 15 C. P. 325.

Change of Wind.]—The defendant, for the purpose of clearing his land, set out fire on the same, but before doing so, consulted with the plaintiff, who had some lumber piled on an adjoining lot, who agreed that the weather was favourable, the wind blowing in a direction away from the plaintiff's property, and to prevent its spreading thereto, the defendant burnt up the stubble, &c., around the plaintiff's property. The fire was set out on Monday, the wind continuing in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep watch over the fire. On Thursday morning there were indications of a change of wind, and the defendant sent his son to watch the fire, but when the latter arrived on the ground, the wind was blowing a heavy gale, at the rate of from thirty-five to forty miles an hour, and the fire communicated to the plaintiff's property, which was destroyed, and it appeared that even if the defendant had been watching he could not have prevented the fire spreading:—Held, that the defendant was not liable for the damage sustained by the plaintiff. *Murphy* v. *Dalton*, 5 O. R. 541.

Clearing Road Allowance — *Contractor's Negligence.*]—Action for negligently setting out and managing a fire on a road allowance in order to clear it. The evidence shewed that the fire was set out by a person who had contracted with defendants to clear the allowance at a certain price:—Held, that defendants were not liable. *Carroll* v. *Township of Plympton*, 9 C. P. 345.

Construction of Railway—*Contractor's Negligence.*]—The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing, and clearing of the track of trees, to be done to the satisfaction of the defendants' engineer, were let to M. and G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage:—Held, that the contractors, not the defendants, were primâ facie responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out in the report of this case, did not shew such an interference by the engineer as would make the defendants liable:—Held, also, that if the action could be maintained only the damages awarded for the first fire in July should be recovered, as the weight of evidence showed that the second fire arose from other causes than the first fire. *Gillson* v. *North Grey R. W. Co.*, 33 U. C. R. 128; 35 U. C. R. 475.

Duty to Put Out Fire.]—However clear the rule may be that a party may kindle or permit fire to burn on his own land, still if it is likely by spreading to injure his neighbour, he is bound to put it out, or exert himself so to do, otherwise he will be liable. *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252.

Extent of Liability.]—A person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks for any injurious consequences that may ensue to the property of his neighbours. *Dean* v. *McCarty*, 2 U. C. R. 448.

Held, following Dean v. McCarty, 2 U. C. R. 448, that a proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence. *Gillson* v. *North Grey R. W. Co.*, 35 U. C. R. 475.

Fletcher v. Rylands, L. R. 3 H. L. 330, commented upon, and held not applicable to this case. *Ib.*

Negligence—*Time for Deciding.*]—In the month of August, the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon:—Held, that the question of the defendant's liability for negligence should be determined having regard to the circumstances existing in October, and not to those existing in August. *Beaton* v. *Springer*, 24 A. R. 297.

Pleading.]—The first count of a declaration for setting fire to the plaintiff's barn, &c., alleged that the plaintiff, at the time when, &c., was possessed of a farm, &c.: that the defendant C. was at the said time possessed of the southerly portions of the lots of which the plaintiff had the northerly parts, and that G., being the servant and agent of C., and by his instructions, and negligently, set fire to a brush heap on C.'s land, &c., and that by reason of negligence the fire spread to the plaintiff's land and burned his barn, &c. The third count alleged possession of the plaintiff and C., as in the first count; it then described the defendant's premises as adjoining the plaintiff's premises, and then alleged that G. by the order, &c., of C. he, the said G., being at the time in the service and employ of C., set fire to a brush heap, &c., and that the defendant did not use due care, &c., whereby, &c.:—Held, that the allegation, that C. was at the time when, &c., was a material allegation. That the allegation of G., being, &c., in the first count referred to the time stated, namely, at the time of the committing, &c., and was sufficiently certain. That the allegation distinctly appeared in the first count, and was quite distinct from the wrongful act alleged. That the allegation that G. was at the time when, &c., was not in issue under the

plea of not guilty, and should, if intended to be disputed, have been specially traversed. *Henderson* v. *Chapman*, 3 P. R. 331.

Railway—*Limitation of Action.*]—In an action against a railway company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining:—Held, that the Railway Act, s. 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway. *Prendergast* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 193.

Sudden Rise in Wind.]—Persons have a right to set out fire on their land for the purpose of clearing it, and if the flames spread under the influence of a wind suddenly arising, and cause damage to a neighbour, no action will lie without proof of negligence. It was held a misdirection in such a case, to tell the jury that defendants were bound to have anticipated the rising of the wind, and to use extraordinary caution. *Buchanan* v. *Young*, 23 C. P. 101.

Workman or Contractor.] — One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home, two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land, and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:—Held, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment, and subject to his direction, and that defendant was responsible. *Johnston* v. *Hastie*, 30 U. C. R. 252.

Quære, whether if M. had been such contractor, the defendant would have been liable. *Ib.*

See CORONER — INNKEEPER, I.—LANDLORD AND TENANT, XXIII. 7 — RAILWAY, X., XIII. 6—SHIP, X. 3 (b).

FIRE ARMS, UNLAWFULLY POINTING.

See CRIMINAL LAW, IX. 45.

FIRE INSURANCE.

See INSURANCE, III.

FIRE LIMITS.

See MUNICIPAL CORPORATIONS, VII.

FISHERIES.

I. IN GENERAL, 2800.

II. BEHRING SEA ACT, 2805.

I. IN GENERAL.

Baie des Chaleurs—*Three Mile Limit.*]—Under the Imperial statute 14 & 15 Vict. c. 63, regulating the boundary line between old Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick and within the Dominion of Canada, and subject to the Fisheries Act, 31 Vict. c. 60. Therefore the act of drifting for salmon in the Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act, and of the regulations made in virtue thereof. *Mowat* v. *McFee*, 5 S. C. R. 66.

Beach.] — In trespass for entering the plaintiff's close and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing:—Held, that the Crown has the power to grant the beach to high water mark, and that the defendant was a trespasser, the patent having conveyed to the plaintiff the land on the waters of Lake Ontario. *Parker* v. *Elliott*, 1 C. P. 470.

Held, that no common law right exists to the public to use the beach above high water mark for the purpose of fishing, when the beach has been conveyed by the Crown to a subject. *Ib.*

Bounty—*Fishing by Traps and Weirs.*]—Defendants prosecuted fishing by means of brush weirs and traps. The weirs were formed by brush leaders from the shore with a pound at the extreme end. At low water the weirs were dry, and at neap-tide there would be some four feet of water therein. The traps were constructed by means of a leader from the shore and a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water. Boats were sometimes, but not always, used to take the fish from the weirs and traps:—Held, that fishing by such means was not "deep-sea fishing" within the meaning of R. S. C. c. 95, and the regulations made thereunder by the Governor-General in council, and the instructions issued by the minister of marine and fisheries in the year 1891; and that the defendants were not entitled to bounty as provided by the said Act. *The Queen* v. *Eldridge*, 5 Ex. C. R. 38.

Constitutional Law—*Dominion and Provincial Rights.*]—Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. Robertson v. The Queen, 6 S. C. R. 52, followed. The rule that riparian proprietors own ad medium filum aquæ does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide. Where the provisions of Magna

Charta are not in force, as in the Province of Quebec, the Crown in right of the Province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Per Strong, C.J., and King and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the Provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation. The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the Provinces under the British North America Act. The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the department of marine and fisheries, may impose fees for such license, and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal conferring qualification, and give no exclusive right to fish in a particular locality. Section 4 and other portions of R. S. C. c. 95, so far as they attempt to confer exclusive right of fishing in Provincial waters, are ultra vires. Per Strong, C.J., Taschereau, King, and Girouard, JJ. R. S. O. 1887 c. 24, s. 47, and ss. 5 to 13 inclusive of the Ontario Act of 1892, are intra vires but may be superseded by Dominion legislation. R. S. Q. Arts. 1375 to 1378 inclusive are intra vires. *In re Jurisdiction over Provincial Fisheries*, 26 S. C. R. 444. See the next case.

Whatever proprietary rights vested in the Provinces at the date of the B. N. A. Act, remained so unless by its express enactment transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject matter of those proprietary rights. The transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lakes improvements," operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonably and probably in accordance with the intention of the Legislature. The transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed. With regard to fisheries and fishing rights:—Held, (1) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, short of transferring them to others. (2) A tax by way of license as a condition of the right to fish is within the powers conferred by s.-ss. 4 and 12. (3) The same power is conferred on the Provincial Legislatures by s. 92. (4) R. S. C. c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over Provincial property, is ultra vires the Dominion. (5) R. S. O. 1887 c. 24, s. 47, is with a specific exception intra vires the Province. As regards the Ontario Act 55 Vict. c. 10, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see B. N. A. Act, s. 91, s.-s. 12. Secus with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights," or "The Management and Sale of Public Lands." Held, further, that the Dominion Parliament had power to pass R. S. C. c. 92, intituled "An Act respecting certain works constructed in or over navigable waters." *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia, Attorney-General for the Province of Ontario* v. *Attorney-General for the Dominion of Canada, Attorneys-General for the Provinces of Quebec and Nova Scotia* v. *Attorney-General for the Dominion of Canada*, [1898] A. C. 700.

Exemptions.]—A boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt. *Daragh* v. *Dunn*, 7 L. J. 273.

Fishery Act—*Constable Receiving Fine.*]—Held, that a constable acting under a warrant issued under the Fishery Act, 31 Vict. c. 60 (D.), directing him to convey plaintiff to gaol, and the gaoler to hold him for thirty days absolutely, and not until the fine, &c., be sooner paid, for the non-payment of which the warrant was issued, had no authority to receive the money and discharge the prisoner:—Held, also, that under the Act a warrant of commitment might issue in the first instance, the statute not requiring that a distress warrant must first issue. *Arnott* v. *Bradley*, 23 C. P. 1.

Fishery Act—*Offence*—"*On View.*"]—The term "on view" in s.-s. 4 of s. 16 of the Fisheries Act is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. *Mowat* v. *McFee*, 5 S. C. R. 66.

Inspector's Sureties.]—Liability of inspector's sureties for deputy's default—Disputes within s. 11 of 37 Vict. c. 45 (D.). See *Verratt* v. *McAulay*, 5 O. R. 313.

Navigable Waters.]—The Crown cannot grant an exclusive right of fishery in navigable waters in this Province. *Moffatt* v. *Roddy*, M. T. 2 Vict.

Navigable Waters—*Inlet.*]—This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated 19th March, 1798, and contended that it conveyed the inlet; and that the "bank" referred to in the patent was part of the bay, and not part of the inlet, and consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded, the inlet; and further, that the locus in quo being navigable waters, if the

Crown could grant at all, the public had the right to use the fish in it:—Held, that the locus in quo was a navigable water, and therefore the public had a right to the free use thereof as such. *Gage* v. *Bates*, 7 C. P. 116.

Held, 1. That all Her Majesty's subjects have a right to take bait or fish in any harbour, river, or public water in Upper Canada (not duly set apart by the governor in council for the natural or artificial propagation of fish,) so that in so doing they trespass not on Crown lands or beaches, or by their place, time, or mode of fishing contravene any provision of the Fisheries Act, or any regulations made by the governor-general under its provision, and applicable not merely to individuals, but equally to all Her Majesty's subject. *Daragh* v. *Dunn*, 7 L. J. 273.

Prosecution under Provincial Fisheries Act.]—*See Regina* v. *Plaws*, 26 O. R. 339.

Public Harbour—*Ownership by City under Royal Charter.*]—The harbour of the city of St. John is not one of the public harbours which by virtue of s. 108 and 3rd schedule of the British North America Act, 1867, became at the Union the property of Canada. It is vested in the corporation of the city of St. John, who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city. (2) Notwithstanding such ownership of the harbour by the corporation of the city of St. John and their rights therein, the attorney-general of Canada may file an information in this court to restrain any interference with or injury to the public right of navigation or fishing in such harbour. (3) By the Act of Assembly of the Province of New Brunswick, 8 Vict. c. 80, s. 16, incorporating the defendants, they were prohibited from throwing or draining into the harbour of St. John any refuse of coal-tar or other noxious substance that might arise from their gas works, under a penalty of £20:—Held, that the remedy so provided was cumulative, and that while the repeal of the provision might relieve the defendants from the penalty prescribed by the Act, such repeal would not legalize any nuisance they might commit by throwing, or permitting to drain into the harbour, the refuse of coal-tar, or other noxious substances that might result from the manufacture of gas at their works. 4. Semble, that while an exemption granted by the minister of marine and fisheries under s.-s. 2 of 31 Vict. c. 60, s. 14, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any one from throwing any poisonous or deleterious substance into waters frequented by fish if the act complained of constituted an injury to, or interference with, some right of fishing existing in such waters. (5) By the Act of Assembly of the Province of New Brunswick, 40 Vict. c. 38, authority was given to the defendants to construct a sewer, with the sanction of the governor-general of Canada, (which was obtained) from their gas works to the harbour for the purpose of carrying off the refuse water from such works; it was further provided by the Act that the drain should be laid under the supervision of the common council of the city, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebbing of the tide, as the common council should direct. After the drain was constructed it appeared that at times tar had been suffered to escape with the refuse water through the drain into the harbour, but that the discharge of refuse water when separated from the tar had not been injurious to the fisheries carried on in the harbour. Under these circumstances, the court granted an order restraining the discharge of tar and other noxious substances through the drain by the defendants and further restraining them from allowing any discharge therefrom except at the ebbing of the tide, and at such times during the ebbing of the tide as the common council of the city of St. John might direct. (6) Held, that whilst the Legislature of New Brunswick could not, at the time of the passing of the Act of Assembly, 40 Vict. c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and so long as the discharge of such refuse water through the drain did not amount to a nuisance there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it. *St. John Gas Light Co.* v. *The Queen*, 4 Ex. C. R. 326.

Riparian Proprietor — *Salmon Fishing —Notice of Action—Damages.*]—Three several actions for trespass and assault were brought by A., B., and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fishery Act, 31 Vict. c. 60 (D.), and justified the seizure on the ground that the plaintiffs were fishing without license in violation of an order-in-council of 11th June, 1879, passed in pursuance of s. 19 of the Act, which order was in these words.—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the department of marine and fisheries, is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. recovered $3,000, afterwards reduced to $1,500 damages; B. $1,200; and C. $1,000:—Held, that ss. 2 and 19 of the Fisheries Act, and the order-in-council of the 11th June, 1879, did not authorize the defendant in his capacity of inspector of fisheries, to interfere with A., B., and C.'s exclusive right as riparian proprietors of fishing at the locus in quo; but that the damages in all the cases were excessive, and therefore new trials should be granted:—Held, also, that when the defendant committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the department of marine and fisheries, and was not entitled to notice of action under C. S. N. B. c. 89, s. 1, or c. 90, s. 8. *Venning* v. *Steadman*, 9 S. C. R. 206.

Three-mile Limit — *Seine Fishing.*]—The crew of a fishing vessel owned in the United States had thrown their seine more than three miles off Gull Ledge in the Province of Nova Scotia, but before they had secured all the fish in the seine both it and the vessel had drifted within the three-mile limit, where the vessel was seized by a Canadian cruiser while

her crew was in the act of hailing out the seine:—Held, that the vessel was guilty of "fishing" within the meaning of the Treaty of 1818 and Imperial Act 59 Geo. III. c. 38, and also under the provisions of R. S. C. c. 94. *The Queen* v. *The Frederick Gerring Jr.*, 5 Ex. C. R. 164; 27 S. C. 271.

Three-mile Limit—*Burden of Proof.*]—See *The Henry L. Phillips* v. *The Queen*, 25 S. C. R. 691.

Three-mile Limit—*Inland Waters.*]—On the 21st April, 1894, the American steamer Grace was seized on Lake Erie by a Canadian Government cruiser for an alleged infraction of R. S. C. c. 94, intituled "An Act respecting Fishing by Foreign Vessels." Upon an action for condemnation it was found by the court that the vessel, when seized, was more than three marine miles from the shore, but clearly north of the international boundary line between Canada and the United States of America:—Held, the three-mile limit to the maritime territory of a state, as fixed by the rules of international law, does not apply to the waters of the great lakes between Canada and the United States, and the territorial limits of both countries are determined by the international boundary line. (2) An American vessel fishing without a license upon the Canadian side of the boundary line on one of the great lakes is subject to seizure and condemnation under the provisions of R. S. C. c. 94. *The Grace*, 4 Ex. C. R. 283.

II. Behring Sea Act.

Circumstances Justifying Arrest—*Evidence—Costs.*]—Article 6 of schedule 1 of the Behring Sea Award Act, 1894, 57 Vict. c. 2 (Imp.) prohibits the use of nets, firearms and explosives in the fur-seal fishing in certain waters mentioned in the Act, during the season therein prescribed. A vessel left the port of Victoria, B. C., on the 11th January, 1895, to prosecute a fur-sealing voyage in the North Pacific, her equipment including a supply of firearms and explosives. The Behring Sea Award Act, 1894, came into force on the 23rd April, 1894. On the 18th June of that year, the master of such vessel received notice of the Act, with instructions to proceed to Copper Island for the purpose of having his firearms sealed up. On the 27th July, the vessel reported to the American custom house officer there, who informed the master that he had no authority to seal up the arms and ammunition, but after making a manifest of the things on board, gave the master a clearance permitting his vessel to proceed to Behring Sea for the purpose of hunting for seals. The manifest shewed that the vessel had on board a certain number and certain kinds of loaded and empty cartridge shells. On the 2nd September the vessel was boarded by officers of H. M. S. Rush, and afterwards arrested by them and taken to Ounalaska, and there handed over to H. M. S. Pheasant as being guilty of an infraction of article 6 of the Behring Sea Award Act, 1894. The grounds upon which the arrest was based were: (1) The fact that among the 336 sealskins on board, one had a hole in it which might have been caused by a bullet or buckshot; and (2) That there was a less number, as well as another kind, of shells found on board the vessel when arrested than appeared in the manifest. At the trial it was not established beyond a doubt that the hole in the skin in question was produced by a gun shot, or, if so, by one fired by those on board the defendant vessel. On the other hand, it could be reasonably inferred from the evidence that the number and the kinds of shells on board the vessel were incorrectly stated in the manifest. Although the evidence disclosed doubts as to a breach of the provisions of the Act, which the court resolved in favour of the vessel, yet it was held that the circumstances created sufficient suspicion to warrant the arrest, and no costs were given against the Crown in dismissing the petition. *The Queen* v. *The E. B. Marvin*, 4 Ex. C. R. 453.

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

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

Infraction by Foreigner.]—The punitive provisions of the Behring Sea Award Act, 1894, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner. *The Queen* v. *The Viva*, 5 Ex. C. R. 369.

Mistake of Master—*Informal Log.*]—Where the official log of a ship arrested under the Seal Fishery (North Pacific) Act, 1893, did not disclose the position and proceedings of the ship on certain material dates, an independent log kept by the mate was offered in evidence to prove such facts:—Held, not to be admissible. The Henry Coxon, 3 P. D. 156, referred to. (2) The mere presence of a ship within the prohibited zone, owing to a bonâ fide mistake in the master's calculations, is not a contravention of the Act. *The Queen* v. *The Ainoko*, 4 Ex. C. R. 195.

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

Official Log—*Penalty.*]—By s. 1, s.-s. 2, of the Behring Sea Award Act, 1894, any ship employed in contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under s. 103 of the Merchant Shipping Act, 1854. Sub-section 3 enacts that the provisions of the Merchant Shipping Act, 1854, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing. The penal clauses of s. 284 of the last mentioned Act merely subject the master to a penalty, in the nature of a fine,

for not keeping an official log-book, and do not attach any penalty or forfeiture in respect of the ship; — Held, following Churchill v. Crease, 5 Bing. 180, that inasmuch as the particular provision of the Merchant Shipping Act, 1854, inflicting a fine only upon the master was in seeming conflict with the general provisions of s.-s. 2 of s. 1 of the Behring Sea Award Act, 1894, imposing forfeiture for contravention of the latter Act, such provisions of the last mentioned enactment must be read as expressly excepting a contravention by omission to keep a log.—Section 281 of the Merchant Shipping Act, 1854, enacts that every entry in an official log shall be made, "as soon as possible" after the occurrence to which it relates:—Held, following Attwood v. Emery, 1 C. B. N. S. 110, that the words "as soon as possible" should be construed to mean "within a reasonable time:" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9.

Protocol of Examination — *Presence within Prohibited Zone.*]—By s. 3 of the Seal Fishery (North Pacific) Act, 1893, it is provided that "Her Majesty the Queen may, by order in council, prohibit during the period specified by the order, the catching of seals by British ships in such parts of the seas to which this Act applies as are specified by order:"—Held, that the court might take cognizance of such order in council without proof. (2) By s.-s. 3 of s. 1 of the Act in question the provisions of ss. 103 and 104 of the Merchant Shipping Act, 1854, giving jurisdiction to colonial admiralty courts in actions for the condemnation of ships guilty of offences under such Act, are applied to offences against the first mentioned Act. (3) By s. 8 of the Act in question it was provided that "a statement in writing, purporting to be signed by an officer having power in pursuance of this Act to stop and examine a ship, as to the circumstances under which, or grounds on which, he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated." Clause 2 of the order in council extended to the "captain or other officer" in command of any war vessel of "His Imperial Majesty the Emperor of Russia" all the powers conferred upon officers of the British Navy by s.-s. 4 of s. 3 of the Act, in relation to the examination and detention of an offending British ship:—Held, that where a protocol of the examination of an offending British ship by a Russian vessel did not disclose on its face that the person who signed the same was an officer in command of the examining vessel, or that the vessel was a Russian war vessel, the court by reason of its being a matter involving international obligations, must apply the maxim omnia presumuntur rite esse acta and assume that the person who signed the protocol was an officer properly in command of the examining vessel, and that such vessel was a Russian war vessel within the meaning of the Act. (4) A ship, the master of which had notice of the prohibited zone, was found within the waters thereof fully manned and equipped for sealing, and having on board shooting implements and one seal skin. It, however, did not appear that the seal had been taken within the zone:—Held, that under the provisions of the Seal Fishery (North Pacific) Act, 1893, the presence of the ship within the prohibited waters required the clearest evidence of bona fides to exonerate the master of an intention to infringe the provisions of the Act, and that as his explanation of the circumstances was unsatisfactory, the ship must be condemned. *The Queen* v. *The Minnie*, 4 Ex. C. R. 151.

Seal Fishery Act—*Presence within Prohibited Zone.*]—The Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes in pari materiâ, are to be read as one Act. McWilliams v. Adams, 1 Macq. 120, referred to. (2) Held, following the Queen v. The Minnie, 4 Ex. C. R. 151, that under the provisions of the above Acts, the presence within prohibited waters of a ship fully manned and equipped for sealing, requires the clearest evidence of bona fides to relieve the master from a presumption of an intention on his part to violate the provisions of such Acts; and where the master offers no explanation at all, and such evidence as is produced on behalf of the ship is unsatisfactory, the court may order her condemnation and forfeiture, or may commute the forfeiture into a fine. *The Queen* v. *The Shelby*, 5 Ex. C. R. 1.

Wrongful Arrest of Ship—*Damages—Interest.*] — Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by the Behring Sea Award Act, 1894, and such vessel was found to be innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention together with interest upon the ascertained amount of such damages. *The Queen* v. *The Beatrice*, 5 Ex. C. R. 160.

See CONSTITUTIONAL LAW, II. 21—GAME —NOTICE OF ACTION, I.

FISHING VESSELS.

See SHIP, VII.

FIXTURES.

I. EXECUTION, 2808.

II. LANDLORD AND TENANT, 2809.

III. MORTGAGEE AND MORTGAGOR, 2813.

IV. VENDOR AND PURCHASER, 2821.

V. MISCELLANEOUS CASES, 2823.

I. EXECUTION.

Frame House on Posts.]—A frame house rested upon posts sunk in the ground, but not in any way attached thereon:—Held, a fixture, and not liable to sale under an execution against the goods of the vendor of the land, by whom it had been put up as a dwelling house. *Bald* v. *Hagar*, 9 C. P. 382.

Machinery Disconnected for Repairs.]—The execution debtor mortgaged a grist-mill and premises to one B., and this

mortgage was assigned to the claimant, but not until after the execution issued. Previous to the execution, however, the debtor had executed a second mortgage to the claimant direct. The machinery of the mill had been disconnected, and taken down to be altered and repaired, with the intention of replacing it again:—Held, that while thus lying in the mill, and on the premises, it could not be treated as chattels. *Grant* v. *Wilson*, 17 U. C. R. 144.

Machinery of Burnt Mill.]—Trespass against the sheriff for seizing under a fi. fa. The goods in question, an engine and boiler, had been in a saw-mill which was burnt down, and remained there, set in brick, and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them to the plaintiffs, who detached them from the mill, and removed them to another place, where the sheriff followed and sold under a ven. ex.:—Held, that the first attempt at sale was clearly illegal, as the goods were then fixed to the freehold, and could not be taken as chattels. Quære, whether the oral sale was effectual, or whether the Statute of Frauds would apply. Semble, that it would not; but that the sale would in effect amount only to a license to the vendee to enter on the land and detach the goods; and quære, whether on being so severed the fi. fa. would not attach upon them. *Walton* v. *Jarvis*, 13 U. C. R. 616.

After a second trial it was held on the same facts that the engine and boiler while fixed in the mill after the fire could not be seized as chattels. *S. C.*, 14 U. C. R. 640.

Mortgage of Fixtures as Chattels— *Mortgage of Realty.*]—The fact that fixtures affixed to the freehold in the usual way have sometimes been mortgaged as chattels, and on other occasions have passed with a mortgage of the freehold, does not render them exigible upon an execution against goods, if at the time of the seizure the chattel mortgages are non-existent, and a mortgage of the freehold is in existence as a first charge thereon. *Carson* v. *Simpson*, 25 O. R. 385.

Title not in Debtor.]—A creditor having execution against lands, cannot claim fixtures which do not belong to his debtor. *Brown* v. *Sage*, 11 Gr. 239.

II. LANDLORD AND TENANT.

Covenant to Repair.]—In an indenture of lease defendant covenanted with plaintiff at all times during the term to repair, support, amend, and keep the demised premises, with all necessary reparations and amendments whatsoever, and the said premises so repaired, "with the appurtenances, and all things which at the time of the execution of the said indenture were, or at any time during the term should be fixed or fastened to, or set up in or upon the premises," at the expiration of the term, peaceably to yield up to plaintiff "with all and singular the fixtures thereto belonging," in as good condition as the same were at the execution of the indenture, reasonable use excepted:—Held, that the covenant extended to a building resting on blocks of wood, not let into the ground, also to a building laid upon scantling and old posts, not let into the ground, all placed on the demised premises during the term. *Allardice* v. *Disten*, 11 C. P. 278.

Covenant to Repair.]—Held, that under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make; that the right to erect such fixtures exists to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title. The plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture. *Holderness* v. *Lang*, 11 O. R. 1.

Greenhouse — *Heating Apparatus.*]—A greenhouse, conservatory, and hothouse, affixed to the freehold, were held not to be removable by a tenant; also, the glass roofs. *Gardiner* v. *Parker*, 18 Gr. 26.

But machinery for heating greenhouses, which rested by its own weight on bricks, and was not fastened to the freehold, was held to be removable; also, the pipes passing from the boilers through a brick wall into adjoining buildings. *Ib.*

Hop Poles.]—Hop poles left standing in the ground after the hops have been gathered, are not distrainable. *Alway* v. *Anderson*, 5 U. C. R. 34.

Intention.]—The tendency of modern decisions seems to be to effectuate the apparent intention of the parties at the time the article in question was attached to the freehold. Defendant leased land to M. for 25 years for the purpose of boring for oil, salt, or minerals. M. was to be allowed two years for testing the oil-bearing character of the land, when, if oil was not found in paying quantities, the lease was to be null and void. A steam engine was placed upon the land, for the purpose of drilling the rock and experimenting for oil. It rested on sills let into the ground, and was fastened to the sills by bolts and spikes. It was similar to others which it appeared were movable, and were used on the surface for the purpose of sinking shafts to test whether or not there was oil there. The two years having elapsed without M. obtaining the oil, defendant declared the lease forfeited, and resumed possession of the land, and claimed the engine as part of the freehold:—Held, that under the facts disclosed, the engine was not a fixture. *Burnside* v. *Marcus*, 17 C. P. 430.

Machinery.]—The saws and other machinery of a saw-mill, are not trade fixtures. *Richardson* v. *Rauney*, 2 C. P. 469.

Machinery — *Trade Fixtures — Special Agreement.*]—Where a trade fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it, if he does so in proper time; in the meantime it remains part of the freehold. Meux v. Jacobs, L. R. 7 H. L. at pp. 490, 491, followed. But where the parties have made a special contract, they have defined and made a law for themselves on the subject. Davey v. Lewis, 18 U. C. R. at p. 30, followed. In a lease dated in July, 1890, there was a provision that the lessees might, during the term, erect machinery upon the demised premises,

which should be the property of the lessees and removable by them, but not so as to injure the building, &c. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit, under a clause in the lease, but they permitted M. G., a purchaser of the machinery from the lessee's assignee, to remain in possession, paying rent until December, 1892, when she ceased, leaving the machinery on the premises. The defendants became the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M. G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession:—Held, that the machinery was, owing to the provisions in the lease, chattels, and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to M. G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property, nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it. The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title:—Held, that a wrongful detention of the goods was shewn, and that the action of replevin therefore lay. *Scarth v. Ontario Power and Flat Co.*, 24 O. R. 446.

Short Forms Act—*Removal of Fixtures.*]—The term "fixtures," as used in the extended form of the covenants to repair and leave the premises in good repair, in a lease made pursuant to the Short Forms Act, R. S. O. 1887 c. 106, includes only irremovable fixtures, which are such things as may be affixed to (e.g., doors and windows), or placed on (e.g., rail fences), the freehold by the tenant, the property in which passes to the landlord immediately upon being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things as may be affixed to the freehold for the purpose of trade or of domestic convenience or ornament, qualified property in which remains in the tenant, or such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant. Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purpose of his trade, and has a reasonable time, after such election, within which to do so. And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value. *Argles* v. *McMath*, 26 O. R. 224; 23 A. R. 44.

Special Agreement.]—Defendant leased a building to L., reciting in the lease that it was required to carry on the business of a miller, and that it might be necessary to erect other buildings, and to put in certain machinery and a steam engine; and it was agreed that such machinery should be the sole and absolute property of the lessee, and that he might remove it within a reasonable time after the expiration of the term, doing as little damage as possible to the freehold; that any buildings erected by him should be paid for by defendant at the expiration of the term; and further that the lessee might, in his discretion, use the premises for any other business, and in that case the lease should stand as if originally made therefor. The lessee covenanted to repair and leave the premises in good repair. L. assigned to M. the premises demised, and all the machinery erected thereon, in trust to secure the payment by L. of certain drafts which M. had accepted for his accommodation, and for that purpose on default to sell the residue of the term, and the machinery and mill-gearing. Soon afterwards L. went away. M. obtained possession by ejectment, and sold by deed to the plaintiff all the machinery, &c., giving him authority to take down and remove it. While he was doing so defendant prevented him, and the plaintiff in consequence replevied. Defendant pleaded only that the machinery was not the plaintiff's:—Held, that the plaintiff was entitled to recover, for by the terms of the lease the machinery was expressly made chattels, and the property of the lessee, and though defendant, after it had been detached from the freehold, might have distrained upon it for his rent, yet he had not placed his defence upon that ground. *Dacey* v. *Lewis*, 18 U. C. R. 21.

Substituted Machinery.]—One I. being the tenant of premises under the plaintiff, consisting of a mill, &c., upon the same being burned down, refitted the machinery, putting in some of the old and some new portions. The sheriff under an execution against the tenant, seized some part of the gearing. It was not shewn whether the tenant's term had expired at the time of the seizure or not, nor whether he was under a covenant to repair and keep in repair or not:—Held, that the facts were not sufficiently shewn to enable the court to come to a decision, but that primâ facie the landlord was entitled to the goods seized. *Donkin* v. *Crombie*, 11 C. P. 601.

Tenant of Mortgaged Land.]—A. owning land on which was a saw-mill, mortgaged to C. and D. to pay for machinery put up in the mill, of which his son was in possession as tenant at will, paying no rent. A. made default, and C. and D. gave notice, and attempted to sell. Defendant, the sheriff, upon an execution against A., seized the machinery, which was replevied by the son, who claimed:—Held, that the property while attached to the freehold was the property of the mortgagees, and that the plaintiff being only their tenant by sufferance, (after default in the mortgage) could not remove it as trade fixtures. *Anderson* v. *McEwen*, 9 C. P. 176.

Trade Fixtures—*Second Lease before Removal.*]—Action on a covenant in a lease, that defendant had not incumbered, charged, or affected the premises leased in any manner, and assigning as a breach that A. and B., claiming under the defendant prior to the plaintiff's lease, and having a right to certain fixtures on the leased premises from the defendant, would have entered to remove them, if the plaintiff had not paid them for them. Plea, that before the lease to the plaintiff, the defendant had leased the same premises for

five years to C., who had a right, under the lease, to the fixtures, which were trade fixtures, and that C. assigned to A. and B., who claimed these fixtures as trade fixtures:—Held, on special demurrer, plea clearly bad. *Cameron* v. *Tarratt*, 1 U. C. R. 312.

Trade Fixtures.]—The execution debtor had leased from defendant certain premises in which were an engine and boiler, to be left by him in repair on the determination of his lease. Finding both unfit for his purposes, a larger cylinder was put into the engine with defendant's consent and partly at her expense, which on being broken was replaced by another at the tenant's expense, as also a shaft, crank, fly-wheel, connecting-rod, slides, &c., with a different kind of engine-pump. A new boiler, also, instead of the old one, was put into the premises by the tenant, and was by brick-work attached to the freehold: it was also removable. All the additions made by the tenant had been so made for the purposes of his trade, and though attached to the freehold could be removed with little injury thereto, the machinery being admitted by holes made in the walls, and the shafting attached to the building. There were, also, certain driving presses, vats, and cocks in the building, and all were placed on temporary flooring, supported on scantling and trestle-work not let into the walls or ground; the partitions of the building were of wood:—Held, that the engine in its entire state belonged to defendant, as part of the freehold, and was not liable to seizure under execution; but that the temporary floors, scantling, partitions, presses, shafting, other than had been before in the building, vats and cocks, were all trade fixtures, and so liable to seizure under execution. *Hughes* v. *Towers*, 16 C. P. 287.

The rule respecting trade fixtures, as between landlord and tenant, is that all such as can be removed without materially injuring the building may be removed, and are liable to sale under an execution against the tenant. *Ib.*

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements:—Held, to be trade fixtures, and removable by the tenant. *Pronguey* v. *Gurney*, 36 U. C. R. 53, 37 U. C. R. 347.

Held, that neither the increase nor reduction of the rent, under the facts stated in this case, operated as a surrender of the term, and acceptance of a new tenancy, so as to prevent the tenants from claiming the fixtures. *Ib.*

Quære, whether the plaintiff the proprietor of a skating rink, was a person engaged in trade, so as to make fixtures used in his business exempt from distress. *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

Under the particular circumstances herein, a hardwood flooring, put down specially for skating, and capable of removal, was held to be a tenant fixture, and exempt from distress. There was no finding by the jury that the flooring could be restored in the same plight as before distress; but in view of a finding of a tender having been made, this was not material. *Ib.*

III. Mortgagee and Mortgagor.

Boiler and Engine.]—A mortgagor put up a steam boiler and engine for the purpose of working planing machinery. The boiler rested on brick work, without fastening; the engine was firmly attached to the floor, with bolts and nuts to make it work steadily; the machinery propelled by it was all unconnected with the premises:—Held, that the boiler and engines were not fixtures. *Schreiber* v. *Malcolm*, 8 Gr. 433.

Boiler and Engine and Machines.]—The purchaser of the equity of redemption in certain mortgaged premises, erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop, except by belting or similar means when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery or doing any damage to the realty in any way:—Held, that the articles were removable as trade fixtures, *Patterson* v. *Johnson*, 10 Gr. 583.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted. *Ib.*

McDonald v. *Weeks*, 8 Gr. 297, considered and approved of. *Ib.*

Building and Piping after Mortgage —*Onus of Proof.*]—S. mortgaged land upon which was a sawmill, together with machinery, plant, trade and other fixtures. He afterwards erected a drying-kiln with the necessary iron piping for drying lumber, and subsequently released his equity of redemption in all the property mortgaged to the mortgagees. The latter sold to the plaintiff the iron piping, which was claimed by defendant under a sale from S.:—Held, that primâ facie the piping being part of a building erected for the purpose of improving the inheritance, was a fixture, and passed to the mortgagees, either under their mortgage or the release; that the burden of shewing that it was to continue chattel property, when put into the kiln, lay on the defendant; and that the plaintiff therefore must succeed. *Burke* v. *Taylor*, 46 U. C. R. 371.

Chattels — *Mortgage of Realty — Conversion by Express Agreement—Subsequent Chattel Mortgage.*]—Chattels of the nature of plant or machinery not structurally affixed to the freehold, as well as those of a like nature afterwards placed on the mortgaged premises, may, by the express terms of a mortgage of the realty, become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance. *Canada Permanent L. & S. Co.* v. *Traders Bank*, 29 O. R. 479.

Counters in Chemist's Shop.]—Certain counters were embraced in the contract for the carpenter's work for a chemist's shop, and nailed to a scantling, which was placed in the wall of the shop. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected with the framework of the windows in such a way that the wainscotting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged:—

Held, that the counters were part of the freehold and included in a mortgage thereof, and not chattel property. Holland v. Hodgson, L. R. 7 C. P. 328, and Keefer v. Merrill, 6 A. R. 121, approved of. *McCausland* v. *McCallum*, 3 O. R. 305.

Dwelling-house — *Hot-air Furnace.*]—A hot-air furnace fixed to the floor by screws and placed in a dwelling-house, during its construction, by a mortgagor, in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its removal, and if removed no title to it passes as against the mortgagee even to an innocent purchaser, and the former is entitled to an order for its replacement. *Scottish American Investment Co.* v. *Sexton*, 26 O. R. 77.

Engine.]—An engine fastened into and bolted upon a wooden frame let into the ground, is a fixture, and is no less so because it could be removed without defacing or removing any part of the walls of the building. *Oates* v. *Cameron*, 7 U. C. R. 228.

Going Concern—*Building and Chattels.*]—H. H. S. gave a mortgage to R. to secure a past debt and future advances, in which it was recited that security was to be given "by the lands hereinafter mentioned, and also by the machinery hereinafter mentioned," and which proceeded to mortgage the said lands, "together with the machinery and foundry apparatus now in use and that may in future be used in the brick and frame buildings situate on the said lots, used as a machine shop and a foundry downstairs and as a printing office upstairs, the machinery being composed of one printing press, &c. (describing various articles of machinery), together with all the machinery now in or that may hereafter be put in the said premises." In the proviso in the mortgage the property was described as "lands and chattels." The mortgage was registered, but was not filed as a chattel mortgage, nor was there change of possession:—Held, that the above was, in effect, a mortgage of the machine shop and foundry, and of the printing office, as going concerns, not of the land as such and chattels as such, and had the same force and effect as if these had been mortgaged, naming them:—Held, therefore, that certain articles in question in this action, which were at the time of the execution of the mortgage on the premises, and were essential parts of the going concerns, passed under the mortgage. Held, also, following Kitching v. Hicks, 6 O. R. 739, that the mortgage was in any event good without registration as a chattel mortgage, so far as it was a mortgage upon property brought upon the premises after its date. *Robinson* v. *Cook*, 6 O. R. 590.

House on Blocks of Wood.]—The plaintiff owning land mortgaged it and afterwards built a house thereon which was placed on blocks of wood and was held by its own weight on them. Per Armour, J., the house was a mere chattel, not having become by annexation to the land or by the intention of its owner part of the land. Per Cameron, J., the house was a fixture. *Phillips* v. *Grand River Farmers' Mutual Fire Ins. Co.*, 46 U. C. R. 354.

Intention to Sever.]—The owner of land upon which there are fixtures, such as machinery in a mill has the right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held not to be prejudiced by his subsequent mortgage of the land. The mortgage was not re-filed within the year, but within the year, the mortgagor having sold the fixtures, the purchaser gave the mortgagee a mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid:—Held, that the omission to re-file did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration" within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect. Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures. *Rose* v. *Hope*, 22 C. P. 482.

Machinery.] — Certain machinery was placed in situ on land and housed with a view to the utilization of the land as a phosphate mine; and it was intended to utilize the machinery upon the land, moving it from place to place so long as veins could be found. The soil was excavated in order to form a bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock bottom of the excavation; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor, and the smoke stack was steadied by guys fastened to the ground and to stumps in the ground:—Held, that the chattels in question were fixtures and could not be removed without the consent of the mortgagee. Semble, that apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had the right to detach and remove them as chattels. *Rogers* v. *Ontario Bank*, 21 O. R. 416.

The intention, object, and purpose for which articles for the purposes of trade, or manufacture, are put up by the owner of the inheritance, are the true criteria by which to determine whether such articles become realty or not, not the mere fastening to the soil. *McDonald* v. *Weeks*, 8 Gr. 297.

In 1875, A. K. and H. K. entered into partnership as shingle makers for a term of years on equal terms, and for the purposes of the partnership purchased in A. K.'s name a piece of land about 200 feet distant from the Georgian Bay, which was conveyed to him on the 1st September, 1875. In the waters of the bay a shingle mill was erected, which was connected with the land so purchased by a tramway, which was filled from time to time with saw dust, &c. The mill was so erected for the convenience of floating logs to it. H. K. advanced the money to pay for the mill and machinery. The partnership was never formally dissolved, although H. K. ceased to interest himself in it subsequent to June, 1876. In June, 1876, A. K. mortgaged the land to J. K. by a mortgage, in the statutory form, to secure a sum of money

advanced by the mortgagee to him, and H. K., to secure the loan, also executed a mortgage of his individual interest as partner in the land. This last mortgage recited the partnership, and was given at the request of the mortgagee, who was aware of the existence of the partnership. The mill was in operation until the end of 1882, having been run by different persons in the interval. The land was sold under the power of sale in the mortgages and with the intention of getting the machinery, was purchased by defendant, who, under authorization, removed the machinery. The land was conveyed by the same description to defendant by J. K., by deed made pursuant to the Short Form of Conveyances Act, R. S. O. 1877 c. 102. H. K. subsequently executed a release of the land to the defendant. Under an execution against A. K. the machinery was seized by the sheriff after having been loaded on the cars for defendant. In an interpleader issue it was held that the mill and machinery composing the articles in question, became part of the realty in such a manner as to pass under the mortgage of the land from A. K. and H. K. to J. K. by virtue of s. 4 R. S. O. 1877 c. 104; and, by the deed from J. K. to the defendant under s. 4 of R. S. O. 1877 c. 102. *Winfield* v. *Fowlie*, 14 O. R. 102.

The court below (26 Gr. 618) held that the mortgagee of the realty had in this case no right to look to the machinery as security for his claim. On rehearing the court varied this decree by declaring the plaintiff entitled to restrain the removal of the machinery in question, by virtue of a mortgage prior to that in favour of the plaintiff upon the machinery, which prior mortgage had been, before the institution of this suit, assigned to the plaintiff; leaving the rights of the parties in respect of the subsequent charges on the property to be disposed of either on appeal or on further directions, or on leave reserved. *Dewar* v. *Mallory*, 27 Gr. 306.

A mortgage having been created on land on which was a steam sawmill, the mortgagor was restrained from removing the machinery, although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises. *Gordon* v. *Johnston*, 14 Gr. 402.

Mortgagors of vacant land, adjacent to their foundry, which was constructed of stone, erected thereon a frame building as a lean-to to the foundry, and placed in it three lathes, an iron planer, two drills, a crane and a shaper, all of which, with the exception of one drill, which was bolted to the frame work, the latter being bolted to the girders, were kept in their position by their own weight, without being fastened to any part of the building, and were capable of being removed without injury to either building or machinery. When the mortgage was given the land was not worth the money advanced, but the mortgagees relied upon a substantial building which the mortgagors intended to erect on it as an extension to their factory, and took a covenant to insure the building for $4,000, but they did not bind the mortgagors to build or put in machinery:—Held, that the machines were not fixtures, as they were not put in the building with the intention that they should become part of the realty. Held, also, that the mere fact that such machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty. Per Patterson, J.A., the weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric as an integral portion of the architectural design, or as in the case of a millstone, which is an essential part of the mill. McDonald v. Weeks, 8 Gr. 297, dissented from. *Keefer* v. *Merrill*, 6 A. R. 121.

Machinery Acquired after Mortgage.]—Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abell; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs the master made the lumber company parties as subsequent incumbrancers:—Held, (assuming the machinery, or some portions of it, to be trade fixtures removable as between landlord and tenant), that the machinery (or such portion aforesaid), when acquired by the mortgagor, would go to increase the plaintiffs' security; and that therefore the master was right in making the lumber company parties as subsequent incumbrancers. Further, that there appeared no good reason why the plaintiffs having purchased and taken an assignment of a mortgage made by defendant in 1869, were not entitled under it to have the greater part if not all the machinery added to their security. *London and Canadian Loan, &c., Co.* v. *Pulford*, 8 P. R. 150.

Machinery — *Special Description.*] — B. mortgaged to the plaintiffs certain premises, together with the water wheel and flumes, outhouses, buildings, ways, waters, watercourses, privileges and appurtenances to the said premises belonging; and afterwards mortgaged to H. the same premises, describing them as the woollen works, and also all the fire engine, boiler, machinery and fixtures, and the water wheel, and all fixed machinery, and shafting and fixtures of every kind about the same. Subsequently to the mortgage to the plaintiffs there were placed on the premises certain looms, spinning machines, warping mills, and various other articles of the same kind, which were secured by nails and screws to the floors, and by braces secured by screws and bolts to the ceiling, but could be easily removed without injury either to the premises or to themselves. In an action to try the right to this last mentioned machinery, it was—Held, that the terms of the mortgage to the plaintiffs indicated an intention that the plaintiffs should not have a claim upon any portion of the machinery in the premises except that only which related to the motive power of the mill. Semble, that though the machinery might for many purposes have been looked upon as fixtures, yet as between the plaintiffs as mortgagees and B., and all persons claiming under him, it was not so annexed to the freehold as to be irremovable by the latter. *Great Western R. W. Co.* v. *Bain*, 15 C. P. 207.

Quære, as to the general right of a mortgagor to remove from the mortgaged premises machinery of the kind annexed in such a way to the freehold. *Ib.*

General review of the authorities both in England and this country on the subject of fixtures since *Carscallen* v. *Moodie*, 15 U. C. R. 304. *Ib.*

Machinery Treated as Chattels.]—The owner of a mill, originally constructed for the purpose of sawing, afterwards added to it machinery for planing the lumber, and subsequently executed a mortgage of the land and a chattel mortgage of the machinery, treating and calling it "chattels:"—Held, that the mortgagee of the realty had no right to look to the machinery as security for his claim, although in the absence of the acts of the owner in severing the machinery from the realty it would have been considered part of the freehold. *Dewar* v. *Mallory*, 26 Gr. 618. See *S. C.*, decree varied on rehearing, 27 Gr. 363.

Mill and Machinery on Land Subject to Mortgage.]—The plaintiffs were registered mortgagees of a large tract of land. M. desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, in order that he (M.) should erect a flouring mill thereon. M., without searching the title, and without actual notice of the plaintiffs' mortgage, erected a mill with the intention of establishing a business there. Before its completion, and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, millstones, and several machines necessary for carrying on milling. On the plaintiffs attempting to sell under their mortgage, the machinery was removed by M. An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine-house, boilers, engine, and machinery—was put up with the express purpose of establishing a flouring mill on land that M. believed to be his own:—Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with the liberty to M. to pay its value to the plaintiffs, which they ought to accept, if offered, and release the machinery. *Dickson* v. *Hunter*, 29 Gr. 73.

Mortgage before Acquisition of Title.]—O. and K. under an oral agreement with an agent of the Canada Company (which that company refused to adopt) entered into possession of land belonging to the latter, and erected a steam mill thereon. They procured from the plaintiffs an engine, boiler, &c., under an agreement that the property therein should not pass to the vendees till paid for. They exchanged the plaintiffs' boiler for another made by one D., which they put up with the plaintiffs' engine. This coming to the knowledge of the plaintiffs they seized their own boiler, in consequence of which O. and K. on the 27th November, 1883, executed to the plaintiffs a chattel mortgage on the D. boiler. Prior to this date, however, and on the 12th of the same month O. and K. executed a mortgage on the said lands and premises to the defendant, to whom they were indebted, and three days later as a matter of precaution and as part of the same bargain they executed a chattel mortgage in his favour as further security for a debt due him (not naming any amount), and assigned all and singular certain goods, &c., viz.: "One mill and machinery, one frame house * * two bay horses," &c. This security by reason of defects under the Chattel Mortgage Act was void as against the plaintiffs' claim. Prior to the commencement of this action the defendant obtained from the Canada Company a deed of the land in question. On appeal to this court it was:—Held, reversing 9 O. R. 692, that although O. and K. had not any interest in the land on which they had so erected their mill, and placed their machinery, yet by their mortgage the D. boiler and other fixtures not originally purchased from the plaintiffs passed to the defendant as part of the realty; such mortgage, unlike that of the chattels, not requiring registration to give it validity. Held, also, that the defendant might support his title under the deed from the Canada Company; the boiler having been affixed to the land and passing under the deed as part of the realty. *Stevens* v. *Barfoot*, 13 A. R. 366.

Prior Mortgage.] — C. owning land on which the building for a steam saw-mill had been in part erected, mortgaged it to D., having previously mortgaged it to M. Afterwards the machinery was put in; D. assigned his mortgage to H.; and the mill having been destroyed by fire, the machinery, engine, boiler, &c., were removed by C., with the assent of H., to another county, to place in a new mill, and while still detached they were seized there under an execution against the goods of C., the mortgagor. On an interpleader issue between H., as plaintiff, and the execution creditor:—Held, that the plaintiff must succeed, for the machinery, &c., were fixtures before the fire, and after it continued to be the property of the mortgagee; and though there was a prior mortgage the execution creditor shewed no right as against H. *Harris* v. *Malloch*, 21 U. C. R. 82.

Tools—*Machines—Belting.*]—The firm of C., G. & Co. being indebted to the plaintiffs, mortgaged to them in fee certain lands and premises, on which was erected an iron foundry, with the machinery and iron fittings used in the business. Previous to this mortgage a prior owner of the land had already mortgaged it in fee to one G., which mortgage was still outstanding. The defendant, assignee of C., G. & Co., removed certain portions of the machinery, and a dispute arose with the plaintiffs as to what part of the property so removed consisted of fixtures. The matter was referred to an arbitrator, who submitted a special case, describing particularly the various articles in dispute, and the manner in which they were annexed to the freehold. The different articles enumerated, and their connection with the freehold, are stated in the case, and the judgment of the court as given upon them respectively, some being held fixtures and some not. *Gooderham* v. *Denholm*, 18 U. C. R. 203.

Tools ordinarily in use for the purpose of working any of the machines so attached as to form part of the freehold—Held, fixtures: other tools not. *Ib.*

The arbitrator on a reference back amended his report in the description of some of the machines and tools and fittings mentioned in the case first submitted; and on the report so amended, which is set out in the case, the court gave judgment, altering their decision as to some of the articles. *Ib.*

Belting necessary for communicating the motive power from the engine:—Held, a fixture. *Ib.* 214.

Trade Fixtures.]—A. having a term with right of purchase, built a water mill on the premises and mortgaged to B. for present and future advances. He afterwards introduced steam machinery, consisting of engine and boiler, into the mill, affixed as described in the case. Subsequently an extension of the term to B., the mortgagee, with right to purchase, was obtained from the reversioners by deed, to which A. and B. were parties, reciting their position:—Held, that the steam machinery belonged to B. as mortgagee, and could not be seized under execution against A., though they might be trade fixtures, and though the estate mortgaged was not a freehold interest. *Paterson* v. *Pyper*, 20 C. P. 278.

Trade Fixtures—*Tools and Machinery.*]—The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty. *Hogaboom* v. *Town of Brampton*, 28 S. C. R. 174.

Wooden Building.]—A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by a mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband, who swore that it was placed on the land without any intention of leaving it there permanently. Judgment below, 29 O. R. 21, reversed. *Miles* v. *Auka-tell*, 25 A. R. 458.

IV. Vendor and Purchaser.

Barn.]—A barn, whether affixed to the soil or not, is, as between vendor and vendee of the land, a part of the land, and not a personal chattel for which an action of trover will lie. G. died, having a right of pre-emption to certain lands; his executors disposed of this right to the plaintiff, who received possession of the land, and of a barn which was supposed to be on it. It turned out, however, that the barn stood partly on a highway, and partly on the defendant's land. The defendant removed it, and the plaintiff brought trover:—Held, that the action would not lie. *Bunnell* v. *Tupper*, 10 U. C. R. 414.

Covenant not to Remove.]—On the sale of a woollen factory and machinery, it was stipulated that until the purchase money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards conveyed to the purchasers, who, to secure the unpaid purchase money, executed a mortgage purporting to be of the factory only, and not mentioning the machinery:—Held, that the covenant against removing the machinery remained in force:—Held, also, that the mortgage covered not only the machinery which was fastened with nails or screws, but also machines which were kept in their place by cleats, as well as the plates and paper used with the press. The purchasers resold, their vendee having notice of the covenant, and the vendee subsequently became insolvent:—Held, that his assignee in insolvency was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise. *Crawford* v. *Findlay*, 18 Gr. 51.

Effect of Deed.]—Mill machinery passing under the description of land in deed. See *Winfield* v. *Fowlie*, 14 O. R. 102.

Hay Scales.]—One J. sold the land in question to W., who took possession under the contract for sale, and erected a set of hay scales, partly upon it, and partly upon the street. A pit was dug about three feet deep, which was boarded inside, and posts let into the soil to hang the scales upon, and as rests. The platform rested upon posts thus let in, and hung upon hooks in the posts, so that the scales might be removed by lifting it up, without disturbing the posts or boards. The earth was banked up on the outside, so that teams could drive upon the platform. W. could not carry out the contract, and with his consent J. sold the land to the plaintiffs, and conveyed it to them by a deed in the usual form, in which nothing was specified as to the hay scales. The defendants, W. and another, having removed them, taking away all except the posts:—Held, that they were not fixtures as between J. and his vendees, the plaintiffs, and did not pass by the conveyance. *Markle* v. *Houck*, 19 U. C. R. 164.

Intention to Sever — *Subsequent Purchaser of Freehold.*]—The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another, even if communicated to one who becomes a subsequent purchaser of the freehold, will not operate to convert the fixture into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser. *Minhinnick* v. *Jolly*, 29 O. R. 238.

Machinery.]—A building originally used as a storehouse was converted into a steam grist-mill. Afterwards the mill machinery was taken out, the boiler and engine being left to work various other machines, which were put in for the purpose of making sashes and blinds, such as planing machines, turning lathe, &c. These were fastened to the floors and timbers of the building to steady them while in motion, each machine being independent, capable of being moved without material injury to the building, or interfering with the engine, and of being worked by any other proper motive power. In the assignment under which the plaintiff claimed, these machines were described as chattels, but the deed being void as to the personalty for want of registration, he contended that they were part of the inheritance, not subject to an execution against goods, and passed to him with

the land and building in which they were, which were included in the assignment:—Held, that the machines were chattels, and seizable under a fi. fa. goods. *Carscallen* v. *Moodie*, 15 U. C. R. 304.

Removal of House.]—Declaration, for entering plaintiff's land, and also plaintiff's dwelling-house thereon, and removing the house therefrom, and converting it to defendants' use. Plea, to so much of the count as refers to the dwelling-house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling-house thereon, so that it might thereafter be removed by them, not affixing it to the land; and defendants afterwards, and while the land was uninclosed and used as a common, and the house open and unoccupied, in the day time, peacefully entered the lot and removed the dwelling-house, the same being their property, and placed it on their own land, which are part of the trespasses complained of. Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land, and built the house on the land, and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiff:—Held, that the plea was bad, as shewing no justification for the trespass admitted. Held, also, replication good, by way of estoppel. *Cameron* v. *Hunter*, 34 U. C. R. 124.

Removal of House — *Trover.*] — The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he had also agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all the buildings thereon:—Held, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere. *Clearer* v. *Culloden*, 15 U. C. R. 582.

Vendee Erecting Building.]—A building put up by a vendee of land in possession, under a contract to purchase, resting upon a foundation in some parts let into the soil, and connected to the foundation by mortar, is a fixture belonging to the owner of the soil, and when wrongfully severed it becomes a chattel; and the defendants, the vendee of the land and others, who had at first removed it into the highway, and afterwards took it away, were held liable in trespass for taking the goods of the plaintiff, the owner of the soil. *Gasco* v. *Marshall*, 7 U. C. R. 193. Followed in *Clearer* v. *Culloden*, 14 U. C. R. 491.

V. MISCELLANEOUS CASES.

Barn—*Insurance.*]—The plaintiff insured with defendants a barn as appurtenant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold, but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him:—Held, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel. *Sherbaneau* v. *Beaver Mutual Fire Insurance Co.*, 33 U. C. R. 1; 30 U. C. R. 472.

Lien Agreement — *Machinery.*] — See *Waterous Engine Works Co.* v. *McCann*, 21 A. R. 486.

Nova Scotia Bills of Sale Act.]—See *Warner* v. *Don*, 26 S. C. R. 388.

Quebec Law.] — See *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121; *Lainé* v. *Beland*, 26 S. C. R. 419; *Banque d' Hochélaga* v. *Waterous Engine Works Co.*, 27 S. C. R. 406.

Quebec Law—*Railway Rolling Stock.*]—See *Wallbridge* v. *Farwell*, *Ontario Car and Foundry Co.* v. *Farwell*, 18 S. C. R. 1.

Still—*Death of Owner.*]—On the death of the owner of a distillery, the still goes to the heir or devisee with the realty. *McLaren* v. *Coombs*, 16 Gr. 587.

The widow professed to sell the property, but had no authority to do so under the will, except for her own life; the purchaser removed the still, sold it, and put in a new one. Finding after the widow's death that his title was defective, he removed the still, and it was—Held, that the devisee was not entitled to have the new still restored, but was entitled to the value of the old still. *Ib.*

Taxes — *Planing Machine.*] — Held, that a planing machine standing by its own weight on the floor, without fastening, with belts and an engine to work it, is a chattel liable to seizure for taxes. *Hope* v. *Cumming*, 10 C. P. 118.

Title not to Pass.]—T., being liquidator of a company which was being wound up, sold the company's factory to H. for $9,000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there were an engine, boiler, pulleys, &c., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler, and pulleys, but T. objected until assured that they would be replaced by better machinery. H. purchased from I. and H., the defendants, another engine, boiler, shafting, hangers, and pulleys to replace the old ones, paying part in cash, and securing the balance by notes, under a written agreement, which stipulated that the property should not pass to H., but was to remain in I. and H. until the full payment of the price, and of any obligations given therefor, but H. was to have possession at once, and to use the same until default in payment * * when I. and H. might resume possession. The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises other than that from which the old ones had been removed. They could be removed by taking down a part of the wall of the buildings in which they were placed, and without injury to the old building; but were so affixed to the realty as under ordinary circumstances to become a part of it. H. failed, assigned his estate for the benefit of his creditors, and made default in payment, and I. and H. began to remove the machinery. In an action brought by T. for an injunction restraining the defendants I. and H. from such removal:—Held, that the express agreement

between H. and the defendants that the property in the machinery should not pass from the defendants to H. until paid for, and the intention with which the articles were affixed, must govern; and that the machinery therefore did not become part of the realty or pass to the plaintiffs. *Thomas* v. *Inglis*, 7 O. R. 588.

Trespass.]—In trespass for taking away mill machinery, millstones, wheels, &c., the defendant pleaded not possessed, and it appeared that the injury was done by severing fixtures in the mill and taking them away:—Held, that the action would lie, as when they were severed they became personal property, for which the owner could maintain trespass. *Meyers* v. *Marsh*, 2 U. C. R. 148.

In trespass it was held, on motion in arrest of judgment, that the word "fixtures" in the declaration did not necessarily mean things attached to the freehold. *S. C., ib.* 185.

Trover.]—Trover cannot be maintained for a fixture so long as it remains annexed to the freehold. *Oates* v. *Cameron*, 7 U. C. R. 228.

See MORTGAGE—TROVER AND DETINUE, II. 2 (*b.*)

FLOATING TIMBER.

See WATER AND WATERCOURSES, VII.

FOLLOWING MONEY.

Cheque—*Forged Indorsement.*]—Payment by a bank on forged indorsement of cheque. Right of the drawer to recover back. See *Agricultural Investment Co.* v. *Federal Bank*, 45 U. C. R. 214; 6 A. R. 192.

Fraudulent Mortgage.]—G. obtained a loan of $3,700 through R. from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for $7,500, and had paid $4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. $3,000, which was the total purchase money for the 220 acres; and another parcel of about 50 acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs, it was:—Held, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs; that the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands; but that a mortgage on the 50 acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid), as the mortgagee was no party to the action. *Hamilton Provident and Loan Society* v. *Gilbert*, 6 O. R. 434.

Mortgage to Secure Note.]—D. J. indorsed a promissory note for the accommodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. J., during the currency of the note, absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M., with whom he had dealings, as D. J. knew, but D. J. had no notice of any wrongdoing in connection with the money:—Held, affirming 10 O. R. 1, that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow the money into the note and was therefore not entitled to stand in the shoes of D. J. as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack* v. *Jack*, 12 A. R. 476.

Stolen Money—*Proceeds.*]—If the court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it. Accordingly where money was stolen the owner was held entitled to leasehold property, furniture, and other chattels, purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274.

Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property in this country, the court granted an injunction to restrain the selling or incumbering thereof. *Ib.*

Trust Funds.]—The testator by his will left money to his children, which was to be paid to them on their coming of age, and be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian:—Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though as against the surety the bill was dismissed, with costs. *Galbraith* v. *Duncombe*, 28 Gr. 27.

Warehouse Receipt—*Proceeds of Sales.*]—A miller gave a warehouse receipt to a bank on some wheat "and its product" stored in his mill for advances made to him and died insolvent about two months after. During this period wheat was constantly going out of and fresh wheat coming into the mill. Just before his death the bank took possession and found a large shortage in the wheat which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time. In the administration of his estate it appeared that during the period of shortage some of the wheat had been

converted into flour which had been sold, and the proceeds, which were less than the value of the shortage, paid to the administrator:—Held, that the bank was entitled to the purchase money of the flour. *Re Goodfellow, Traders Bank* v. *Goodfellow*, 19 O. R. 289.

See TRUSTS AND TRUSTEES, I. 4.

FORCIBLE ENTRY.

See CRIMINAL LAW, IX. 18.

FORECLOSURE.

See MORTGAGE, IV.

FOREIGN AGGRESSION.

See CRIMINAL LAW, IX. 19.

FOREIGN BANKRUPTCY.

See BANKRUPTCY AND INSOLVENCY, III.

FOREIGN COMMISSION.

See COSTS, IV.—CRIMINAL LAW, VI. 5—EVIDENCE, VIII.—PARLIAMENT, I. 11 (e).

FOREIGN COMPANY.

See COMPANY, IX. 1.

FOREIGN ENLISTMENT.

See CRIMINAL LAW, IX. 20.

FOREIGN GUARDIAN.

See INFANT, II. 3.

FOREIGN JUDGMENT.

See EVIDENCE, XV. 5—JUDGMENT, IX.

FOREIGN LANDS.

See FOREIGN LAW—HIGH COURT OF JUSTICE—MORTGAGE, V.

FOREIGN LAW.

Acts of War—*Neutral Territory.*]—Lawful acts of war against a belligerent, cannot be either commenced or concluded in neutral territory. *In re Burley*, 1 C. L. J. 34.

Administration.]—See *Milne* v. *Moore*, 24 O. R. 456, as to rights of foreign creditors in administration proceedings.

Administration of Trust Estate.]—A bill having been filed against trustees and executors, residing at Montreal, for an account of the estate of the testator, who at the time of his death, and for some years previously, had been domiciled there, the trustees, &c., although not obliged to do so, had appeared to and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper or Lower Canada, but which at the time of filing their answer they were not aware did exist:—Held, that under the circumstances, they ought to be allowed to file a supplemental answer, for the purpose of placing the necessary facts upon the pleadings; and that the fact that such permission might enable the parties to set up a defence of want of jurisdiction in the courts of this Province, was no objection against, but rather a reason for, this permission. *Torrance* v. *Crooks*, 1 E. & A. 230.

Administration of Foreign Estate.]—A bill was filed in this court for the purpose of administering an estate in the Province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties to the suit, other than the debtor, who resided in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as a manager for the trustees, and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of want of jurisdiction. The court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings. *Grant* v. *Eddy*, 21 Gr. 45, 60, note.

Agreement to Give Bill of Lading—*Attachment Intervening.*] — A bank in this Province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this Province, which, under the agreement, when purchased were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession of, and control over, them were to end, bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of saisie-arrêt, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the Province of Quebec, against the steamship owners, for the amount of which the latter, having paid it, sought to prove on the estate of the bank in winding-up proceedings:—Held, that, apart from the Bank Act, R. S. C. c. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any

process was served, must be taken to have held the cattle for the bank. The agreement having been made, and the parties to it being domiciled in this Province, the rights of the parties to it must be determined by the laws of this Province and not by those of Quebec, which, however, were not shewn to be different:—Held, also, that the rights of the parties were entirely governed by the provisions of the Bank Act, and following, though not altogether approving, Merchants Bank v. Suter, 24 Gr. 356, that under s. 53, s.-s. 4, of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment:—Held, lastly, that the bank "acquired" the bills of lading within the meaning of the Bank Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. *Re Central Bank, Canada Shipping Co.'s Case*, 21 O. R. 515.

Ante-nuptial Contract — *Matrimonial Domicile.*]—The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate:—Held, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or Quebec. *Taillifer* v. *Taillifer*, 21 O. R. 337.

Ante-nuptial Settlement.] — By an ante-nuptial settlement made in Lower Canada in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no community of property between them should exist, but that each should hold and continue to enjoy what each then had, or should thereafter acquire. In 1848 certain goods and chattels of the husband were sold at sheriff's sale, on execution against the husband, and having been bought in by a third person, were by a deed of donation conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under executions issued on judgments obtained against the husband:—Held, that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts. *Ryland* v. *Alnutt*, 11 Gr. 135.

Arrest—*Foreign Discharge.*] — Where an insolvent is discharged from arrest by foreign authority, the court will not set aside an arrest made under the process of this court for the same cause of action. *Brown* v. *Hudson*, Tay. 390. See, also, *Dascomb* v. *Heacocks*, Tay. 438.

Arrest.] — Arresting foreigner for debt. See ARREST, I. 3.

Assuming Similarity of Foreign Law.]—Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained:—Held, that assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract, and illegal, it lay upon defendants to establish clearly that such was the character of the dealing, and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice* v. *Gunn*, 4 O. R. 579.

Held, in this case that failing any information respecting the law in Maine, U. S., as to grants of administration, it must be assumed to agree with the law in this Province. *Re O'Brien*, 3 O. R. 326.

See, also, *Langdon* v. *Robertson*, 13 O. R. 497.

Bond—*Interest.*]—In assessing damages in the nature of interest on a bond payable at a particular place, reference should, in general, be had to the rules in force at the place where the same is so payable. *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132.

Compounding Felony — *Suspension of Civil Remedy.*]—To an action on five promissory notes the defence was that the plaintiff, in Utah territory in the United States, had charged defendant with felony (receiving cattle stolen from the plaintiff), and that in consideration of the plaintiff consenting to withdraw and abstain from prosecuting the charge, defendant agreed to make the notes; and that in pursuance of such agreement the notes were made, and the plaintiff abstained from prosecuting the charge:—Held, no difference between our own law and that of Utah having been shewn, that the effect of compounding a felony must be presumed to be the same in both countries. Per Wilson, J.—The plaintiff, if not prevented from recovering on the defence set up, would not have been bound first to take criminal proceedings in Utah for the felony before suing here on the notes, the suspension of the civil remedy being a matter of purely local policy. *Toponce* v. *Martin*, 38 U. C. R. 411.

Confederate States — *Postage Stamps.*] —On the determination of the civil war in the United States the government at Washington became entitled to the property theretofore belonging to the Confederate government. *United States of North America* v. *Boyd*, 15 Gr. 138.

During the war, United States postage stamps to the amount of $10,500 were taken by a Confederate ship from a United States vessel. There was no condemnation in a prize court, nor any transfer of the stamps to any person by the Confederate government. After the war was over, these stamps being in possession of an officer of the Confederate ship, were sold by him through a broker to the defendant in Liverpool at a large discount. The defendant alleged that he had bought without notice of any infirmity in the title; but the court—being satisfied that he bought with knowledge of the facts, or with a strong suspicion of them, and designedly avoided inquiry, ordered the stamps to be delivered up to the United States government. *Ib.*

Conflicting Evidence.]—Where the opinions of experts on foreign law are conflicting, the court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion. *Rice* v. *Gunn*, 4 O. R. 579.

Consideration.]—C. was indebted to the plaintiff, whose vessel he had chartered to carry certain lumber belonging to defendants from Collingwood to Chicago, and the plaintiff having threatened to detain the lumber on its arrival at Chicago if his claim was not paid, was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel. Quære, whether the plaintiff's forbearing to detain defendants' lumber as he had threatened would have been sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberly* v. *Baines*, 15 U. C. R. 25.

Court Construing Foreign Law.]—It is not desirable, even with the consent of parties, that the court should construe the law of a foreign country, instead of the fact of what is the law there being proved by lawyers of such foreign country. *Meagher* v. *Ætna Insurance Co.*, 20 Gr. 354.

Custody of Child.]—The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the United States courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the state of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners, and the domicile of the child not having, under the circumstances, been changed, the law of the state of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive (23 Vict. c. 24), it was competent to consider the "cause assigned" by the father; and so it was held (especially in view of the fact that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her. *In re Kinney*, 6 P. R. 245.

Custom.]—Evidence of the custom of brokers at Toledo, U. S., the contract being made in Ontario was:—Held, to have been properly rejected. *Williams* v. *Corby*, 5 A. R. 626.

Default Judgment—*Indemnity.*]—By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy until suit brought therefor, without an express promise. The legatee referred to sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Gr. 518, 8 Gr. 220.

Devise to Foreign State.]—See *Parkhurst* v. *Roy*, 27 Gr. 361, 7 A. R. 614.

Discharge in Insolvency.]—A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default, and is in execution. *Brown* v. *Hudson*, Tay. 346.

Divorce.]—Jurisdiction of foreign courts in cases of divorce. See *Maguire* v. *Maguire*, 3 O. R. 570, 11 A. R. 178.

Divorce and Alimony.]—An action by a husband, who had been married in Ontario, in a foreign state, for a divorce a vinculo, on the ground of the adultery and cruelty of his wife, resulted in favour of the latter, and judgment dissolving the marriage was granted to her; and by it she was awarded a sum of money as alimony. Subsequently the wife sought in this action to recover the amount of the alimony, and it was contended by the husband that as he had never acquired the necessary domicile to give the foreign court jurisdiction to grant the divorce the judgment was invalid:—Held, that as he had invoked and submitted to the jurisdiction of the foreign court, he had precluded himself from setting up want of jurisdiction. Held, however, were this not so, that in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction the production of the record was primâ facie evidence entitling the wife to recover in this action, and although the presumption in favour of the judgment might be rebutted, clear proof of the facts to shew want of jurisdiction must be adduced. Held, also, that the wife was entitled to judgment for payment of alimony, although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario. Semble, had the foreign judgment provided for the division in specie of the husband's property in Ontario it would not have been invalid. Judgment below, 31 O. R. 81, reversed. *Swaizie* v. *Swaizie*, 31 O. R. 324.

See HUSBAND AND WIFE, I.

Dower—*Marriage Contract.*]—By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "customary, prefix, or stipulated," no mention being made of lands in Upper Canada:—Held, that this did not preclude her from claiming dower out of lands in Upper Canada held by her husband during the coverture; and that notwithstanding the contract which was entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. *Jamieson* v. *Fisher*, 2 E. & A. 242; *Fisher* v. *Jamieson*, 12 C. P. 601.

Enforcing Contract.]—Where the defendants in a suit reside in this country and

the principal office of the plaintiffs is in England and a contract is entered into there between the parties which is to be executed in New York, a suit in respect thereof may be instituted in this Province. *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Gr. 648, 8 A. R. 416.

English Bankruptcy Proceedings.]—Quære, as to the power of a Judge under the English Bankruptcy Act, 1883, to grant an injunction enjoining plaintiffs from proceeding with an action in the high court of justice for Ontario against defendants who were subject to the proceedings in bankruptcy in England. *Maritime Bank v. Stewart*, 13 P. R. 86.

Execution.]—Alien friends residing in their proper country, cannot, upon a summary application to the court be deprived, under 5 Geo. II. c. 7, of the right to an execution against the lands of their debtor:—Semble, the alienage should be pleaded in bar of execution. *Wood v. Campbell*, 3 U. C. R. 269.

Foreign Action.]—Defence of foreign action pending. See *Direct United States Cable Co. v. Dominion Telegraph Co. of Canada*, 8 A. R. 416.

Foreign Company — *Foreign Winding-up.*]—A life insurance company incorporated in the state of New York and carrying on business in this Province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile, with a view of winding up the affairs of the company; and that irrespective of what the result of the proceedings may be as to solvency or insolvency of the company. *Douglas v. Atlantic Mutual Life Ins. Co. of Albany*, 25 Gr. 379.

Foreign Land—*Fraudulent Conveyance.*]—An action will not lie in this Province by a judgment creditor to set aside as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province. Although the court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns v. Davidson*, 21 O. R. 547.

——— *Mortgage — Trust.*]—A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the Province in which the action was brought. Burns v. Davidson, 21 O. R. 547, approved. Judgment below, 23 A. R. 9, sub nom. Pavey v. Davidson, reversed. *Purdom v. Pavey*, 26 S. C. R. 412.

——— *Redemption Action.*]—A creditor who has recovered judgment in Manitoba, and who has by virtue of an Act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien. Judgment below, 23 O. R. 327, reversed. *Henderson v. Bank of Hamilton*, 20 A. R. 646; 23 S. C. R. 716.

——— *Sale under Mortgage.*]—Although in an action on a mortgage of lands situate out of the Province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating in personam as an extinguishment of a personal right, yet the court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale. *Strange v. Radford*, 15 O. R. 145.

——— *Specific Performance.*]—The plaintiff, a resident of Buffalo, United States, agreed in writing with the defendant, to exchange certain land situate in Buffalo for land of the defendant situate in Ontario; and brought this action for specific performance of the contract:—Held, that the plaintiff having brought his action in this court, thereby submitting to its jurisdiction, the court would decree specific performance. *Montgomery v. Ruppensburg*, 31 O. R. 433.

——— *Title—Incidental Relief.*]—Certain land was situate in the Province of Quebec, and a case was sent, under the Imperial statute 22 & 23 Vict. c. 63, for the opinion of the court of Queen's bench there. That court decided, thereupon, that the deed by the administrator passed the land and ores to the plaintiff: that defendant had no title sufficient to defeat it: that a certain judgment, set out in the case, recovered by defendant against the plaintiff there, had no effect upon the plaintiff's title; and that the plaintiff by their law could maintain an action for both the land and the ore, before the ore was removed from that Province, but not for the ore until the title, if in dispute, had been established by a petitory action, to which the action for the ore would be incident:—Held, that the inability to sue for the ore there, except as incidental to the right to the land or after it had been determined, formed no reason why our court here should not adjudicate with respect to the ore. *Stuart v. Baldwin*, 41 U. C. R. 446.

——— *Title—Timber Cut.*]—Trespass or trover will lie here for timber cut in the Province of Quebec (the declaration not charging any trespass to the realty), although it may be necessary in such action to try the title to the land on which it was cut. *McLaren v. Ryan*, 36 U. C. R. 307.

——— *Title.*]—The courts in this Province have no jurisdiction to entertain an action for determining the title to lands in the North-West Territories, even though the parties be resident here. Re Robertson, 22 Gr. 449, distinguished. *Ross v. Ross*, 23 O. R. 43.

——— *Will.*]—Testator, by his will made in 1842, devised the land in question, lot 37, to his son J., and to the plaintiff, Alexander, another son, lot 32, but directed that if J. should prefer lot 32 he should take it, and the plaintiff should then have lot 37. By a

codicil he declared his will to be, that if his son Allan should not take holy orders, as he intended, then he should have lot 37, and J. lot 32, and the plaintiff the west half of lot 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family; but should Allan not divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise that my said son Allan shall only receive of my property what has been willed to him in my last will, then this codicil to be null and void." The will of Mrs. M. referred to was made in Upper Canada in 1828, and devised the house mentioned to her son Allan, "with power to give an equal share to his sisters Helen, Catherine, and Harriet, and to his brother John:"—Held, that the condition in the codicil respecting the property in Montreal must be governed by the law of Upper Canada as regarded its effect upon the land in question. *Macdonell* v. *Macdonald*, 19 U. C. R. 130.

See Macdonald v. *Macdonell*, 2 E. & A. 341. *See* HIGH COURT OF JUSTICE, I.

Forgery.]—Forgery in foreign country. *See* CRIMINAL LAW, VII.

Fund Payable in Foreign Country—*Compelling Foreigner to Claim Here.*]—Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction:—Held, that the agreement was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and that the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order. Held, also, affirming 17 P. R. 300, that the court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here. Credits Gerundeuse v. Van Weede, 12 Q. B. D. 171, distinguished. *Re Benfield and Steeens*, 17 P. R. 339.

Garnishee "within Ontario"—*Foreign Insurance Company.*]—The garnishees, an English insurance company, had an agent or attorney and a chief agency in Ontario, and service of process could be made upon such attorney for the purposes mentioned in ss. 14 and 17 of 55 Vict. c. 39, the Ontario Insurance Corporations Act:—Held, that the garnishees were not "within Ontario," within the meaning of rule 385. Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed. County of Wentworth v. Smith, 15 P. R. 372, distinguished. *Boswell* v. *Piper*, 17 P. R. 257. *See* ATTACHMENT OF DEBTS, I.

Imperial Company.] — Imperial Joint Stock Companies Acts—Action against company here—Set-off for shares unpaid held by plaintiff—Application to stay the action here, to enable the matters to be dealt with in England. *See Howell* v. *Dominion of Canada Oils Refinery Co.*, 37 U. C. R. 484.

Suit in England and here to sell corporate property and appoint a receiver—Practice—Refusal to make a decree here which would conflict with the steps taken there. *See Louth* v. *Western of Canada Oil Lands, &c., Co.*, 22 Gr. 557; *Howell* v. *Jewett*, 7 P. R. 69.

Infant—*Investment of Funds.*]—In cases where if money belonged to an infant residing in Upper Canada, the court would invest it for his benefit, the court will, where the infant is resident in a foreign country, direct an investment for his benefit in the securities of such country. *Sanborn* v. *Sanborn*, 11 Gr. 359.

Insolvency.]—Difference between our insolvent law as to set-off and that in England and the United States remarked upon. *See Mason* v. *Macdonald*, 45 U. C. R. 113.

Insurance.]—A policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here, with whom the plaintiff insured:—Held, that the law of this country, and not of the foreign country, should govern, the contract being in fact made here. *Meagher* v. *Ætna Ins. Co.*, 20 U. C. R. 607.

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

——— *Collision in Foreign Waters.*]—Declaration on a policy of insurance on a propeller. Plea, that the vessel was lost in Lake Michigan by coming into collision with a schooner in American waters, and that the rights and liabilities under said policy on account of such collision ought to be governed by the laws of the United States, according to which all steamers must keep out of the way of sailing vessels, and in case of collision and loss occasioned thereby to the steamer, it is presumed that the fault was hers, and her owners cannot recover from the

owners of the sailing vessel, or from insurers: that the plaintiff's steamer did not avoid the schooner as she might have done, whereby the wreck was occasioned. Replication, that the plaintiff's vessel did not collide with the schooner through the want of ordinary care and skill in navigating her, such as is proper in the navigation of the lakes. Rejoinder, that the propeller was an American vessel, sailing under American colours, and in American waters at the time of the loss: that the defendants are an American company: that by the American law, as the plaintiff well knew, the schooner was justified in keeping her course, while the steamer should have turned out of her way to enable her to do so, as she might have done, yet the steamer's course was not altered, as it easily might have been; and so by reason of the said facts the collision did take place from the want of ordinary care and skill in navigating the steamer. Surrejoinder, that the steamer was not lost through the want of ordinary care and skill in those navigating her, as alleged in the rejoinder:—Held, on demurrer, that the surrejoinder was good. As to the plea,—Held, that the allegation of want of care on the plaintiffs' part formed no defence; and that if it had been averred in the declaration that the contract was made in this Province, the American law would not govern, though the loss happened in their waters. *Patterson* v. *Continental Ins. Co.*, 18 U. C. R. 9.

——— *Conditions — Waiver — Procedure.*]—To an action on a judgment recovered in the supreme court of the state of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B. not being a resident of the state of New York, the plaintiffs, in accordance with the laws of that state, sued there in their own names as such assignees, and recovered judgment, as by the laws of said state they had a right to do:—Held, a good replication, for defendants by their Act of incorporation being evidently designed to carry on business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in New York the law there would govern. Per Hagarty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs by the foreign law to sue in their own name was a question of procedure, on which that law must govern. In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made. The plaintiffs replied, that when called upon to pay, defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing; that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered, upon proof of such waiver, without any evidence of proof or adjustment:—Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit it might, under 23 Vict. c. 24, be set up here; and whether the condition was waived or performed was a matter of evidence only, on which our law must prevail. *Waydell* v. *Provincial Insurance Co.*, 21 U. C. R. 612.

——— *Payable in Quebec.*]—To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the money:—Held, on demurrer, a good defence. *Pritchard* v. *Standard Life Ass. Co.*, 7 O. R. 188.

——— *Policy Issued in Ontario.*]—The defendants signed and sealed a number of policies in blank, and sent them to an agent in New York to be filled up and issued as insurances were effected. A., their agent there, filled up one for a risk of $2,500 on a lumber yard, a risk greater than extra hazardous, although he had been instructed not to take any extra hazardous risk for more than $1,500. He issued the policy without receiving payment of the premium, although a condition was indorsed on it that no insurance proposed to the company was to be considered in force until the premium should be paid in cash. The policy was issued on the 8th August. The fire occurred on the 10th August. A cheque for the premium was sent to the company on the 11th August, which was immediately returned and the risk repudiated. Under the winding-up proceedings of the company, it was attempted to prove a claim for the loss in the master's office, when it was contended that the law of the state of New York, where the policy was issued, governed the contract, and under that law the agent had power to waive the payment of the premium:—Held, that the law of Ontario governed, as the place where the policy was signed and sealed was the place where the contract was made. *Clarke* v. *Union Fire Ins. Co., Re Export Lumber Co.*, 10 P. R. 313, 6 O. R. 223.

And see INSURANCE.

Interim Injunction — *Undertaking for Damages.*]—Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction. *Delap* v. *Robinson*, 18 P. R. 231.

International Bridge — *Jurisdiction of Ontario Court.*]—By Acts of the Legislature of Canada and the state of New York, respectively, a company was incorporated in either country for the purpose of constructing a suspension bridge across the river Niagara, for railroad and other purposes, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of

their charters to a railway company, to be for their exclusive use, and the use of such other railway companies as the lessees might arrange with:—Held, that such assignment was ultra vires and void. *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Gr. 490.

The Erie and Niagara Railway Company had, by statute, authority to arrange for the passage over such bridge from Canada into the United States; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon an information by the attorney-general of Ontario, at the relation of the Erie and Niagara Co., and a bill by that company, were filed against the two bridge companies and their lessees, complaining of such refusal; and praying a declaration, 1. That the lease of the bridge was ultra vires; 2. That the Erie and Niagara Company were entitled to the use of the bridge on paying reasonable tolls; and for an injunction restraining the defendants from preventing the Erie and Niagara Company using the bridge. The evidence showed that the Erie and Niagara Company had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to the Erie and Niagara Company was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognize their right to use the bridge, the court at the hearing dismissed their bill as against all the defendants, and also dismissed the information as against the American Bridge Company with costs; declared the lease of the bridge as regarded the Canadian Bridge Company, void, and restrained them from further acting thereunder. Andsemble, that even if the Erie and Niagara Company had established a complete title to relief as against the Canadian Bridge Company, still as this court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of the Erie and Niagara Company to cross as far as the Canadian Bridge Company's charter extended, i.e., to the centre of the bridge, and was thus unable to afford any effectual assistance, the court on this ground also would have refused to interfere. *Ib.*

Interpleader—*Foreign Claimant.*]—On application to rescind or vary an interpleader order:—Held, that the claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim. *Buffalo and Lake Huron R. W. Co. v. Hemmingway*, 22 U. C. R. 562.

Joint Contract—*Survivorship.*]—Where in an action of assumpsit on a contract against executors, they pleaded that the cause of action accrued in Scotland, against the testator and one A., jointly; that A. is still living, and that by the law of Scotland, where the contract was made, if one of the parties to a joint contract die, his personal representatives are discharged, the plea was held bad on general demurrer, as by our Provincial statute 1 Vict. c. 7, the personal representatives of a joint contractor are made liable notwithstanding the survivorship of the other, and the lex loci contractus applies only to the contract, and not to the remedy. *Gilmour v. Crooks*, H. T. 6 Vict.

Joint and Several Judgment—*Survivorship.*]—If a foreign judgment against two defendants be several in its terms, the court here will hold it good according to the law of the foreign country until the contrary be shewn; and the executor of one defendant may be sued, although the other defendant survive. *Race v. Goodman*, E. T. 3 Vict.

Judgments.]—Actions to enforce foreign judgments. See JUDGMENT.

Judgments.]—Proof of foreign judgments. See EVIDENCE, XV, 5.

Legacy to Unincorporated Association.]—A testator domiciled in the state of Missouri, U. S., at the time of the execution of his will, and at the time of his death, bequeathed personal property situate in this Province, to a Lodge of Oddfellows in the state of New York, U. S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge. In an action to test the validity of the bequest:—Held, that the parties having selected their forum in this Province, the action must be dealt with here according to the law of the testator's domicile, which in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province:—Held, also, there being no prohibitory law of the legatees' domicile, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members. Walker v. Murray, 5 O. R. 638, followed. *Graham v. Canandaigua Lodge*, 24 O. R. 255.

Lien by Foreign Legislature.]—A foreign legislature can make no law creating a lien on real estate in Canada, and any contract founded on such a consideration is void ab initio. *Genesee Mutual Ins. Co. v. Westman*, 8 U. C. R. 487.

Limitation of Actions.]—A plea that the defendant and plaintiff were both residing in a foreign country when the cause of action accrued, and that by the laws of that country the defendant is discharged because no action was brought within six years, the defendant and plaintiff having both resided there during all that time, was held bad on general demurrer. *Hart v. Wilson*, 6 O. S. 19.

Maritime Law—*Necessaries Supplied to Foreign Ship in Foreign Port.*]—The exchequer court of Canada, under the provisions of 24 Vict. c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada. Cory Bros. v. The Mecca, [1895] P. D. 95, followed.—Under the principles of international law, the courts of every country are competent and ought not to refuse to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14 C. C. P. (L. C.) and Arts.

27, 28 and 29 C. C. (L. C.). *Coorty* v. *The George L. Colwell*, 6 Ex. C. R. 196.

Marriage — *Slaves.*] — The plaintiff in ejectment claimed as heir of his father, H., who it appeared, while a slave in the state of Virginia, had, in 1825, been married to the plaintiff's mother, S., also a slave. The marriage was performed by a Baptist minister, with the usual ceremony, and with all the formalities practicable to make it binding, but without a license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there. It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying; that to constitute a strict legal marriage between free persons a license was essential; but that slaves could not obtain it, or in any way contract a legal marriage, being regarded by the law as property only, not persons. It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia arising from the law of slavery, which our law could not recognize; but:—Held, otherwise; for the parties not being British subjects, as in Ruding v. Smith, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated. *Harris* v. *Cooper*, 31 U. C. R. 182.

Marriage Settlement.]—A., being domiciled and carrying on business in Montreal, in 1875, executed at Toronto, where he was temporarily resident, a deed entered into between B., his wife, of the first part, and himself and C. of the second part, whereby A., B., and C. covenanted that certain Ontario Bank stock, which had been bought with certain moneys received by B. after her marriage, and which were then held in the name of A. in trust for B., should be duly transferred into the names of C. and A., and that this stock as well as a sum of $4,000, which B. had received from her mother at the time of her marriage, and which had been put into the commercial business of A. in Montreal, should, with $2,000, the value of some furniture received by B., be held by C. and A. in trust to invest as therein mentioned, and to permit B., during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue over. In 1877 the bank stock was transferred in Montreal in trust pursuant to the deed. The head office of the Ontario Bank is in Toronto, but they have a stock registry in Montreal for convenience:—Held, that inasmuch as all the property settled appeared on the evidence to have become, and to have been "community property," and inasmuch as, although the bank stock must be held to have been at the time of the execution of the deed and of the transfer situate in Ontario, yet the deed not purporting to be a complete transfer of the property in the stock, but containing only a covenant to transfer, which was consummated afterwards, but in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock:—Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of that Province, under which the transfer both as to the wife and children was void; for even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift:—Held, on the whole case, that no property passed into the hands of the trustees by the transactions set forth. *Hughes* v. *Rees*, 5 O. R. 654.

When the husband's domicile is in the Province of Quebec, and there is no ante-nuptial settlement, the law there upon marriage makes a settlement of the property of the parties, wherever situate, including that acquired subsequently, though the ceremony of marriage may take place out of the Province. This is called "community property," and it is not in the power of the husband, during the coverture, to make a gift of it, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children, if the gifts are properly accepted. *Ib.*

The fact that a suit for the same matter is pending in Quebec cannot be urged as a plea in bar to a suit for the same cause in this Province. *Ib.*

Married Woman.]—Law of Ohio respecting property of married woman. See *Levine* v. *Claflin*, 31 C. P. 499.

Medical Diploma.]—Held, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise the medical profession in the upper Province subject to any local law affecting the profession there. *Shaver* v. *Linton*, 22 U. C. R. 177.

Money in Court — *Payment Out—Marriage.*]—Where a female was entitled, at majority, to payment out of court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled, upon marriage, to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 228.

See INFANT.

Note Drawn in Foreign Country.]—Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect of certain gambling transactions on the New York stock exchange, and that, as such, it was, under the law of New York, an illegal contract, and invalid:—Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario and although the drawers were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated. *Story* v. *McKay*, 15 O. R. 169.

Note Payable in Quebec.]—A note made in Ontario, payable at a particular place in

Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. c. 57, s. 4, is payable at the place named therein, C. S. U. C. c. 42 requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured:—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quære, whether the personal service referred to in R. S. O. 1877 c. 50, s. 145, refers to personal service in Quebec. *Court* v. *Scott*, 32 C. P. 148.

Nun—*Civil Death.*]—The Crown, in 1798, granted land to J. and E. and three others. In 1800, E. became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838:—Held, that she had not lost her share by becoming a nun. *Stuart* v. *Prentiss*, 20 U. C. R. 513.

Officer of Foreign Court.]—Semble, that comity of nations does not extend so far as to render it incumbent on our courts to enforce a judgment against one of their own officers obtained in a foreign court for an act done by him under the authority of their process, and that in such a case it is competent for our courts to stay the action on the foreign judgment, and compel the plaintiff to proceed on the original cause of action. That the fact of defendant's acting in his official capacity made no difference, and it would not deprive the foreign court of jurisdiction, or be a reason for refusing to enforce its judgment in our courts. *Kingsmill* v. *Warrener*, 13 U. C. R. 18.

Partnership.]—Partnership articles—Ownership of plant—Law of Quebec. *See Macdonald* v. *Worthington*, 7 A. R. 531; 9 S. C. R. 327.

Penal Action—*Distinction between Public and Private Penalties.*]—To an action by the appellant in an Ontario court upon a judgment of a New York court against the respondent under s. 21 of New York State Laws of 1875, c. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign court:—Held, reversing 18 A. R. 136, and 17 O. R. 245, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial and not penal in the sense pleaded. It was not within the rule of international law which prohibits the courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the state:—Held, further, that it was the duty of the Ontario court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction, and that such court was not bound by the interpretation thereof adopted by the courts of New York. *Huntington* v. *Attrill*, [1893] A. C. 150; 20 A. R. (Appendix.)

Pleading.]—To displace the defence to a note, by shewing that the lex loci contractus is different from the law of our courts, such foreign law must be replied and set out on the record. *Hope* v. *Caldwell*, 21 C. P. 241.

Plea:—Held, bad, for not alleging that the note, under the facts stated, was void by the law of Quebec, by which the validity of the note must be decided. *Robertson* v. *Caldwell*, 31 U. C. R. 462.

Promissory Note—*Indorsement.*]—Law of Michigan as to indorsement of note. See *Jenks* v. *Doran*, 5 A. R. 558.

Promissory Note—*Presentment.*]—Where a bill is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by our law. *Buffalo Bank* v. *Truscott*, M. T. 2 Vict.

Quebec Advocate—*Contract in Ontario.*]—As the agreement in this case between the suppliant, an advocate of the Province of Quebec and a minister of the Crown at Ottawa, on behalf of Her Majesty, was made at Ottawa, in the Province of Ontario, for services to be performed in Halifax, in the Province of Nova Scotia, it was not subject to the law of the Province of Quebec. *Regina* v. *Doutre*, 6 S. C. R. 342.

Receiver.]—The jurisdiction of the court exercised on behalf of an execution creditor by way of equitable execution, to make the sheriff receiver of the moneys secured by a mortgage of land in his county held by the execution debtor, who was resident out of the Province. *Parent* v. *Lortie*, 7 C. L. T. Occ. N. 195.

Reported Case in Foreign Court.]—After judgment, at the trial, but before the argument in banc, the defendants put in the report of a case bearing upon the question, decided in the supreme court of the United States, verified by affidavit:—Held, admissible. *Rice* v. *Gunn*, 4 O. R. 579.

Robbery in Foreign Country—*Following Proceeds.*]—Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property here; the court restrained the selling or incumbering thereof. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274.

Scotch Winding-up Proceedings.]—In the course of proceedings taken in Scotland for winding up the plaintiff company, an order was made by a Scotch court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any court in Ontario having authority to

compel delivery, and upon default this action was brought for that purpose:—Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish court. And an order striking out the defence in the action on the ground that it was res judicata by the order of the Scottish court was rescinded. Reynolds v. Barneds Banking Co., Cassels' Dig. p. 92, followed. Semble, that the order of the Scottish court should have been limited to such books and papers as were in the hands of the defendant at its date. *British Canadian Lumbering and Timber Co.* v. *Grant*, 12 P. R. 301.

Statute of Frauds.]—A contract for the sale of goods to plaintiffs at a certain price, payable in Toronto, was made by defendant at Chicago, through his agent there, the goods to be shipped by the G. T. R. from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that s. 17 of the Statute of Frauds was not in force in Illinois:—Held, that the contract being valid where it was made, could be enforced here, though not in writing. *Green* v. *Lewis*, 26 U. C. R. 618.

Transfer of Goods—*Bank Act—Bills of Sale Act.*]—C. & Co. carrying on business in Chicago, in the State of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of $5,000 each, discounted by the plaintiffs, indorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled and new ones dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November, the defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved:—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & Co. being residents of the State of Illinois, the transfer must be governed by the law of that State, according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when M. & T. gave the warehouse receipts direct to the bank, they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and the Act as to banks and banking and warehouse receipts did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago* v. *Corcoran*, 6 O. R. 527.

Transfer of Goods — *Preference.*] — A company incorporated in the State of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan. *River Stave Co.* v. *Sill*, 12 O. R. 557.

Transfer of Goods.]—The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, so far as the formalities of registration or change of possession are concerned, are governed by the law of Ontario. River Stave Co. v. Sill, 12 O. R. 557, followed. *Marthinson* v. *Patterson*, 20 O. R. 125; 19 A. R. 188.

Transfer of Insurance.]—The husband of the defendant, while a bachelor domiciled in this Province, had, in the years 1871 and 1876, effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec, where the insurance moneys were payable. After his marriage, and while still domiciled in this Province, he indorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrator of his estate, against which there were creditors:—Held, that the indorsements on the policies were governed by the law of this Province. Lee v. Abdy, 17 Q. B. D. 309, followed. *Toronto General Trusts Co.* v. *Sewell*, 17 O. R. 442.

Usury—*Note Negotiated in Ontario.*]—B. Bros. & Co., carrying on business at Morristown and Syracuse, in the state of New York, and also at Brockville, in Ontario, on the 11th October, 1872, at Morristown, signed a promissory note for $500 at three months, payable at a bank at Syracuse to the order of C. F., a sleeping member of the firm, who at the time and until after the maturity of the note resided at Brockville. The note was indorsed by C. F., as also, but merely for the accommodation of the firm, by one H. H. and one A. B., both residents of Syracuse. The note so indorsed was handed to J. W. B., one of the firm, who resided at Brockville, and was there negotiated by him with a person named Harding at a rate exceeding 7 per cent., and Harding sold it to the plaintiff, who also resided in Brockville. The note was left by the plaintiff with a banker at Ogdensburg, N. Y., for collection, and at its maturity H. H. came over to Brockville and saw the plaintiff, who agreed to accept in renewal thereof the joint note of H. H., A. B., and the defendant at six months, which was accordingly made and deposited with the Ogdensburg banker, who then gave up the previous note:—Held, that the note of the 11th October, 1872, although drawn up and made payable in the State of New York, was in fact made and became a binding contract on all the parties thereto on its being discounted at Brockville, and must therefore be deemed a Canadian contract and governed by our laws, and that therefore the law of New York, which made void any note discounted at a higher rate of interest than 7 per cent., or any note in substitution thereof, did not apply. The plaintiff, therefore, having sued defendant on the

last named note:—Held, that he was entitled to recover. *Cloyes* v. *Chapman*, 27 C. P. 22.

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

Will.]—Held, upon the facts set out in the judgment in this case, that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U. S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 18 O. R. 36.

Winding-up Act—*Claim Under Quebec Law.*]—There is nothing in s. 56 of the Dominion Winding-up Act which alters or interferes with the lex loci contractus in the case of a claim. Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code, Article 1092) on such insolvency the rent not yet exigible by the terms of the lease, becomes so, a claim for the whole rent, taxes, &c., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

Winding-up Act—*Foreign Company.*]—A winding-up order by a Canadian court in the matter of a Scotch company incorporated under the Imperial Joint Stock Companies Acts doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor, with the consent of the liquidator previously appointed by the court in Scotland, as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. Merchants Bank of Halifax v. Gillespie, 10 S. C. R. 312, distinguished. *Allen* v. *Hanson, In re Scottish-Canadian Asbestos Co.*, 18 S. C. R. 667.

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Acknowledgment of Title.]—Ejectment—Statute of Limitations—Acknowledgment of title said to be obtained by fraud. See *Ferguson* v. *Whelan*, 28 C. P. 112.

Advance on Worthless Mortgage.]—Defendant having by fraud induced plaintiff to advance money on mortgage upon the assurance that the title was correct, although well aware that the party executing the mortgage had no title, a writ of ne exeat was issued against him. A motion to discharge the writ on the ground that the bill alleged that

the debt arose out of the fraudulent conduct of the defendant, was refused with costs. *Hunter* v. *Mountjoy*, 6 Gr. 433.

Assignment for Creditors—*Duress.*]—Assignment for the benefit of creditors obtained by duress and improper use of the criminal process. See *Sharey* v. *Jones*, 15 S. C. R. 598.

Assignment for Creditors—*Secret Advantage.*]—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business. A promissory note given to secure the amount of the preference payable under such an arrangement is wholly void. *Brigham* v. *Banque Jacques-Cartier*, 30 S. C. R. 429.

Attorney—*Money Recovered under Fraudulent Judgment.*]—In an action for money had and received against an attorney, he cannot set up as an answer to his client, that the judgment under which the money was collected was fraudulently confessed by the defendant in that cause to the client. *Williams* v. *King*, Dra. 439.

Bond—*Negligence.*]—To an action on a bond against the defendants as the sureties of one F. for his liability to the plaintiff on a running account, the bond being a continuing security until countermanded by defendants by notice in writing, the defendants, who by their own shewing had never taken the trouble to read over the bond although they had every opportunity of so doing, set up that they were induced to execute it by the false and fraudulent representation of the plaintiffs' agent that it was merely a renewal for another year of a previous bond for that period for the same purpose, to which the defendants were also parties. The agent denied any such representation, and it appeared that he could have had no object in obtaining the bond, as defendants were already liable on the previous bond, which the plaintiffs could immediately have enforced:—Held, under these circumstances, and on the evidence more fully set out in the report, that there was no sufficient evidence of any such false representation, and that the plaintiffs were entitled to recover. Semble, that defendants by their own negligence had precluded themselves from such defence. *Dominion Bank* v. *Blair*, 30 C. P. 591.

Certificate Founded on False Affidavit.]—A certificate granted ex parte on a false affidavit was set aside with costs, notwithstanding the contention that the notices as to the service of which the false allegation was made would not have been directed had the full facts been before the court, the court declining to enter into any question of merits. *Re Ashford*, 3 Ch. Ch. 77.

Collusive Purchase—*Division Court.*]—The goods of a tenant were seized for rent levied for sale by a bailiff. The tenant sold them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money:—Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant. *Sullivan* v. *Francis*, 18 A. R. 121.

Concealment of Title.]—Where a debtor, to effect a compromise with his creditors, offered a mortgage on property which he represented as belonging to a person who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that before it was executed the debtor had obtained a conveyance of the property to himself:—Held, that such conveyance was, under the circumstances, subject to the mortgage. *Fraser* v. *Sutherland*, 2 Gr. 442.

Conspiracy to Induce Marriage.]—Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract:—Held, that the action being without precedent and contrary to public policy, was not maintainable. *Brennen* v. *Brennen*, 19 O. R. 327. *See Wright* v. *Skinner*, 17 C. P. 317.

Conspiracy—*Supplanting in Purchase.*]—An action on the case in the nature of a conspiracy does not lie against a person supplanting another in the purchase of goods which had first been contracted for by the latter; and in every action on the case in the nature of a conspiracy the declaration must expressly aver malice on the part of defendant. *Davis* v. *Minor*, 2 U. C. R. 464.

Conveyance on Trust.]—The plaintiff having occasion to raise $3,100 to pay the church society for a lot which he had leased and improved, which was worth $4,200 cash, procured defendant to raise the money and to pay it to the society; whereupon the society conveyed the land to the plaintiff, and the plaintiff to defendant. The defendant a few days afterwards sold the lot for $4,200 cash, to a person with whom the plaintiff had been previously negotiating. Defendant admitted that, after the sale, he intended to give plaintiff the difference, less his own expenses, and $200 for his trouble. There was great inequality between the parties, and some evidence of confidence between them, and the negotiations between the two were private. The court inferred from the whole evidence that the intention had been expressed during the negotiations between the plaintiff and defendant, and that the plaintiff had conveyed on the strength of it; and held, that it constituted an agreement which the court would enforce. *McLeod* v. *Orton*, 17 Gr. 84.

Deposit Accepted by Insolvent Bank.]—Deposit made in bank which contemplated suspension, and did not open again after the day on which the deposit was made. —Recovery back of the money. See *Re Central Bank of Canada, Wells & MacMurchy's Case*, 15 O. R. 611.

Dissolution of Partnership.]—A., B., and C. were partners. Two of them, A. and B., before the expiration of the term, induced the third, C., to agree to a dissolution, a valuation of the assets, and a settlement based on such valuation, under the false impression that A. was the partner who was to retire, and that the business was to be continued by B. and C., while the fact was that the object of A. and B. was to get rid of C., and to carry on the business without him:—Held, that, by reason of this deceit, the transaction was not binding on C., every partner being entitled to the utmost good faith by his co-partners in effecting a dissolution of the partnership and winding up its affairs, as well as in their previous transactions. *O'Connor* v. *Vaughton*, 13 Gr. 428.

Documents Plain in Terms—*Bond.*]—Appellant, a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events to a bank. By an agreement, bearing even date with the bond, it was recited inter alia that in consideration of a mortgage granted to the bank by a certain firm, the bank had agreed to make further advances to the firm, joint obligors with appellant and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the agreement against appellant, alleging a deficiency in the assets of the firm and indebtedness to the bank, appellant pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over valuation of the property embraced in the mortgage, and not otherwise. The bank made no representations whatever to the appellant:—Held, affirming 5 O. R. 122, that appellant was bound by the documents, and was liable upon them according to their tenor and effect. *Moffatt* v. *Merchants Bank of Canada*, 11 S. C. R. 46. Leave to appeal to the Privy Council refused.

Estoppel—*Res Judicata.*]—Plaintiff being indebted to defendant on a note for $106 and on an open account, gave a mortgage to him for £50. The land in the mortgage was sold by plaintiff, and after payment of the prior incumbrances thereon, there was left the sum of $90 to be applied on defendant's mortgage, on payment of which sum defendant executed a discharge. Defendant subsequently sued plaintiff in the division court for a balance on the note and book debts, and recovered judgment. Plaintiff sued defendant for fraud, in defendant's having sued him for the note, alleging that when the mortgage was given, defendant agreed to give up the note when the mortgage was satisfied:—Held, 1. declaration not proved in fact; 2. discharge of mortgage not being under seal, not an estoppel; 3. that if the declaration had been proved, plaintiff could not, after failing in the division court suit, maintain the action. *Bigelow* v. *Staley*, 14 C. P. 276.

Estoppel.]—Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been plain and made with the knowledge of the facts, and not a matter of mere inference or opinion; and certainty is essential to all estoppels. *McGee* v. *Kane*, 14 O. R. 226.

Foreign Judgment.]—Defence of fraud practised on a foreign court to an action on a foreign judgment. See *Woodruff* v. *McLennan*, 14 A. R. 242.

See, also, JUDGMENT.

Fraudulent Assessment.]—Impeaching decision of a court of revision on the ground of improper arrangement or conspiracy entered into before the holding of the court by the members thereof in conjunction with others to increase the assessment of plaintiffs. See *Canadian Land and Emigration Co.* v. *Municipality of Dysart*, 12 A. R. 80.

Fraudulent Misstatement of Claim.]—In 1846, the defendant contracted for the sale of a building lot in Toronto to the plaintiff's father (one of the defendant's workmen), for $500, payable in eight annual instalments; the purchaser went into possession and built two small houses on the lot. He died in 1856 intestate. The plaintiff, who was his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one A. to manage his affairs, he was not quite of age at this time; in February, 1859, the defendant brought ejectment, and A. in the following March, filed a bill in plaintiff's name for specific performance of the contract. The defendant claimed that there was about $800 due thereon, and the claim appeared to be confirmed by a book produced by a book-keeper of the defendant, who was examined as a witness; the value of the property at the time, was about $700. A. believing the defendant's representations, agreed with him to dismiss the bill without costs, which he accordingly did, and gave up possession to the defendant. Some years afterwards, the plaintiff returned to the Province, and discovered that not one-half the amount so claimed by the defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance, and proved this state of the account, from entries in the books of the defendant and otherwise:—Held, in view of the misrepresentations of the defendant and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time. *Larkin* v. *Good*, 12 Gr. 585.

Guarantee.]—*Partial Failure—Innocent Purchaser.*]—Where J. H., R. M. and F. H. had agreed to give their notes to the creditors of E. F., (who had already made an assignment for their benefit) in composition for his debts at 10s. in the £, and had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods, and the goods were afterwards all delivered to C., with the knowledge and assent of E. F.:—Held, that their deed could not be avoided on the ground of

fraud, because there was subsequently a partial failure in the arrangement on the faith of which they had made it. *Matthewson* v. *Henderson*, 15 C. P. 99.

If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected. *Ib.*

Indemnity—*Bona Fides of Claim Indemnified against.*]—The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action:—Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt showed no defence, but a mere oral agreement without consideration. Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of fi. fa. against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, showed no fraud, and was no answer to the action. *Paisley* v. *Braddy*, 11 P. R. 202.

Inducing Interference with Title.]—The first count of the declaration alleged that the plaintiff was an hotel keeper at Niagara Falls, and furnished guides and dresses to persons going under the falls, and by consent of the government, had a stairway for visitors down the bank of the river; that defendants also had a stairway for the same purpose; that the plaintiff's stairway had been burned down, and while he was rebuilding it, the defendants, contriving to injure him, falsely and maliciously, and without reasonable or probable cause, represented to the attorney-general that the land on which the plaintiff's stairway was built (which belonged to the Crown) was necessary for military purposes, and that the land on top of the bank was required for a highway, and had so been used for many years by license from the Crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road; and thereby the defendants induced the attorney-general to permit the use of his name in filing an information in chancery to restrain the plaintiff, and obtained an injunction against the plaintiff to restrain him from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the Crown so to do, and lost the profits of his business, &c. The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshments and dresses to persons wishing to go under the falls; that there was a certain public stairway for such persons down the bank; that the defendants intending to injure the plaintiff falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, and forcibly and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants, and the plaintiff lost the profits of hiring his dresses and selling refreshments, &c.:—Held, on demurrer, that both counts were bad; for as to the first no action would lie so long as the decree in equity remained in force, notwithstanding the subsequent license from the Crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action. *Davis* v. *Barnett*, 26 U. C. R. 109.

Inducing Owner by Possession to Accept Lease.]—The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the land under the Statute of Limitations but was not aware of the effect of his possession. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to the plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years, at a nominal rent, with a covenant to yield up possession at the end of the term:—Held, that under the circumstances the lease must be set aside, but even if allowed to stand it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock* v. *Sutton*, 2 O. R. 548.

Inducing Persons to Assume Liability—*Acceptance of Insolvent Succession—Law of Quebec.*]—See *Ayotte* v. *Boucher*, 9 S. C. R. 469.

Innocent Party.]—Of two innocent parties, one of whom must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss. See *Merchants Bank of Canada* v. *McKay*, 12 O. R. 498; 15 S. C. R. 672.

Insurance—*Misrepresentation as to Loss.*]—Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss:—Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there would be no recovery on the record as framed, for—plaintiffs having accepted a surrender of the policy—they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit not only must there

be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew; that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but, even if invoked, they would afford no defence, as there was no misrepresentation as to the amount of loss:—Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation. Semble, that on the evidence there was no misrepresentation at all. *Royal Ins. Co.* v. *Byers*, 9 O. R. 129.

Insurance—*Title—Stifling Prosecution.*]—The defendant insured his dwelling house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire, defendant swore to the same facts in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by the defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid to him under false pretences and for perjury; and defendant to avoid the arrest and prosecution, gave the plaintiffs a note for $700:—Held, that the plaintiffs could not recover on the note, for in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration appeared but that of avoiding the arrest and prosecution. Held, also, that for the same reason the plaintiffs could not recover on the common counts, as for money paid under a mistake or misrepresentation of fact; but a new trial was granted to enable plaintiffs to shew the facts more fully. Quære, as to the effect upon the validity of the note, of the threats to prosecute defendant, if it had been shewn that the plaintiffs were entitled to recover the money for which it was given. *Canada Farmers Mutual Insurance Co.* v. *Watson*, 25 C. P. 1.

Judicial Sale.]—Effect of fraudulent judicial sale. See *Mitchell* v. *City of London Fire Ins. Co.*, 12 O. R. 706.

Landlord and Tenant—*Pretended Sale of Goods by Tenant.*]—A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser. *Whitelock* v. *Cook*, 31 O. R. 463.

Lease from Person not in Fact the Owner.]—A. was in possession of the premises in question, without title thereto. B. came to him and represented himself to be owner of said premises, when in fact he was not. A. by writing agreed to lease from B. for five years, at a rental of £4 10s. This writing was signed by A. alone:—Held, that under the circumstances A. could dispute B.'s title to said premises on the grounds of fraud and misrepresentation. *Lynett* v. *Parkinson*, 1 C. P. 144.

Lease—*No Concealment or Imposition.*]—Declaration on defendants' covenant to pay the ground rent on land, which B. held under lease, and which the plaintiffs, his executors, by deed reciting the lease, had assigned to defendants. Defendants pleaded, by way of equitable defence, that the sole object of their purchase was to erect buildings on Front street, for which purpose the frontage on said street was expressly stipulated for, and included in the description of said premises, and the rent calculated on such frontage, as in the declaration mentioned; and the property without such frontage was valueless: that they never were in actual possession of any part of the premises: that since April, 1862, defendants first discovered that the description in the lease did not include any frontage on Front street; and so defendants alleged that by such error and omission they had not the lands they bargained for: that the land in the lease to B. was specifically described, and the northern boundary of it adjoined the southern boundary of a strip of land belonging to the city, twenty feet wide, extending to Front street: that such strip was included in the deed between plaintiff and defendants: that the corporation had, since the execution of such deed, entered into possession of said strip, and now hold it by title paramount to the plaintiffs:—Held, on demurrer, that the plea afforded no answer, for no concealment or imposition was alleged; and defendants, by calling for the lease, of which they had notice by the assignment, might have ascertained the facts at first. *Talbot* v. *Rossin*, 23 U. C. R. 170.

Life Insurance—*Surrender of Policy.*]—The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property. A contract for the surrender of a life policy, unlike a contract for life insurance, is not uberrimæ fidei. The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale. In an action by his executors to set aside the transaction:—Held, that there was no evidence of fraud to submit to a jury. Hill v. Gray, 1 Stark. 434, explained and distinguished: Smith v. Hughes, L. R. 6 Q. B. 597, followed: Jones v. Keene, 2 Moo. & R. 348, distinguished. *Potts* v. *Temperance Life Assurance Co.*, 23 O. R. 73.

Loan on False Valuation.]—W. conveyed to his nephew, E., for an alleged consideration of $1,200, fifty acres of land, and afterwards these parties applied to the plaintiff, the appraiser of a loan company, for a loan of $1,000 to pay, as was alleged, upon the purchase money, W. asserting that the property was well worth $2,200 cash, or $2,500 on a fair credit. The plaintiff, relying on the statements of W., certified the value accordingly and the loan was effected. The land was not worth the $1,000 advanced, and sold

for $800, leaving a balance due the company of nearly $500, which they required the plaintiff to pay, and which he did settle with the company for, considering himself liable, and obtained from the company an assignment of their securities. The court being satisfied that the whole transaction was a fraudulent scheme to obtain the loan upon the certificate of the plaintiff, ordered both defendants to make good the deficiency, and pay the costs of the suit; holding that the plaintiff was entitled to take an assignment of the claim as against W. to indemnify himself, that he could sustain his suit though he had only secured the money without paying it, that he had an independent right of suit against W. for the misrepresentation, and that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself. *Moberly* v. *Brooks*, 27 Gr. 270.

G. obtained a loan of $3,700 through R. from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for $7,500, and had paid $4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the $3,000, which was the total purchase money for the 220 acres and another parcel of about 50 acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs it was:—Held, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the 50 acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid), as the mortgagee was no party to the action. *Hamilton Provident and Loan Society* v. *Gilbert*, 6 O. R. 434.

Note Fraudulently Filled Up.]—Where the defendant signed, as maker, a printed form of a note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became indorsees of it for value without notice:—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or indorsed. *McInnes* v. *Milton*, 30 U. C. R. 489.

Personal Representatives.] — Action against personal representatives of deceased person who is charged with fraud. See *Hamilton Provident and Loan Society* v. *Cornell*, 4 O. R. 623.

Personal Representative bound by Testator's Fraud.]—An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts, which such deceased person had given to his creditors during his lifetime. *Merchants Bank* v. *Monteith*, 10 P. R. 467.

Pretended Marriage.] — Conspiracy to induce a woman to go through the ceremony of a pretended marriage. See *Wright* v. *Skinner*, 17 C. P. 317.

Purchase by Mortgagee.] — Fraud by mortgagee purchasing through another at mortgage sale. See *Faulds* v. *Harper*, 9 A. R. 537.

Purchase as Trustee—*Repudiation.*]—A party on a sale of land attended and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser; but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands. The court declared the plaintiffs entitled to redeem, and ordered defendant to pay all the costs of the suit. *Watson* v. *James*, 19 Gr. 355.

Sale of Goods—*Mistake of Vendor as to Identity of Vendee.*]—A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in fact its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered, which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time ignorant of the circumstances above mentioned. About a week prior to the judgment, a winding-up order was obtained against the company, hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained ex parte an order vacating the judgment against the company:—Held, that the plaintiff was entitled to recover from the syndicate the price of the goods. *Keating* v. *Graham*, 26 O. R. 361.

Sale of Land — *Mortgage for Purchase Money—Concealment of Incumbrance.*]—The defendant, to an action on a covenant for payment of mortgage money, pleaded on equitable grounds, that before making the mortgage sued on the plaintiff falsely and fraudulently represented himself to be the owner of the land, free from all incumbrances, but that the legal estate was vested in one W., who held in trust for him: that defendant relying upon his representation purchased the land, &c., although the plaintiff then well knew of a mortgage to the Trust and Loan Co., which he fraudulently concealed from the defendant; and thereupon said W., at the plaintiff's request, conveyed to defendant by a deed containing absolute covenants for title free from incumbrances, and defendant executed the mortgage sued on to secure the balance of purchase money. The plea then alleged the existence of the mortgage to the Trust and Loan Co., which fact was well known to the plaintiff at the time of such sale and false representation, but was fraudulently concealed by him from defendant for the purpose of defrauding defendant, who otherwise would not have purchased: that the land was sold by the Trust and Loan Co., and defendant was evicted therefrom and lost the same, &c.:—Semble, that the plea shewed a good legal defence on the ground of fraud, but was not such an

equitable plea as could be admitted under the Common Law Procedure Act. *Whitehouse* v. *Roots*, 20 U. C. R. 78, 65.

Where on the sale or conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances, and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage brought at the instance of the mortgagee—or the voluntary transferee, unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. *Loveland* v. *Harrington*, 27 Gr. 178.

This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor himself. *Ib.*

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

See, also, *Cameron* v. *Carter*, 9 O. R. 426.

Sale of Reversion.]—*See Marcy* v. *Totten*, 6 Gr. 176.

Stifling Prosecution.] — The defendant while a prisoner arrested on a charge of larceny sent for the agent of the owner of the property stolen and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen. The agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he secured him, but after the security was given he let him know that he would endeavour to get a mitigation of the sentence, which he afterwards did:—Held, that there was not sufficient evidence that there was any agreement to stifle the prosecution and that the security was valid. *Henry* v. *Dickie*, 27 O. R. 416.

See DURESS.

Taking Advantage of One's Own Wrong.]—In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded inter alia that the action was premature inasmuch as he had got the money irregularly from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided:—Held, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings. *Bury* v. *Murray*, 24 S. C. R. 77.

Devisee killing testator cannot take under the will. *Lundy* v. *Lundy*, 24 S. C. R. 650.

Threat to Prosecute.] — W. obtained from P. an order for £50, (which was paid) on a statement that he could prosecute him for felony:—Held, recoverable on an action brought therefor. *Pasco* v. *Wegg*, 6 C. P. 375.

Transfer of Shares by Directors.]—Fraudulent transfer of shares by directors of a company, to a person of insufficient means to pay impending calls, in order to avoid liability for such calls. *See Thompson* v. *Canada Fire and Marine Insurance Co.*, 9 O. R. 284.

Undisclosed Trust—*Enforcement.*]—The property of M. having been advertised for sale under power in a mortgage, his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount, B. agreed to lend it for a year taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price, which B. signed, and he told the solicitor that he would advise by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property subject to repayment of the loan from B. and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and in addition to denying said charge defendants pleaded the Statute of Frauds:—Held, affirming 19 A. R. 602, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement she must be held to have taken the property in trust as B. would have done if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff. *Barton* v. *McMillan*, 20 S. C. R. 404.

See sub-title V.

II. FALSE REPRESENTATIONS.

General Rule.]—To entitle a party to recover damages against one who has been guilty of deceit, it is not necessary to shew that the person practising it has benefited thereby; but no action will lie for a false representation, unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it, and he does act upon it and sustains damage in consequence. *French* v. *Skead*, 24 Gr. 179.

There must be a wilful and fraudulent statement of that which is false to sustain

an action of deceit, and the law still distinguishes between legal and moral fraud in this respect. *Petrie* v. *Guelph Lumber Co.*, 2 O. R. 218; 11 A. R. 336; 11 S. C. R. 450.

To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts; and it must also be established that such fraud was the inducing cause of the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct. *Garland* v. *Thompson*, 9 O. R. 376.

In order that a representation may be actionable, it must be fraudulently made. In an action to recover damages for falsely representing that a forged cheque was genuine, the jury answered in the negative the question, "Did the defendant falsely, fraudulently, and deceitfully represent the signature to the cheque to be genuine, when in truth and in fact it was a forgery?" The action was held not maintainable, though in answer to other questions they found that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth and without making proper inquiries. *White* v. *Sage*, 19 A. R. 135.

See Royal Ins. Co. v. *Byers*, 9 O. R. 120, *ante* sub-title I.

Adopting Contract—*Nature of Misrepresentations.*]—The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be $500, payable by crediting $100 on an old piano taken in exchange, and the balance of $400 by monthly instalments, the plaintiff giving a note for the $400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth $500; that it was a first-class instrument, and as good as any Steinway or Chickering piano:—Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to shew that the defendant did not believe the statements made to be true, or that they were made recklessly; and also no damages were shewn; and, semble, the statements were such as are properly styled simple commendation:—Held, also, that as the property had not passed, an action for the breach of warranty would not lie. *Ure* v. *Milligan*, 10 O. R. 569.

Agency—*Unqualified Assertion—Quantum of Damages.*]—A person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent, is answerable to the person who so contracts, for any damages which he may sustain by reason of the assertion being untrue. And costs incurred by such third person in an action against the supposed principal for the recovery of damages may be recovered as damages. *Eckstein* v. *Whitehead*, 10 C. P. 65.

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

Agent for Work—*False Orders on Principal.*]—The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges; that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and plaintiffs thus lost the money. Common counts were added. It appeared that the corporation, by one resolution, directed that $200 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another, that $100 should be placed to the credit of each councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, though contracted for, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended. The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action:—Held, that though giving orders false in fact might raise a primâ facie case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs. *Township of Chatham* v. *Houston*, 27 U. C. R. 550.

Agent of Company—*Repudiation.*]—An agreement was made between plaintiffs of the one part and the Great Western Railway Company, by their agent, of the other part, by which the plaintiffs contracted to furnish a large quantity of cordwood on the terms specified. The agreement was signed and sealed by the plaintiffs, and by defendant, styling himself "agent." No representation as to authority was shewn to have been made by defendant, but it was proved that after the company had accepted and paid for a portion of the wood they refused to carry out the contract, and defeated the plaintiffs in an action upon it by setting up the want of their corporate seal:—Held, that this evidence was insufficient to sustain an action against defendant for falsely

representing to the plaintiffs that he had authority to bind the company. *McDonald* v. *McMillan*, 17 U. C. R. 377.

Agent of Insurance Company—*Want of Seal.*]—Declaration, that a certain vessel insured in the Provincial Insurance Company was sunk, and that defendant, who was the agent of the company in effecting settlements on account of vessels lost or damaged—in consideration that the plaintiff would contract with defendant as, and assuming to be, the agent of the company, to raise the vessel for $3,100, the question of the liability to pay said sum to be referred to arbitration—promised the plaintiffs that he was authorized by the company to enter into the said contract as their agent, as follows, (the contract was then set out, made between the plaintiffs and the company, and signed by the defendant for the company): that the plaintiffs entered into such contract with defendant as, and assuming to be, the agent of the company, and raised the vessel; yet defendant was not authorized by the company to make such contract, and refused to pay the plaintiffs the $3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the contract against the company, and were put to expense, &c. Plea, that the plaintiffs were unable to enforce the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the company:—Held, on demurrer, 1. That there was no assertion in the declaration of defendant being the agent inconsistent with the allegation of his want of authority; 2. that the plea shewed no defence, for if defendant had been authorized as he represented, the company could have been compelled in equity to affix their seals to the contract. *Calvin* v. *Davidson*, 31 U. C. R. 396.

Amalgamation of Companies—*Measure of Damages.*]—Measure of damages in an action of deceit on the part of the defendants, owners of a line of steamers, as to certain contracts alleged by them to be held in connection with their line of steamers, whereby the plaintiffs, owners of another line of steamers, alleged that they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. *See Beatty* v. *Nealon*, 12 A. R. 50.

Arrest—*Incorrect Information.*]—Although as a general doctrine of law a person who makes a false statement, knowing it to be such, which is acted upon by another, may be held liable for any injury thus caused, yet where a person, in laying an information before a police magistrate, had given an incorrect version of the statement made by him to the defendant, and caused the plaintiff's arrest, it was held that an action therefor could not be maintained against the defendant. *Sparks* v. *Joseph*, 7 C. P. 69.

Bank Director—*False Report.*]—The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over-estimating the assets and under-estimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock:—Held, upon the evidence set out in the case, 1. that there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed: 2. that the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by defendant: 3. that if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information. *Parker* v. *McQuesten*, 32 U. C. R. 273.

Composition—*Debtor's Position Untruly Stated.*]—A declaration alleged that defendant was indebted to the plaintiffs in a large sum of money, to wit, &c., besides the costs of a suit to recover the same; and that defendant fraudulently represented to plaintiffs that he was insolvent and unable to pay said indebtedness in full, and thereby induced plaintiffs to take a composition in respect of said debt and costs, whereas defendant was not insolvent, &c., whereby plaintiffs lost the difference, &c., and were put to costs in arranging the composition:—Held, that it was no objection to the declaration that it did not aver that defendant knew that he was not insolvent, because it charged the representation to be fraudulent: but that the declaration was bad because no damage was shewn; for if the plaintiffs were induced to take a less sum through defendant's fraud the original cause of action still existed, and the plaintiffs could proceed with their former action. *Ontario Copper Lightning Rod Co.* v. *Hewitt*, 29 C. P. 491.

Composition—*Deceit.*]—The plaintiff, in 1873, sold to defendant certain timber limits and chattel property for $85,000, payable in eight yearly instalments, with many special terms as to advances to be made by plaintiff to defendant to assist him in getting out lumber thereon, commission to be paid by defendant to plaintiff, &c. By deed in 1878, reciting that defendant had been unable to carry out this agreement, it was agreed that in consideration of defendant being released from all obligations to plaintiff except as set out in a deed of composition of the same date, the said agreement should be cancelled. By the composition deed, between the defendant and his creditors, to which plaintiff was a party, the creditors agreed to accept 25 cents in the $ on their respective claims, which was to be paid in part out of the proceeds of a raft belonging to defendant, then on its way to Quebec, and the balance in three years; and certain lands were assigned as security. To enable defendant to transport the said timber to market, the plaintiff agreed to advance the necessary funds, for which he was to have a preferential claim on the proceeds. The unpaid balance due by one J., under an agreement made by the plaintiff, was to be deducted from the full and not from the reduced amount due to the plaintiff, and in fixing the amount due to the plaintiff $30,000 was to be deducted for the retrocession of the limits, which the plaintiff had agreed to sell to defendant by the cancelled agreement. It appeared that the defendant, in 1878, representing himself to be unable to meet his engagements, and to be largely indebted to one E., among others, and owing the plaintiff about $80,000, had called a meeting of his creditors, the result of which was the composition deed mentioned and the

agreement of the same date with the plaintiff. The plaintiff had taken possession of the property so taken back by him, and had received the advances made by him to enable the defendant to get down the raft, and part of the money due by J. He had never offered back to defendant such property or money, nor offered to release the security, and E., with defendant's other creditors, had been paid in full. Having discovered that there was no such debt as represented due by the defendant to E., the plaintiff sued on his agreement of 1873:—Held, that the whole transaction evidenced by the two deeds in 1878, must be regarded as one arrangement; that the plaintiff could not be treated as a creditor who had received part of his claim, and been induced by fraud to release the residue; that he could not repudiate the release for fraud, not being in a position as having offered to repudiate the whole arrangement; and that his proper remedy was an action for the damages caused by defendant's deceit. *Fraser* v. *McLean*, 46 U. C. R. 302.

See *Turner* v. *Bowerman*, 29 U. C. R. 187; *Clarke* v. *Ritchey*, 11 Gr. 499, sub-title V., *post*.

See BANKRUPTCY AND INSOLVENCY, II.

Contract of Affreightment—*Depth of Water.*]—The plaintiff declared that defendant,—by falsely pretending and representing to the plaintiff, that if the plaintiff would go with his vessel to Willie's bay, for the purpose of carrying a load of defendant's wood thence to C., he would be able to approach the shore and load the wood on his vessel with scows,—induced the plaintiff to go with his vessel to said bay for that purpose, and to incur great expense, &c., whereas the depth of water, &c., was not sufficient, &c.:—Held, on motion in arrest of judgment, 1. that the declaration was sufficient, without averring that defendant knew of the want of water; 2. that it sufficiently appeared that defendant induced the plaintiff to go for the wood by his false representation, though no contract to carry was stated. *Harvey* v. *Wallace*, 16 U. C. R. 508.

Conveyance Perfected—*Grantor's Remedy.*]—When on a sale of land there has been a conveyance perfected, unless fraudulent misstatement or concealment is clearly made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor. Semble, that where fraud is established, but the conveyance has been made, and the parties cannot be placed in statu quo, then the remedy is by an action for deceit, and assumpsit for money had and received, to recover the purchase money, will not lie:—Held, that on the evidence set out in the case, the defendant was not shewn to have been guilty of fraudulent misrepresentation or concealment of title. *Thomas* v. *Crooks*, 11 U. C. 549.

Corporation's Liability for Deceit.]—An action for deceit will lie against a corporation. *Moore* v. *Ontario Investment Association*, 16 O. R. 269.

Demurrer to a statement of claim for damages against a company, wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports of the company, and in letters written to him by the president, to purchase stock practically from the company, which stock was valueless, overruled with costs. *Ib.*

Semble, that if the plaintiff had been induced to buy the stock from a private holder by the false representations aforesaid, the corporation would not have been liable, but only the individual officers; but that if the vendor of the shares was privy to the representations, the plaintiff could also recover against him. *Ib.*

Exchange of Horses — *Warranty.*]—A. and B. exchanged horses, each taking that of the other, and B. gave A. a note for a difference of value in the exchange. A. sold the horse he got from B. almost immediately; and after a lapse of two years, during which nothing was done by either party, B. was sued upon the note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

Express Agent — *Receipt of Money.*]—The declaration alleged that the defendant before the committing of the grievance, &c., was a carrier and express agent; that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S.; and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to his own use; and by reason of such false and fraudulent representation W. obtained time to and did abscond, and the plaintiff lost said money, which he would otherwise have recovered from W.:—Held, on demurrer, that a sufficient cause of action was shewn; that it was unnecessary to allege that defendant knew the representations to be false, the words "falsely and fraudulently" being equivalent to "knowingly;" or that defendant was a carrier at the time when, &c., for the ground of action being the fraud, his being a carrier was immaterial. *Young* v. *Vickers*, 32 U. C. R. 385.

False Representation by Crown Lands Agent.]—A., a Crown lands agent, being asked by the plaintiff whether there were any lands for sale by the government in the township of M., told him that there were not, but that B. had certain lots there to which he would sell his right, and the plaintiff being introduced by A. to B. paid £50 for his goodwill; together with the first instalment required by government, and received from him a receipt for the latter signed by A. as Crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B., to enable the latter to obtain an advance upon the government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence; or as money had and received. *McMaster* v. *Geddes*, 19 U. C. R. 216.

Fictitious Claims—*Railway Subsidies—Payment by Crown.*]—A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for $175,000, which was approved of

and paid, whereupon he paid over $100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The Government afterwards brought an action against P. to recover back the $100,000 on the ground that A.'s claim was fictitious and was paid on false representations: — Held, that the action must fail if it could not have been maintained against A., that the onus was on the Crown of proving A.'s claim to be fictitious and that the Crown not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one:—Held, further, that, in any case, the action could not be maintained, as it failed to ask for the cancellation of the order in council, the letter of credit, and the payment made by the Crown thereunder:—Held, further, that the payment to A., with the consent of the new company, was a discharge to the government pro tanto of the subsidy due to the company, and if wrongfully paid the latter only could recover it back:—Held, also, that even if the Crown could have recovered the amount from A., it could not succeed against P., who, as the record shewed, had ample reason for believing that the company was indebted to A., as claimed. *Pacaud* v. *The Queen*, 29 S. C. R. 637.

Intent to Deceive — *Means of Knowledge.*]—Defendant was mortgagee of plaintiff's farm, and the latter, being unable to pay the mortgage, asked defendant to buy the farm, and defendant offered him therefor some cash and a mortgage for $619, representing to him that the mortgage was a second mortgage; that the land was as good as defendant's own land, and that any money-lender would readily cash it at a small discount, thus inducing plaintiff, an ignorant man, to accept it when in fact the defendant knew it was a fourth mortgage and almost worthless. After this an abstract of title was shewn to the plaintiff, but it did not appear that he read it or that it was read or explained to him. The jury having found for plaintiff in an action for deceit, on motion for a nonsuit:—Held, that there was no obligation on the plaintiff, as a matter of law, to examine the title or search the registry office, but that his omission to do so was matter for comment only; and that his having been furnished with the means of knowing, of which he did not avail himself, after the false statements had been made, was no answer to the action. Semble, that on sustaining the verdict a reconveyance of the mortgage to defendant might be ordered. Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive, and did deceive the plaintiff:—Held, that taking the whole statement together the verdict was not unwarranted. *Barr* v. *Doan*, 45 U. C. R. 491.

Lease—*Taxes more than Stated.*]—On the negotiation for a lease of real estate in the city of Toronto, the intended lessee asked the intended lessor, who had owned, occupied, and paid the taxes assessed on the proposed leasehold premises for several years, what the taxes would be on the property, and the intended lessor answered they were about $70 or $75, but that he could not tell exactly, as he had never separated them from his personal assessment; the fact being that for some years the owner had been paying nearly double that amount. The intending lessee, however, accepted the owner's statement and executed the lease without making any reference to the chamberlain's office, where the exact amount rated on the premises could have been ascertained. The court, under the circumstances, refused any relief to the lessee on the ground of misrepresentation. *Coates* v. *Bacon*, 21 Gr. 21.

——— *Untrue Reason for Demanding Possession.*]—By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing 45 U. C. R. 94, that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling* v. *Dickson*, 5 A. R. 549.

See Gold Medal Furniture Co. v. *Lumbers*, 29 O. R. 75, 26 A. R. 78, 30 S. C. R. 55.

Lease of Booth—*Statements at Auction.*]—Declaration, that the defendants owning the land upon which the Provincial exhibition was to be held, advertised certain portions to be let by auction for the purpose of refreshment booths; that the plaintiff attended and leased one of such portions; that at the auction defendants made certain statements and representations as to the positions of the gates and entrances to the fair grounds, the number of persons to be allowed to sell refreshments, and the relative positions of the booths, on which the value of the plaintiff's letting was estimated and depended, and relying on which the plaintiff purchased and erected a booth; but that defendants departed from such representations, and so changed the position of the gates, and the number of the booths, that the plaintiff's letting became useless to him:—Held, that no cause of action was shewn, for the declaration was for a wrong, and the statements were not alleged to have been false when made, or to have been made in order to induce the plaintiff to contract. *Reid* v. *Board of Agriculture for Upper Canada*, 26 U. C. R. 565.

Misstatement of Material Fact — *No Intention to Deceive.*]—Semble, that although the evidence in this case shewed that there was no intention to deceive on the part of defendants' manager, still there was such a misstatement of a material fact as but for the notice received by plaintiffs through their solicitor would have rendered the defendants liable for the damage sustained thereby. *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

Partial Failure of Consideration.]—Action on the common counts for work and labour in cutting and sawing timber for defendants. Plea—on equitable grounds, in substance, that the plaintiff falsely and fraudulently represented to the defendants that he had certain interests in and the title to certain lands, and certain interests in and the

right to cut timber on other lands, whereby defendants were induced to purchase the said interests, &c., paying a certain sum down, and securing the rest by mortgage; and it was further agreed that the plaintiff should cut and saw into lumber all the saw logs on the said lands first mentioned for the defendants: that defendants, relying on plaintiff's representations, entered upon said lands and cut and made timber on said lands secondly above mentioned, and expended a large sum of money therein: yet that the plaintiff had not the right in respect of a large quantity of the said secondly above mentioned lands, by reason whereof defendants acquired rights of much less value than the plaintiff represented he possessed, namely, by a sum exceeding the plaintiff's claim; and defendants first became aware of the said false and fraudulent representation after they had purchased said lands, cut the timber and expended the money as aforesaid, and defendants are likely to lose a large quantity of the said timber and saw logs so cut and made by them as aforesaid: that the plaintiff's cause of action arose in cutting and sawing into lumber, under said agreement, the saw logs upon the said above mentioned lands, and otherwise in part performance of this agreement. And defendants prayed that it might be declared that they were not liable to pay anything to the plaintiff, and that the plaintiff might be ordered to pay defendants what was just and equitable for the loss they had sustained:—Held, plea bad, as constituting no defence, but only amounting to a claim for unliquidated damages, the subject of an action at law and not of a suit in equity:—Held, also, that no ground was shewn for the rescission of the contract, and an amendment, by adding a prayer therefor, was refused. Quære, as to defendants' right to claim a rescission of the contract. *Lapp* v. *Firstbrook*, 24 C. P. 259.

Pretended Agent—*False Representations as to Authority—Ratification by Creditor—Indictable Offence.*]—Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent. The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence. *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277.

Property not as Expected.]—The plaintiff had bought from defendant 47 acres, paid for it, and taken a conveyance, but subsequently discovered that 44 acres of it were covered with water; whereupon he filed a bill charging defendant with fraud. No evidence of any fraud having been given, and it rather appearing that both parties acted in ignorance, the bill was dismissed with costs, but without prejudice to any new bill being filed. *Clark* v. *Burnham*, 2 Gr. 644.

Prosecuting Unfounded Claim.]—An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury, and with knowledge of his claim. *Shields* v. *De Blaquiere*, 12 U. C. R. 386.

Representation as to Effect of Written Document.]—The defendant was assignee of a land warrant issued to a constable of the North-West Mounted Police Force, for service in that body, which entitled him upon its face to locate 160 acres upon any of the Dominion lands subject to sale at $1 per acre. The defendant induced the plaintiff to purchase the warrant by representing to him that he would be entitled to obtain from the government 160 acres of land. There were lands subject to sale at $1 per acre when the warrant was issued and thereafter. By various statutes and orders in council the Dominion lands were made subject to sale at higher prices than $1 per acre, but these land warrants were to be accepted by the government in part payment of $1 per acre. The plaintiff was refused lands at $1 per acre by the Crown, and then brought this action to rescind the sale to him on the ground of the misrepresentation. The jury found that defendant represented to plaintiff, to induce him to purchase, that the warrant would entitle him to 160 acres of land; that the plaintiff purchased on the faith of this; that the representation was false; and that defendant made it without knowing whether it was true or false, intending it to be relied upon:—Held, that the plaintiff must fail; for the construction of the warrant clearly expressed that the holder was entitled to 160 acres of land at $1 per acre, and not simply to a credit of $160 on a purchase and the representation was such as defendant might properly make. *McKenzie* v. *Dwight*, 2 O. R. 366; 11 A. R. 381.

Sale — *Damages—Returning Property.*]—Where a buyer seeks to recover damages by an action for deceit against the seller of any property by reason of any false representations made by such seller upon the sale to him of such property, it is not necessary for him in order to maintain such action to return or offer to return the property so sold, and in respect of which such representation was made. It is only necessary to do so when the buyer disaffirms and seeks to rescind the sale as being altogether void by reason of the false representation, and to recover back the consideration he has paid or given for the property. *Star Kidney Pad Co.* v. *Greenwood*, 5 O. R. 28.

Sale by Official Assignee—*Warranty of Title.*]—Defendant having been appointed by the proper authority official assignee in insolvency for a county in which he was non-resident, assuming to act as such assignee, sold the goods of the insolvent to plaintiff, who purchased on defendant's assertion that he had the right to sell, after full discussion between the parties as to this right, and plaintiff having been satisfied by defendant's assertion, made in the honest belief that he had such right. The sale to the plaintiff having been pronounced invalid:—Held, that defendant's honest belief in his right to sell, as assignee, did not protect him from liability to plaintiff if he warranted his title, nor was the knowledge on plaintiff's part of the possible defect in defendant's title fatal to the warranty on the sale of the goods. Held, also, that had nothing occurred beyond the discussion of his title, and plaintiff had bought with this full knowledge, defendant would not have been liable; but as it was clear that after full discussion of the supposed defect of title, defendant might have induced plaintiff to buy on express warranty, a new trial was granted to ascertain this fact. The third count of plaintiff's declaration alleged that defendant, by falsely pretending and representing himself to

be official assignee of the insolvent, and as such to have a lawful right and title to the goods then in his possession, and to sell and deliver the same to plaintiff, induced plaintiff to buy the same and thereupon plaintiff paid defendant for same, whereas, in truth, defendant was not such assignee, and had no right to sell, whereby the goods were lost to plaintiff, and taken from him by process of law:—Held, a good count, as a count in case upon a breach of warranty. *Johnston* v. *Barker*, 29 C. P. 228.

Sale of Chattel—*Note for Price.*]—Defendant gave a note made by one K. to the plaintiffs in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiff sued defendant on the common counts for the price, alleging that he had induced them to take the note by fraudulent representations:—Held, that the plaintiffs could not recover, for there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud. *Auger* v. *Thompson*, 3 A. R. 19.

Sale of Goods—*Vendor Induced to Accept Notes of Third Person.*]—To an action on the common counts for goods sold defendant pleaded that at the time of sale the plaintiff agreed to and did receive in payment therefor two promissory notes made by one M. The plaintiff replied that he was induced to receive these notes by fraud (setting out defendant's fraudulent representation respecting them.) The facts as stated in the pleadings being admitted by the plaintiff's counsel:—Held, that the plaintiff could not recover, for there being an express contract defendant's fraud could not create an implied one, though it would entitle the plaintiff to recover back the goods, or maintain a special action for the deceit. *Sheriff* v. *McCoy*, 27 U. C. R. 597.

Sale of Land—*Bona Fide Mistake as to Crown Dues.*]—One W., as agent for J., sold to defendant two lots of land for $1,000, receiving $100 down and defendant's notes for the balance. This land had been purchased from the Crown in 1854, by one Wake, who had assigned his right to Colvin, and Colvin to J. The instalments had all been paid to government, and W. told defendant that when he did the settlement duties, he could get the patent. He also handed to defendant the assignments and receipts, with an assignment from J. to defendant. The lots were then vacant, and defendant soon after went into possession and performed the settlement duties, but when he applied for his patent, he was informed that the original sale to Wake had been cancelled, as having been obtained in fraud of their regulations; and to avoid losing the land he again purchased it from government for $550. In an action brought by J.'s agent upon the notes, W. swore that he believed what he told defendant to be true, and had no doubt J. also believed it, and there was no proof to the contrary:—Held, that there was no evidence to sustain a defence on the ground of fraud; that there was not a total failure of consideration; and that the plaintiff therefore was entitled to recover. *Walker* v. *Douglas*, 23 U. C. R. 9.

——— *Counterclaim—Rescission.*]—In an action on a promissory note, the defendant counterclaimed, setting up that the note was given in part payment of the purchase money of certain land in Manitoba, which the defendant alleged he had been induced to purchase by plaintiff's false representations as to its value and location. The jury found the amount due on the note was $1,590, but that the defendant was induced to enter into the contract to purchase the land by the plaintiff's fraudulent misrepresentations; and they assessed his damages at the above amount; and judgment was entered in defendant's favour:—Held, on the evidence as set out in the report, there could be no rescission of the contract, but defendant must rely on his claim for damages for deceit; that the evidence failed to disclose actual fraud, at all events the only evidence which could be submitted to the jury was as to location, but while this was too slight to allow the verdict to stand, the court did not feel justified in disposing of the case themselves, though perhaps they might do so under O. J. Act, rule 321. They therefore directed a new trial on the counterclaim, but that plaintiff's legitimate claim on the note should not be delayed; in the meantime judgment was directed to be entered in his favour thereon. *Garland* v. *Thompson*, 9 O. R. 578.

——— *Non-delivery of Possession.*]—In an action for foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant; that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form), and give the mortgage; that as a matter of fact the land was at the time of such representations, and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date; that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times for payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counterclaimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays* v. *Emard*, 10 O. R. 314.

——— *Requisites of Action for Deceit.*]—Before the defendant can be charged with deceit in a contract for sale of land he must be shewn to have contracted as required by the Statute of Frauds, and to have clearly practised or intended the deceit alleged. *Irving* v. *Merigold*, 3 U. C. R. 272.

——— *Statement as to Buildings.*]—Declaration on the case for falsely alleging that a certain hotel stood upon defendant's land,

whereby the plaintiff was induced to purchase said land, defendant well knowing that the hotel was not on his land, but on land adjoining, and belonging to the Queen. Pleas, 1. that the said hotel was not erected upon the land of the Queen, &c.; 2. that the plaintiff knew that the false representations, &c., were false, and if damnified thereby, he was damnified of his own wrong;—Held, both pleas bad. Held also, that the declaration, given at full length in the report, was good in substance. *Tenery* v. *Stiles*, 5 U. C. R. 254.

——— *Want of Title—Pleading.*]—Declaration on a covenant to pay $500. Equitable plea, that the plaintiff agreed to sell to defendant certain land, which the plaintiff represented that he had purchased from government, and was entitled to obtain a patent for on payment of $500; that defendant thereupon covenanted to pay the plaintiff the $500, and plaintiff covenanted that on receiving it he would cause a patent to be issued in defendant's name; that defendant had always been ready to pay; but that plaintiff had not purchased from the government, and had no right to the land, nor could he procure a patent; and if defendant paid him the $500, he would receive no consideration, and would be unable to recover it back:—Held, a bad plea, for the agreement was not alleged to be the same as that sued on; no fraud was averred; no definite misrepresentation which induced defendant's contract; no breach of contract on the plaintiff's part was stated; and no ground for an injunction was shewn. *Cameron* v. *Borrowman*, 28 U. C. R. 262.

Sale of Ship—*Warranty.*]—The plaintiff purchased a steam vessel from defendant on the faith, as he alleged, but which defendant denied, of certain representations made by defendant as to her power and capability; and, after some discussion, a document called a bill of sale, but not under seal, the vessel being unregistered, was executed. This merely stated that the defendant, in consideration of $3,000, sold and assigned the vessel to plaintiff, with a warranty only as to title. The boat did not answer the alleged representations as to power and capability, but no fraud was charged against defendant. The plaintiff having brought an action for a false representation, and also for a breach of warranty:—Held, that the plaintiff could not recover as for a false representation, there being no imputation of fraud; that his remedy, if at all, must be for breach of warranty; and that although the document contained only a warranty as to title, still it was a question for the jury, upon the whole evidence, whether the defendant had in fact intended to warrant her power and capability, or whether the document contained the whole contract. *Bennett* v. *Tregent*, 24 C. P. 565.

Sale of Timber—*Non-payment of Dues.*]—Declaration, that defendant intending, &c., falsely and fraudulently represented to plaintiffs that certain land and timber were defendant's, and that he had the right to grant to plaintiffs the privilege of cutting the timber thereon, and that all Crown dues in respect of such timber and the cutting thereof had been paid by him; whereas the land and timber were not defendant's property, nor had defendant any right to grant to plaintiffs the privilege of cutting the timber, nor had the dues been paid by defendant, as defendant well knew; by reason whereof the plaintiffs were induced to contract with defendant to purchase the timber, and paid him $88 for the same, and for the privilege of cutting it, and not to investigate the title to the land and timber; and relying on the same, they cut and conveyed to Quebec the timber to be sold on their behalf; and that by reason of the premises, and before sale the timber was seized on behalf of the Crown for non-payment of the dues, and plaintiffs had to pay the same, and damages for the illegal cutting thereof, and were deprived thereof for a long time, and prevented during that time from selling the same, and the same became greatly depreciated in value:—Held, on demurrer, good; for it sufficiently disclosed a cause of action against defendant for assuming fraudulently to sell the privilege of cutting the timber discharged from Crown dues to which it was subject, when it was not discharged from them; and that it did not profess to set out a case of either defendant or plaintiffs being mere wrong-doers, without license of any kind from the Crown. Quære, as to an action on the case lying, where the cause of action arises from matter of contract. *Edwall* v. *Hamell*, 16 C. P. 93.

Second Mortgage Represented to be First—*Merger of Original Claim.*]—Defendant owing the plaintiff on bills and notes, executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land, but on searching at once he found a prior incumbrance, and told defendant he would not accept the mortgage:—Held, that the plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a reconveyance. *Adams* v. *Nelson*, 22 U. C. R. 199.

Sheriff—*Certificate.*]—Declaration against a sheriff for falsely certifying that there were no executions against the lands of one H. Plea, on equitable grounds, in substance, that the plaintiffs' agent duly authorized in that behalf, late in the day, and after the defendant's office was closed, applied to defendant's clerk for the certificate on the street; that the clerk having declined to return to the office to make the requisite search, the plaintiffs' agent then represented to him that the plaintiffs were aware of their own knowledge that there were no executions, and would take the risk of there being any, and would not hold defendant responsible if such certificate should prove untrue, of which the agent said there was no danger whatever; and the clerk thereupon signed the certificate at the agent's request, in reliance solely upon such representations and without searching as his duty required and under the belief induced by such representations that there were no executions, and upon the understanding aforesaid, that no responsibility should attach to defendant:—Held, on demurrer, a good defence, for it shewed that the certificate was obtained by the false representation of the plaintiffs' agent made by him at the time, for which the plaintiffs were responsible. *Colonial Securities Co.* v. *Taylor*, 29 U. C. R. 376.

——— *Direction to Levy.*]—Declaration stated that one A. having recovered a judgment against B. and B., his attorney (defendant) delivered fi. fa. to plaintiff as sheriff, directing him to levy on certain goods in the possession of one Burns, as the goods of B. and B., that the plaintiff believing said representation to be true, levied and sold the said

goods; and that he (plaintiff) afterwards suffered damage in an action brought by Burns the owner of the goods. Demurrer, that defendant acting as an attorney, is not liable under the circumstances stated, and if this action will lie at all, it should be against A., the plaintiff in the execution:—Held, on demurrer, that, it being expressly stated that there was a false representation, and that the defendant directed the plaintiff to levy, and having made him a mandatory or agent for taking the goods, quoad the trespass in seizing (under the authority of Humphrey v. Pratt, 5 Bli. N. R. 154), the declaration was good: 2nd plea, that (defendant) honestly believed the said goods belonged to B. and B., and made such representation only for the purpose of assisting the plaintiff in the execution of the writ:—Held, bad, as not being a traverse of any particular fact, and an answer merely to the false representation, but not to the direction to levy, which is the substance of the complaint. *Moodie* v. *Dougall*, 12 C. P. 555.

——— *Execution Creditor Repudiating Seizure.*]—A sheriff cannot maintain an action on the case as for a fraudulent representation, when, having seized goods on an execution of a third party, he is afterwards instructed by defendant to seize them on his execution, although on an adverse claim being set up, the plaintiff in the first writ withdrew his execution, and the defendant refuses either to withdraw his, or to indemnify the sheriff, and the adverse claimant afterwards prosecutes the sheriff, and recovers for the illegal seizure and detention. *Jarvis* v. *Commercial Bank*, 6 O. S. 337.

——— *Plaintiff Misrepresenting Title.*]—A sheriff having made a return of a writ of fi. fa. "lands on hand for want of buyers," and having subsequently, under a writ of venditioni exponas in the same suit, sold the lands under a binding contract, on which writ of venditioni exponas he made a return of "no lands;" a plea on equitable grounds to a declaration against him for a false return, that the plaintiff misrepresented to the sheriff that the lands levied on were the lands of the execution debtor:—Held, to be no answer to the action. *Patterson* v. *Thomas*, 11 C. P. 539.

Statute of Limitations.]—In case of fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damages accrued. *Dickson* v. *Jarvis*, 5 O. S. 694.

Untrue Statement of Creditor of Capital of Firm.]—S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced to him £3,000 as his share of the capital thereof. The firm having failed, made an assignment, in which S. was preferred to the amount of £3,565, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1,000:—Held, notwithstanding, that S. was bound to make good his representation to R. and K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, but consisted of capital advanced to the son, in which event that portion would be applied to their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. and K.; but, semble, if that had been shewn to have been the case, they would have had that right. *Rainey* v. *Dickson*, 8 Gr. 450.

Valuation of Property.] — Negligent valuation of property — Misrepresentation as to value—Right of action. See *French* v. *Skead*, 24 Gr. 179.

Void Sale of Wheat—*Damages—Costs of Owner's Action.*]—Defendants sold to plaintiffs and received the purchase money for some wheat, which they represented to be their own, but which belonged to one B., who obtained it from the railway company in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. The plaintiff then sued defendants for the deceit, claiming as special damages the costs of this unsuccessful action:—Held, that such costs could not be recovered. *Merritt* v. *Nevin*, 20 U. C. R. 540.

Warehouse Receipt — *False Statement of Quantity.*]—Defendants, a railway company, gave warehouse receipts to one B. for 7,500 barrels of flour as in store for him, on the faith of which the plaintiffs accepted and paid bills drawn upon them by B.; and there being a deficiency of 192 barrels, they sued defendants as for a false and fraudulent representation made by them, which they knew would, in the course of trade, be relied upon by persons dealing with B. The evidence shewed defendants knew such receipts were commonly used to obtain advances of money upon, and that they sometimes gave receipts to B. for flour in advance, on being told that it was on the way; but how the mistake in question occurred was not shewn:—Held, that there was a case to go to the jury, and that a verdict for the plaintiffs must be allowed to stand, although they might well have found otherwise. *McLean* v. *Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 270.

See S. C., 23 U. C. R. 448.

——— *False Statement of Quantity—Privity.*]—Defendants gave a receipt to C. H. & Co., stating that they had received and held on their (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff relying upon this receipt, and the representations made by C. H. & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiff. In fact, however, the defendants at the date of the receipt had only received some 270 bushels on account of C. H. & Co.:—Held, that defendants having given their receipt for 500 bushels of wheat, were estopped from setting up that they had not at the date thereof the quantity of wheat mentioned therein in store for C. H. & Co. Held, also, that from the evidence it was to be assumed that the defendants gave this receipt to C. H. & Co. for the purpose of enabling C. H. & Co. by means thereof to sell the amount of wheat therein mentioned to any persons to whom they offered the same for sale, and thereby sufficient privity was established between plaintiff and defendants

to enable him to sue for the damage he sustained by reason of their (defendants') false representation. *Holton* v. *Sanson*, 11 C. P. 606.

See sub-title V.

III. FRAUDULENT CONVEYANCE.

1. *By and Against Whom Attack May be Made.*

Agreement to Purchase Mortgage—*Misrepresentations — Subsequent Judgment.*] The plaintiffs sought to set aside a certain conveyance dated 27th February, 1880, and made by M. to G., as executed in fraud of themselves as creditors. It appeared that the plaintiffs had not recovered judgment for the debt in respect of which they claimed to be creditors until 23rd July, 1883, and that this was a judgment recovered in an action on a covenant as to the validity of certain mortgages purchased by them from M., contained in a deed of 1st March, 1880, by which the said mortgages were conveyed by M. to them. The plaintiffs, however, sought at the trial of this action to give evidence that this deed of 1st March, 1880, was made in pursuance of an agreement for the purchase of the said mortgages entered into by themselves with M. before 1st January, 1880, and that this agreement was induced by certain misrepresentations made by M. as to the validity of the said mortgages. It appeared, however, that the consideration of the purchase was to be the transfer of certain shares in the capital stock of the plaintiffs' company to M., and that these shares were not actually so transferred until after 27th February, 1880, and the evidence so sought to be given was excluded:—Held, that the liability of M. only began at the time of the execution of the covenant in the deed of 1st March, 1880, and inasmuch as the impeached conveyance was antecedent to this, and it was not shewn that there were at the date of it any existing debts, nor that it was intended to defeat any future debt, the plaintiffs must be nonsuited. On appeal this judgment was affirmed by an equal division. *Real Estate Loan Co.* v. *Yorkville and Vaughan Road Co.*, 9 O. R. 464.

Assignee for Creditors.]—A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee. *Lumsden* v. *Scott*, 4 O. R. 523.

See BANKRUPTCY AND INSOLVENCY, I. 1.

Attaching Creditor — *Establishing Claim at Law.*]—The fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor, does not afford any ground for coming to the court of chancery to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside. Before the court can be called upon to do so, the creditor must establish his right to recover at law. *Whiting* v. *Emerson*, 7 Gr. 603.

Attacking Mortgage after Selling Equity under Execution.]—An execution creditor proceeded to a sale of the lands of his debtor, and sold a property which was subject to mortgage for £500, given, as the creditor alleged, to defeat creditors, but which property the creditor alleged was not worth more than £200, and became himself the purchaser thereof at the price of £10 10s.; whereupon he filed a bill setting forth these facts, or that the mortgage was given to secure a much smaller, if any debt, and praying alternative relief, in accordance with such allegations. The court at the hearing pro confesso refused to set aside the mortgage, but gave the plaintiff the usual decree as a judgment creditor, not as a purchaser. The proper course for the plaintiff was to have come to this court in the first instance, and not to proceed to a sale of the property with such a cloud upon the title. *Matlock* v. *Plunkett*, 9 Gr. 596.

Where a debtor executes a fraudulent conveyance, in respect of which relief in equity may have to be sought, the proper course for the creditor is, not to have the property sold by the sheriff at a great undervalue, and then to come into equity to have the sale confirmed; but to come into equity first to have the conveyance set aside, and the property then sold. *Kerr* v. *Bain*, 11 Gr. 423.

Claim Acquired by Person Himself Estopped.] — Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the court. Judgment below, 27 O. R. 423, reversed. *Young* v. *Ward*, 24 A. R. 147.

Continuing Indebtedness.] — In case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance. *Ferguson* v. *Kenny*, 16 A. R. 276.

Creditor taking Benefit.]—A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company it was held that they could not attack the conveyance. Wood v. Reesor, 22 A. R. 57, applied. Judgment below, 28 O. R. 497, reversed. *Rielle* v. *Reid*, 26 A. R. 54.

Creditor's Claim under $40—*Suing on Behalf of all Creditors.*]—A creditor for an amount under $40 cannot attack a conveyance of land as voluntary or fraudulent and he cannot improve his position by bringing his action on behalf of other creditors. *Zilliax* v. *Beans*, 20 O. R. 539.

Creditor Previously Advising Impeached Transaction.]—Where a debtor at the express instance and under the advice

and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him. *Blackley* v. *Kenny*, 16 A. R. 522.

Debt not Due.]—Under s. 28 of R. S. C. c. 173, every one who makes or causes to be made amongst other things, any assignment, sale, &c., of any of his goods and chattels with intent to defraud his creditors, or any of them, is guilty of a misdemeanour: —Held, it is not essential under the Act, that the debt of the creditor should, at the time of the sale, &c., be actually due. *Regina* v. *Henry*, 21 O. R. 113.

Delay in Attacking.]—Delay for seven years in suing held no objection to a creditor's right to set aside a deed as fraudulent against creditors, where the position of the parties to the impeached conveyance had not been materially altered by the delay; if that were shewn, the court has the power of modifying the relief given, so as not to wrong the parties; or it might, in its discretion, refuse to give any relief. *Currie* v. *Gillespie*, 21 Gr. 267.

Delay in Attacking—*Statute of Limitations.*]—One G., in 1873, made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. *Bower* v. *Gaffield*, 11 O. R. 571.

A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Ib.*

Execution Creditor.]—Where a bill was filed by an execution creditor to impeach a conveyance by the debtor, and it did not appear that the action at law had been commenced after the passing of the Administration of Justice Act, a demurrer on the ground that the plaintiff ought to have obtained relief in the suit at law was overruled. *Sawyer* v. *Linton*, 23 Gr. 43.

Heirs of Grantor.]—A deed of gift void against the grantor may be set aside at the instance of his heirs after his death. *Dawson* v. *Dawson*, 12 Gr. 278.

Intestate's Fraud.]—In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase; the assignment was made absolute in form so as to deceive and defraud other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees. Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendors in respect of the contract, obtained an award of $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600:—Held, that the plaintiff was entitled to such payment: that in view of the fraud and trust, the lapse of time was no defence, and that a bill against the assignees by the creditor, instead of by the administrator, was proper. *Gillies* v. *Hoar*, 19 Gr. 32.

Judgment Creditor—*Execution Creditor.*]—Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect. *Morphy* v. *Wilson* 27 Gr. 1.

Judgment Recovered after Action.] —Held, that the plaintiffs were not at liberty to rely on a judgment at law recovered since the filing of the bill, for the purpose of setting aside an assignment of a claim as fraudulent, but must stand in their position as creditors when the bill was filed. *St. Michael's College* v. *Merrick*, 26 Gr. 216.

Land in Foreign Country.]—See *Purdom* v. *Parcy*, 26 S. C. R. 412; *Burns* v. *Davidson*, 21 O. R. 547.

Mortgagee—*Insufficiency of Security.*] —Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within 13 Eliz. c. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged fraudulent conveyance was of less value than the amount of the loan. Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie* v. *Young*, 26 O. R. 194.

Partnership Transaction—*Execution Creditor of One Partner.*]—The plaintiffs were execution creditors of one of two copartners in trade, both of whom had joined in an assignment by way of mortgage of all their goods and chattels, and also certain lands, comprising all the real estate owned by the judgment debtor, as an indemnity to the assignee against an incumbrance on lands sold and conveyed by both parties to the assignee. The bill charged that such assignment was executed in fraud of creditors, as by reason of the joint occupation of the partners the sheriff was unable to ascertain what portion of such chattels belonged to the execution debtor, and prayed a declaration that

such assignment was void as against the plaintiffs, and that such portion of the goods and lands as was not required to indemnify the assignee might be sold, and the proceeds applied in payment of the plaintiff's claim. A demurrer by the execution debtor for want of equity was allowed, with costs. *Bank of Rochester* v. *Stonehouse*, 27 Gr. 327.

Person Having Right of Action.]—The protection of 13 Eliz. c. 5, is not confined to creditors only, but extends to creditors and others who have lawful actions; and in this case, where, before the impeached conveyance was made, all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage; and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage. *Oliver* v. *McLaughlin*, 24 O. R. 41.

Second Mortgagee—*Secured Creditor.*]—A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor, having accepted a mortgage, does not lose his rights as a judgment creditor. *Warren* v. *Taylor*, 8 L. J. 243, 9 Gr. 59.

Simple Contract Creditor.]—Where a creditor simply seeks to have a deed made by his debtor declared fraudulent and void, it is not necessary to allege that the creditor has carried his claim to judgment. In such a case, however, the creditor must sue on behalf of himself and all the other creditors. *Longeway* v. *Mitchell*, 17 Gr. 190.

A bill to set aside a fraudulent deed by a simple contract creditor, whether the debtor is living or dead, should be filed on behalf of the plaintiff and all other creditors. Although it would seem that in this Province every bill by a creditor against the assets of a deceased debtor, whether so expressed or not, should be taken to be on behalf of all the creditors, and that it is the duty of personal representatives in every case where a deficiency of assets is apprehended to ask for a general administration, and if they do not ask for it, it would be the duty of the court to direct it; and although there may not exist any cogent reason for requiring the bill to be in that form in this country, still, the practice of the court here having been uniform in following the English rule, it would now require the decision of a higher tribunal to alter it. The same reasoning which requires that in proceeding against a living debtor a creditor without a lien must sue on behalf of all others applies with equal force where the suit is against the representatives of a deceased debtor. Longeway v. Mitchell, 17 Gr. 190, observed upon and followed. *Colver* v. *Savage*, 26 Gr. 395.

——— *Extent of Relief.*]—Where a creditor brings his action to set aside as fraudulent a conveyance made by his debtor of his property, without first obtaining judgment and execution, he must sue on behalf of all the creditors of the debtor, and in such action his relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property comprised in such conveyance. *Oliver* v. *McLaughlin*, 24 O. R. 41.

——— *Preference.*] — A simple contract creditor may sue to have a conveyance set aside as fraudulent and preferential. *Rae* v. *McDonald*, 13 O. R. 352; *Macdonald* v. *McCall*, 12 A. R. 593, 13 S. C. R. 247.

Subsequent Creditor—*Acquiescence.*]—Where one impeached a conveyance of land to M., the wife of K., on the ground that the land was really bought with K.'s money, and was so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K., and no fraudulent intent in respect to the said conveyance was proved, and it appeared that the plaintiff himself was consulted with regard to the matter, and knowing all the circumstances of K.'s financial position, expressed his approval of what was done; and it further appeared that the plaintiff was not himself a creditor of K., at the time of the impeached conveyance, but only became so subsequently by indorsing and finally paying a promissory note of K.'s representing a liability incurred by K. prior to the impeached conveyance:—Held, that under these circumstances the plaintiff could not have the deed set aside as a fraud upon him. *Ferguson* v. *Ferguson*, 9 O. R. 218.

——— *Prior Debts Barred.*] — A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. c. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time. *Struthers* v. *Glennie*, 14 O. R. 726.

Tort.]—Where a conveyance of land was made by the father to a daughter, while an action for slander against the father was pending, of which the daughter was aware, in satisfaction of a bonâ fide pre-existing debt to the extent of the full value of the land:—Held, that the conveyance being attacked under 13 Eliz. c. 5, by one who became a creditor by judgment obtained in the action of slander three months after the conveyance, and there being no other creditors, the preferring of one creditor was no ground for setting aside the conveyance as fraudulent and void. Cameron v. Cusack, 17 A. R. 489, followed. A plaintiff suing for a tort is not a creditor within the meaning of the Ontario statutes as to preferences. Ashley v. Brown, 17 A. R. 500, followed. *Gurofski* v. *Harris*, 27 O. R. 201; 23 A. R. 717.

Wife Entitled to Alimony.] — The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached

conveyance demurred for multifariousness, for want of equity, and want of parties. The court overruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution could only sue in a representative capacity—that is, on behalf of herself and all other creditors. Longeway v. Mitchell, 17 Gr. 390; Turner v. Smith, 20 Gr. 198; Colver v. Swayze, 26 Gr. 395; and Morphy v. Wilson, 27 Gr. 1, considered and followed. *Campbell* v. *Campbell*, 29 Gr. 252.

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2. Transactions Set aside or Upheld.

(a) In General.

Absence of Fraud.]—Plaintiffs having recovered judgment against one H. issued execution under which the sheriff professed to sell certain goods of H., and gave a deed to plaintiffs conveying all the "share and interest" of H. in the goods. Six months before the recovery of the plaintiffs' judgment, H. had made a mortgage covering all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under the statute of Eliz. and fraudulent in fact. The court below held the mortgage good and dismissed the bill:—Held, that no fraud being shewn, and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed. *Halifax Banking Co.* v. *Matthew*, 16 S. C. R. 721.

Advances—*Evidence of Parties*—*Costs.*]—A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a distance, it being agreed that he should remit to his father from time to time a part of his earnings, and that the same should be repaid by the father after the son attained majority, as the son should want it. Accordingly remittances were alleged to have been made to his father, which, on the son coming of age, amounted to $600, and upwards, when he found his father was unable to repay his advances. It was arranged that the son should make further advances, and that unless the father paid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement made in 1877, it was ascertained that the father's indebtedness amounted to $1,000 and upwards, which it was then agreed should be the consideration for the purchase of the equity of redemption of the father in the premises, the conveyance of which was impeached by a judgment creditor of the father under 13 Eliz. The court being satisfied of the bona fides of the dealings between the father and the son, and that the sums claimed had really been advanced, (although the only evidence of the dealings was that of the father and son) dismissed the bill, but without costs. *Jack* v. *Greig*, 27 Gr. 6.

Alleged Sale—*Onus.*]—G. had recovered a judgment against his father for costs in an action instituted by the latter, and under the execution issued thereon seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shewn that several years before the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for $50, and this he kept upon the premises, as had always been done, using it in the work of the farm, and occasionally working for others with it for hire, the father sometimes using it for his own purposes. On this state of facts, the jury found a verdict for A. The court refused to disturb the finding of the jury, and dismissed an appeal with costs. *Danford* v. *Danford*, 8 A. R. 518.

Bona Fide Advance—*All Mortgagors' Property Included.*]—The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of $400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff being one of the trustees thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the movables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness at the trial:—Held, that the mortgage was not invalid under R. S. O. 1877 c. 95, s. 13, and the fact that all the movable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the court of any fraudulent intent in making it. *Brown* v. *Sweet*, 7 A. R. 725.

Bona Fide Debt.]—A person indebted to his housekeeper in $600, conveyed to her some land in satisfaction of the debt, the consideration being not inadequate. On a bill by another creditor to set aside the conveyance as fraudulent and void, the court being satisfied that the debt was owing, and that the conveyance was intended to be effectual, held it valid, and dismissed the bill, but without costs. *Moore* v. *Davis*, 16 Gr. 224.

In 1878 J. D., carrying on business as a wool merchant, arranged with his two sons, H. D. and T. D., to convey to H. D. two parcels of land which H. D. was to hold until T. D. came of age. H. D. held the land until 1882, when he conveyed it to his father, who immediately reconveyed one parcel to H. D. and the other to T. D. It was found that the conveyances of 1882 were merely to carry out the trust upon which the conveyance of 1878 was made; that when it was made J. D. was in a position to pay all his debts in full, even after deducting the property in question; and that no debt in existence when the conveyance of 1878 was made was now unpaid, except a sum of $1,000 due to the wife for rent, which was secured by mortgage, but it appeared she joined in the conveyance, and therefore it was not available to the plaintiffs for the purpose of setting the conveyance aside:—Held, that the conveyances to H. D.

and T. D. were valid, for that under the circumstances they could not be deemed to be made with intent to hinder, delay, or defraud creditors. *Bank of Montreal* v. *Davis*, 9 O. R. 556.

Cancellation of Deed or Reconveyance.]—The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled; and that, although his title may be sufficient as a defence to any action at law. *Harkin* v. *Rabidon*, 6 Gr. 405; 7 Gr. 243.

Change of Possession.]—In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on business in her own name, the price of which was said to have been paid partly in a note of hand by S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in the stable of S. B. S. as before, and fed it with her fodder, etc.—no other act was shewn to indicate a change of ownership before the animal was seized by the sheriff under a fi. fa. goods issued against S. B. S. Judgment of the county court in favour of the execution creditor was affirmed by equal division. *Pettigrew* v. *Thomas*, 12 A. R. 577.

See Thompson v. *Doyle*, 16 C. L. T. Occ. N. 286.

See BILLS OF SALE, II.

Collusive Sale by Fraudulent Grantee.]—A. being largely indebted to B. & Co. and the owner in fee of certain real estate, conveyed the same to his son, without consideration. B. & Co. recovered judgment against A., and issued execution against his lands in May, 1864, but in February previous the son had conveyed the premises to D., taking for the purchase money thereof his promissory notes not yet due and still unpaid. Evidence establishing collusion between his son, and D., was adduced, and both the conveyances were declared fraudulent, and the lands held subject to B. & Co.'s judgment debt. *Buchanan* v. *Dinsley*, 11 Gr. 132.

The owner of real estate worth $4,800, subject to a mortgage on which $1,950 was due, sold the equity of redemption for $500 to avoid executions at the suit of his creditors, he being insolvent, and the vendee aware of that fact, and that his object was to place his property out of the reach of his creditors. The purchaser resold the property for an advance of $1,000, after the institution of proceedings to set aside the transaction, of which the party purchasing was aware:—Held, that the transaction was within 13 Eliz., and should be set aside, as having been made to hinder and delay creditors. *Forman* v. *Hodgson*, 12 Gr. 150.

Collusive Sale under Execution.]—In an interpleader the plaintiff claimed as purchaser under an execution, upon a judgment of which he was the assignee; the defendant claimed under a subsequent execution. The bona fides of the judgment and assignment to the plaintiff was not disputed, and the goods had been regularly sold under the fi. fa. upon it to the plaintiff. It appeared, however, that the execution debtor had been a party to the notes given by the plaintiff for a portion of the purchase money of the original judgment, and that since the sale he had remained, as before, in possession of the household furniture. The jury were told that if the object of the sale was to prevent other creditors from enforcing their claims, it would be void:—Held, a misdirection, and that it should have been left to them to say (as in Graham v. Furber, 14 C. B. 414) whether the sale to the plaintiff was bonâ fide for the purpose of relieving the execution debtor from the necessity of a forced sale of his goods, or for the mere purpose of protecting them from the claims of other creditors, in which latter case it would be fraudulent and void. *Clark* v. *Morrell*, 21 U. C. R. 596.

Collusive Sale under Mortgage.]—M. mortgaged land to B. for $400, and afterwards caused it to be divided into village lots, and plans thereof made. M. then became indebted to C. and others, who obtained judgment and executions against him; W. was then also a creditor of M. by simple contract. B. advertised the premises for sale under the power of sale in his mortgage, such sale to be in village lots according to the plan thereof. M. and the sheriff, who held the writs of execution previous to the sale, agreed that the sheriff should buy in the premises at the amount due B., and hold the same in trust for M. It was found difficult at the sale to sell in village lots, and at the suggestion of the sheriff, and with M.'s consent, they were put up en bloc, and bought by the sheriff for the amount due B. W. afterwards obtained judgment and issued execution against lands, and on a bill by C. and W. against M., the sheriff, and B., the sale was set aside as collusive, and tending to delay creditors, within 13 Eliz. c. 5. *Watson* v. *McCarthy*, 10 Gr. 416.

Company — *Fictitious Incorporation.*]—When a limited liability company has been regularly formed in accordance with the Ontario Companies Act, for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company, though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth or the Assignments and Preferences Act, cannot be set aside at the instance of his creditors on the principle of the company being merely his alias or agent. Salomon v. Salomon, [1897] A. C. 22, applied. Judgment below, 28 O. R. 497, reversed. *Rielle* v. *Reid*, 26 A. R. 54.

Consideration in Part Bad—*Security Avoided in Toto.*]—An insolvent person executed to his son a mortgage for $1,000, of which $600 was a sum fraudulently pretended to be due to the mortgagor's wife:—Held, that, even if the remaining sum was really due to the mortgagee, his concurrence in the fraud as to the $600 rendered the mortgage void in toto. *Totten* v. *Douglas*, 15 Gr. 126.

Contemplation of Indebtedness.]—A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted. *Bank of British North America* v. *Rattenbury*, 7 Gr. 383.

Conveyance Absolute in Form — *Creditor Allowed to Redeem.*] — A debtor conveyed his land in fee for a sum greatly below its value, but continued in possession without paying rent; the heir of his vendee several years afterwards sold and conveyed the land, the sale having been brought about and managed by the debtor, and the purchaser was shewn to have had notice of the indebtedness and other material circumstances. A creditor afterwards sued out an execution against the lands of the debtor, under which his interest in this property was sold for 5s. to the execution creditor, who filed a bill to set aside the sale by the original owner, and have himself declared the owner of the land. The court refused this, but gave him a right to redeem by virtue of his judgment, in accordance with an alternative prayer in the bill. *Wilson* v. *Shier*, 6 Gr. 630.

——— *Creditor Submitting to Redemption.*]—H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff who had subsequently recovered an execution against the grantor as being a fraudulent preference. H. insisted that the conveyance to him was bonâ fide, while the grantor alleged it had been obtained by the fraud of H. The court, in view of the fact that the grantor in another suit had sworn that it was made for a valuable consideration and in good faith, refused the relief asked; the other circumstances in the case being such as not to justify a decree on the grantor's present statements, although not estopped by the first statement, but that he was at liberty now to present the facts otherwise. In such a case the explanations given for the different account of the transaction must be convincing. Under these circumstances and H. claiming to hold the land only as security for the amount due him, and the court being satisfied of the bona fides of the transaction, ordered an account to be taken of the amount due H., and the land to be sold; the proceeds to be applied first in payment of the amount due to H. for principal, interest, and costs, and the balance as in ordinary fraudulent conveyance cases; and for these purposes the usual reference to the master was directed. *Sommerville* v. *Rae*, 28 Gr. 618.

Conveyance Based on Claim Collusively Acquired.]—A person having a claim against an insolvent person, gave it to his sister, the wife of the insolvent, in order that she might thereby obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party, who conveyed the land to her. The court set aside the conveyance at the instance of a creditor of the husband, as void under 13 Eliz. and the Indigent Debtors Act of this Province. *Pegg* v. *Eastman*, 13 Gr. 137.

Conveyance to Debtor's Nominee.]—A married woman entered into a contract for the purchase of land; one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mortgage he held on other property, which, so far as appeared, was his only means. It did not appear that he was indebted at the time, but a month afterwards he indorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, and made improvements, but no deed was obtained, and a small balance of the purchase money remained unpaid for twelve years, when the money was raised by loan on the property, and the deed was taken to a son of the purchaser:—Held, that this deed was void as against the holder of the note. *Waddle* v. *McGinty*, 15 Gr. 261.

Conveyance to Protect Property from Expected Claim — *Trust.*] — A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process, conveyed the same to his solicitor for a money consideration, and the solicitor afterwards made a conveyance of the same lands back to him, but the solicitor retained the deed in his possession, and subsequently by desire of the plaintiff struck out his name as the grantee, and inserted as such the name of the sister of the plaintiff, the consideration money being paid by the plaintiff. The court, being of opinion that this had not the effect of divesting the title which had been reconveyed to the plaintiff, and that even if it had had that effect there would have been a resulting trust in favour of the plaintiff, decreed relief accordingly, but under the circumstances without costs. And, semble, that if under the circumstances stated no consideration money had passed between the parties, there would have been a trust by operation of law in favour of the plaintiff. *Wilson* v. *Owens*, 26 Gr. 27.

Conveyance to Defeat Creditors — *Rights of Grantor's Wife.*]—Property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards the person claiming to be beneficially interested, filed a bill for a conveyance to himself. Under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee only; it appearing that the wife, who was not a party to the suit, and was living separate from her husband, was entitled to the beneficial inheritance, an inquiry was directed as to the cause of her separation, to ascertain how the court should direct the rents of the estate to be applied. *Phelan* v. *Fraser*, 6 Gr. 336.

——— *Sale under Execution against Fraudulent Grantee.*]—The owner of real estate being under arrest upon civil process, conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action; and after the same had been settled the lands were reconveyed, but in the meantime a writ against the lands of the grantee had been placed in the hands of the sheriff, and a sale was effected thereunder after such reassignment, and a conveyance made to the purchaser (the plaintiff in the writ,) who had notice of the claim set up by the original owner:—Held, that the transaction was one against public policy and

morality, and that the court would not lend its aid to the grantor in getting back his estate: but the purchaser at sheriff's sale having in his answer disclaimed any interest in the lands other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of such judgment and expenses, together with interest and the costs of suit. The defendant having also by his answer alleged that the conveyance was made for the purpose of enabling the grantee therein to justify as bail, and that he did justify as such bail upon the lands so conveyed, and having submitted that "the plaintiff under the circumstances ought to be estopped and precluded from saying that the said lands are not the lands" of the grantee: —Held, also, that although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated. *Langlois* v. *Baby*, 10 Gr. 358; 11 Gr. 21.

——— *Subsequent Sale by Grantee.*]—J., the owner of lands, conveyed his land in fee to L. L. afterwards conveyed them to J.'s wife. She and her husband then mortgaged the lands to L.; but the wife was never separately examined. L. then filed his bill, alleging that the mortgage was to be taken to secure part of the purchase money, and that J.'s wife refused to be examined. By the decree it was referred to a master to ascertain the consideration for the original deeds. The master reported that the original deeds were given by J. to L. without consideration, and to enable J. to defeat his creditors. From this report the plaintiff appealed; but the appeal was dismissed. Defendants then heard the cause on further directions; but the plaintiff did not appear: —Held, that under the circumstances the plaintiff was entitled to have the mortgage completed, or the deeds to J.'s wife given up to be cancelled. But as the plaintiff did not appear, he did not get a decree, though the defendants were refused any relief. *Lindsay* v. *Johnston*, 15 Gr. 446.

——— *Compelling Reconveyance.*] — The plaintiff made a note in favour of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by the payee, who, notwithstanding, sued on the note and recovered judgment. The plaintiff thereupon conveyed all his real estate to a third party, to defeat the judgment. A demurrer to a bill filed to have the grantee declared a trustee for the plaintiff, or for payment of the alleged purchase money, was allowed for want of equity. *Rosenburgher* v. *Thomas*, 3 Gr. 635.

——— *Refusal to Compel Re-conveyance.*]—The plaintiff had executed a conveyance of land without consideration, to avoid an execution expected, upon the secret trust or understanding that when called upon the grantee would re-convey; the court, under these circumstances, refused to enforce a re-conveyance, and a bill filed for that purpose was dismissed with costs. *Emes* v. *Barber*, 15 Gr. 679.

——— *Pleading.*]—If a defendant wishes to set up in answer to an action to declare him a trustee of land the defence that the land was conveyed to him for a fraudulent purpose he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act. If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to shew, as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated. *Day* v. *Day*, 17 A. R. 157.

See sub-title, III. 3 (e), *post*.

——— *Rescission.*]—Evidence not admissible to cut down to a mortgage an instrument absolute in form which had been executed for the purpose of securing a debt due to a grantee, but the main object of which was to protect the property from the results of an anticipated action for breach of contract. *Mundell* v. *Tinkis*, 6 O. R. 625.

Crops Raised on Fraudulently Conveyed Land.]—Though a sale of land may be fraudulent as against creditors, still where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labour and means had been contributed by the vendee alone, semble, that the crops were the sole property of the vendee as against the execution creditor. *Kilbride* v. *Cameron*, 17 C. P. 373.

Debtor Refusing to Enrich Himself.]—13 Eliz. c. 5 is directed against fraudulent alienations of property whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself. *Bain* v. *Malcolm*, 13 O. R. 444.

Deed after Previous Sale.]—Where A. being seized in fee of land sold a portion of it to B., but gave him no deed, and B. went into possession, and A. afterwards sold all the land to C., directing that a deed should be made to B. of his portion when he paid for it in full, and C. sold all to D. except B.'s portion, which D. subsequently bought at sheriff's sale, where it was sold for B.'s debt, and C. then made a deed of B.'s portion to a stranger for a nominal consideration:—Held, that such deed was fraudulent as well against D. as against creditors. *Doe d. Wilcox* v. *Thorne*, 4 O. S. 315.

Delay Merely.]—A debtor sold his property, reserving by parol certain future rents to pay a creditor, which were sufficient for the purpose: the object was to delay the creditor, and to compel him to wait for payment until these rents should accrue, and all parties combined for that object. The sale was held wholly void against the creditor, a transaction to delay a creditor being within 13 Eliz. as much as a transaction to defeat him altogether. *Martha* v. *McKenna*, 14 Gr. 59.

Devisor and Devisee.]—A deed by a devisee to defeat a creditor of his own, is void against the devisor's creditors also. *Johnston* v. *Sowden*, 19 Gr. 224.

Discharge of Mortgage without Consideration.] — S., by arrangement between

himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances, praying that the discharge might be declared void, as being within 13 Eliz. c. 5, under our C. L. P. Act, 1856, and for foreclosure or sale, and an order against H. to pay the deficiency:—Held, that the interest of a mortgagee is of a nature to bring it within the statute of Eliz., if it can be seized under the C. L. P. Act, or can be compulsorily applied to the payment of the debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute: that the mortgage would have been seizable had it not been discharged: that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received, the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee: that when the mortgage debt is to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled: that the discharge of the mortgage, and the arrangement between H. and S., had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again, and therefore that G. would not have been a proper party. *Bank of Upper Canada* v. *Shicklana*, 10 Gr. 157.

Where a person in business being liable to a bank as indorser for others to about £6,500, and on his own account to about £3,500, and otherwise to a large extent, made a gift of a mortgage which he held upon real estate for £250, by releasing the claim to the owner of the equity of redemption, (his assets at the time being much more than £10,000) and subsequently his indebtedness to the bank was doubled, and afterwards a judgment was obtained by the bank, and execution issued out against him for £6,855, in respect of moneys due at the date of the release:—Held, that these facts did not bring the case within 13 Eliz. *Ib.*

Effect of Retention of Possession.]—It is not always to be taken as conclusive evidence that a deed is fraudulent against creditors, that the debtor has remained in possession, receiving the rents and profits for a long time after the execution of the deed. *Doe d. Roy* v. *Hamilton*, 6 O. S. 410.

Enforcing inter Partes Covenant in Fraudulent Mortgage.]—Declaration on defendant's covenant, made in 1857, to pay the plaintiff £37 10s., and interest. Plea, that the covenant was contained in a chattel mortgage made by defendant at the plaintiff's request, and to hinder, defeat, and defraud his creditors, and without consideration. Upon demurrer:—Held, bad: a covenant so executed is only void as against third parties, and not between the parties to it. *Scoble* v. *Henson*, 12 C. P. 65.

Amongst other defences, in an action on a covenant to pay contained in a chattel mortgage, the defendant set up that the mortgage in question was given for the purpose of defeating and delaying creditors of the mortgagor, and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereof the mortgage was void and the covenant could not be enforced against defendant:—Held, that even if the defence was proved, the defendant, being a party to the fraud, should not be allowed to set it up as an answer to his liability on the covenant. *Millican* v. *Headon*, 8 O. R. 503.

Estoppel.]—An insolvent sold land to his brother: a creditor filed a bill impeaching the sale as fraudulent: part of the consideration was said by the defendants to be a pair of horses and a waggon, of the value of $200; but the parties had fraudulently given out after the sale that these horses were still the horses of the brother who had bought the land, and in this way had misled the plaintiff and other creditors:—Held, that this brother was estopped from afterwards setting up against the creditor that the $200 had been paid in that way; and, the plaintiff's debt being less than that amount, he was held entitled to a decree for payment, or in default a sale of the land. *McCarty* v. *McMurray*, 18 Gr. 694.

——— *Execution Creditor — Purchase of Mortgage—Denial of Mortgagor's Title.*]—An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgagor, that the said grantor was not the owner of the property in question, and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter. *Gordon* v. *Proctor*, 20 O. R. 53.

Evidence not Clear.]—A debtor conveyed land to his father and brother-in-law respectively, which they claimed to be bonâ fide, and for valuable consideration. On a bill by a creditor the court was not entirely satisfied with the account given of the transaction with the father, and had serious doubts in regard to the transaction with the son; but being of opinion that the evidence was insufficient to prove the account of the transactions on defendant's part to be false, sustained both conveyances. *Attorney-General* v. *Harmer*, 16 Gr. 533.

Expected Claim.]—A conveyance executed by a debtor in satisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognizance. *Attorney-General* v. *Harmer*, 16 Gr. 533.

Expenditure by Grantee—*Rents and Profits.*]—An assignment of an equity of redemption was made, which the court held to be void against the creditors of the mortgagor: but it appearing that the sons of the assignee had paid off the mortgage for her benefit, the court gave relief only on the terms of the amount being paid to the assignee: and—Held, that the creditors were not entitled to set off the rents the assignee had received. Held,

also, the assignee was not entitled to be allowed for improvements made upon the mortgaged premises; but that if the same were properly allowable then that the rents and profits accrued should be set off against the value of such improvements. *Buchanan* v. *McMullen*, 25 Gr. 193.

Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property. *Scott* v. *Hunter*, 14 Gr. 376.

Felony—*Proceeds Invested.*]—The person upon whom a robbery has been committed is, even before conviction, entitled to be considered as a creditor of the party committing the robbery, although the remedy for the recovery of the amount may be suspended until after conviction. Where, therefore, a person had feloniously possessed himself of certain securities, and invested a portion of the money realized therefrom in the purchase of real estate, the conveyance of which he procured to be made to his wife, in order to its being preserved in the event of proceedings being taken by the party robbed, the court, on a bill filed by a subsequent creditor, declared the conveyance void as against creditors, under 13 Eliz. c. 5. *Reid* v. *Kennedy*, 21 Gr. 86.

Fictitious Breach of Chattel Mortgage—*Judgment before Expiration of Period of Credit.*]—L. being in insolvent circumstances executed a chattel mortgage to D. who was cognizant of his state; and shortly after the execution thereof, in collusion with the mortgagee but against an expressed prohibition, made a delivery or pretended sale of the goods to one M., which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts, the mortgage having then three months to run:—Held, that the mortgage and judgment, so far as the covenant was concerned, were void as being a fraud upon creditors. The mortgagor was really indebted to the mortgagee upon an account, though the time for payment was extended three months by the mortgage:—Held, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act (R. S. O. 1877 c. 118) in the debtor when sued, not insisting on the fact of the credit not having expired, or that the debt had been merged in the mortgage. *King* v. *Duncan*, 29 Gr. 113.

Fictitious Consideration.]—M. B., an unmarried woman, resided for some years with her sister and brother-in-law. He having become involved, conveyed his real estate to M. B., for the alleged consideration of wages due her as a hired servant. Notes were also made and given to M. B. by her brother-in-law; and, on these notes becoming due, judgment was obtained, under which M. B., sold the farm stock and other personal property of her brother-in-law, becoming herself the purchaser. The evidence as to bona fides and good consideration for the transfer of the land and giving of the notes was unsatisfactory, and the conveyance was set aside as fraudulent, at the instance of the creditors of the grantor. *Ball* v. *Ballantyne*, 11 Gr. 199.

Fictitious Dealings.] — H. being indebted to R., and both being in pecuniary difficulties, H. made an absolute conveyance of his land to R., which was intended to secure the debt due to R., but was made absolute in form to deceive H.'s creditors. Various subsequent dealings with the property took place with a view of securing the creditors of both parties, and by means thereof the interest of H. and R., if any, appeared to be a mere money charge on the property at the time fi. fas. against their lands were given to the sheriff; but—Held, that the writs bound their respective interests, and that they should be sold in equity to pay the execution debts. *Brock* v. *Saul*, 16 Gr. 589.

J. A. S. contracted to purchase from M. on credit a wood lot, 32, and to secure the price (£400) the purchaser's father gave a mortgage on his farm: this mortgage not being paid, was foreclosed. Shortly afterwards, M. being still willing to receive his money, J. A. S. sold lot 32 for £300, which sum went to M.; part of the remaining £100 was satisfied by delivering to M. a pair of horses raised on the farm, valued at £62 10s.; and W. S., another son of the owner, agreed to pay the balance, £37 10s. The farm, by arrangement between all the parties, was conveyed to W. S., who was not more than twenty-one years old, if so much:—Held, that these transactions were, as respects the father and sons, a mere roundabout way of securing the farm from the creditors of the father, and the farm was ordered to be sold to pay the plaintiff, an execution creditor of the father. *McDonald* v. *McLean*, 16 Gr. 665.

Fictitious Joint Stock Company.]—A merchant in insolvent circumstances formed a joint stock company, he and his wife subscribing for all the stock, except a few shares, which were allotted to employees of his, these forming the five directors. They, then, as directors and shareholders, appointed him manager for five years at a salary, and all his assets were assigned to the company:—Held, that the company was the mere alias and agent of the assignor, and the assignment a fraud on his creditors, and must be set aside, subject, however, to the rights of the creditors of the company. Salomon v. Salomon, [1897] A. C. 22, distinguished. *Rielle* v. *Reid*, 28 O. R. 497. Reversed in appeal on the ground that the creditor, having seized the debtor's shares in the company, could not attack the transfer for which these shares were the consideration. *S. C.*, 26 A. R. 54.

Fictitious Sale under Execution.]—A., being indebted, made a voluntary conveyance of certain real estate to B. to prevent its being taken in execution, leaving, however, ample property to satisfy his creditors. A creditor obtained judgment after this against A., but before any execution against lands B. sold to defendant for valuable consideration, but with notice of the nature of the first conveyance. After this sale an execution was taken out, and this lot was sold, apparently to satisfy the judgment. It appeared, however, that the judgment was in fact satisfied by the heirs of A. out of his estate and that the sale under this execution was intended for their benefit and the purchaser at sheriff's sale was acting on their

account, and had paid nothing:—Held, that this sale could not defeat the conveyance made by A. to B., and by B. to the defendant. *Doe d. Daily* v. *VanKoughnet*, 5 O. S. 246.

Fictitious Sale—*Concurrence in Fraud.*]—C. and P. Cinqmars, carrying on business at Belleville, being indebted to B. & Co. for goods, executed to them a confession of judgment. Other creditors pressing, an execution was issued on this confession, and an arrangements made that the goods should be sold by the sheriff: that a brother of C. and P. Cinqmars, a minor, should buy them in, and the execution debtors receive credit for the proceeds, and that the business should be carried on by him and C. Cinqmars, the goods remaining in his name as ostensible owner. P. Cinqmars lived in Montreal. Afterwards the plaintiff packed up the goods, and being about to send them to his brother in Montreal, they were seized and sold by B. & Co. as the property of C. Cinqmars. For this the plaintiff sued; and the jury having twice found in his favour:—Held, that although it seemed clear that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co. had concurred in holding him out in a false character, the court should not interfere. *Cinqmars* v. *Moodie*, 15 U. C. R. 691.

First Mortgage Set aside — *Subrogation—Costs*]—As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like. The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent, two mortgages of real estate made by his execution debtor, and succeeded as to the first, the action being dismissed as to the second mortgage. The lands were sold but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage to the extent of the mortgage so set aside as fraudulent:—Held, that he was not entitled to any such priority as to his execution, but that his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage. *Coursolles* v. *Fookes*, 16 O. R. 691.

Following Proceeds.]—Where moneys arising from a feigned sale of goods, fraudulent and void as against creditors, were at the time of the commencement of the action by a creditor to set the same aside, in the hands of the nominal purchaser, one of the defendants and a party to the transaction, he was ordered to pay the moneys into court for distribution among the creditors of the insolvent, and in default of payment by him, it was ordered that execution should issue for the amount. *Masuret* v. *Stewart*, 22 O. R. 290.

An insolvent debtor, for the purpose of defeating the plaintiff's claim against him, by voluntary deed conveyed the equity of redemption in certain lands to another creditor who, as previously arranged with the grantor, sold the property to an innocent purchaser and applied the proceeds in payment of all incumbrances on the property and all his own debts and those of certain other creditors of the grantor, and of a commission to himself in respect of the sale, and paid over the final balance to the grantor:—Held, that the plaintiffs had no right of action against the fraudulent grantee to recover any part of the purchase money. Masuret v. Stewart, 22 O. R. 290 and Cornish v. Clark, L. R. 14 Eq. 184, distinguished. *Tennant* v. *Gallow*, 25 O. R. 56.

See Fleury v. *Pringle*, 26 Gr. 67; *Ross* v. *Dunn*, 16 A. R. 552; *Robertson* v. *Holland*, 16 O. R. 532; *Stuart* v. *Tremain*, 3 O. R. 190; *Davis* v. *Wickson*, 1 O. R. 369.

Gross Inadequacy.]—A sale of a lot at an absurdly inadequate price, the sale being otherwise attended with suspicion, was set aside as fraudulent under the Statute of Elizabeth. *Bank of Toronto* v. *Irwin*, 28 Gr. 397.

Inadequacy.] — Where an insolvent who was pressed by his creditors, and contemplated leaving the country in consequence of his embarrassments, made a conveyance of all his tangible property for an inadequate consideration to a relative who was aware of his circumstances, the conveyance was set aside as against creditors. *Crawford* v. *Meldrum*, 3 E. & A. 101.

——— *Parent and Child.*] — Adequacy of consideration is not necessary to maintain a transaction under 13 Eliz.; though the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son, in consideration of an annuity of less value than the property conveyed, does not suggest the son's guilty knowledge of a fraud by his father, in the same way that a conveyance for an inadequate price to a stranger sometimes does. *Carradice* v. *Currie*, 19 Gr. 108.

Intent to Defeat.]—The agent of a bank having become largely indebted to it was sued, and when execution was about to issue, he absconded from the country; and, with the avowed object of defeating the claim of the bank, but, as the agent alleged, for the purpose of paying his other creditors, conveyed away to a person to whom he was only then introduced, a large quantity of valuable lands, to be paid for in goods at long dates, returning at night for the purpose of executing the conveyances, which were executed without any investigation of the title of the property; and the agent subsequently assigned the agreement for the delivery of the goods to his son, taking in payment his notes payable over a period of several years. The court, under the circumstances, set aside the sale as fraudulent as against the bank. *Bank of Upper Canada* v. *Thomas*, 9 Gr. 321. See *S. C.*, in appeal, 2 E. & A. 502.

A sale made with intent of both vendor and vendee, to defeat the creditors of the former, is void in equity, whether the sale was or was not intended to take effect as between the parties to it. *Wood* v. *Irwin*, 16 Gr. 398.

Semble, that since Wood v. Dixie, 7 Q. B. 829, a bonâ fide transfer of property made by a debtor to a third party, cannot be considered invalid merely because the object of

the sale, in the mind of both parties, was to defeat an expected execution. *White* v. *Stevens*, 7 U. C. R. 340.

A sale and conveyance for valuable consideration, paid at the time, of the grantor's interest in certain land to his father-in-law, made in 1857, was impeached as being fraudulent as against creditors under 13 Eliz. c. 5. The learned Judge asked the jury whether the deed was a bonâ fide transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors, in which latter case he said it would be void; and he refused to add, that if they believed the consideration was paid to cover the property and protect it from creditors, they should find against the deed:—Held, affirming 27 U. C. R. 195, that the charge was unobjectionable, being substantially in accordance with Wood v. Dixie, 7 Q. B. 892, which was recognized and followed. *Smith* v. *Moffatt*, 28 U. C. R. 486.

A conveyance between a debtor and a third party bonâ fide, and for valuable consideration, when the property was intended to pass and the consideration money paid:—Held, valid under 13 Eliz. c. 5, notwithstanding that the intent of the parties to the transaction was to defeat a creditor who had obtained judgment. *Dalglish* v. *McCarthy*, 19 Gr. 578.

A sale or conveyance by an insolvent, though not in the ordinary course of trade, without intent to defeat or delay creditors, or to give a preference, is valid; for the intent with which it was made must govern. *Gottwalls* v. *Mulholland*, 15 C. P. 62.

The last clause of s. 18, c. 26, C. S. U. C., does not avoid all conveyances by an insolvent which are not for the benefit of creditors, or which are not made in the ordinary course of trade to innocent purchasers; it merely excepts the cases therein mentioned from the operation of the antecedent portion of the section, but does not invalidate other transactions within the objects of the Act. In this case the execution debtors on the eve of insolvency, and after service upon them of the writ at the suit of defendants (the execution creditors,) sold their stock-in-trade to the plaintiff, who knew that they had been so sued, taking from him notes payable in one, two, three, and four years, for the purpose of dividing them ratably among their creditors. These notes were accordingly accepted by the creditors, with the exception of defendants, who rejected them:—Held, that the jury were properly directed to support the sale to plaintiff, if they found it made bonâ fide with intent to transfer the property to plaintiff, and not colourable to protect it for the debtor, even though the effect might be to defeat the defendants' execution. Held, also, that save as to the provisions in our statute against preference, it is substantially like 13 Eliz. c. 5. Wood v. Dixie, 7 Q. B. 892, was a case of preference, and does not decide that the intent to defeat creditors is not inquirable into, even when the sale was for good consideration, and intended to pass the property; but, semble, it would not be sustained here under the Provincial Act, which prohibits preferences. Per J. Wilson, J., that the jury should have been further directed, that if the vendors were at the time of sale insolvent, or knew themselves to be on the eve of insolvency, and made the sale with intent to defeat or delay their creditors, or to give one or more a preference, the sale was void, unless made in the ordinary course of trade to an innocent purchaser; that a sale may be bonâ fide as opposed to colourable, and yet void by C. S. U. C. c. 26, s. 18, if the intent was to contravene its provisions; and that the question for the jury is, was it made with that intent? *Ib.*

Held, affirming the above judgment, that such sale was valid; but if the sale had been made with intent, by vendor and purchaser, to defeat or delay creditors, it would have been void, though made bonâ fide with the intention of passing the property. *S. C.*, 3 E. & A. 194.

To maintain a sale impeached by creditors, it is not sufficient to prove that the transaction was really intended to pass the property; for, as laid down in Gottwalls v. Mulholland, 3 E. & A. 194, "although the sale may have been bonâ fide, with intent to pass the property, yet if made with intent by vendor and purchaser to defeat and delay creditors, it would be void." *Merchants Bank of Canada* v. *Clark*, 18 Gr. 594.

Intent—*Mistaken Belief as to Liability—Effect not Evidence of Intent.*]—Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist, the action cannot succeed. The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent. And where a debtor, under the mistaken belief that she was a trustee of a sum of money invested by her in land, in her own name, made a conveyance thereof to the supposed cestuis que trust, honestly thinking she was carrying the trust into effect, an action to set aside the conveyance was dismissed. *Carr* v. *Corfield*, 20 O. R. 218.

Interest not Subject to Execution.]—M. sold goods to P., and took back a mortgage on them for the price, together with P.'s note. Afterwards, and after 22 Vict. c. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor:—Held, that the assignment of the mortgage to F. was void under 22 Vict. c. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore, having possession, was entitled to hold the goods as against the execution creditor. *Ferrie* v. *Cleghorn*, 19 U. C. R. 241.

In July, 1853, R., in order to provide for his daughter, and in consideration of 5s., assigned the land conveyed and money secured by a mortgage made by S. to a trustee for his said daughter. In August, 1856, the plaintiff recovered judgment against R., and subsequently obtained a garnishee order against C., the executor of S., to compel C. to pay him a sum then due on the mortgage from S. to R. At the time of the assignment there was nothing due and payable from R. to the plaintiff, nor was he in a situation to seek to enforce the payment of his claim until 1858:—Held, that the assignment of mortgage in 1853, as the law then stood, had not the effect of delaying, hindering, or defrauding the plaintiff, so as to make it void

under the statute 13 Eliz. c. 5; that the said statute extends only to the assignment of such things as are liable to be taken in execution, and that a mortgagee's interest is not so liable. *Lodor* v. *Creighton*, 9 C. P. 295.

See Blakely v. *Gould*, 24 A. R. 153.

Invalid Deed — *Subsequent Sale by Grantee — Mortgage for Part of Purchase Money.*]—A deed purporting to convey land to M. was executed by the plaintiff, under circumstances which made it an invalid deed. The grantee, M., having afterwards sold and conveyed the land to R., receiving part of the purchase money, and a mortgage for the balance:—Held, affirming 11 Gr. 426, that on confirming the title of the purchaser, R., the plaintiff was entitled to the balance of the mortgage money from R., and to a decree against M. for what M. had received; but the court, under the facts, refused to remove the invalid deed as a cloud on the title of the grantor. *Fraser* v. *Rodney*, 12 Gr. 154.

Invalid Mortgage Transferred for Value—*Release of Debt.*]—An insolvent executed to his son a mortgage for $1,000, of which $400 was a pretended debt to the son, and $600 a pretended debt to his mother. The son subsequently, under an arrangement with the father, transferred the mortgage to C., who was the holder of notes of the mortgagor to the amount of $600, which he gave up to the mortgagee, and he paid in cash $400 to the mortgagee. C. had notice of the character of the mortgage, but the transaction with him was bonâ fide:—Held, that he was entitled to claim for the full amount of the security, in priority to subsequent execution creditors of the mortgagor. *Totten* v. *Douglas*, 15 Gr. 126; 16 Gr. 243; 18 Gr. 341.

Knowledge of Grantee—*Inadequacy of Consideration.*]—In a suit by a creditor impeaching a sale by N. to his sister, made in consideration of her assuming two mortgages on the land, certain executions against him which she paid, and of a debt due to herself, it appeared she was aware of the plaintiff's claim; that her brother had no other property to meet it; that he was of improvident habits; that a sheriff's sale was pending; that N. had previously refused a larger sum for the land than his sister gave; that N. continued after the sale to reside on the land; that she shortly afterwards sold the estate for more than twice what she gave for it; and that she bought other lands with part of the proceeds, upon which lands N. went and resided:—Held, that sufficient was shewn to warrant a decree declaring the conveyance by N. to his sister fraudulent as against creditors under the statute of Elizabeth. *Merritt* v. *Niles*, 28 Gr. 346.

——— *Valuable Consideration—Actual Intent to Defraud.*]—The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. 1887 c. 124, following Molsons Bank v. Halter, 18 S. C. R. 88, and where valuable consideration has been given, clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute 13 Eliz. c. 5. *Hickerson* v. *Parrington*, 18 A. R. 635.

Land in Foreign Country—*Absence of Remedy there.*]—An action will not lie in this Province by a judgment creditor, to set aside, as fraudulent, a conveyance made by a debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province. Although the court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns* v. *Davidson*, 21 O. R. 547; *Purdom* v. *Pavey*, 26 S. C. R. 412.

Ordinary Course of Trade.] — Interpleader issue to try plaintiff's right to property seized by the sheriff on executions issued by defendant against C. The plaintiff claimed by purchase prior to the execution: — Held, that under C. S. U. C. c. 26, s. 18, a sale of goods for cash would not be void, where a similar sale would not be an act of bankruptcy in England; and that the sale in question would not, under the evidence, have constituted such an act there. The words, "in the ordinary course of trade," &c., were inserted in our statute by way of greater precaution, to protect the ordinary dealings of parties having mutual accounts, where the party selling was not known to be insolvent. Held, also, that the evidence did not shew C. to be in insolvent circumstances: that the Judge's charge was virtually to the effect, "that if C. had sold his only horses when as a farmer he needed them, and when the sale so made would imply a suspicion that the same was not in the ordinary course of dealing, and if the plaintiff had then purchased, the sale would not have been bonâ fide;" and that such direction was in accordance with the statute. *Tuer* v. *Harrison*, 14 C. P. 449.

Parol Sale of Goods.]—Where on alleged sale of goods in a store by a son to his mother (the plaintiff) the only change in possession consisted in the former assuming the position of clerk to the latter, and no stock was taken, and there were other circumstances tending to shew want of bona fides in the transaction, and no evidence was given of a written assignment or of such assignment having been registered:—Held, that a verdict for the plaintiff was against evidence, and a new trial was ordered. *Ranny* v. *Moody*, 6 C. P. 471.

The sale of goods by parol in this case, without any actual delivery and change of possession:—Held, void as against subsequent creditors. *Williams* v. *Rapelje*, 8 C. P. 186.

See BILLS OF SALE, II.

Pressure—*Valuable Consideration.*] — D., the purchaser of land, in 1856 gave a mortgage thereon to A., the vendor, to secure part of the purchase money. Taxes were allowed to accumulate, for which the land was sold, and D. became the purchaser in 1868. In 1872, D. made conveyances of his other land and personal property to his two sons, each of whom gave back a mortgage to secure the maintenance of D. and his wife, and the payment of certain sums to other children. No claim was made on the mortgage given by D.

until 1876, and the plaintiff claiming as assignee of A., recovered judgment against D. in June, 1878, on the covenant. In the same year, in order to defeat this judgment, the mortgages made in 1872 to D. were released and new mortgages made to his wife securing substantially the same provision. The plaintiff having obtained a decree in the court below (28 Gr. 590) to set aside the transactions of 1872 and 1878, as fraudulent against creditors, such judgment was reversed on appeal, Per Burton and Patterson, JJ.A., the transaction of 1872, upon the evidence more fully set out in the report, was not fraudulent, for it was not voluntary, but brought about by pressure on the part of the sons, and was for valuable consideration; the mere fact, therefore, if it were shewn, of creditors being delayed would not dispense with proof of intent to delay, &c., and there was no sufficient proof of such intent, either on the part of the father or sons, and certainly not on the part of the latter, which was essential, for the evidence went to shew that this debt, which was the only one, was neither known or apprehended. *Allan* v. *McTavish*, 8 A. R. 440.

Purchaser of Goods Giving Mortgage on these and Other Goods.]—The plaintiffs sold to C. their stock-in-trade in a country store which he had managed for them as their agent; and took a chattel mortgage thereon as security for the purchase money. The mortgage also included sundry other chattels the property of C. At the time of the sale and mortgage there were executions in the sheriff's hands at the suit of the defendants by which these latter goods were bound; —Held, that the acceptance by the plaintiffs of a mortgage on goods which they knew belonged to C. though already bound by the defendants' executions, with knowledge of the judgment recovered by S. against C., rendered the whole transaction fraudulent and void against creditors, so that the stock-in-trade sold by the plaintiffs to C. became subject to the defendants' executions. *Cameron* v. *Perrin*, 14 A. R. 565.

Purchaser under Execution Lending Goods to Debtor.]—Where goods have been openly set up for sale under a fi. fa., and bonâ fide bought by the execution creditor, he may, if he please, lend them immediately after sale to the execution debtor, and while in his possession they cannot be seized by the sheriff at the suit of a subsequent execution creditor; and where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant upon a direction from the Judge that such arrangements must be looked at as in themselves, without reference to the facts of the case, inconsistent with good faith and the rights of subsequent creditors—the court set aside the verdict for misdirection and granted a new trial, with costs to abide the event. *Williams* v. *McDonald*, 7 U. C. R. 381.

Quebec Law — *Preference — Secretion of Property—Right of Indorser of Note.*]—See *Mackinnon* v. *Keroack*, 15 S. C. R. 111.

Revival of Grantee's Rights.]—Where a debtor conveyed away his estate, in fraud of creditors, to a person having a judgment against him, which conveyance was declared fraudulent against creditors, upon a bill filed at the instance of certain of them:—Held, that the creditor to whom the conveyance had been made, was not, under the circumstances, precluded from enforcing his judgment against the lands of the debtor, the conveyance of which had been so avoided. *Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502.

Sale after Colourable Conveyance.]—The owner of an equitable interest in lands under a contract of purchase, conveyed his interest to the plaintiff, his brother-in-law, and subsequently, while still in possession of the land, assigned the contract to third parties, in consideration of their giving him a lease of the premises. A lease was subsequently, after the deeds were completed, executed in the presence of and witnessed by the plaintiff. The plaintiff some time afterwards filed a bill impeaching the assignment and lease as fraudulent. The evidence tended to shew that the conveyance to the plaintiff was colourable only; and, there not being any evidence of notice of the claim of the plaintiff, the court dismissed the bill with costs. *Davison* v. *Wells*, 15 Gr. 89.

Sale by Grantee.]—Held, that a bonâ fide purchase from a grantee who had given no consideration, and who had taken a conveyance fraudulent against creditors under 13 Eliz., was valid, notwithstanding such bonâ fide purchaser had notice of the former fraud, and purchased the property with a view of carrying out the intent to defeat creditors. *Daigish* v. *McCarthy*, 19 Gr. 578.

Secret Trust.]—The owner of lands, subject to several mortgages, conveyed to his brother, but without his knowledge; and the person by whose advice the deed was executed stated in evidence that the deed, though absolute in form, was made upon trust for securing the incumbrances affecting the property and for the benefit of the grantor's children; the grantor at the time being greatly involved, and having no other property except book debts and household furniture. A sale of the grantor's interest was subsequently effected by the sheriff upon an execution, and the purchaser having filed a bill impeaching the conveyance upon trust as a fraud upon creditors, and praying to be admitted to redeem, the court, under the circumstances, decreed in his favour. *Beamish* v. *Pomeroy*, 6 Gr. 586.

——— *Account of Proceeds—Parties—Decree Binding in other Action.*]—In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase: the assignment was made absolute in form so as to deceive other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees. Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendor in respect of the contract, obtained an award for $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600, and it was—Held, that the plaintiff was entitled to such payment: that in view of the fraud and trust, the lapse of time was no defence; and that a bill against the assignees by the creditor, instead of by the administrator, was proper. *Gillies* v. *How*, 19 Gr. 32.

In a suit by a creditor, A., and his assignee, B., to enforce payment of a debt due by C. out of the proceeds of certain property assigned by C. to D., it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:—Held, in another suit by B. and his assignee against D. and C.'s representatives in respect of another debt due by C. to B., that, notwithstanding the difference of parties, the decree in the first suit was binding in the second on the question of fraud. *Ib.*

Several Purposes.]—If one purpose of a sale and conveyance is to defeat a creditor, the sale is, in equity, void as to him. *Scott v. Buraham*, 19 Gr. 234.

A sale was made by a devisee to defeat the claim of a creditor of the testatrix; the creditor recovered judgment a few days after the sale, and before payment of the purchase money; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due:—Held, in a suit by a creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment. *Ib.*

Solicitor's Knowledge Imputed to Client.]—Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice. Where mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was held, that the circumstance of his having employed one of the mortgagees as his solicitor in drawing the assignment, &c., did not make the knowledge of the solicitor notice to the vendee. *Cameron v. Hutchison*, 16 Gr. 526.

See Gibbons v. Wilson, 17 A. R. 1; *Burns v. Wilson*, 28 S. C. R. 207.

Special Facts.]—In ejectment the plaintiff claimed through a deed from J. M. to J., made in 1857. Defendant claimed through a purchase at sheriff's sale under execution against J. M., at the suit of one C., and he contended also that the deed from J. M. to J. was void under the statute of Elizabeth. Both J. M. and J., however, swore that this deed was made in good faith for a valuable consideration; provision was made for paying off C.'s judgment out of the purchase money; and it did not appear that J. M. had any other creditors:—Held, that the deed was good. *Morrison v. Steer*, 32 U. C. R. 182.

Divers conveyances made by defendant shortly before the commencement of this suit, declared fraudulent and void as against the plaintiff. *Prentiss v. Brennan*, 4 Gr. 148.

Suspicious Circumstances.]—A person being embarrassed made a deed of land to his son in 1864, in alleged pursuance of a prior agreement, but he remained in possession and kept the deed in his own hands, and unregistered, for fifteen months; and there were other circumstances against the good faith of the transaction:—He'd, that the deed was void as against subsequent creditors, the prior creditors having been paid. *Stevenson v. Franklin*, 16 Gr. 139.

Transfer of Property—*Delaying or Defeating Creditors.*]—A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. *Mulcahey v. Archibald*, 28 S. C. R. 523.

Uncorroborated Evidence of Parties.]—In the case of a sale by an insolvent person to a relative, attended by suspicious circumstances, the reality and bona fides of the transaction should not be rested on the uncorroborated testimony of the parties to it. *Merchants Bank of Canada v. Clarke*, 18 Gr. 594.

See Jack v. Greig, 27 Gr. 6; *Morton v. Nihan*, 5 A. R. 20; *Rice v. Rice*, 31 O. R. 59, 27 A. R. 121.

See BANKRUPTCY AND INSOLVENCY, I. 8; V. 4; VI. 5.

(b) *Dealings between Husband and Wife.*

Ante-nuptial Agreement — *Costs.*]—A memorandum was produced partly destroyed by fire, to the effect that W. undertook to settle the property of his intended wife as her guardians should require; this was proved to be in his handwriting, and to have been seen in a perfect state since his decease, and, as the witness believed, signed by W., and that before the marriage he had produced and read a paper similar, so far the memorandum went, to it. After the marriage the wife's property was all sold, and the proceeds applied by W. to the purposes of his business, and he subsequently, and while insolvent, assigned to the cashier of a bank a policy on the life of himself, in trust, to pay certain bills of his in the hands of the bank, and then to hold the moneys to be received on the policy for the benefit of his wife and children, but in the event of W. paying off the bills to re-assign the policy to him, or as he should appoint. W. having died, the trustee received the insurance money, paid these bills, and claimed a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow and children of W. against the trustee, the court thought the ante-nuptial agreement sufficiently established, and ordered the trustee to pay over the balance, with interest; and that the trustee being the cashier of the bank who had thus received the benefit of the moneys, he sufficiently represented the bank, and it was therefore not necessary to make the institution itself a party to the suit; but under the circumstances, directed all parties to the cause to receive their costs out of the fund. *Whittemore v. Lemoine*, 10 Gr. 125.

——— *Foreign Country.*] — By an ante-nuptial settlement made in Lower Canada in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no community of property between them should exist, but that

each should hold and continue to enjoy what each then had, or should thereafter acquire. In 1848 certain goods of the husband were sold at sheriff's sale, on execution against the husband, and having been bought in by a third party, were, by a deed of donation, conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under execution issued on judgments obtained against the husband:—Held, that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts. *Ryland* v. *Abatt*, 11 Gr. 135.

——— *Evidence of Parties.*]—S., a wholesale merchant, upon the treaty for marriage with the defendant, and at her suggestion, verbally agreed to make a provision or settlement for her benefit, and proposed the purchase of a particular property for that purpose. Subsequently, and after the marriage had taken place, which was in 1870, the property referred to was sold, but producing a larger sum than was anticipated, S. did not buy. Afterwards, and between the 9th of April, 1872, and the 10th of June, 1873, S. purchased amongst other properties four several parcels of land, for the alleged purpose of the proposed settlement, which, with the improvements put thereon, amounted in value to $15,320, or thereabouts; some of the conveyances of which it was alleged were in error taken to S. himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. S. subsequently became insolvent, and on a bill filed by the assignee of his estate impeaching the conveyance in trust as a fraud upon creditors, the court being satisfied that an agreement, though oral, had been made by the parties prior to the marriage, although the only evidence thereof was that of the parties themselves, and that the conveyances of the parcels to S. had been so made by mistake, declared the defendant entitled to hold the lands in settlement, and dismissed the bill, with costs. It was alleged that S. was indebted at the time of the settlement, but upon the evidence set out in the report of this case, it was held that this was not shewn, and that the entry of some of the property in the business books of S. as an asset did not, under these circumstances, shew that it remained his property. *Boustead* v. *Shaw*, 27 Gr. 280.

——— *Intent to Defeat Creditors.*] — A young man under twenty-one made an offer of marriage by letter to a young woman, and in the letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given. Gilchrist v. Herbert, 20 W. R. 348, followed. Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned. Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors. *Stuart* v. *Thomson*, 23 O. R. 503.

——— *Knowledge of Insolvency—Voluntary Settlement.*]—In an action brought by T. K. & Co. on behalf of themselves and all other creditors of J. G. against J. G., his wife, and the trustee, to set aside a marriage settlement by which J. G., a day or two before his marriage, had settled the greater portion of his property on his wife, in which it was shewn that he and his wife before the marriage, were living on the most intimate terms short of the intimacy of husband and wife, and that she would have accepted a proposal of marriage without hesitation, without any condition as to a marriage settlement, and that he was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on his part, and that she knew nothing of it until she was asked to sign the deed:—Held, that the settlement was not the consideration, or part of the consideration of the marriage, and that it must be set aside as fraudulent and void against creditors: Commercial Bank v. Cooke, 9 Gr. 524, and Columbine v. Penhall, 1 Sm. & G. 228, referred to and followed. Fraser v. Thompson, 1 Gif. 49, distinguished. *Thompson* v. *Gore*, 12 O. R. 651.

Bona Fide Dealings.]—Where the evidence shewed that a husband had received moneys from his wife, for which she claimed to be his creditor, these moneys having in great part been produced by sale of her lands, and she subsequently obtained moneys from her husband, which she expended in the purchase of land—a bill, filed on behalf of the creditors of her husband, seeking to enforce their claim against the property so purchased, was dismissed, with costs, the court being satisfied with the bona fides of the dealings between the husband and wife, although there were some slight discrepancies in their evidence. *Fair* v. *Young*, 26 Gr. 544.

Bona Fide Debt—*Pecuniary Ability.*]—The defendant F. was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and, acting on behalf of his wife, he received large sums from the estate which it was alleged he borrowed from her—£7,000 before 1859, and £2,800 in 1870; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of F. The mother of his wife had frequently requested F. to settle these properties on the wife, which he did not object to do, and in 1873, when he with his wife was about to visit Europe, F. did convey the property in question to the wife. In 1872 and 1873 F., jointly with one C., entered into extensive speculations and made a considerable amount of money. In 1873

F. indorsed C.'s note for $10,000, which C. discounted, and the same remained unpaid, and F. in 1874 gave his cheque to the plaintiff for $4,000, on which this suit was instituted:—Held, (1) that as to the £7,600, F. having acted for his wife in obtaining this money from her father's estate, and having never made any claim thereto in exercise of his marital right, having borrowed it only, as established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the onus was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do; on the contrary, the evidence shewed it to have been a loan. When F. incurred the liability for C., he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit, after which period the liability to the plaintiff was incurred:—Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it. *Vindin* v. *Fraser*, 28 Gr. 502.

Continuing Indebtedness—*Grantor in Business.*]—The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about $1,500, exceeded his assets. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about $23,000, but much more than $1,500 had been in the meantime paid to them:—Held, that the conveyance was fraudulent and void as against creditors. *Ferguson* v. *Kenny* 16 A. R. 276.

Per Maclennan, J.A.—The settlement having been made with the object of putting the property beyond the chances and uncertainties of the business in which the settlor was engaged and which he continued to carry on until insolvent, must be regarded as having been made with intent to defraud the creditors of that business, and it was unnecessary to prove any old debt still unpaid. *Ib.*

See Blackley v. *Kenney*, 19 O. R. 169; 18 A. R. 135.

Creditors of Voluntary Grantee Attacking Reconveyance.]—The defendant E. C. having entered into a business partnership, at the instigation of his wife conveyed certain land to her to prevent its becoming liable to creditors of the new firm. He, then, as agent of his wife, placed the property in the hands of the plaintiff, a land agent, to sell or exchange, and through him an agreement for exchange was arranged. The plaintiff sued the wife for his commission, and recovered a verdict against her, but while the action was pending she reconveyed the land to her husband. There was no consideration for any of these conveyances. In an action to set aside the reconveyance as fraudulent and void against the creditors of the wife, it was:—Held, that the conveyance by the husband to the wife having been made to defraud creditors, following Mundell v. Tinkis, 6 O. R. 625, the court would not assist a person who has placed his property in the name of another in order to defraud his creditors; that the wife had an interest in the property which could be made available to her creditors for the payment of her debts, and that the conveyance from her was made with intent to defeat, delay, and prejudice her creditors, and that as the evidence shewed she was unable to pay her debts in full, it fell within the provisions of 48 Vict. c. 26, s. 2 (O.), and was void. *Johnson* v. *Cline*, 16 O. R. 129.

Whether a conveyance to a wife of property purchased with the money of the husband is a gift to the wife, is a question of fact, as to which there is no presumption, at any rate in the lifetime of the parties. Although the object with which property is conveyed to another may be to protect it against the creditors of the actual purchaser, yet the property belongs to such purchaser, and if in an action to have the grantee in such a conveyance declared a trustee for the true owner, the grantee does not choose to raise such a defence, the plaintiff will be entitled to judgment. The grantee having no interest in the property may convey it to the true owner at any time, and creditors of the former have no right to have the conveyance set aside to obtain that which does not really belong to their debtor. Johnson v. Cline, 16 O. R. 129, dissented from. Day v. Day, 17 A. R. 157, specially referred to. *Gibbons* v. *Tomlinson*, 21 O. R. 489.

Creditor's Right to Rely on Mortgage Debt.]—The owner of Blackacre and Whiteacre created a mortgage on Blackacre in favour of a loan society to secure an advance of $2,000, the estimated value of the mortgaged premises being $3,000 at least. The mortgagor subsequently, not being indebted otherwise, voluntarily settled in good faith Whiteacre on his wife. On a bill filed by a subsequent creditor the court set aside the settlement as fraudulent against creditors, it being shewn that Blackacre was not sufficient to pay the loan society at the time of the settlement, although the loan society was not a party impeaching the settlement. *Masuret* v. *Mitchell*, 26 Gr. 435.

Deed from Husband to Wife.]—A husband, on 2nd September, 1885, by deed of bargain and sale made in pursuance of the Act respecting Short Forms of Conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and $5;" the receipt of the consideration was also admitted in the deed, besides the usual marginal receipt of the $5; habendum to the wife, her heirs and assigns, for her and their sole and only use forever:—Held, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made, vesting in the wife all the estate and interest of the husband at the date of this deed to her. *Whitehead* v. *Whitehead*, 14 O. R. 621.

Dower.]—The release of a wife's dower to a purchaser is a good consideration for the grant of a reasonable compensation to the wife; and such a grant made bonâ fide is valid against the husband's creditors. *Forrest* v. *Laycock*, 18 Gr. 611.

A wife joined in a mortgage of her husband's estate to secure a loan of one-fourth or one-fifth of its value, and he subsequently sold the property; his wife claimed dower, and refused to join in the conveyance without a reasonable compensation. Her right to dower being supposed by all parties to exist, her husband had a piece of land conveyed to her, which she accepted, and thereupon she signed the conveyance. The transaction appearing to have been for the interest of creditors, it was held to be valid, independently of the question whether her claim to dower was well founded in law or not. *Ib.*

A trader in insolvent circumstances, for the purpose, avowedly, of inducing his wife to release her dower in a property shewn to have been worth about $1,300, conveyed to her a farm, the net value of which was about $1,700:—Held, that this was a fraud upon creditors; and the court set aside the transaction with costs. *Black* v. *Fountain*, 23 Gr. 174.

The male defendant mortgaged his property several times, and finally sold the equity of redemption. His wife barred her dower in each mortgage, under an agreement with her husband, made on the first occasion, that he would convey other property to her. Upon this claim being reiterated on the sale of the equity of redemption, and the refusal of the wife to join in the conveyance unless the promise of the husband was fulfilled, the husband conveyed other land to a trustee for her. The effect was that the plaintiff, a creditor of the husband, was delayed and hindered in recovering his debt:—Held, that the conveyance to the wife's trustee was not voluntary; and as the transaction had been found to have been bonâ fide, and without intent to defraud creditors, it could not be impeached under 13 Eliz. c. 5. *Beavis* v. *Maguire*, 7 A. R. 704.

Chattel mortgage to wife, in consideration of right to dower in certain real estate being barred by her, upheld. *Morris* v. *Martin*, 19 O. R. 564.

Embarking in Business.]—The owner of real estate being about to enter into a business partnership, settled his property on his wife and children. The evidence shewed that it was made at the instance of the settlor's wife, and with a view to save the property from any debts which might arise in consequence of the partnership:—Held, that the settlement was void as against subsequent creditors; although at the time of the settlement the settlor was perfectly solvent, and no intention of fraudulently withdrawing his assets could be imputed to him, and the property in question was partly paid for by money given to the wife by her father. *Buckland* v. *Rose*, 7 Gr. 440.

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

See Ferguson v. *Kenny*, 16 A. R. 276.

Expenditure on Wife's Property—*Prior Mortgage.*]—The insolvent had conveyed by way of settlement to his intended wife a lot of land on which he was building a house, which was not completed until after the marriage. On a bill filed by the assignee in insolvency, the court declared that for so much of the building as was completed after the marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Gr. 156.

A purchase by a wife from her husband, the consideration being paid out of her separate estate, was held to be maintainable against creditors of whose debts she had no notice. The husband, after the purchase, expended money in improving the property:—Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought. *Hill* v. *Thompson*, 17 Gr. 445.

The defendant B., who was carrying on a thriving business, and possessed of personal property to the value of about $1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shewn that all debts due by B. at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance:—Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors. *Collard v. Bennett*, 28 Gr. 556.

In 1877, B., being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year B. made additions to the house on the land, which he paid for:—Held, that in respect of the moneys so expended, the case came within future creditor. *Collard* v. *Bennett*, 28 Gr. 156. *Ib.*

In November, 1876, a marriage being contemplated between the defendant and M., the defendant's father proposed that M. should erect a house, which he had intended building, on a lot belonging to the father, who agreed to convey the same to his daughter as a marriage portion. This M. assented to, and in that month the marriage took place. During the year following M. built the house, and his father-in-law conveyed the lot to the defendant as had been previously agreed upon. In January, 1880, M. became insolvent, and proceedings were taken by his assignee to have the transaction declared fraudulent as against creditors, under s. 132 of the Insolvent Act, 1875; or under 13 Eliz. c. 5:—Held, affirming 27 Gr. 483, that no fraudulent

intention was shewn on the part of M., and any knowledge by the defendant or her father was distinctly negatived by the evidence, and therefore the transaction could not be impeached under either statute. Jackson v. Bowman, 14 Gr. 156, remarked upon, distinguished and approved of. *Davidson* v. *Maguire*, 7 A. R. 98.

See Till v. *Till*, 15 O. R. 133; *Davidson* v. *Fraser*, 23 A. R. 439.

Findings Insufficient—*New Trial.*] — In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore such transfer was made to secure the payment of moneys lent by her. Immediately after such transfer he absconded from the Province. At the trial the jury found, in answer to questions put by the presiding Judge, (1) that the husband at the time he absconded was not solvent and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favour of the defendant (the wife), which, on motion in term, the Judge refused to disturb. On appeal this court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under R. S. O. 1877 c. 118, ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial. *Fradenburgh* v. *Haskins*, 12 A. R. 257.

Following Proceeds.] — The owner of land, subject to a mortgage created by himself and his wife, being in insolvent circumstances, sold the equity of redemption therein to a bonâ fide purchaser, the wife joining in the conveyance and the larger portion of the consideration being paid to her in the shape of a promissory note, which she subsequently paid over to one J. N., upon a purchase from him of his equity of redemption in other lands; the conveyance of which was made to the wife. On a bill filed by an execution creditor of the husband impeaching the transaction as fraudulent under the statute of Elizabeth:—Held, that it was a fraudulent device to defeat creditors, and that the plaintiff was entitled to follow the consideration paid to J. N. into the lands conveyed by him to the wife. *Fleury* v. *Pringle*, 26 Gr. 67.

Husband Working Wife's Farm.]—It appeared that the judgment debtor's wife had mortgaged her farm for the purpose of paying some of his debts; and that after the mortgage instead of his continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he had agreed that until the mortgage was paid off he would work it for his wife alone:—Held, that this arrangement was not illegal nor unreasonable, and on no principle could it be said that it was a making away with property in order to defeat or defraud creditors. *Baby* v. *Ross*, 14 P. R. 440.

Income—*Payment to Husband — Gift — Presumption.*]—A married woman having separate estate paid over her income therefrom to her husband who treated it as his own, and used it towards paying the ordinary family expenses without keeping a separate account, paying her no interest and giving no acknowledgment, all her business matters being under his management. After many years of this kind of dealing, the husband, who had for some time been largely indebted to the plaintiff, being pressed for payment immediately made a conveyance of his property to his wife without her knowledge, and without her being informed of the fact, the consideration for which it was sought in this action to support by alleging that the payments to the husband had been made as loans:—Held, that the onus of proof that payments of income to her husband were by way of loan, and not of gift, was on the wife, and that the evidence of both defendants, being without corroboration, did not support the allegation, and the conveyance was set aside as fraudulent against creditors. *Rice* v. *Rice*, 31 O. R. 59; 27 A. R. 121.

Jus Tertii.]—In a suit to declare a conveyance to a wife void as against creditors, it was alleged that the land had been conveyed by the father of the wife to the husband after executing his will, (whereby he devised the same property to his said daughter,) under such pressure and undue influence as would have rendered the deed liable to be impeached on those grounds; but the court refused to try such issue in this suit, as the creditors of the husband were entitled to make out of his interest in the property at the time of the conveyance impeached what they could towards satisfaction of their claims. *Pegg* v. *Eastman*, 13 Gr. 137.

Land Purchased with Money Payable by Crown.]—S. purchased lands with money payable to him by the Crown for work done under a contract, which lands he procured to be conveyed to his wife:—Held, that although the money could not be reached by garnishing it before being paid by the Crown, yet that the money having passed out of the Crown, by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth. *Nicholson* v. *Shannon*, *McPherson* v. *Shannon*, 28 Gr. 378.

No Debt Subsisting.]—One of the members of a trading firm, in March, 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling-house at an expense of $3,000, and in July following the firm were compelled to effect a compromise of their liabilities, and finally, in February, 1877, became insolvent. The plaintiff was appointed their assignee, and thereupon filed a bill impeaching the settlement as having been made, while insolvent, with a view of defrauding creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency. Under these circumstances the court dismissed the bill without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife. *Darling v. Price*, 27 Gr. 331.

No Fraudulent Intent.]—A deed purporting to be a bargain and sale in consideration of £1,000, and bearing date the day be-

fore the marriage of the grantor to the grantee, was impeached by a subsequent creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her, or to any one acting for her, until long after the marriage. The grantor, who was in trade, continued to deal with the property as owner, and the deed was not registered for three years afterwards, when the grantor had become insolvent:—Held, that the deed could only be regarded as a voluntary deed; and as it did not appear that the grantor was in circumstances at the time to make a gift of so much property, the deed was set aside as a fraud on creditors. *Mulholland* v. *Williamson*, 12 Gr. 91.

On appeal from the above decision, the court being satisfied that the deed was executed as a marriage settlement, and not considering there was any proof of a fraudulent intent, upheld the deed and varied the decree made in the court below accordingly, with costs. *S. C.*, 14 Gr. 291.

Power of Revocation.]—The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of age, being about to marry, applied to her solicitor, who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of the marriage settlement were agreed upon. The solicitor did not know her husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage:—Held, that it was not a voluntary settlement; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation, which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock* v. *Button*, 29 Gr. 490.

Purchase by Husband—*Conveyance in Wife's Name.*]—A man who had been carrying on business in partnership agreed to buy out the interest of his co-partner, for the purpose of continuing the business on his own account, and subsequently made a purchase of property and took the conveyance thereof in the name of his wife, the husband swearing that at the time he did not owe a dollar, and that the money expended in the purchase of the property belonged to his wife, having been obtained on the sale of lands belonging to her. This statement, however, was shewn to be incorrect; and a judgment having been recovered against the husband, upon which nothing could be realized under execution, the court, on a bill filed by the judgment creditor, following Buckland v. Rose, 7 Gr. 440, declared the transaction fraudulent as against creditors, and ordered a sale of the lands in the usual manner, and the payment of proceeds to creditors. *Campbell* v. *Chapman*, 26 Gr. 240.

Purchase of Land by Wife—*Re-sale—Attachment of Purchase Money by Husband's Creditor.*]—See *Donahoe* v. *Hull*, 24 S. C. R. 683.

Special Facts.]—The plaintiff and M. became sureties for W. who absconded, and the sureties satisfied the claim by giving their note for $215, upon which judgment was subsequently recovered against them, whereupon M. absconded from the Province. A year previously a conveyance of land had been made to the wife of M., which the plaintiff alleged was so conveyed to her as the appointee of her husband and for the fraudulent purpose of defeating the plaintiff in recovering contribution. The evidence adduced satisfied the court that more than a year before the parties had entered into such suretyship the contract for purchase had been made in the wife's name, who paid the first instalment; and that the subsequent earnings of the sons, the moneys belonging to the wife, had been expended in erecting a house upon the premises and paying the balance of purchase money thereof. A bill seeking to charge the land as the property of the husband was, under such circumstances, dismissed with costs. *Barton* v. *Merritt*, 24 Gr. 139.

See the preceding sub-head.

See, also, BANKRUPTCY AND INSOLVENCY, I. 8; V. 4; VI. 5—GIFT.

(c) *Voluntary Conveyances and Transactions.*

Agreement to Maintain.]—In ejectment the plaintiff claimed under a deed from her father, made in 1846, on the day after her marriage, expressed to be in consideration of natural love and affection, and of £5, in fee, reserving, however, the use and occupation of the premises to the grantor and his wife during their lives and the life of the survivor; and on condition that the plaintiff should cause the land to be properly cultivated, and furnish a comfortable maintenance and support to the grantor and his wife for the remainder of their respective lives; and also that, after their decease, the plaintiff and her heirs should pay to each of her sisters £25. No other condition was proved except as above expressed. The plaintiff and her husband lived with her father and mother on the land for several years, but separated in 1854, and went to the United States, having had constant disagreements, and did not return until 1876. In 1854, the father sold and conveyed the land for value to the defendant:—Held, that the deed to the plaintiff must be regarded as a voluntary deed, there being no binding agreement to perform the condition as to maintenance, &c., or to pay the sums named to the sisters; and that it was therefore void under 27 Eliz. c. 4, as against the defendant, a subsequent purchaser for value, though with notice. *Demorest* v. *Miller*, 42 U. C. R. 56.

Assuming Debts—*Life Lease.*]—In August, 1861, J. B., being indebted jointly with W. B. to T. in the sum of £88, for which judgment had been recovered, and to one R. in the sum of £10, agreed with R. B., who was his son, and was not then of age, to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment, and of his making a lease for life to J. B. or J. B.'s wife, of 25 acres of the land, being the arable portion thereof. R. B. was then the holder of a due bill for £20, given to him in satisfaction of wages earned by him as hired servant with an elder brother, and in pursuance of the said agreement transferred this to T., who received

payment thereof, and also made a promissory note jointly with J. B. and W. B. for the balance of T.'s claim, which note remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not to J. B., for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861, and spring of 1862, J. B. became indebted to the plaintiffs, who recovered judgment, and filed a bill to set aside the transaction as fraudulent within the statute of Elizabeth:—Held, that under the circumstances, the conveyance to R. B. could not be deemed voluntary, but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs. *Delesdernier* v. *Burton*, 12 Gr. 569.

Bond to Convey.]—The locatee of lands of the Crown executed a bond in favour of one of his sons for the conveyance of fifty acres of his land, for the purpose of procuring his marriage with a particular person, which, however, never took place, and the son afterwards married another woman, having, in the meantime, been allowed to retain possession of the bond. The father subsequently conveyed for value to another son, who had notice of the existence of the bond; and he applied for and obtained the Crown patent for the land, and having refused to recognise the right of his brother under the bond, a bill was filed to compel the specific performance of the agreement contained therein:—Held, that as against a purchaser for value the bond was voluntary and could not be enforced. *Osborne* v. *Osborne*, 5 Gr. 619.

Bonds — *Priority.*]—A. gave a voluntary bond to B. for £5,000, and a few days afterwards a like bond to C.; neither was given for any fraudulent purpose. C. recovered judgment on the second bond; and the obligor had not property enough to pay both bonds:—Held, that B., whose bond was prior in date, had no equity to restrain proceedings by C. to enforce the judgment recovered; nor to set aside a conveyance made by A. of land of less value than the judgment, which C. had accepted in discharge thereof. *Newenham* v. *Mountcashel*, 19 Gr. 530.

Charity.]—A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's lands. *Anderson* v. *Paine*, 14 Gr. 110.

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

Consideration not Proved.] — A deed purporting to be a deed of bargain and sale, but containing no statement of consideration pecuniary or otherwise, and no sufficient proof of consideration aliunde:—Held, void in law against a bonâ fide purchaser for value at sheriff's sale under judgment and execution, although the jury had by their verdict negatived any fraud in fact in the deed expressing no consideration. *Doe d. Proudfoot* v. *McCrae*, 6 O. S. 502.

Conveyance to Protect against Creditors.] — The Voluntary Conveyances Act, 1868, 31 Vict. c. 9 (O.), gives effect as against subsequent purchasers to prior voluntary conveyances executed in good faith, and to them only; and a voluntary conveyance to a wife for the purpose of protecting property from creditors, was held not to be good against a subsequent mortgage to a creditor. *Richardson* v. *Armitage*, 18 Gr. 512.

Deed in Lieu of Dower—*True Consideration not Stated.*]—A deed by the heir-at-law to his mother of certain lands in lieu of dower is not to be considered as voluntary and fraudulent against subsequent purchasers for value, &c., although the consideration expressed in such deed be money, and no money in fact be proved to have been paid. *Patulo* v. *Boyington*, 4 C. P. 125.

Defeating Creditors—*Absence of Fraud.*]—Voluntary conveyances are void against existing debts which are thereby defeated or delayed, whether the conveyances were fraudulent or not. *Irwin* v. *Freeman*, 13 Gr. 465.

Dower of Wife of Voluntary Grantee.]—A. conveys land without consideration to N. W., who remains in possession some years and leaves. A. subsequently conveys to T. W., for value, the same land. In an action for dower by the widow of N. W. against T. W.:—Held, that the first deed being without consideration was fraudulent as against the second, and that the claim for dower resting upon the seisin under it was not sustainable. *Wilson* v. *Wilson*, 8 C. P. 525.

Dower Released Voluntarily.] — A widow having by her conduct parted with her right to equitable dower in favour of her son, a subsequent creditor of hers was held not entitled to have her dower set out and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it. *Cottle* v. *McHardy*, 17 Gr. 342.

Effect of Jury's Finding.]—A. by deed of 14th April, 1843, conveyed to B. certain lands, the consideration being expressed in the deed as £62 10s., but £12 10s. only was paid. At the execution of such deed A. was embarrassed, a fi. fa. having been issued against his goods in February, 1843. A. had other property besides the premises in dispute; and his property subsequently turned out well. In September, 1846, the sheriff conveyed the premises to defendant by deed, reciting an execution against the lands of A., tested 28th July, 1845; and upon this deed defendant relied, treating the conveyance to B. as voluntary and void as against creditors. After verdict for the plaintiff, B.:—Held, that the question of the deed to B. being voluntary, and as such fraudulent, having been submitted to the jury, and they having found that it was bonâ fide and for value, there was no sufficient reason to disturb such verdict. *Reaume* v. *Guichard*, 6 C. P. 170.

Effect of Registration.]—O., requiring money, mortgaged land to B., in 1854, for £50, to enable B. to obtain it for him, which mortgage was registered in the same year. B. having done nothing, O., in 1856, got him to assign the mortgage to S., who paid B. £25, but neglected to register the assignment until 1864. In the meantime O. conveyed, for value, to M., to whom B., for a nominal consideration, conveyed his interest:—Held, that the mortgage to B. being voluntary, was void

under 27 Eliz. c. 4 as against the conveyance for value to M., and that the fact of its being first registered could not affect its validity in this respect. *Miller* v. *McGill*, 24 U. C. R. 597.

Embarking in Business.] — A. having received a large sum for the sale of a secret imparted to him and his wife by a relative of the latter, bought with it part of a farm, of which he took the deed in his own name; and afterwards gave instructions for a settlement of the property for the use of himself for life, with remainder to his wife and children; but the settlement was not prepared or executed for a year. Shortly before it was executed he had entered into a hazardous business, which proved disastrous, all his means not sufficing to pay its losses. The farm was the only real estate he had in the Province:—Held, at the suit of a creditor whose debt accrued before the settlement, that the settlement was void as against creditors. *King* v. *Keating*, 12 Gr. 29.

Gift by Husband to Wife.] — A husband, not being in debt or engaged in or contemplating engaging in business, bought certain land and stock thereon from one C., the purchase money comprising nearly all the husband's means, and procured C. to make the conveyance and assignment thereof direct to the wife, who had been married to her husband in 1860 without any marriage contract or settlement; and the wife mortgaged the property to the plaintiff. In an interpleader action between the plaintiff and defendants, subsequent execution creditors of the husband, to try the title to the above stock:—Held, that the husband, being in a position to make such voluntary gift or settlement, the conveyance was good: that the property in question was the wife's equitable separate estate, and was not affected by s. 5 of the Married Woman's Property Act, R. S. O. 1877 c. 125, which leaves such settlements untouched. *O'Doherty* v. *Ontario Bank*, 32 C. P. 285.

Grantor's Intent.]—Where a conveyance is voluntary, it is only necessary to shew fraudulent intent on the part of the grantor. *Oliver* v. *McLaughlin*, 24 O. R. 41.

Grantor not Chargeable with Rents.] —A voluntary grantor of real estate is not chargeable, at the suit of the objects of his bounty, for rents of such estate subsequently received by him, or which but for his neglect might have been so received. *Mitchell* v. *Ritchey*, 11 Gr. 511.

Intent to Defeat—*Knowledge of Trustee —Rights of Issue—Parties.*] — Although the consideration of marriage is one of the most valuable, still a settlement upon the marriage either of the settlor or his child is, like any other conveyance, liable to be impeached as void under the Statute of Elizabeth, on the ground of having been made to hinder and delay creditors. Where, therefore, a person in embarrassed circumstances hastened the marriage of his daughter, and conveyed all his real estate to a trustee for her benefit and the issue of the intended marriage—having stated to the solicitor who prepared the conveyance, and to the trustee, that his object was to prevent his property from being seized by his creditors, and there being a strong presumption that the daughter and her intended husband had also been informed of this object—the court, upon a bill filed by a judgment creditor, against the husband and wife and their infant children, to set aside such settlement, declared the same void as against creditors; notice to the trustee of the fraudulent purposes of the settlor being sufficient to bind the issue of the marriage. To such a bill the settlor is not a necessary party. *Commercial Bank of Canada* v. *Cooke*, 9 Gr. 524.

Insolvent Settlor.] — A person against whom several executions for small amounts were in the sheriff's hands, and whose chattel property when sold by the sheriff was not sufficient to pay these executions, made a settlement of the only real estate he had in trust for his wife and children:—Held, fraudulent and void under 13 Eliz. c. 5. *Goodwin* v. *Williams*, 5 Gr. 539.

Judgment Creditor.]—A judgment creditor is not a purchaser for value within 27 Eliz. c. 4. *Gillespie* v. *Van Egmondt*, 6 Gr. 535.

Legal Owner Conveying without Consideration.]—A debtor after judgment and execution against his goods, having conveyed without consideration certain lands, which he held as the legal owner under a deed containing no declaration of trust, and the same lands having been sold under an execution subsequently issued against his lands, the court held that the deed, being a voluntary conveyance, was fraudulent and void against the sheriff's vendee. *Doe d. Sted* v. *McGill*, M. T. 6 Vict.

Mortgagee of Crown Vendee — *Subsequent Assignment.*]—A vendee of the Crown transferred his interest by way of mortgage to a person who took bonâ fide. Afterwards the vendee made a second assignment for a nominal consideration of £200, but no money in fact passed, the consideration mentioned being intended to cover what the assignee would have to pay the government for the balance due on the contract with the vendee. On a bill filed by the mortgagee to set the second conveyance aside:—Held, that as against the plaintiff the second deed was voluntary; and even if it had been under the statute regulating the sale of Crown lands, it would not have prevailed against the prior incumbrance of the plaintiff. *Garside* v. *King*, 2 Gr. 673.

Mortgage to Raise Funds for Claims —*Redemption—Costs.*]—There being disputed accounts between A. and B., an action at law was commenced by the former against the latter prior to February, 1859. In December of that year B. executed a mortgage for £130 to one H., to secure to him the payment of £30, but principally with the object of raising money upon it with which to pay off another indebtedness. There being a mistake in the description, and B. requiring more money than this mortgage would cover, another mortgage (for £200) was executed for these purposes. Both of these instruments were held by H. for sale, in order to raise the required amount, and he withheld them from registration until he could find a purchaser. On the 22nd September, 1860, A. recovered a judgment, which he registered on the same day. Hearing that A. was about to enter judgment, H. on the day of entering the judgment, and before the entry, though so far as appeared without the knowledge of B., registered the mortgages for the avowed purpose of retaining his priority.

Shortly after the registration H. returned the first mortgage to B., intending to use the second one only, and endeavoured immediately afterwards to sell it, and had contracted to do so for the bonâ fide purpose of raising money wherewith to pay off the claim of A., though the object was not accomplished. Besides the lands covered by the mortgages, B. owned other available real estate more than sufficient to pay his debts, as also a quantity of household furniture. On a bill filed against B. and H., impeaching the mortgage as voluntary, without consideration, and with intent to defeat and delay creditors:—Held, that these charges were not supported; but the plaintiff was allowed to redeem on payment of the amount for which the mortgage was a subsisting security, and paying H. his costs of suit. *Dickinson* v. *Duffill*, 10 Gr. 76.

Natural Love and Affection.]—A deed made by one brother to another in consideration of natural love and affection, is void as against a subsequent purchaser from the grantor for a valuable consideration. *Doe d. Phillpott* v. *Blanchfield*, 1 U. C. R. 350.

Onus.]—In a suit to set aside a voluntary conveyance as void against creditors, it lies upon the parties interested in supporting the deed to shew the existence of other property of the debtor available to his creditors; but in such a case, the parties having omitted to give such evidence, the court at the hearing directed an inquiry before the master as to the indebtedness of the grantor at the date of the conveyance. *Brown* v. *Davidson*, 9 Gr. 439.

A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the court held that the onus was on the grantee, of proving that the grantors understood the nature and effect of the deed; and as it did not appear to have been explained before being executed, the deed was held invalid. *Fraser* v. *Rodney*, 11 Gr. 426; 12 Gr. 154.

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

Where a wife claimed as against her husband's creditors certain chattels as a gift from him while they were living together:—Held, that the onus of proof of right to the goods was on her, and there being no writing or witnesses, her own evidence, although corroborated by her husband, was not sufficient to satisfy the onus. *Thompson* v. *Doyle*, 16 C. L. T. Occ. N. 286.

Partial Relief.]—An agreement may be allowed to stand, though a voluntary deed arising out of it may be set aside. *Delesdernier* v. *Burton*, 12 Gr. 529.

Priority of Registration.]—The patent issued in 1839. The patentee conveyed to M. in the same year, and M. to the plaintiff in 1867, the conveyances not being registered. Defendant claimed through his wife, who was one of the co-heiresses of the patentee. He alleged that before his marriage, which took place in November, 1866, she agreed verbally to convey it to him after the marriage; and the deed under which he claimed was executed and registered in October, 1867:—Held, that the conveyance to defendant was voluntary, and therefore could not prevail by reason of its priority of registration. Per Galt, J.—If defendant had been a purchaser for valuable consideration, he would have been entitled to succeed under the Registry Act, 29 Vict. c. 24, s. 62, by reason of such priority. Quære, per Wilson, C.J., whether s. 62 applies to cases where the patent has issued before its passing. *McCarthy* v. *Arbuckle*, 29 C. P. 529.

Proof of Insolvency.] — Held, that in order to obtain the revocation of the gift in question, made under the circumstances set out in the report, by a father on the marriage of his daughter, it was incumbent on the plaintiffs to prove the insolvency or deconfiture of the donor at the time of the donation, and that there was no proof in this case sufficient to shew that the property remaining to the donor at the date of his donation, consisting of property purchased by him and on which he owed the balance of the purchase money, was inadequate to pay the hypothecary claims with which it was charged. *Treacey* v. *Liggett*, 9 S. C. R. 441.

Provision for Children — *Subsequent Sale for Value.*]—A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage:—Held, that the provision could not be defeated by a sale for value by the settlor. *McGregor* v. *Rapelje*, 17 Gr. 38, 18 Gr. 446.

Purchaser for Value.]—A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:—Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Gr. 541.

In ejectment, both parties claimed the title through one N. M. The defendant contended that a deed from N. M. to C. and J. M., dated 12th September, 1838, was voluntary, and therefore void. The jury having found for plaintiff, upon motion for new trial:—Held, that the deed could only be void as against a subsequent purchaser for value, and that inasmuch as there was evidence to shew that C. and J. M. were in possession on the 31st August, 1839, when N. M. conveyed to A. H. M. through whom defendant claimed, the deed to A. H. M. was therefore void, and he was consequently precluded from saying the deed to C. and J. M. was void because voluntary. *Weller* v. *Hartgraves*, 14 C. P. 360.

Reformation.] — A mortgage which had been executed by the defendant L., reciting that it had been agreed to be given to secure notes held by the plaintiffs and containing covenants for title, was reformed on parol evidence by substituting for one of the parcels inserted by mistake which did not belong to L., another lot proved to be his at the time of creating the mortgage, and being the only other lot owned by him. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Bank of Toronto* v. *Irwin*, 28 Gr. 397.

Sale at Undervalue.]—A sale at an undervalue to a person under whose influence the grantor is, is as objectionable as a gift would be under like circumstances. *Mason* v. *Seney*, 12 Gr. 143.

Special Facts.] — Held, that under the special facts set out in this case, the deed of the defendant B. to the lessor of the plaintiff, was not to be regarded as voluntary under 27 Eliz. c. 4, nor would the deed subsequently executed for a valuable consideration defeat it on that ground of objection. *Doe d. Spafford* v. *Breakenridge*, 1 C. P. 492.

Settlement by Debtor and other Members of Family—*Valuable Consideration.*]—A person, having entered into business, joined with his brothers and sisters in a settlement, the effect of which was to transfer all their undivided interest in their father's estate to trustees for the benefit of their mother, and subsequently became insolvent:—Held, on the evidence, that there was no fraudulent intent, and that the agreement to execute, and the execution, by the other members of the family, was a valuable consideration for the settlement. *Randall* v. *Dopp*, 22 O. R. 422.

Settlement under Pressure.]—A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and he had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother. The wife was advised to take proceedings against him under the statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. To compromise these threatened proceedings, the husband made a settlement in favour of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof:—Held, that the settlement could not be impeached under the statute 13 Eliz. *Mason* v. *Scott*, 20 Gr. 84.

Statute Barred Debt.]—Where a debt, the remedy for which is barred by the Statute of Limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment, and before the remedy was barred, is void as against a fi. fa. issued on the judgment. *Irwin* v. *Freeman*, 13 Gr. 465.

Subsequent Sale.]—A settlor filed a bill to set aside a settlement on his wife and her heirs, alleging fraud by the trustees in inducing him to make the settlement. The wife died leaving no children by him, but leaving children by a former husband. The allegations in the bill failed, and it was accordingly dismissed, but it was held that the settlement only vested a life estate in the trustees; and, semble, that the settlor could defeat the settlement by a sale. *Crafford* v. *McDonagh*, 5 L. J. 187.

Trust not Made Known.]—A person being embarrassed, proposed to assign a policy on his life, in trust, first to secure certain advances, and then for his wife. The advances were made and the assignment executed, but no trust in favour of the wife was declared, or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, and in his evidence stated that the settlor might have absorbed the whole amount if he (the trustee) had seen fit to advance it. After the death of the settlor all the advances were paid, and the residue of the insurance moneys invested for the benefit of the widow:—Held, that so far as the interest of the widow was concerned, the settlement was void. *Cotton* v. *Vansittart*, 20 Gr. 244.

Two Voluntary Settlements—*Beneficiaries under — First Attacking Second.*] — Where there are two voluntary settlements, the court will, at the suit of those interested under the first, set aside the second; and it is no objection to relief in such a case that courts of law would give effect to the first against the second. *Houlding* v. *Poole*, 2 Gr. 685.

Valuable Consideration.] — L. devised lands to his widow "provided she does not marry or misbehave," and to his son after his wife's death:—Held, that the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate. *Leech* v. *Leech*, 11 Gr. 572.

A., the owner of land, conveyed part of it to his son, "on account of natural love," the son to give to his father one-half of the produce, if demanded:—Held, that this was a valuable consideration. A, afterwards by deed conveyed to others these premises, and their assignee having commenced ejectment, L.'s widow obtained an injunction against the action. L.'s widow having meantime intermarried, the assignee moved to dissolve, urging that the widow's estate had determined, and that it was defeasible, and had been defeated by the testator's subsequent transfer for value under 27 Eliz. c. 4; but the application was, under the circumstances, refused. *Ib.* See, also, *S. C.*, 24 U. C. R. 321.

The administratrix of a mortgagee executed an instrument purporting, in consideration of $1, to assign the mortgage to the plaintiff, who was her brother, and he executed a bond binding him to pay her one-half of the mortgage money as received:—Held, as between the plaintiff and the mortgagor, that this was a valid assignment, being for consideration and not a gift. *Sinclair* v. *Dewar*, 17 Gr. 621.

Voidable only.]—A voluntary or covinous conveyance under 27 Eliz. c. 4, is voidable only, and is good and valid until avoided. *Harper* v. *Culbert*, 5 O. R. 152.

Voluntary Grantee not a Surety.]—When a debtor makes a voluntary settlement under circumstances that render it void as against creditors, the grantee is not entitled, as being in effect a surety for the debt, to hold the property exonerated from the debt, in consequence of time being given to the debtor, or of any like transaction that would free a surety from his liability in ordinary cases of suretyship. *King* v. *Keating*, 12 Gr. 29.

Voluntary Settlement—*Rights of Prior Equitable Mortgagee.*]—An equitable mortgage by deposit of title deeds had been created for $1,000 by a son in favour of his mother, who had advanced him that sum. The mother subsequently delivered the title deeds to the party in favour of whom a voluntary settlement had been created, but it was not intended to be a transfer of the $1,000 due to the mother:—Held, that the effect of the delivery of the deeds was to extinguish the claim on the land for the $1,000, and that in a decree declaring the settlement void as against creditors the beneficiary under the settlement was not entitled to any lien in respect of this amount. *Masuret* v. *Mitchell*, 26 Gr. 435.

See BANKRUPTCY AND INSOLVENCY, I. 8; V. 4; VI. 5—GIFT.

3. *Practice and Procedure in Actions.*

(a) *In General.*

Competency of Witness.]—The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband:—Held, that notwithstanding such interest on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed. *Scott* v. *Hunter*, 14 Gr. 376.

Creditor Suing on Behalf of All Creditor—*Settlement.*]—Before judgment in an action by a creditor, on behalf of himself and all other creditors, to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but where judgment has been obtained by the plaintiff, it enures to the benefit of all creditors, and the defendant cannot get rid of it by settling with the actual plaintiff alone. Any other creditor will be entitled to obtain the carriage of the judgment, and to enforce it; and if, upon appeal from the judgment, the actual plaintiff refuses to support it, the court will give the other creditors an opportunity of doing so before reversing it. *Canadian Bank of Commerce* v. *Tinning*, 15 P. R. 401.

Cross-bill.]—A suit having been instituted by judgment creditors to set aside conveyances by their debtor made fraudulently and with a view to delay creditors, the debtor attempted to shew facts which, if established, would tend to annul the judgment altogether, or reduce it; such facts having been discovered since the judgment at law, and when it was too late to obtain a new trial:—Held, that the proper means of obtaining such relief was by cross-bill; the order of the court (G. O. 12, s. 4, of June, 1853), permitting cross-relief to be given to a defendant against the plaintiff, applying only where the defendant is entitled to some relief growing out of the same transaction as forms the foundation of the suit; not where the object of the defence is to obtain relief not growing out of such transaction, but against it. *Buchanan* v. *Cunningham*, 10 Gr. 513.

Directing Trial of Issues.]—The plaintiff prayed that his deed to one of the defendants should be set aside for fraud; and though he failed to prove the fraud as alleged, yet the case being extremely peculiar and surrounded with many circumstances of suspicion, the court directed issues for the trial at law of the points in dispute. *Taylor* v. *Shoff*, 4 Gr. 261.

Error in Decree.]—At the hearing a decree was pronounced declaring a deed void to the extent of the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing up the decree the deed was declared void as to the children of an intended marriage of the son of the grantor. Under this decree a sale of the trust estate was had at the instance of the plaintiff, a creditor who had filed the bill impeaching the deed as fraudulent. The court refused to carry out the sale, and ordered the decree to be corrected, and a new sale had, in which the interests of the children of the marriage should be protected. *Thompson* v. *Dodd*, 26 Gr. 381.

Evidence of Acts not Pleaded.]—Where a party filed a bill to set aside a deed on the ground of fraud:—Held, that evidence of particular acts of fraud, although not charged in the bill, was admissible. *Wright* v. *Henderson*, 1 O. S. 304.

Evidence of Other Transactions.]—Plaintiff was son-in-law of and lived with one J. D., using half of the same shop, and they had made arrangements with the express object of putting J. D.'s property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D.'s real estate prior to plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D.'s goods, it appeared that the purchase money paid by plaintiff had been credited to him out of the sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D.:—Held, 1. That evidence of the settlement was admissible; 2, that the jury rightly found against the plaintiff's claim. *Cook* v. *Hendry*, 7 C. P. 354.

Form of Decree—*Dower.*]—In setting aside a deed for fraud, at the instance of a judgment creditor by a decree of the court, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property; the court will not simply set aside the deed and allow the judgment creditor to enforce his claim at law. And where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate of the grantor, the creditor not being entitled to the benefit of such release of dower. Quære, in such a case what is properly the effect following from the release of dower, and to whose benefit it will enure. *Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502.

Form of Judgment.]—In a suit by a judgment creditor to set aside a fraudulent settlement, and to realize his judgment, praying a sale of the property on default in payment, if the sale prove abortive:—Semble, that the usual order for redemption, or in default foreclosure, will be granted; at all events it would be so if the judgment debt was subject to a prior mortgage which the judgment creditor would be entitled to redeem. *Commercial Bank* v. *Cooke*, 1 Ch. Ch. 205.

Fraudulent Transfer of Goods—*Joinder of Action for Recovery of Penalty.*]—An action by the party aggrieved to recover the moiety of the penalty imposed by s. 3 of 13 Eliz. c. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes. Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act. Section 28 of R. S. C. c. 173, only applies to the concluding part of said s. 3, namely, that relating to imprisonment on conviction, &c. Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the statute of Elizabeth,

such claim cannot afterwards be set up on appeal to a divisional court. *Millar* v. *McTaggart*, 20 O. R. 617.

Jurisdiction of Master.]—Held, (1) An instrument may be impeached in the master's office for fraud, where the question legitimately arises during a reference. (2) This may be done, though an executor be thereby delayed in passing his accounts, where the question raised affects the accounts, and where, moreover, the executor is charged with participation in the fraud. (3) This may be done where the question of fraud is raised by persons served with copy of decree under G. O. 99. *Darling* v. *Darling, Re Rossa's Claim*, 15 C. L. J. 112.

In the course of a reference made to the master in ordinary in winding-up proceedings under R. S. C. c. 129, s. 77, s.-s. 2, as amended by 52 Vict. c. 32, s. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—Held, that the master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. c. 129, s. 31, by way of action. *In re Sun Lithographing Co., Farquhar's Claim*, 22 O. R. 57.

Perverse Verdict.]—Where in trover the court thought the jury should have treated the transaction as being, on the plaintiff's own shewing, ipso facto fraudulent, they granted a new trial, though the verdict was only for £11 10s., with costs to abide the event. *Knowlson* v. *Conger*, 7 U. C. R. 455.

Sale in Default of Payment.]—Where the circumstances attending a transfer of real estate from one brother to another, were such that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold. *Bank of British North America* v. *Rattenbury*, 7 Gr. 383.

Service out of Jurisdiction—*Fraudulent Conveyance of Land in Ontario—Fraudulent Transfer of Goods in Ontario.*]—See *Livingstone* v. *Sibbald*, 15 P. R. 315; *Clarkson* v. *Dupré*, 16 P. R. 521.

(b) *Amendment.*

Allegation of Insolvency.]—Leave refused when the proposed amendment was an allegation that a mortgage was made whilst the mortgagor was insolvent. *Curtis* v. *Dale*, 2 Ch. Ch. 184.

Description of Land.]—The plaintiffs filed their bill to impeach a conveyance of lands in N. to the wife of a defendant. In describing the lands by metes and bounds, by mistake only a portion of the lands in N. was included, which portion was afterwards lost to the parties by being sold under a power in a mortgage. A motion for leave to amend the bill by inserting the property in N. not included in the former description, was granted. *Wallace* v. *Ford*, 1 Ch. Ch. 287.

New Ground of Relief.]—The court, though it refused to set aside a purchase on the ground of fraud in the vendor, gave leave to amend the bill, alleging over value as a ground for relief. *Rees* v. *Wittrock*, 6 Gr. 418.

Recovery of Second Judgment.]—The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and, as judgment creditors under that judgment, had filed their bill to set aside a prior judgment of other defendants, and had obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction granted, the plaintiffs obtained another judgment against P., not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill, by alleging the recovery of the second judgment, was granted. *Montreal Bank* v. *Auburn Exchange Bank*, 1 Ch. Ch. 283.

Renewal of Writ.]—After a bill had been filed by a judgment creditor, impeaching certain dealings between his debtor and a vendee of the debtor, the plaintiff allowed the writ against lands to run out for some time, but subsequently renewed it before the hearing:—Held, not necessary to amend stating this fact, and that its existence was no objection to the plaintiff obtaining relief at the hearing. *McDonald* v. *McLean*, 16 Gr. 695.

Setting up New Grounds.]—Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief, at the hearing leave was given him to amend, setting forth such grounds, and a decree was made in his favour, but without costs. *Watson* v. *McCarthy*, 10 Gr. 416.

(c) *Costs.*

Contribution to Solicitor and Client Costs.]—Where a creditor filed a bill impeaching conveyances made by the debtor as fraudulent against creditors, and the relief prayed was granted at the hearing, the court ordered the difference between party and party and solicitor and client costs to be paid pro ratâ by such of the creditors as might avail themselves of the benefit of the suit, for the purpose of obtaining payment of their demands. *Pegg* v. *Eastman*, 13 Gr. 137.

Disclaimer.]—A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee by his answer disclaimed and alleged that the deed was executed without his knowledge or consent, and that when he became aware of it he had repudiated it:—Held, that having been properly made a defendant, he was not entitled to his costs. *Shuttleworth* v. *Roberts*, 11 Gr. 237.

Personal Liability of Defendants.]—Where a conveyance is set aside as void against creditors, a sale ordered, and costs up to the hearing given against the defendants, these costs should be paid by the defendants immediately, where it is manifest the property is not sufficient to pay the creditors in full. *Gill* v. *Tyrrell*, 11 Gr. 474.

Preference—*Creditor's Duty to Give Information.*]—Where a bonâ fide transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and afford to the other creditors reasonable satisfaction as to the moral character of the transaction; and if this duty is neglected the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this court by the other creditors whom it disappointed. *Healey* v. *Daniels*, 14 Gr. 633.

Representative Action—*Costs in Nature of Salvage.*]—In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant C. as might contribute to the expenses of the suit; and directed that the plaintiff should be paid his party and party costs by the defendant McC., and his additional costs as between solicitor and client out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the court of appeal and the supreme court of Canada, and the judgment at the trial was finally affirmed in all respects, but the additional costs as between solicitor and client were not given by the court of appeal or the supreme court:—Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred as between solicitor and client to the end of the proceedings in the supreme court; that the plaintiff had a right to object to the other creditors coming in to share in the fund until they had contributed to these extra costs; and, in order to avoid circuity, it was directed that they should be taxed and paid out of the fund. *Macdonald* v. *McCall*, 12 P. R. 9.

——— *Two Mortgages—First Set aside—Salvage.*]—See *Coursolles* v. *Fookes*, 16 O. R. 691.

Second Action.]—A bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved failed to establish more than a case of suspicion against the bona fides of the transaction; and the same relief having been sought in a bill by other creditors who were also the personal representatives of the debtor, which relief was refused, the court in dismissing the present bill did so with costs, notwithstanding the reasons for doubting the bona fides of the transaction. *Scott* v. *Hunter*, 14 Gr. 376.

Tendered Reconveyance.] — Where a conveyance of land was set aside as being fraudulent, the costs of preparing and tendering a reconveyance for execution before service of the bill were held not taxable against the defendant. *Pringle* v. *McDonald*, 7 P. R. 152.

Trustee—*Acting in Good Faith.*]—A postnuptial settlement was executed by a person insolvent, but the trustee was ignorant of the fact of his indebtedness. The court, on a bill filed impeaching the settlement as fraudulent against creditors, set it aside with costs as against the settlor; but ordered the trustee to receive his costs out of any residue of the fund, after payment in full of the claims of the creditors, with costs. *Merchants Bank* v. *Macdonald*, 19 Gr. 476.

A bill was filed impeaching a deed as void under the statute of Eliz., and the same was set aside with costs, as against the party beneficially interested; but without costs, as against the trustees, as the ground upon which the same was set aside was not necessarily, and probably was not, known to them. *Beavitt* v. *Scanlon*, 20 Gr. 352.

(d) *Parties.*

Adding Execution Creditors as Co-Plaintiffs.]—In an action to set aside a conveyance by K. to his wife as fraudulent, brought by the assignee for the benefit of creditors of K., in pursuance of the powers conferred upon such assignee by 48 Vict. c. 26, s. 7 (O.), an order was made adding certain execution creditors of K. as parties plaintiff, upon the motion of the plaintiff, who desired that the action should not be defeated, if in other litigation pending it should be determined that the Act was ultra vires. *Ferguson* v. *Keaney*, 12 P. R. 455.

Attacking Conveyance to Separate Grantees.]—To a bill by an execution creditor to set aside as fraudulent against creditors, two distinct conveyances executed at different times to two separate grantees, the two transfers having no connection with one another—a demurrer for multifariousness was allowed. *Pyper* v. *Cameron*, 13 Gr. 131.

Grantor.]—A person claiming under a disseisor, may obtain a release from the disseisee, notwithstanding he has previously executed what purported to be a conveyance in fee to a third person, void for fraud as well as for want of interest in the grantor; and may file a bill to have such conveyance delivered up, without making the disseisee a party. *Whitla* v. *M'Intosh*, 2 O. S. 10.

To a bill to set aside a conveyance as void against the grantor's creditors, the grantor, to whom a small balance was due, and who resided in the United States, was—Held, not to be a necessary party. *Scott* v. *Burnham*, 19 Gr. 234.

Since the Judicature Act, in an action by a simple contract creditor, claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee. *Gibbons* v. *Darvill*, 12 P. R. 478. See *Beattie* v. *Wenger*, 24 A. R. 72.

Husband of Married Woman Grantor.]—To a bill against a married woman to set aside a mortgage made by her on the ground that the same was fraudulent as against creditors, the husband was made a

party defendant:—Held, on demurrer, that since the passing of the Married Woman's Property Act, 1872, the husband was not a necessary or proper party. Semble, that such a dealing on the part of a married woman was a "tort" within the meaning of the above Act, for which she could be proceeded against as if unmarried. *McFarlane* v. *Murphy*, 21 Gr. 80.

Joining Husband in Action to Declare Wife his Appointee.]—In proceeding to set aside a deed to a married woman on the ground that the same was made to her as the appointee of her husband, who was insolvent, and was so made in order to defeat his creditors, it is not proper to make the husband a party. *Murdoch* v. *O'Sullivan*, 25 Gr. 392.

Joint Debtors.]—To a bill by an execution creditor of two joint debtors to set aside conveyances by one of them as fraudulent and void against creditors, the grantor was a defendant:—Held, that if the grantor was a necessary party, his co-debtor should be a party also. *Pyper* v. *Cameron*, 13 Gr. 131.

Partner against Partner—*Trustee and Cestuis que Trust.*]—To a bill filed by one co-partner against another seeking to set aside a marriage settlement as having been made by the settlor at a time when he was insolvent, the trustee and cestuis que trust of the settlement are necessary parties, as they are entitled to have the accounts of the partnership taken, and assets thereof applied in exoneration of the settled lands. *Thomas* v. *Torrance*, 1 Ch. Ch. 46.

Several Creditors Joining.]—A bill to set aside a conveyance as fraudulent against creditors was filed by five distinct persons or firms who held overdue notes upon which the alleged fraudulent grantor was indorser, "on behalf of themselves and all other the creditors of the defendant:"—Held, on demurrer, that there was no misjoinder, and that the bill sufficiently shewed it to be on behalf of all creditors. *Turner* v. *Smith*, 26 Gr. 198.

Several Plaintiffs.]—The plaintiffs who were severally interested in certain chattels, joined in a bill seeking to have an alleged sale and transfer of them to defendant, set aside on the ground of fraudulent practices by the defendant. A demurrer on the ground of misjoinder of plaintiffs, was allowed, and a demurrer for want of equity was overruled, but, following the rule in Paine v. Chapman, 6 Gr. 338, without costs to either party. *Skinner* v. *Palmer*, 20 Gr. 374.

Trustee—*Cestuis que Trust.*]—Where the tenant for life was trustee, and after the cesser of other estates, was to hold the estate for the benefit of the children of C.:—Held, that the trustee sufficiently represented their interests, and that they need not be parties to a bill impeaching the trust deed as fraudulent against creditors. *Thompson* v. *Dodd*, 26 Gr. 381.

(e) *Pleading.*

Admission of Concurrence in Fraud.]—See *Day* v. *Day*, 17 A. R. 157.

Allegation of Intent.]—In a suit impeaching a conveyance on the ground of fraud, the bill stated that the grantor for a professed valuable consideration conveyed the land; and the conveyance "was made with intent on the part of the said defendant to defeat, delay, and defraud the said plaintiff," and the other creditors:—Held, that this sufficiently stated a want of consideration for the conveyance, and that the object was to defeat, hinder, and delay creditors within the meaning of 13 Eliz. c. 5. *Sawyer* v. *Linton*, 23 Gr. 43.

Alleging Notice of Fraud.] — A bill setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mortgage. It is for the defendant, in such a case, to set up the defence of no notice. *Kitchen* v. *Kitchen*, 16 Gr. 232.

Fraud not Distinctly Charged.] — Where a bill was filed to impeach a deed as colourable, and the evidence shewed it to be fraudulent, if not colourable, and the same statements would have been necessary had the bill sought to impeach it on the ground of fraud, the court refused to entertain an objection at the hearing that the bill had not sought to set it aside on that ground, or assigned fraud as an alternative ground of relief. *Commercial Bank* v. *Cooke*, 9 Gr. 524.

Non-Averment of Representative Capacity.]—In an action to set aside a conveyance of land as a fraudulent preference the non-averment that the plaintiff sues on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. Act, rules 103, 104. *Scane* v. *Duckett*, 3 O. R. 370.

(f) *Summary Application.*

Issue from County Court.]—An issue had been directed from a county court to one of the superior courts under R. S. O. 1877 c. 49, s. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the county court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to defendant, the grantee in the conveyance, who did not return it; and the plaintiff, after the time for trial had elapsed, applied in the superior court for an order absolute for sale of the land:—Held, such order could be made only in the county court, whence the issue had been directed, and that the superior court could only try the issue, and could make no final disposition of the matter:—Held, also, that the application was not in any event well founded, as the plaintiff should have proceeded with the trial of the issue. Quære, as to the granting of a new trial, or reviewing the verdict upon such an issue. *Merchants Bank* v. *Brooker*, 8 P. R. 133.

Issue Directed.]—A plaintiff having obtained a decree for payment of money, registered the same pursuant to 20 Vict. c.

56, and applied on petition for an order to sell the lands affected by such registration. By the same petition he impeached a sale of the same lands made by defendant to his mother before the registration of the decree, and sought to have the sale declared fraudulent and void as against him; but the court, though strongly impressed with the mala fides of the transaction, thought the question raised would be best decided in a suit to be brought to test the validity of the conveyance by the son. *Fish* v. *Carnegie*, 7 Gr. 479. See also *Ray* v. *Briggs*, 13 C. L. J. 40; *The Queen* v. *Smith*, 7 P. R. 429.

Scope of Act.]—Held, following Eastern Counties, &c., R. W. Co. v. Marriage, 9 H. L. C. 32; Lang v. Kerr, 3 App. Cas. 529; and Van Norman v. Grant, 27 Gr. 498, that both ss. 10 and 11 of R. S. O. 1877 c. 49, are to be governed by the heading immediately preceding s. 10; so that where the interest sought to be reached by the creditors has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under s. 11, and a decree for partition issued by a local master at the instance of a purchaser at sheriff's sale, under an order made by a county court Judge, where the interest which had been sold was that of one of four tenants in common in an equity of redemption in land which was subject to two mortgages in different hands, was on appeal reversed with costs. *Wood* v. *Hurl*, 28 Gr. 146.

Scope of Rules.]—Held, that con. rule 1008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances," is not limited to cases of equitable interests arising under fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land. A reference was directed to ascertain what interest the debtor had in the land in question. *Peters* v. *Stoness*, 13 P. R. 235.

IV. Fraudulent Judgment.

1. *In General.*

Action on the Case.]—Case will lie for collusively obtaining from defendant's debtor a confession for more than is due to him, under which the debtor's property has been sold in execution; and it may be maintained by any creditor injured by these collusive proceedings. *Ley* v. *Madill*, 1 U. C. R. 546.

Administrator Confessing Judgment for his Own Claim.]—An administrator being a creditor of the intestate, in order to secure his own debt, confessed judgment to his friend the plaintiff, to whom the intestate owed nothing, with the understanding that the lands in his hands should be sold under the judgment, and the proceeds paid over to him by the plaintiff. The court, on the application of the tenant of the land, set aside the judgment and execution with costs. *Bonstiel* v. *McMaster*, 6 O. S. 32.

Administratrix Giving Cognovit.]—A cognovit given by an administratrix to a creditor to enable him to sell the lands of intestate to perfect his title, without taking out an execution against goods, was set aside as collusive against the heir. *Ward* v. *McCormack*, 6 O. S. 215.

Assignment for Creditors.] — Under what circumstances an assignment made by a debtor of his goods to one or more of his creditors, for the benefit of themselves and others, may be upheld against another creditor, who has seized the same goods in execution upon a judgment confessed to him before the assignment, see *Farish* v. *McKay*, 5 U. C. R. 461.

Attachment — *Priority.*] — Where goods have been attached, a creditor obtaining a confession of judgment from the debtor without service of process, and execution upon it before the attaching creditors, does not obtain priority:—Held, that on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion. *Bird* v. *Folger*, 17 U. C. R. 536.

Collusion.]—One of the creditors of defendant, an absconding debtor, applied to set aside the judgment, &c., in this cause, for collusion, &c. It appeared by the affidavits filed, that one of the notes on which the action was brought, was dated the same day the writ was issued. Three days after the defendant absconded. The relations between the defendant and the plaintiff, were proved to have been intimate. A lawyer had been consulted a week previously to the commencement of the action, in relation thereto, and no defence had been made:—Held, to be facts from which collusion might be inferred such as the statute was intended to prevent. *Bevan* v. *Wheat*, 14 C. P. 51.

See Martin v. *McAlpine*, 8 A. R. 675. *Edison General Electric Co.* v. *Westminster Tramway Co.*, [1897] A. C. 193.

Collusive Sale under Execution.]—Where a debtor being embarrassed executed a cognovit to one creditor without his knowledge, and the debtor's household furniture being sold upon execution, the creditor purchased and immediately leased it to the debtor, at a rental amounting only to the interest of the purchase money, giving the debtor power to retain it as long as he pleased, and not making any provisions for deterioration; and it was afterwards seized at the suit of another creditor; and on the claim of the first creditor, an interpleader was directed, which was found in favour of the second execution creditor, on the ground that the sale to the first had been collusive—the court refused to grant a new trial on affidavit. *Sercos* v. *Tobin*, 2 U. C. R. 530.

Compelling Judgment Debtor to Impeach Judgment.] — A judgment debtor had suffered a judgment and execution against his goods, in a suit which he had himself caused to be brought by a party as trustee for his wife, under the assumption that she was beneficially entitled to the money come to his hands from the estate of her father, which in fact she was not, but a third person, her mother, was equitably entitled. On an application at the instance of a judgment creditor, that a co-defendant with the judgment debtor should be directed to file a bill to impeach the judgment so obtained by the wife's trustee, the court refused to interfere, holding

that there was sufficient doubt of the impeachability of the judgment to induce the court to refrain from directing a bill to be filed, but left the party entitled to the equity to take proceedings on her own responsibility. The application was under the circumstances refused without costs. *Granger* v. *Latham*, 2 Ch. Ch. 419.

Contest between Execution Creditors.]—Plaintiffs having seized the goods of defendants under an execution upon cognovit, other execution creditors applied to set aside or postpone the execution of plaintiffs, on the ground that the cognovit was void as against creditors under C. S. U. C. c. 26, s. 17:—Held, that the court ought not to interfere, but leave the parties to enforce their respective claims against the sheriff. *Ferguson* v. *Baird*, 10 C. P. 493.

Creditor of Company Suing Shareholder — *Impeaching Creditor's Judgment.*]—In an action by a creditor against a shareholder for unpaid stock in a company incorporated under 32 & 33 Vict. c. 13 (D.):—Held, that the shareholder under a plea that the judgment was obtained by fraud, was entitled to set up as a defence that the company had not in the original suit been served with process under s. 50, the person served as secretary not being such officer. *Harvey* v. *Harvey*, 9 A. R. 91.

Discharge in Insolvency — *Delay.*]—Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a scheduled creditor, issued a fi. fa. against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him and his assets taken; and also because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was being granted, raise the objection of no assets:—Held, that the fi. fa. goods must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment. Semble, however, that the plaintiff, by his conduct and lapse of time, was precluded. *Parke* v. *Day*, 24 C. P. 619.

Evidence of Interested Parties.]—Where a trader being in embarrassed circumstances arranged with the plaintiff to supply him with goods as agent, with a right to retain whatever sum he could make over a certain price, and also gave plaintiff a confession of judgment, under which execution was issued and the trader's furniture sold, part of which was purchased by the plaintiff, and remained in possession of a brother-in-law of the trader, in the house of the latter, and the bona fides of the transaction was proved at the trial solely by the evidence of the trader and his brother-in-law, when a disinterested witness might have been called, the court ordered a verdict for the plaintiff to be set aside, and a new trial had, on the ground that the ends of justice might be furthered by a second investigation. *Fowler* v. *Hendry*, 7 C. P. 350.

Executors.]—This action was brought to contest the validity of a judgment by the Bank of Upper Canada, against defendants, executors of Z., on a confession for £217,637 9s., the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared in evidence that nearly half of the judgment was for a debt due by Z. to the bank; the remainder was for debts of Z. assumed and paid by the bank at defendants' request, and for the advance of $60,000 to defendants, to enable them to complete the Sarnia branch of the Great Western Railway:—Held, that the debt on which this judgment was obtained, was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. *Commercial Bank of Canada* v. *Woodruff*, 13 C. P. 621; *Hamilton* v. *Woodruff*, 14 C. P. 22.

Semble, that lands may be sold under a judgment confessed by an executor. *Doe d. Lyon* v. *Legé*, 4 U. C. R. 360.

Application of executors to set aside judgment confessed by testator: see *Schroeder* v. *Rooney*, 11 A. R. 673. Affirmed by the supreme court: *Cassel's Dig.* 403, 434.

——— *Heirs Impeaching Judgment.*]—For the purpose of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor in the same way as next of kin are bound; and, although they are not entitled as of course to have the issues tried over again, still it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Gr. 280.

Fictitious Claims.]—In a suit to set aside a judgment obtained by a son against his father, as being fraudulent against creditors, it was alleged by both that after the son had attained twenty-one, he had remained working with his father as his farmer and overseer, the father promising to pay him what was right, but no sum as wages was ever named. This alleged agreement continued for about eight years, the son in the meantime having married and brought his wife home to reside with his father, who clothed and maintained them. The father having become embarrassed, by having indorsed for his brother, on which actions had been commenced against him, settled accounts with the son, he demanding, and the father agreeing to give, $15 a month to the son, and $5 a month to the son's wife during her residence in the house as wages. For this amount the father gave his note to the son, payable on demand, which was immediately put in suit, and the action not being defended, judgment and execution therein were obtained before the plaintiff could recover judgment in her action, which was defended. About the same time the father conveyed his farm to the son for $1,300, alleged to have been paid by the father of the son's wife, the property at the time being subject to several mortgages, one of them, for $2,000, having been

given by the father in payment of a small lot of land near Sarnia, but which neither the father nor son had ever seen. The court, under the circumstances, declared the judgment and execution fraudulent and void as against the plaintiff, and ordered the defendants to pay the costs of the suit. *Douglass* v. *Ward*, 11 Gr. 39.

Fictitious Debt.]—Where a debtor, who absconded from this Province, before his departure gave his cognovit for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the sheriff, and some paid to the plaintiff's attorney, the court, on the affidavits and application of several bonâ fide creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the creditors who had executions in his hands, ratably, according to their several claims. *Bergin* v. *Pindar*, 3 O. S. 574.

Foreign Divorce.]—Held, that the nonfeasance of the wife in failing to appear or defend an action for divorce in a foreign court, did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that court. *Maguire* v. *Maguire*, 11 A. R. 178.

See JUDGMENT.

Impeaching in Chancery.] — A judgment recovered at law by the fraudulent acquiescence of the defendant in the action, will be inquired into in the court of chancery at the instance of a subsequent judgment creditor; although the rule at law is, that only the party to the action can move against the judgment there. *McDonald* v. *Boice*, 12 Gr. 48.

Indemnity — *Impeaching Judgment against Plaintiff.*]—Debt on a bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A. to the plaintiff, through the agency of B., which sum was also claimed to have been paid to the plaintiff by one C., and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified of his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C. for the said sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shewn that the recovery by C. had been on admissions made by plaintiff after the execution of the bond:—Held, not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. *Powell* v. *Boulton*, 2 U. C. R. 487.

Irregularity — *Subsequent Creditor.*] — Interpleader, to try the right to certain shares in a schooner, seized under an execution at the suit of the defendant against W. S. M., on the 2nd of April, 1863. The plaintiff's title arose thus: On the 27th April, 1859, W. S. M. made a voluntary conveyance to his son. On the 5th March, 1860, the sheriff, under a ven. ex. against W. S. M., sold to S. M. The son on the 24th March, 1863, confirmed this title by a voluntary deed to S. M., who on the same day conveyed to the plaintiff. S. M. had in December, 1861, mortgaged to one T., who on the 28th March, 1863, assigned to the plaintiff. All these conveyances were duly registered at the custom house. The defendant objected that a judgment should have been shewn to support the ven. ex., and he desired to prove fraud affecting the sheriff's sale, by shewing that W. S. M. supplied the money then paid; but it was not denied that the plaintiff was a bonâ fide purchaser for value without notice; —Held, that the defendant, who so far as appeared was not a creditor of W. S. M. until long after the deed to his son, and who was a stranger to the judgment on which the ven. ex. issued, was not in a position to impeach the plaintiff's title, or to require that such judgment should be proved. *Vindin* v. *Wallis*, 24 U. C. R. 9.

——— *Fraud — Special Indorsement.*]—A subsequent judgment creditor of defendant cannot attack a prior judgment for insufficiency of the special indorsement on the writ on which it was obtained, but he may do so on the ground that it was allowed to be entered by fraud, and to defeat his claim, for judgments obtained on a writ specially indorsed are for this purpose to be looked upon in the same light as if founded upon a confession. Where it appeared that the bona fides of the judgment was open to suspicion, an issue was directed. *Wilson* v. *Wilson*, 2 P. R. 374. Approved of and followed in *Klein* v. *Klein*, 7 L. J. 286.

A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain. *Balfour* v. *Ellison*, 3 P. R. 30; 8 L. J. 330.

Where final judgment in default of appearance to a specially indorsed writ was entered on the 23rd January, and execution issued on the 30th of same month, and a writ of attachment under the Insolvent Act of 1864, issued on the 3rd February, an application on the 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service, was held to be too late. *Dunn* v. *Dunn*, 1 C. L. J. 239.

See Macdonald v. *Crombie*, 11 S. C. R. 107. *Bowerman* v. *Phillips*, 15 A. R. 679

Judgment for more than Debt.]—Application by a bank to set aside the judgment in this cause, for fraud and collusion with the absconding debtor. The defendant, being largely indebted to the bank, absconded on the 24th May, 1864, having previously, on the 7th May, assigned part of his property to the beneficial plaintiff. The judgment was on a note for $1,000, dated 1st October, 1863. The summons was issued 27th April, 1864, judgment signed 17th May, and execution issued 25th. The fi. fa. was indorsed for $1,037.83 debt, and $17.39 costs. The beneficial plaintiff admitted that he had only advanced £100 on the note:—Held, that the beneficial plaintiff not denying or explaining the circumstances mentioned in the affidavits filed, or why he allowed judgment to be entered and the execution indorsed for $1,000

instead of $400, (the amount actually due him) until the judgment was attacked; the judgment was fraudulent and should be set aside. *Dickson* v. *McMahon*, 14 C. P. 521.

Loan to Enable Debtor to Leave the Country.]—A security taken for a bonâ fide loan of money is not fraudulent and void merely because the money was lent to enable the borrower to leave the country in order to escape from his creditors. C. being involved went to K., and informed him that H., a creditor, was pressing him, and he must leave the country. K. lent him money to enable him to get away, took a confession of judgment, payable immediately, entered judgment, and issued execution, on which the sheriff seized C.'s goods which he had left behind. The day following the execution, H. sued out an attachment against the estate of C. as an absconding debtor:—Held, the bona fides of the loan not being disputed, that the object for which the money was advanced would not deprive K. of the benefit of his judgment as against H. *Hall* v. *Kissock*, 11 U. C. R. 9.

Mistaken Belief as to Liability.]—When a security intended to be given for the benefit of one supposed to be equitably entitled, although in preference to another creditor, which would itself be unimpeachable, has been given by mistake to a wrong person, and that person the wife of the grantor, the transaction, although the grantee had been apparently influenced by motives of personal advantage, was held not necessarily to be impeachable. *Granger* v. *Latham*, 2 Ch. Ch. 419.

Partial Invalidity.]—A judgment fraudulent against creditors as to part of the sum included therein, is void as against them in toto. *Commercial Bank* v. *Wilson*, 3 E. & A. 257; 14 Gr. 473.

See Campbell v. *Patterson*, *Mader* v. *McKinnon*, 21 S. C. R. 645.

Partition Judgment.]—Where proceedings for a partition in a county court have been terminated by an order confirming such partition, and nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception practised on the court otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside. *Jenking* v. *Jenking*, 11 A. R. 92.

Postponing Judgment.] — A judgment upon a confession obtained contrary to C. S. U. C. c. 26, s. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment. *McGee* v. *Baird*, 3 P. R. 9.

Reference to Ascertain Amount Due on Impeached Judgment.]—A. sued B., who had been previously sued by C., the plaintiff. Both suits were in the superior courts, but A. obtained judgment first, chiefly by having his case tried in the county court. A. issued execution and sold the goods of B., who was his son, after which he issued execution against B.'s lands for the residue, and advertised them for sale. C. then filed his bill, charging that at the time of recovering judgment nothing was due from B. to A., and that the judgment was collusive and fraudulent. But it appeared that A. had advanced various sums to B., or paid them on his account, and had also given him goods to a considerable amount, while there was no evidence of anything having been paid or given on account by B.:—Held, that the judgment of A. was good under the circumstances; but C. consenting to allow A. to examine B. as a witness, a reference was directed to ascertain the amount actually due from B. to A. at the time of A.'s recovering judgment, reserving further directions. *Stevenson* v. *Nichols*, 13 Gr. 489.

Relief at Law.]—Where by fraud and collusion a judgment has been recovered at law to protect the property of the judgment debtor, and a creditor takes proceedings at law for the recovery of his demand, he is precluded from applying to the court of chancery for relief, as the court of law has power to work out all the rights and remedies necessary to do complete justice. *Knox* v. *Travers*, 23 Gr. 41.

Sale to Defeat Claim — *Purchaser Impeaching Judgment.*]—A sale was made by a devisee to defeat the claim of a creditor of the testatrix; the creditor recovered judgment a few days after the sale, and before the payment of the purchase money; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due:—Held, in a suit by a creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment. *Scott* v. *Burnham*, 19 Gr. 254.

Special Facts.]—S., a judgment creditor of J. N., sr., applied on affidavits, to have a judgment of J. N., jr., against J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to cover up assets of the said J. N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., sr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum; and that on an examination of the father for disclosure he would not swear that he owed his son the amount and that he had no settlement of accounts. The affidavits in answer stated how the debts had accrued, giving the details; that there was no collusion between the father and son; that the son frequently asked his father for a settlement but could not get it; and that he had never been a party to or authorized any settlement. The court held that the applicant had failed to shew fraud and refused to set aside the judgment. *Snowball* v. *Neilson*, 16 S. C. R. 719.

Statute of Limitations not Set up.]—The suffering a judgment by default, where Statutes of Limitations would have been a bar, is no proof of fraud in defendant. If such judgment be fraudulent, as giving a preference to one creditor, it can only be objected to on that ground by the creditor, and not, as in this case, by the tenant of the executor. *Sloan* v. *Whalen*, 15 C. P. 319.

Statute of Limitations Set up by One Creditor against Another.] — Where a judgment is successfully impeached on the

ground of fraud and collusion between the creditor and the executor of the debtor, it is open to the parties interested in the estate of the deceased to set up the Statute of Limitations to the claim of the creditor, which the executor had omitted or neglected to plead. *Jardine* v. *Wood*, 19 Gr. 617.

Surety Obtaining Judgment before Paying.]—Where the plaintiffs had incurred liabilities by joining with a trader in notes, and took a judgment by confession from him before they had discharged such liabilities, or before any actual debt was owing from such trader to them:—Held, that such transaction was not necessarily void as against the creditors of such trader, and that it was properly left to the jury to say whether it was bona fide. *Swayne* v. *Rattan*, 6 C. P. 399.

It appeared that B.'s judgment, which was attached, was made up for the most part of notes on which he was liable for the defendant in the execution, but which he had not then paid. The defendant had not defended B.'s action, though he had for a time defended that of the plaintiff:—Held, that this conduct did not of itself avoid the judgment, and that the jury were warranted in finding it not fraudulent. *Snarr* v. *Waddell*, 24 U. C. R. 105.

Testator and Executrix—*Appropriation of Payments.*]—M., the testator, died in November, 1847, indebted to the plaintiff in £55, having appointed defendant his executrix. The account was continued after his death, and was afterwards rendered to defendant and headed as against widow M.; and further advances were made to her from time to time, and payments made by her on account, down to August, 1849, the payments amounting to far more than the debt due from the testator. In December, 1849, a confession of judgment was obtained from defendant, as executrix of the testator. On a rule nisi to set aside the judgment entered on the confession:—Held, that the plaintiff having transferred his claim against the estate to the individual account with the defendant, and with her assent, and having since received more than sufficient to cover the debt of the estate, he could not sever the two accounts and fall back upon the estate for the amount due at the testator's death; and the judgment was set aside. *Beatty* v. *Maxwell*, 1 P. R. 85.

Usury.]—Where a plaintiff had been guilty of gross usury in taking a confession of judgment from a defendant, the court stayed the proceedings on payment of the true debt and interest, although the judgment had been assigned, the assignee having been shewn to have had notice of the usury before he took the assignment. *Knapp* v. *Forrest*, 6 O. S. 557.

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2. *Practice as to Cognovits.*

(a) *By Whom Executed.*

A cognovit may be executed by the attorney of the party giving it. *Richmond* v. *Proctor*, 3 L. J. 202.

One of several executors has no power to bind the other by giving a cognovit, and where judgment had been entered on such a confession it was set aside as against all. *Commercial Bank of Canada* v. *Woodruff*, 21 U. C. R. 602.

The drawer of a bill accepted by the testator having joined in a confession thus given, the court refused to set aside the judgment as against him. *Ib.*

A partner cannot sign a cognovit in the name of the firm without special authority, and a judgment entered upon such cognovit will be set aside. *Holme* v. *Allan*, Tay. 348; *Huff* v. *Cameron*, 1 P. R. 255.

Where one partner gave a cognovit for himself and partner, without his partner's concurrence, and there was strong evidence of collusion with the plaintiffs to defraud other creditors, the court set aside the cognovit and judgment entered thereon with costs. *Joyce* v. *Murray*, M. T. 6 Vict.

But where eighteen months had elapsed since the judgment entered on a cognovit so signed had been acted upon, and it seemed most probable that the other partner was an assenting party, the court refused to set aside the judgment. *Brown* v. *Cinqmars*, 2 P. R. 205.

(b) *In What Cases.*

May be taken in a cause although no process has issued; and a defendant who has given such cognovit with a stay of execution to a certain day, may be arrested on a ca. re. before that day. *Walton* v. *Hayward*, 2 O. S. 408.

A plaintiff giving time to defendant by accepting notes may, as an additional security, take a cognovit for the whole debt, with power to issue execution thereon at any moment. *Parker* v. *Roberts*, 3 U. C. R. 114.

A verbal agreement, however, restricting such power, will be acted upon by the court. *Ib.*

The fact that none of the notes had become due when the cognovit was put in force, will not affect the judgment or execution on such cognovit. *Ib.*

A cognovit may be taken as a continuing security for future acceptances, and will be good as against other creditors. *Potter* v. *Pickle*, 2 P. R. 391.

(c) *Intervention of Attorney.*

See McLean v. *Cumming*, Tay. 184; *Jones* v. *Barnes*, T. T. 7 Wm. IV., R. & J. Dig. 675; *Lodor* v. *Heathcote*, H. T. — Wm. IV., R. & J. Dig. 673; *Thompson* v. *Zwick*, 1 U. C. R. 338; *Clarkson* v. *Miller*, 2 U. C. R. 96; *Paterson* v. *Squires*, 1 C. L. Ch. 234; *Kay* v. *Grant*, 8 U. C. R. 517; *McLeod* v. *Mead*, 1 P. R. 285; *Case* v. *Benson*, 3 L. J. 132.

(d) *Filing.*

Where judgment has been entered upon a cognovit it need not be filed within the periods respectively limited by ss. 17 and 18 of the C. L. P. Act, 1857. *Commercial Bank of Canada* v. *Fletcher*, 8 C. P. 181; *Armour* v. *Carruthers*, 2 P. R. 217; *McLean* v. *Stuart*, 2 P. R. 367.

Immaterial discrepancies between the sworn copy filed and the original, constitute no ground for setting aside the judgment. *Irvin v. Hoss*, 9 L. J. 80.

A defendant seeking to set aside a judgment on a cognovit, as not being filed in the county where he resided at the time of giving the cognovit, must shew that he was not so resident. *Ib.*

Where parties dispute as to the balance due on a judgment, a reference may be made to the master. *Ib.*

(e) *Judgment on Cognovit.*

Application to Enter.

Granted, where the witness to a cognovit had left the Province. *King* v. *Robins*, Tay. 260.

Refused, on a cognovit more than fifteen years old, when it appeared that the plaintiff had once accepted property from defendant, and discharged the action, though the property proved unproductive. *Grant* v. *McIntosh*, 4 O. S. 184.

Cognovit given by one attorney and witnessed by another, who was absent. Leave given to enter judgment upon proof of the handwriting of defendant and the witness. *Chad* v. *Latham*, 1 U. C. R. 412.

Granted upon a cognovit seven years old, upon affidavit from plaintiff of the whole being due, and that having received a letter from defendant he believed him to be still alive, though the affidavit did not state that defendant wrote or signed the letter. *Oliphant* v. *McGinn*, 4 U. C. R. 170.

Application to Set Aside.

Where a cognovit was given with a stay of execution to a future day, and a memorandum was indorsed deferring payment of part for a longer time, and at the day judgment was entered for the whole, the court restrained the levy, according to the memorandum with costs. *Alexander* v. *Hervey*, T. T. 7 Wm. IV.; *Fisher* v. *Edgar*, 5 O. S. 141.

After a cognovit given by the principal and his sureties jointly, the court will not set aside a judgment entered against all because time has been given to the principal without the consent of the sureties. *Mowat* v. *Switzer*, M. T. 3 Vict.

Where a cognovit intituled in the cause against several defendants, is executed by some only, judgment cannot be entered against these latter only. *Roach* v. *Potash*, T. T. 2 & 3 Vict.

A judgment entered on cognovit without filing common bail, is irregular. *Goslin* v. *Tune*, 1 U. C. R. 277.

Where the plaintiffs are styled in proceedings upon a cognovit as they are named in the cognovit itself, the defendant, having recognized the plaintiffs' names in his cognovit, cannot object that the christian and surnames of the plaintiffs have not been used in the proceedings. *Parker* v. *Roberts*, 3 U. C. R. 114.

Judgment entered and fi. fa. issued in an outer district, where suit not commenced, were set aside. *Commercial Bank* v. *Brondgeest*, 5 U. C. R. 325.

Semble, that the assignees of a bankrupt defendant may take the above exception to a judgment. *Ib.*

A judgment entered upon a cognovit in an outer district, no previous proceedings having been had there, is void. Semble, however, that if it had been transmitted to Toronto, and an entry made there, so as to constitute an entry of judgment on the face of the judgment roll, or so as, in the terms of 8 Vict. c. 36, s. 4, to enter judgment of record, and docket it in the principal office, it might have been upheld. *Laverty* v. *Patterson*, 5 U. C. R. 641.

The styling of a cognovit thus, "Thomas Paterson, plaintiff, v. Philemn Squires and Willian Squires, defendants," leaving out the letter o, and omitting part of the letter m, was not an irregularity, (there being no doubt as to the identity of the parties), upon which a judgment and execution upon the cognovit could be set aside. The application was also refused on the merits. *Paterson* v. *Squires*, 1 C. L. Ch. 234.

In a cognovit (containing the usual undertaking not to bring error or file any bill in equity) damages were confessed at £500, and the declaration on the roll laid them at that sum; the entry of judgment confessed damages at £1,000, "as by the declaration is above alleged;" and the conclusion was, that the plaintiffs do recover £500:—Held, no irregularity, the judgment being supported by the confession. *Folger* v. *McCallum*, 1 P. R. 352.

Semble, that it is not necessary to enter an appearance for defendant in signing judgment on cognovit, the defendant coming into court and confessing being a sufficient appearance; and that the court would at all events allow such appearance to be entered nunc pro tunc:—Held, however, that in this case the want of an appearance was not sufficiently shewn, and that the application was too late. *Ib.*

A. and B., executor and executrix, having given a cognovit signed by them as executor and executrix, which the plaintiff's attorney led them to believe would bind them only in their representative character:—Held, that though the cognovit might bind them personally in its terms, a personal judgment entered up against them must be set aside. *Gorrie* v. *Beard*, 5 U. C. R. 626.

Semble, also, that the judgment roll, alleging "a debt due by the testator in his lifetime on an account stated, in consideration of which the defendant promised to pay," would not warrant a judgment against the defendants personally, but only against them as executor and executrix. *Ib.*

Where judgment was entered on a cognovit duly executed, but without filing an affidavit of execution:—Held, not a nullity, so that the judgment might be set aside at the instance of other creditors of defendant, but an irregularity only; and the affidavit was allowed to be filed afterwards. *Potter* v. *Pickle*, 2 P. R. 391.

If the judgment entered upon a cognovit be irregular, another judgment creditor of defendant may move to set it aside. *Armour* v. *Carruthers*, 2 P. R. 217.

(f) Miscellaneous Cases.

Where one of the bail to the sheriff had, in consequence of the defendant leaving the Province, and under an apprehension that he would not return to defend the cause, given a cognovit in his own name to the plaintiff, the court, upon an affidavit of merits, stayed the proceedings upon cognovit. *Roberts* v. *Hasleton*, Tay. 32.

Such order being conditional "upon payment of all costs incurred by proceedings against the sheriff's bail," the court determined that the cost of the proceedings upon the cognovit should be considered as such costs. *Hasleton* v. *Brundige*, Tay. 84.

To debt on judgment a plea was pleaded in effect alleging that the judgment was entered upon a cognovit in which, though the nominal debt was admitted to be £200, as sued for, the true debt was only £79, which sum was paid in satisfaction of the judgment:—Held, on demurrer, plea bad. *Crooks* v. *Wilson*, 8 U. C. R. 114.

In a defence like this the proper course for defendant to take is to apply to have satisfaction entered on the judgment, or to stay proceedings in the suit upon the judgment. Principles of pleading prevent the defence being urged in the shape of a plea. *Ib.*

Where defendant gave a confession on the 13th May, 1856, containing an agreement that judgment might be entered at once, but no execution to issue until default in payment of a sum named on the 1st June then next, "with interest thereon from this day till paid," and judgment was not entered till 28th April, 1857:—Held, that the plaintiffs were entitled to interest from the date of the cognovit, not from the entry of judgment only. *Ramsay* v. *Carruthers*, 25 U. C. R. 21.

Plaintiffs were nonsuited for not confessing lease, entry, and ouster. Subsequently to the trial defendant executed a cognovit:—Held, that the fact of the defendant having confessed judgment was a waiver of any formal exception he might have. *Doe d. Kerr* v. *Shoff*, 9 U. C. R. 180.

The acceptance of a confession of judgment with stay of execution until a period not later than the plaintiff could otherwise, and in the ordinary course, have obtained execution, will not discharge the defendant's bail. *Carter* v. *Sullivan*, 4 C. P. 298.

Where the object in an action is to set aside a confession, or a portion of the sum confessed, the plaintiff in the confession may shew in support of it the circumstances that constituted the consideration, and that such confession was to operate as a continuing security to cover future as well as past advances. *Douglas* v. *Mayer*, 5 C. P. 377.

A cognovit payable immediately, given by the maker of a note before it falls due, and judgment entered upon it and registered, forms no defence for the indorser. *Bank of Montreal* v. *Douglas*, 17 U. C. R. 208.

An affidavit of execution of cognovit made by "William D. Baby," signed "W. D. Baby:" —Held, sufficient. *Folger* v. *McCallum*, 1 P. R. 352.

V. Impeaching and Setting aside Transactions.

1. *In General.*

Acquiescence.]—The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the cotenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. A bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, was dismissed with costs. *Kennedy* v. *Bateman*, 27 Gr. 380.

Adopting Contract—*Discovery of New Incident.*]—A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by the fraud, the discovery of a new incident of the fraud does not revive the right to repudiate. In this case there being no finding by the jury that the defendant had knowledge of, and had waived the fraud, a new trial was directed. *Walton* v. *Simpson*, 6 O. R. 213.

Advertisement.] — Misrepresentation in advertisement of land to be sold. Effect of. See *Osborne* v. *Farmers' and Mechanics' Building Society*, 5 Gr. 326; *Canada Permanent Building and Savings Society* v. *Young*, 18 Gr. 566.

Advertisement—*Objects of Sense.*]—By the advertisement of an intended sale of land in lots, it was stated, "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen and various other kinds of trees." A purchaser at the sale, which took place upon the property, set up as a defence to a suit for specific performance that the soil was not such as was represented, and was unfit for gardening purposes, and that the trees upon the property were not of the description set forth in the advertisement:—Held, that these representations having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract. *Crooks* v. *Davis*, 6 Gr. 317.

Assignment of Mortgage — *Mistake — Innocent Holder.*]—P. P. mortgaged certain lands to J. H. as security for $2,100 and interest, the mortgage being left with E. G. P., a solicitor, for safe keeping. Afterwards K. E., a client of E. G. P., sold his farm to his own son for $1,700, who, through E. G. P., procured the advance of the purchase money from a loan company on mortgage, and the money being transmitted to E. G. P., the latter retained it, and handed to K. E. as security for it what purported to be an assignment of the mortgage from P. P. to J. H., executed by J. H., which K. E. registered. J. H. now brought this action, denying the validity of the said assignment, and claiming the removal of it as a cloud upon her title, and for payment of the mortgage by P. P., or on default a sale of the land. K. E. set up

the defence of a bonâ fide purchase by him of the said mortgage without notice:—Held, that inasmuch as it appeared that J. H. executed the assignment upon a misrepresentation of its nature, character, and contents, believing it only to provide for an extension of the term of payment of the mortgage held by her, the assignment was void, even in the hands of an innocent holder, and should be cancelled. There being no transmission of estate legal or otherwise, there was no basis on which to found a defence of purchase for value. Held, also, that under the circumstances, the transfer of the mortgage to K. E. was not carried out in such a way as to make him a purchaser for value of it, inasmuch as K. E., who dealt solely with E. G. P. in the matter, knew he was paying no money which could possibly go to satisfy J. H., but was taking the assignment as security for the money due from his son to him, and therefore had no reason to trust to any statement in the assignment that J. H. had been paid her mortgage money, and was not justified in accepting the assignment without the privity of J. H.; and therefore on this ground J. H. was entitled to relief by way of lien for the mortgage money. Doctrine of Ex parte Swinbanks, 11 Ch. D. 525, applied. *Herchmer* v. *Elliott*, 14 O. R. 714.

Attack Preferable to Defence.] — Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is, to institute proceeding in order to annul it, as it is rarely that effect can be given to a defence on such ground in a suit to enforce it. *Kains* v. *McIntosh*, 10 Gr. 139.

Bond — *Unintentional Misrepresentation.*] —The defendant agreed to become security with McG. for McB. to the plaintiffs, Plaintiffs' solicitor sent two bonds to their agent for execution, one by defendant, the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendant (made before he signed the bond), that McG. had promised to sign a bond too, told him that a bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his. The jury found that a statement was made leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by an unintentionally false representation:—Held, that the plaintiffs could not recover. *Toronto Brewing and Malting Co.* v. *Hevey*, 13 O. R. 64.

Calls—*Subscription Induced by Fraud.*]—In an action for calls on stock, a plea that defendant became holder of the shares by subscription, and was induced to become so by the fraud of the company, and that he has received no benefit from, and has repudiated the shares:—Held, good, on demurrer. *Provincial Insurance Co.* v. *Brown, Provincial Insurance Co.* v. *Denroche*, 9 C. P. 286.

Company—*Sales to Promoter at Fictitious Prices.*]—A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters purchasers would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful: the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market. The court of appeal held that it was too late to rescind the purchase; but that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties. *Lindsay Petroleum Oil Co.* v. *Hurd*, 16 Gr. 147; 17 Gr. 115.

On appeal to the Privy Council it was held that the contract must be wholly rescinded, the price repaid, and the land reconveyed. *S. C.*, L. R. 5 P. C. 221.

Composition — *Misrepresentation as to Debtor's Position.*]—The plaintiff having sued upon a note, and on the common counts for goods sold and delivered, &c., defendant pleaded to the whole declaration that the goods were sold on credit, and before the time had expired the plaintiff accepted from him a less sum in full satisfaction. Issue having been taken on this plea, it appeared that the plaintiff had settled for half the amount, and given a receipt in full to M., the defendant's brother-in-law, who paid it; but this settlement was brought about by a letter from M. to the plaintiff saying that he had just heard from defendant, who was in New York, and on his way to California, and had placed means within his reach to pay fifty cents on the 8, which the writer offered in full. There was strong ground for supposing the defendant never was in New York, or intended to go to California. The jury having found for the plaintiff for the half of the debt unpaid:—Held, that the plea should have been demurred to as pleaded to the whole declaration, and answering only to the claim for goods sold; but though the parties had treated it as an answer to the action, the court, under the circumstances, instead of so amending it, directed a replealer with leave to the plaintiff to reply fraud to the plea when amended. Semble, that the settlement if obtained on the representation, knowingly false, that the defendant was in New York, and on his way to California, would not bind the plaintiff; but quære, whether the plaintiff could reply the fraud, having affirmed the settlement by receiving and retaining the money. *Turner* v. *Boaverman*, 29 U. C. R. 187.

——— *Secret Advantage.*] — A. guaranteed to B. (a creditor of C.), certain composition notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee. *Clarke* v. *Ritchey*, 11 Gr. 499.

See sub-title II., *ante*.

Conditions not Fulfilled.] — In 1819, one Street agreed in writing with one Ryckman to furnish the latter with certain supplies, in consideration of which Street was to receive from Ryckman a conveyance of certain lands; and the agreement was deposited

with one Benson. The supplies were only partly furnished; but in 1824, deeds were prepared by Ryckman of the lands, and were handed to one Shook to be delivered to Street on giving up the agreement. Shook delivered up the deeds to Street on getting an order on Benson for the agreement; but on his presenting the order, it was found that the agreement was not forthcoming. The agreement afterwards got into Street's possession, and no explanation was afforded of this. In 1825, the deeds were accidentally destroyed by fire. Several actions of ejectment appeared to have been afterwards brought, and with varying results; and in 1850, a bill was filed by Street's devisee of part of the property against the defendant, who claimed under Hiles, to whom Ryckman had sold and conveyed the property in 1832. The bill, which prayed for a conveyance and for the cancellation of the subsequent deeds under which defendant claimed, was, under the circumstances, dismissed with costs. *Street* v. *Hogaboom*, 3 Gr. 128.

Conflicting Evidence—*Want of Candour—Costs.*]—The plaintiffs sought to set aside their purchase of a grist mill from the defendant, on the ground of false representations knowingly made to them by the defendant, and relied upon by them, as to the state of repair in which the mill was, and as to the water supply and the capacity of the mill for grinding. The evidence affirming and denying these representations was equally positive and explicit on either side. It appeared, however, that the purchase was not a hasty one; that the plaintiffs were and professed to be competent judges of the subject matter, one being a miller and the other an engineer; that they examined for themselves and made inquiries; that they were more eager to buy than the defendant was to sell; and that the conduct of the plaintiffs—which under the conflict of evidence was assumed to be the safest guide—was inconsistent with their assertion of a warranty, for they did not at first set it up, but asked to be relieved as a favour, and at one time it was agreed that they should pay $1,000 to be let off the bargain. Under all the facts, which are more fully set out in the judgment, the court refused to set aside the contract; but, as the evidence tended to shew a want of candour on the defendant's part, and a disingenuous exaggeration of the condition and capacity of the property, the bill was dismissed without costs. *Henry* v. *Pindar*, 22 Gr. 257.

Contract—*Rescission.*]—Quære, can a misrepresentation avoid a contract without fraud. *Lacey* v. *Spencer*, 3 U. C. R. 169.

——— *Title in Crown.*]—A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the ground of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in quantity:—Held, that as the whole estate, both legal and equitable, was in the Crown, the court would not interfere, even if the plaintiff had established the case stated; and that no fraud having been proved, the bill ought to be dismissed with costs. *Bown* v. *West*, 1 O. S. 287.

Damages — *Settlement — Medical Man's Advice.*]—The relationship of a medical man to his patient is one of trust and confidence, and he must act bonâ fide in advising him, or any settlement made through him, or in consequence of advice given malâ fide, will be set aside. *Rowe* v. *Grand Trunk R. W. Co.*, 16 C. P. 500.

It is the duty of a party setting up that a settlement of a claim for injuries has been obtained by misrepresentation, to establish not only that the settlement has been so obtained; but also that the amount paid is inadequate compensation for such injuries; and where there was an entire failure of evidence on this latter point, a new trial was granted on payment of costs. *Ib.*

Delay.]—A defendant in ejectment filed a bill to restrain the action, alleging that the deed under which the plaintiff claimed, was a forgery. The deed was dated about fifty years before the bill was filed, and the four witnesses to it were dead before the validity was impeached in any way. The court dismissed the bill with costs. *Fick* v. *McMichael*, 5 Gr. 646.

After thirty years' possession of land, by a person to whom the grantee of the Crown had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registry of the conveyance, and executed a deed to a person who had been in possession of a portion of the property for several years under the vendee's heir. To a bill filed to set aside this conveyance, the vendor and the second vendee set up the non-heirship of the plaintiff; a purchase for value without notice; and that the original vendee was a minor at the time of the exchange, and had repudiated the transaction on becoming of age; and further, that he had no title to the land conveyed in exchange. The court considered that the long possession and the absence of proof of the facts alleged by the defendants were sufficient to entitle the plaintiff to a decree with costs. *Harkin* v. *Rubidon*, 6 Gr. 405, 7 Gr. 243.

Error as to Property.]—Defendant induced plaintiff's agent to agree with him for the sale of Blackacre, the agent supposing he was selling Whiteacre. The agreement was set aside with costs, it appearing that the agent's error was either fraudulently occasioned, or confirmed by, or at all events well known to, defendant, when he entered into the agreement. *Talbot* v. *Hamilton*, 4 Gr. 200.

Fraudulent Judgment.]—Impeaching judgment in a partition case on the ground of fraud or deception having been practised on the court. See *Jenking* v. *Jenking*, 11 A. R. 92.

Guarantee—*Means of Knowledge.*]—The defendant, at the instance of F., the plaintiffs' manager, indorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter: that only 75 per cent. of the value of the grain would be advanced: that warehouse receipts would be taken; and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position, to sign a guarantee under seal,

which, though not intended, as F. stated, to vary the defendant's original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as indorser:—Held, that the guarantee was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent. *Molsons Bank* v. *Turley*, 8 O. R. 293.

Illiterate Woman — *Mortgage — Bar of Dower.*] — A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land. The mortgagee's solicitor knew that she had objected to mortgage her land, and it was not explained to her or her husband that, by her joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband, proceedings were instituted against his widow to compel payment by the assignee of the security. The court under the circumstances, declared the instrument invalid as against the separate estate of the widow, and dismissed the bill with costs. *Barrows* v. *Learoyd*, 29 Gr. 475.

Impeaching Administration Proceedings.] — On a bill filed by one of two infant plaintiffs in an administration suit, (after attaining majority) seeking to impeach the proceedings therein on the ground of fraud:—Held, that the fact that the plaintiffs in the suit, as also the trustees and the executors, had been represented by one solicitor; the omission from the decree of any direction as to wilful neglect or default on the part of the defendants therein; a material difference between the decree, and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor so acting for the several parties of a valuable portion of the estate, did not of themselves shew fraud and collusion. *McDougall* v. *Bell*, 10 Gr. 283.

Infant — *Fraudulent Representation of Age.*] — If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan. *Gower* v. *Morrison*, 26 Gr. 69.

The owner of real estate, six months before attaining majority, applied to effect a loan on the security thereof, alleging in answer to a question, that he was then of full age. A mortgage was accordingly executed and the money advanced; this the mortgagor expended in the purchase of other lands, which, together with the land so mortgaged, he, on the day after he attained twenty-one, conveyed to his brother for a nominal consideration:—Held, that the minority of the mortgagor could not be set up in answer to a bill to enforce payment of the mortgage, but the same remained a valid and subsisting charge upon the land held by his grantee. *Ib.*

To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation. *Confederation Life Association* v. *Kinnear*, 23 A. R. 497.

Interests of Third Persons.] — Action on a promissory note for $1,000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We the undersigned hereby covenant, promise, and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M., for $50,000, divided into fifteen shares of $3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, &c., to be borne proportionately by each member according to his share, appointing M. trustee to form the syndicate, and on completion the members were to appoint M. or any other person trustee to carry out the objects of the syndicate. The syndicate was completed, and the defendant appointed trustee, and a conveyance of the land made to him. It appeared that M. by fraudulently representing to defendant that the price he, M., paid for the land was $50,000, whereas it was only $31,000, that it was well worth $50,000, was suitable for being laid out for town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto, and had no knowledge, or means of acquiring knowledge, but relied upon the truth of these statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled:—Held, that by reason of the misrepresentation the defendant would have been entitled to be released from the contract had he been solely concerned, but that the defendant was not in a position alone to put an end to the agreement, for that the so-called syndicate was in fact a partnership, and all the members thereof were not asking for its rescission; and the defendant's remedy must be by cross-action or counter-claim for deceit. *Morrison* v. *Earls*, 5 O. R. 434.

Laches and Acquiescence — *Purchaser for Value.*]—The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed to plaintiffs in these suits, for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings to reform the deed executed by defendant, or treating it as a contract only, for a specific performance thereof:—Held, 1. that though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his favour, the court could not interfere to give the plaintiffs relief; and, 2. that though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief, were he a plaintiff, still they were no ground for granting the plaintiffs the relief sought; and the court dismissed the bill with costs. *Livingstone* v. *Acre*, 15 Gr. 610.

Lapse of Time—*Election to Affirm.*]—The defendant, in January, 1882, bought land in

Manitoba from the plaintiff for speculative purposes, paying $500 in cash, and giving a mortgage for the balance of the purchase money. Before the conveyances were executed the defendant, in answer to inquiries made by him from persons on the spot, received unfavourable accounts of the property, which were, however, explained away by the agent of the plaintiff. The defendant resisted payment of the mortgage, on which this action was brought, and counterclaimed for a return of the $500, upon the ground of false representation by the plaintiff's agent. On the 27th July, 1882, the defendant visted the land and found it worthless, and in the end of August or the beginning of September, gave notice of his intention to repudiate the contract:—Held, that the question of false representation was peculiarly one for the Judge at the trial, and that his finding in defendant's favour should not be disturbed, especially as it was concurred in by the divisional court. Held, also, that the defendant had not by lapse of time, acquiescence, or delay, lost his right to rescind. *Lee* v. *MacMahon*, 2 O. R. 654, 11 A. R. 555.

Lease—*False Representations as to Property.*]—A resident in England owning lands in Canada, where he had never been, was urged by a resident near the land to make him a lease, who represented in his correspondence that the lands were unoccupied, save by some squatters, who had built some huts and were stripping the land of most of the valuable timber, of which they were nearly denuded; that the lands were liable to forfeiture for taxes; and that the title of these trespassers would shortly become absolute by lapse of time. The owner was thus induced to execute a lease for twenty-one years, which he transmitted to the lessee, who went to the persons in possession, and got deeds of quit-claim of their interests respectively, taking from him a bond to re-convey in case he should be entitled to the possession. It was shewn that the persons were not as represented, but substantial farmers, with valuable clearings and buildings. Upon a discovery of the misrepresentations, the lessor and the occupants who had executed quit-claims filed a bill to set aside the transactions, and the court held them entitled to the relief prayed for, and that they were not improperly joined as plaintiffs. *Baby* v. *Cavanagh*, 5 Gr. 378.

Letters of Administration.]—Letters of administration obtained by fraud—Validity of until revoked. See *Irwin* v. *Bank of Montreal*, 38 U. C. R. 375.

Married Woman—*Mortgage.*]—Two mortgages on property of a married woman executed by her and her husband, in manner required by the statute in that behalf, were impeached by her as having been obtained by fraud, practised by the plaintiff in collusion with the husband, and for want of the evidence necessary in equity to sustain gifts:—Held, that as the mortgages had been given for valuable consideration, and the mortgagee had been guilty of no fraud in obtaining them, they were valid securities. *Mulholland* v. *Morley*, 17 Gr. 293.

Means of Knowledge.]—The rule is, that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach and does not choose to do so, he will not, on the facts turning out to be different from what they were represented, be entitled to any relief. *Coates* v. *Balon*, 21 Gr. 21.

Misrepresentation—*Second Action.*]—A person being in gaol on a charge of felony, was liberated upon the present defendant becoming bail for his appearance; and having between his liberation and trial conveyed his property to defendant for an inadequate consideration, afterwards filed a bill to set it aside on the ground of fraud, alleging his impression and defendant's assurance that the deed was merely a recognizance for his due appearance. This allegation being disproved, the court dismissed the bill, but without costs, and gave the plaintiff leave to file another, if so advised, on the grounds of inadequacy of consideration and undue influence. *Vallier* v. *Lee*, 2 Gr. 606.

Partition Unfair.]—An unequal partition obtained in a county court against a minor and feme covert through the contrivance of the co-tenant, the gross laches of the guardian ad litem, and the misapprehension of the referee (appointed under s. 17 of the Partition Act) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly. *Merritt* v. *Shaw*, 15 Gr. 321.

Partnership—*Misstatements to Incoming Member.*]—Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to $18,000, but it subsequently turned out that such losses amounted to about $22,000 or $24,000:—Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner, prior to the discovery of the untruth of the representation made as to the losses of the firm. *Merchants Bank* v. *Thompson, Mallon* v. *Craig*, 3 O. R. 541.

Held, that M. having become a partner also on the faith of the firm in question intending to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *Ib.*

Relief at Law—*Inadequacy.*]—A court of law can set aside a deed where a jury finds fraud in obtaining it; and although mere inadequacy of price is no ground, yet, in connection with the mental imbecility of the party executing it, it goes strongly to prove fraud. *Doe d. Jones* v. *Capreol*, 4 O. S. 227.

Rescission—*Onus of Proof.*]—A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit. *Bell* v. *Macklin*, 15 S. C. R. 576.

The plaintiff bought land described as "two parcels containing eighteen acres, more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot

offered for sale, being some twenty-five acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence at the trial shewed that plaintiff had knowledge, before his purchase, that a portion of the lot had been sold:—Held, that even if plaintiff was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation. *Ib.*

Sale of Goods — *Sct-off.*] — The plaintiff with the intention of parting with the possession and property in certain flour made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff:—Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker* v. *Fisher*, 19 O. R. 650.

Sale of Land—*False Representations as to Value.*]—The plaintiff, a daughter of a U. E. Loyalist, had been granted a lot of land, but in 1825 left Canada for the United States, where she had resided ever since. Various persons took possession of the land, and improved it so that it was worth £2,500. The defendant sent his agent to plaintiff, in Michigan, to treat for the purchase of her interest. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal, and thereby induced plaintiff to convey her interest in the land to defendant for an inconsiderable sum:—Held, that the representations made by the agent were material, and to be considered in weighing the bona fides of the contract, which was ordered to be cancelled. *Latham* v. *Crosby*, 10 Gr. 308.

——— *Mistake as to Boundary — Knowledge of Purchaser.*]—The defendant and his brother partitioned their lands, defendant taking the west half of a lot, on which was an hotel, and the brother, the east half, on which a store was erected, each supposing that the division line ran between the two buildings. The defendant sold his portion to the plaintiff, who had lived opposite for many years, the land being described as the west half according to a plan. The hotel encroached upon the east half at the rear end of the building about thirty-four inches, the value of the land encroached upon being very trifling. It appeared that the hotel could be moved for about $40; and that defendant had offered to procure a lease of the portion encroached upon at a nominal rent, which was refused. The plaintiff charged that the defendant had falsely and fraudulently represented that the division line between the two lots ran between the two buildings, and brought an action therefor, praying for a rescission of the sale, for an account of her improvements made, and for damages. The deed was drawn after the alleged misrepresentation and after the plaintiff knew of the encroachment, and nothing was then said about the line. The learned Judge at the trial found that there was no false representation, but he added defendant's brother as a party, and directed him to convey to the plaintiff the land encroached upon:—Held, that the action could not be maintained, for, among other reasons, the plaintiff knew of the encroachment when she took the conveyance, which made no provision respecting it; and she had so dealt with the property as to preclude her from claiming a rescission:—Held, also, that under the circumstances, more fully stated in the report of the case, the brother should not have been added; and the plaintiff, having based her action on the ground of fraud, should not be allowed to rely upon an entirely different ground. *Dunbar* v. *Meek*, 32 C. P. 195.

——— *Uncertainty — Misrepresentations.*] —The plaintiffs, a company formed for the purpose of colonizing lands in the North-West Territories, represented to defendant, by means of an advertisement issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land," in the said territories, "comprising 2,000,000 acres, for the purpose of settlement, free from the use of intoxicating liquors." The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice from the odd numbered sections of our lands as procured or to be procured from the Dominion," and paid certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors:—Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreements thereby, was therefore entitled to have them rescinded, and to recover back the money paid by him. Per Galt, C.J., the agreement was void under the Statute of Frauds, as when it was made the plaintiffs had no lands, and there was nothing in the agreement to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey:—Held, on appeal, per Hagarty, C.J.O., the agreement was void for uncertainty, the land in question not being in any way defined or ascertained, or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved. Per Burton, Osler, and Maclennan, JJ.A., the plaintiffs were unable to give to the defendant the right of selection they had agreed to give him, so that the action necessarily failed, and the defendant was entitled to judgment on his counterclaim, there being a failure of consideration. Per Burton, J.A., the agreement in itself was sufficiently certain, and was not void for misrepresentation. Per Maclennan, J.A., no misrepresentations justifying a rescission of the contract were proved ,but the agreement was void for vagueness and uncertainty. *Temperance Colonization Company* v. *Fairfield*, 16 O. R. 544; 17 A. R. 205.

——— *Undervalue — Bonâ Fide Purchaser —Account.*]—L. F. D. being the owner of certain valuable property, mortgaged it for $700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for $900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for $5,000, and a mortgage for $4,000 unpaid purchase money was taken to M. A. D. In an action by L. F. D., by L. D. his next friend, to set aside the sale or for an account, it was:—Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as

M. E. B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D. *Dufresne* v. *Dufresne*, 10 O. R. 773.

Sale of Shares.]—Sale of shares by plaintiff to defendant — Omission to communicate information as to standing of company. See *Machar* v. *Vandewater*, 26 Gr. 83.

Specific Performance — *Concealment by Purchaser of Resale.*]—The plaintiff negotiated with the defendants G. for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for $20,000. Defendants G. set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to a society at the same or a higher price for the defendants G. After these options had been given to the plaintiff he agreed to sell to the society for $25,000; and afterwards on the same day he went to the defendants G. and offered to purchase for $19,500 in lieu of the $20,000 previously named. He was asked by them whether the sale to the society was off, to which he replied that it was, and in the same conversation informed them that he could not sell the property for $20,000, as a reason why he should get it for $19,500, for if sold to another he, plaintiff, would be entitled to a commission of $500; and they thereupon agreed to sell to plaintiff for $19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the society for $25,000:—Held, that, without reference to the question of agency to sell, the evidence shewed that a sale to the society was in contemplation of both parties and was the foundation of the transaction, and that the misrepresentation by the plaintiff in regard to the sale to the society, was such as disentitled him to a decree for specific performance. *Walmsley* v. *Griffith*, 10 A. R. 327.

See Sub-titles I., II.

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2. *Improvidence.*

General Rule.]—If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand. It appearing upon the evidence in the report, that the plaintiff being overmatched and overreached by the defendant, without information and without advice, had made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant:—Held, that the plaintiff was entitled to have the transaction rescinded; his general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect, were such as to require the court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected. *Waters* v. *Donnelly*, 9 O. R. 391.

Agreement to Maintain.]—One of the plaintiffs was the owner of a farm valued at about $4,500, and being, as was also his wife, old and feeble and incapable of doing much manual labour, and also illiterate, negotiated with the defendant, the wife's nephew, a young man, with the object of effecting an arrangement for their support and maintenance. The defendant, without permitting the husband plaintiff to obtain independent advice, induced him and his wife to execute a deed to defendant, the latter giving him back a life lease. The consideration in the deed was natural love and affection, $1, and the life lease. The habendum and covenants for quiet enjoyment were made subject to the lease and the covenants therein. The annual rental in the lease was $1 with a covenant for quiet enjoyment, and a special covenant by defendant to support and maintain the plaintiffs, on performance of which he was to have the proceeds of the land. The defendant was also to pay $30 in cash yearly, and provide plaintiffs with a horse and vehicle and house room. On failure by defendant to perform such provisions plaintiffs were to have the proceeds of the land on giving defendant two months' notice in writing, and if the default still continued plaintiffs were to be at liberty to take steps to eject defendant.' The deed did not contain any power of revocation in case of defendant's default:—Held, under the circumstances, the deed and life lease must be set aside. *Hagarty* v. *Bateman*, 19 O. R. 381.

Conveyance Set aside — *Allowance for Improvements—Interest—Rent.*] — On 30th August, 1875, the plaintiff, an illiterate man, over seventy-five years old, voluntarily conveyed the farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On 23rd September, 1875, the plaintiff leased to D., one of the defendants, but for the benefit of both, the farm for the term of his, the plaintiff's life, reserving a rent of $100 a year, and "the proper board, clothing, and lodging" of the plaintiff "so long as he remains on the premises," and by the same deed transferred to D. all the goods and chattels on the farm. The defendants thereupon went into possession of the farm, on which the plaintiff also continued to reside, and before action brought had built a house on it, and made sundry improvements:—Held, that upon the evidence set out in the case, the grant of 30th August, 1875, and the lease of 23rd September, 1875, must be set aside on grounds of improvidence, and want of proper professional advice. Held, however, that though it appeared that the defendants had made serious default in regard to the lease of 23rd September, 1875, and had been guilty of violence to and ill-treatment of the plaintiff, yet the relief could only be granted upon the terms of the defendants being repaid all sums expended in improvements and repairs of a permanent and substantial nature by which the present value of the farm was enhanced, with interest from the time these sums were actually disbursed; also the moneys paid by them to keep down the interest on a certain mortgage, which had existed on the farm ever since its original purchase by the plaintiff, and any principal moneys thereof paid by them; also of the defendant D. being repaid rents paid to the plaintiff, and the value of such maintenance as he had given to the plaintiff, but that on the other hand, the defendants must be charged with deterioration, to be set off against improvements, and with rents and profits of all kinds received by them, and with an occupation rent, and also with the value of

the chattels mentioned in the lease, and given up to them by the plaintiff. *Shanagan* v. *Shanagan*, 7 O. R. 209.

Great Undervalue — *Unsubstantiated Charges of Fraud.*]—The plaintiff, an infirm man seventy-five years old, and nearly deaf, having quarrelled with a son in whose house he had for some time resided, conveyed by deeds, which did not contain any power of revocation, all his property and effects, worth about $6,000, to another son, the defendant, with whom he went to live, the plaintiff receiving back at the suggestion of the person employed by the father to prepare the deeds, a bond in $2,000 penalty, securing to the father a maintenance, or $125 a year in the event of his being unable to continue to reside with the defendant, but which did not charge the amount on the realty in any way. On a bill filed by the father to be relieved from the transaction so entered into, the court, on the ground of the extreme improvidence of the bargain, and that the instruments did not, as the plaintiff swore, carry out his real intention, set the transaction aside; but the bill having improperly charged the defendant with having fraudulently practised upon the plaintiff, and with having by undue influence procured the deeds to be executed, this relief was granted without costs. *Watson* v. *Watson*, 23 Gr. 70.

Illiterate Woman—*No Professional Advice.*]—Where a woman of sixty, who had a first charge on property for her maintenance for life, was induced to exchange it for a life lease of part of the property, subject to conditions which rendered the transaction an improvident one on her part; and it appeared that she was illiterate and dull of intellect, and had no professional or other competent adviser in the matter, and did not in some important respects understand the nature or effect of the transaction:—Held, that it was not binding on her. *McLaurin* v. *McDonald*, 12 Gr. 82.

Inequality of Intelligence.] — An improvident bargain for the sale of the plaintiffs' property, where the parties were very unequal as regards means, intelligence, and otherwise, and the papers were drawn by the vendee, who omitted some important parts of the bargain, and the vendors had not the protection of competent independent advice, was held not to be binding on the vendors. *Fallon* v. *Keenan*, 12 Gr. 388.

Married Woman—*Railway Company.*]—Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. *Bryson* v. *Ontario and Quebec R. W. Co.*, 8 O. R. 380.

Note for Third Person's Debt.]—Where the debtor died owing more than he had the means of paying, and a month afterwards, his mother, who wished to pay all his debts, was induced to give her note to one of the creditors for an amount which was less than one-eighth the value of her property, it was—Held, that in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity. *Campbell* v. *Balfour*, 16 Gr. 108.

Reversioner.] — Although the number of persons in this country in the position of expectant heirs and reversioners is but small, still the same rule applies as in England: the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men. *Morley* v. *Totten*, 6 Gr. 176.

Where the tenant for life was the father of the reversioner, but the son was not dependent on him, and had no expectations from him, and both were illiterate:—Held, that the father's knowledge of a sale of the reversion by the son did not render such sale unimpeachable. *Ib.*

Uncertain Value — *Acquiescence.*] — A widow of uncommon vigour of mind and strength of character, accustomed for many years to manage all her own affairs, and who owned property to the value of at least £25,000, incurred liabilities to the extent of £8,000; and the time of her indebtedness being one of great commercial depression, she could not raise money to pay, and was in danger of losing all she had by a forced sale. She had two sons-in-law, persons of wealth and credit; her solicitor, without any communication with them, advised her to offer her property to them on terms which would make it worth their while to devote their time and energy to save a surplus for themselves; she after some days deliberation, adopted this advice, and proposed to them to take all her property, except two farms with which she wished to provide for the only two members of her family, besides the wives of the two sons-in-law, who had not already had large sums from her; and the consideration which she proposed to the two sons-in-law, was that they should pay her liabilities and pay to herself an annuity. They, with some reluctance, accepted her proposal, which was duly carried out, and she lived for seven years without making any objection to the transaction, though she was aware that they had made considerable profit out of it. After her death, some of her heirs having filed a bill impeaching the transaction on the grounds of fraud and trust, the bill was dismissed with costs. *Wallis* v. *Andrews*, 16 Gr. 624.

Unsuccessful Action — *Deducting Costs from Unpaid Consideration.*]—In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money, had executed a mortgage thereon. In dismissing the bill the court directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless. *Travis* v. *Bell*, 29 Gr. 150.

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3. *Inebriety.*

Fraud not Proved—*Costs.*]—A testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays, for the maintenance and support of herself and six infant children,

and gave certain parts of his estate to his children, to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of twenty-one. One of the sons sold the portion devised to him, and the widow joined in the deed to the purchasers, which declared that the widow had put her son in possession of the lands. The only executor beside the wife, who proved the will, was absent from the Province, and gave no consent to the sale. Less than two months after the sale the purchasers sold the estate at an advanced price to one T., having in the interval created a mortgage thereon, and shortly afterwards the son died; and thereupon a bill was filed by the executors and the infant children against the purchasers and their vendee, T., and also the widow, seeking to set aside the conveyance on the ground that the same was obtained by the purchasers fraudulently, when the son and his mother were both in a state of intoxication, produced and brought about by the purchasers; and that their vendee, T., was affected with notice, as the want of consent of the executor should have put him on inquiry. The evidence, however, negatived the fact of intoxication on the part of the son, but shewed great mental incapacity on the part of the widow, and the court, although unable to set aside the transaction, refused the purchasers their costs on account of their conduct in the matter. *Collingwood* v. *Collingwood*, 21 Gr. 102.

Habitual Drunkard.] — A person who had at one time been remarkable for strength both of body and mind, and was much respected, having become, from habitual drunkenness, imbecile, made a deed of valuable property to one of his sons who had been in the habit of furnishing him with drink; and about fifteen months afterwards executed a deed of the same property to the wife of the same son. A bill was afterwards filed to set aside these conveyances for fraud and incapacity on the part of the grantor. After evidence had been taken at great length, a release of the action was obtained from the plaintiff without the intervention of any legal adviser on his behalf. The court set aside the conveyances, as also the release, with costs. *Nevills* v. *Nevills*, 6 Gr. 121.

Inadequacy—*Deed to Tavern Keeper.*]—The mere fact of a person executing a deed while intoxicated, will not, as a rule, suffice to set such deed aside, unless undue advantage was taken. However, where a person sixty-two years of age, and an habitual drunkard, executed a deed of real estate in trust for the keeper of the tavern where he resided,—who was in the habit of supplying him with whatever drink he desired,—for a greatly inadequate consideration, and afterwards devised the same property to his brother, the court, at the instance of the devisee, set aside the conveyance, and ordered the tavern keeper to pay the costs of the suit. *Clarkson* v. *Kitson*, 4 Gr. 244.

An improvident deed, obtained by a tavern keeper from a boarder who was greatly addicted to intemperance, was set aside with costs. *McGregor* v. *Boulton*, 12 Gr. 288.

An old man, greatly addicted to drinking, executed deeds of all his property, real and personal, to the tavern keeper with whom he boarded, and accepted in consideration therefor the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards the grantor died; and on the application of one of his heirs, the court set aside the deeds with costs. *Hume* v. *Cooke*, 16 Gr. 84.

No Professional Advice.]—A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice. A bill by his heir impeaching the deed was dismissed. *Corrigan* v. *Corrigan*, 15 Gr. 341.

Parol Trust for Grantor's Family.]—A., who was greatly addicted to drinking, gave to B. a mortgage to secure a small debt; the property was worth at least seven times the debt; and the rent of half the property for three years would have paid off the claim; but five years before the debt was payable A., without any additional consideration, released his equity of redemption to B.; and B. was allowed to remain in possession for seven or eight years after the mortgage debt was paid off by rents:—Held, that the facts and evidence shewed that the release was given on a parol trust, for the benefit of the mortgagor and his family, and that to set up the release as an absolute purchase was a fraud on B., against which the court should relieve notwithstanding the lapse of time and the death of some of the witnesses. *Crippen* v. *Ogilvie*, 18 Gr. 253.

Specific Performance — *Unsustained Charges of Fraud.*]—To a bill for specific performance of an agreement to purchase lands, the vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, and while in an insensible state of intoxication had been induced to sign the agreement, in which the price stipulated to be paid for the property was most exorbitant, and which was now sought to be enforced. At the hearing it was clearly shewn that the purchaser had been at the time of executing the contract intoxicated, and that the price agreed to be paid was exorbitant, but the court exonerated the vendor from any fraudulent conduct, and therefore refused to give the defendant his costs in the dismissal of the bill. *Schofield* v. *Tummonds*, 6 Gr. 368.

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4. *Undue Influence.*

(a) *In General.*

Confidential Relationship.] — T., who owned a farm which he had mortgaged to its full value, conveyed it to defendant, and procured her to execute a mortgage thereon in his favour for £1,125. Defendant was a woman fifty or sixty years old at this time and had been living for some weeks at T.'s house, who had her entire confidence. She had no other adviser and there was no reliable evidence of the deeds having been read over or explained to her, and no evidence of any previous negotiation for a purchase by her:—Held that the transaction was invalid. *Elgie* v. *Campbell*, 12 Gr. 132.

Conflicting Evidence as to Value.]—A younger son who was entitled to a large estate under the will of his father, shortly after coming of age, purchased from a step-brother—twenty years his senior, and who was

greatly embarrassed—the equity of redemption in fifty acres of land, the mortgages on which he was to pay off out of the purchase money. Shortly afterwards the purchaser left this country for the United States, where he resided for some years, during which time the mortgagees had foreclosed. The purchaser having returned, filed a bill impeaching the transaction, on the grounds of undue influence on the part of the vendor and excess in price. On the hearing, the evidence failed to establish the fact of undue influence, and the evidence as to value being contradictory, the bill was dismissed with costs. *Denison* v. *Denison*, 13 Gr. 114, 596.

Deed to Third Person.] — A deed in favour of a third person, obtained through the influence of one occupying a fiduciary relation to the grantor, and not giving him the advice which he ought to have received, cannot be sustained. *Dawson* v. *Dawson*, 12 Gr. 278.

Delay.]—An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining her majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by this promise, conveyed the lot selected by her uncle, which was much more valuable than the other. The money, if any, paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and the suit impeaching the transaction. *McGonigal* v. *Storey*, 14 Gr. 94.

Duress.]—The plaintiff, a farmer of about sixty years of age, and unacquainted with legal matters, was taken by defendant to a lawyer's office, and when there was charged with having defrauded the defendant, by changing the figures in certain weigh tickets for grain, to an amount of about $500, and was threatened that if he left the office without settling the claim he would be arrested by a detective, who was pointed out to him, in consequence of which the plaintiff executed a mortgage on his farm for $600. The court, on appeal from the master, found that the mortgage was void as having been obtained by duress and coercion, although the plaintiff, before giving the instrument, had been told that he might leave and go where he pleased, but the party so giving him permission declined to undertake that in case of his leaving he would not be arrested. *Armstrong* v. *Gage*, 25 Gr. 1.

The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then gave a mortgage to B. The re-conveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land;—Held, affirming 30 N. S. Rep. 405, that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure and should be set aside, and B. should not be allowed to set it up.—B. claiming to be a creditor of the father and deceased brother of the defendants wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother:—Held, that this relief was not asked in the action, and if it had been the said provision was a mere contract between the parties to the deed, of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother. *Burris* v. *Rhind*, 29 S. C. R. 498.

——— *Excessive Payment for Services.*]—Where by reason of the confidential relationship existing between plaintiff and defendant and the influence he was able to exert over her by asserting knowledge of matters which he alleged could be used to her prejudice, which at the trial he admitted had no existence, he was enabled to procure from plaintiff an excessive amount for services performed, which was paid by her even after she had obtained independent advice, the plaintiff was held entitled to recover the same back, less a reasonable amount for the services performed. *Disher* v. *Clarris*, 25 O. R. 493.

Great Inequality — *Delay.*]—The plaintiff, a squatter on Crown lands, assigned to defendant to enable him to obtain the patent for the plaintiff. There was no writing shewing the trust, and defendant having procured the patent in his own name, induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in their business capacity and otherwise, and defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure or influence. The court held that the plaintiff was entitled to redeem on payment of the amount of defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transactions; the excuse assigned for the delay being his poverty; it appearing that the parties could be restored to their original positions without loss to the defendant. *Brady* v. *Keenan*, 14 Gr. 214.

Gross Undervalue.]—A farmer died intestate leaving two sons and two daughters, and considerable property, most of which was in the possession of one of the sons. Two days after the funeral, at the suggestion of the sons, all went into town, the sisters being under the idea they were going to the registry office to make inquiries about the property, instead of which they were taken to see a lawyer about the estate; and while there, through the influence and importunity of the sons, and on the faith of their representations, some of which were not correct, and without full or correct information as to the value of the estate, one of the daughters, in her husband's absence, and without any independent advice, executed a transfer of her interest in the estate to the son who was in possession, in consideration of his note for about one-fifth of the value of her share, payable in six years

without interest. There were moral reasons why she should have made a generous settlement with this son; but the settlement having been obtained as stated, was held not to be binding. *Cassie* v. *Cochrane*, 20 Gr. 545.

Husband and Wife — *Voluntary Conveyance — Confidential and Fiduciary Relationship.*]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition was greatly impaired, he subsequently becoming an incurable lunatic, was set aside. The doctrine of undue influence and fiduciary relationship discussed. Distinction between undue influence in cases of gifts inter vivos and testamentary gifts referred to. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

Held, upon the evidence in this case, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife and without independent advice, and was rightly set aside. *Hopkins* v. *Hopkins*, 27 A. R. 658.

Ignorance of Value—*Undue Haste.*]—An unequal division of a residuary estate, agreed to by the parties interested, and sanctioned by the executors, was held not to be binding, where it appeared that the lady to whom the division was unjust had agreed thereto without professional or other independent advice, with undue haste, and in ignorance of the real value of the largest item of the assets of the estate, the other party to the agreement being her brother-in-law, and being the only person, except the executors, who appeared to have had any of her confidence in matters of business. *Clarke* v. *Hawke*, 11 Gr. 527.

Legal Advice.]—A man deliberately and with legal assistance executed to his son-in-law a deed of his farm, subject to a life estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, and to indemnify him against certain mortgages. There was no fraud or pretence of undue influence, and the grantor fully understood what he was doing; but quarrels subsequently arose and the son-in-law left the farm; whereupon the father-in-law filed a bill to set aside the deed on the ground that the conveyance incorrectly mentioned a consideration of $2,000, and that the true consideration was not in writing; but as it appeared that the solicitor had recommended a writing, and that the grantor had voluntarily preferred to dispense with it, the court declined to cancel the transaction. *Cameron* v. *Sutherland*, 17 Gr. 286.

Mental Inequality—*Want of Advice.*]—Differences having arisen between the parties, A. obtained against B. a decree for an account, and large sums were in dispute between them. While the reference was pending, B. got a release of the suit prepared for A.'s signature: a friend brought A. to B.'s office, and B. there induced A. to sign the release in consideration of $150, which he promised to pay. On a subsequent day A. went for the money, and then at B.'s request executed a quit claim deed of all his interest in the land. There was no evidence of the true state of the accounts at the time of these transactions. A. was sober when he entered into them, and he understood their nature; and B. had no fraudulent purpose therein. B. was a person of large experience, A. had little, if any, business experience, and his habits were intemperate and thriftless; and he executed the two instruments without the knowledge of his solicitor, and without advice: —Held, that the instruments were void in equity. *Edinburgh Life Assurance Co.* v. *Allen*, 18 Gr. 425.

Nominal Consideration—*Want of Advice.*]—The defendant, a grandnephew of the plaintiff, who was of advanced age and feeble mind, obtained from the latter a conveyance of certain land, her only property and means of maintenance, for a nominal consideration. He verbally promised to support her as a consideration for a grant. He brought a witness, who was a stranger from a distance, to explain the deed and witness it, though other relatives in the neighbourhood were not consulted. It was explained to her that the defendant could not be legally bound to maintain her, as he was a minor. The deed contained no power of revocation:—Held, that the deed should be cancelled, on the ground that the plaintiff was not in a fit state of mind to understand its effect; but independently of this, that it had been made improvidently and under undue influence and was wholly voluntary, and therefore could not stand. *Widdifield* v. *Simons*, 1 O. R. 483.

Onus.]—It is essential to the validity of a deed of gift in favour of a person occupying towards the grantor a relation of trust and confidence, (in this case a brother in favour of his brothers,) that the grantee should shew that the grantor had competent and independent advice in the transaction. *Dawson* v. *Dawson*, 12 Gr. 278.

The testator, who died in April, 1867, had been a captain in the army, and was represented as a man of intelligence and business capacity, although addicted to habits of intemperance. He had no relatives other than the plaintiffs and the defendant, the latter—a minister of the Church of England—being the brother of his wife, who had died in the previous autumn. Soon after her decease the testator, who was then a resident in London, sent for the defendant, who resided at Brockville, to come to him in order to assist him with his affairs. This the defendant did, and, amongst other things, consulted the solicitor of the testator as to the state and condition of his affairs; and a power of attorney was prepared by the solicitor and executed by the testator authorizing the defendant to sell and dispose of sundry articles of furniture and other effects, which he did. Two days after this testator made his will, bequeathing to the defendant all his pictures, jewellery, trinkets, and wearing apparel; and to his brother, G. W., one of the plaintiffs, all his silver-plate bearing his family crest. Of the residue of his estate, real and personal, he gave one-half to G. W. and the other half he gave to the other plaintiffs his nieces; and appointed defendant executor. Next day the testator executed a transfer of a policy of insurance on his life to the defendant; the instructions for this instrument, as well as for

the will, having been given by the testator personally to his solicitor, who testified as to the testator's thorough competency to execute both. The defendant was present with the testator when instructions for the transfer were given to the solicitor, and so remained until the instrument was executed. The testator died within six months afterwards, and the insurance money was paid to the defendant. The solicitor in his evidence stated that he was not informed as to the object of the transfer, which was absolute in form and for a nominal consideration, but that he understood it was by way of security for some advance or debt. The defendant did not prove the will, or obtain probate thereof until June, 1874, and on the 12th October of that year the plaintiffs obtained an administration order, and sought in proceeding thereunder to compel the defendant to refund the insurance money, on the ground that the transfer of the policy had been obtained by fraud or undue influence, or was intended merely as in aid of the will or as a security:—Held, that the circumstances of the case were not such as to lead to the presumption that the defendant had been guilty of any fraud or undue influence in obtaining such assignment, and that he was not bound to give evidence that the testator voluntarily and deliberately performed the act, knowing its nature and effect. *Re White, Kerston* v. *Tunc*, 22 Gr. 547; 24 Gr. 224.

Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace, and an active, shrewd business man, engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she, however, having sworn in her evidence that she never placed any dependence upon him. The plaintiff's case was closed, and it was contended that the onus was now on the defendant to shew that the transaction was a righteous one. The defendant declined to call any witnesses, and the plaintiff's action was dismissed:—Held, that the onus was not on the defendant, and that the plaintiff must prove her case. *McLean* v. *Milne*, 5 O. R. 100.

Semble, the mere existence of confidence is not enough; influence must be proved and is not to be presumed from the existence of confidence. Wallis v. Andrews, 16 Gr. 637, followed. *Ib.*

Peculiar Relationship — *Absence of Fraud.*]—Where it was shewn that a voluntary deed had been executed without independent advice, the grantor standing in such a relation to the grantee, as that he was likely to be under her influence, the court owing to the peculiar relationship of the parties set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established, in this following Lavin v. Lavin, 7 A. R. 197. *Irwin* v. *Young*, 28 Gr. 511.

Previous Intention.]—When a deed of gift is objectionable according to the doctrines acted upon in equity to guard against undue influence, the mere circumstance that the grantor had previously expressed an intention of at some time giving the property to the grantee is not a sufficient ground for upholding the deed. *Dawson* v. *Dawson*, 12 Gr. 278.

Reasonable Price—*Time for Deliberation.*]—The owner of land subject to mortgages past due, and otherwise pressed for money, applied to a third person, who agreed, after some discussion, to purchase the real estate, as also the chattel property thereon, for about $6,800, which the purchaser arranged, and went into possession of the property. Some time afterwards the vendor filed a bill seeking to impeach the sale, on the ground of undue influence and inadequacy of consideration; but the court, being of opinion that the property was not worth more than $7,500: that the vendor had had ample time for deliberation between the verbal arrangement and the written agreement, which time he admitted he had employed in trying to do better with his property than by accepting the purchaser's offer, and that the bargain made between the parties was as good a one as at the time and under the circumstances could have been obtained, dismissed the bill with costs. *Shank* v. *Coulthard*, 19 Gr. 224.

Sale at Undervalue.]—A sale at an undervalue to a person under whose influence the grantor is, is as objectionable as a gift. *Mason* v. *Seney*, 12 Gr. 143.

Security for Debt.]—The defendant had become liable as accommodation indorser for the husband of one of the plaintiffs, who, with his wife, became makers of a joint note to defendant as security, which it was agreed should be paid out of the proceeds of certain lands that had been previously conveyed by the husband to his wife. Instead of doing so, however, the husband sold the lands, and absconded, leaving the wife behind. The defendant, on learning this, went to the wife in a state of excitement, threatened to aid in criminal proceedings unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter. This, the mother, after persuasion by the daughter, agreed to give the defendant, who advised that the mother's solicitor should not be consulted, and on the evening of the following day a deed absolute in form was executed by both mother and daughter, the latter having dower in the land, in favour of the defendant, who, at the mother's request, gave a separate memorandum of defeazance. There had been no direct communication between the defendant and the mother, nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security. An action impeaching this deed as having been obtained by threats and undue influence, was dismissed by the trial Judge with costs, which judgment was set aside by a divisional court, 15

O. R. 533. On appeal this judgment was reversed, and the judgment at the trial restored with costs. *Sheard* v. *Laird*, 15 A. R. 339.

Specific Performance—*Suspicions as to Vendor's Deed—Discovery.*]—In an action by a vendor for specific performance of a contract for sale of land, at the price of $24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was $5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant:—Held, that under these circumstances the defendant should be allowed, under rule 285, to examine the two sisters before delivering his defence. *Brown* v. *Pears*, 12 P. R. 536.

Undervalue — *Excess of Authority — Delay.*]—A widow having a claim to certain lands belonging to the Six Nation Indians, prevailed upon a person to act as agent in procuring the acknowledgment by the chiefs of her title, which was done after great trouble and expense on the part of the agent, and in accordance with such recognition the Crown patent for the land was perfected; whereupon the grantee of the Crown conveyed by deed of gift to the agent an undivided moiety of the estate as a reward for his services in procuring the grant, previously to which she had executed a power of attorney in favour of the agent, authorizing him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until the time of her death. During her residence there, she urged the agent to dispose of her moiety of the property, and in the course of the correspondence stated that she would be willing to accept £1,000 for it. The agent, in 1844, having directed the property to be sold by auction, his sister became the purchaser for £628, having authorized the person who attended to bid at the sale on her behalf to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, several years after the agent's death, seeking to set aside the deed of gift, as having been obtained by undue influence, and the sale by auction as having been made at a great undervalue, the court, under the circumstances, refused to disturb the title derived under the deed of gift; but set aside the sale by auction, as having been made at a price not warranted by the agent's authority, the infancy of the plaintiff at the death of his mother, and his absence subsequently on duty with his regiment, being deemed sufficient circumstances to excuse the delay which had occurred in instituting proceedings by him; and it was shewn that a suit instituted by his mother, during her residence in England, had been dismissed, owing to her inability to procure security for costs to be given. *Kerr* v. *Lefferty*, 7 Gr. 412.

Undervalue Only.]—A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for his son eight or nine years old, to whom it appeared she was much attached, in consideration of a certain sum, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration however, not being at all equal to the value of the property. The court, in the absence of proof of any undue influence, oppression, persuasion, or fraud, refused to set aside the agreement as against the infant. *Gourlay* v. *Riddell*, 12 Gr. 518.

Want of Independent Advice.]—An old man whose mental faculties had been somewhat impaired by age, being in difficulties with his son, applied for advice to the attorney of persons against whom he had recovered a judgment for one debt, and a verdict for another debt; the attorney obtained from him a release of the two debtors without any consideration, and without his having any advice in regard to the transaction; and the only evidence of what had passed between the two was the evidence of the attorney himself, the client being dead:—Held, that the release could not be maintained in equity. *Dewar* v. *Sparling*, 18 Gr. 633.

Will.]—The execution of the will in this case under the circumstances of the testator's age and condition, and the absence of any explanation to him of the effect of his testamentary act, was held to be a fraud on the part of those concerned in procuring its execution. *Freeman* v. *Freeman*, 19 O. R. 141.

——— *Proof Required.*]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to shew that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shewn that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*, 27 S. C. R. 13.

See WILL, I. 3.

(b) *Parent and Child.*

General Rule.]—To sustain a deed of gift to a person standing in a confidential relation to the donor, (in this case it was by a father to his son), the donee must establish by clear evidence that the nature and effect of the deed were fully and truly explained to the donor: that he perfectly understood them: that he was made alive, by explanation and advice, to the effect and consequences of executing it, and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ; otherwise such deed of gift will be set aside. *Mason* v. *Seney*, 11 Gr. 447.

Where a son who had the entire management of his father's business,—the father being old, and for years unable to attend to business,—obtained deeds of gift from his father and mother of their property, without the intervention of any adviser and failed to give such evidence as above mentioned, the deeds were set aside. *Ib.*

In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence shewing imposition or undue influence, to support the deed by the evidence which might be necessary in the case of a gift from a child to a parent. *Wycott* v. *Hatman*, 14 Gr. 219; *Armstrong* v. *Armstrong*, *ib.* 528.

Absence of Influence or Pressure—*Delay.*]—A widower, a shrewd, thrifty man, possessed of considerable real and personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children, which he did, taking conditional notes for the purchase money. The children did not occupy any confidential relation towards him, and the transaction was his own suggestion, without any influence or pressure on their part. What he retained was more than ample for his wants:—Held, in a suit instituted by the father seven years afterwards, that the deeds could not be impeached. *Luton* v. *Sanders*, 14 Gr. 537.

Evidence.]—A gift can only be upheld if clearly proved; and evidence of loose, casual, and inconsistent admissions offered to prove a gift by a mother to her son, of all the donor's means, was held insufficient. *McConnell* v. *McConnell*, 15 Gr. 20.

Father Acquiring Son's Interest.]—A father having obtained a conveyance of the interest of his sons under a marriage settlement for an alleged consideration which did not exceed one-fifth of the value of such interest, which was never paid, the transaction was set aside after the death of the settlor and one of the sons, in a suit by the devisees of the deceased son. *McGregor* v. *Rapelje*, 17 Gr. 38, 18 Gr. 446.

Gift of Small Part of Donor's Property.]—Where there is no proof of mala fides or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property. *McConnell* v. *McConnell*, 15 Gr. 20.

If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence required in other cases, of due deliberation, explanation, and advice, the gift of more than a trifling proportion may be sustainable without such evidence. *Ib.*

Maintenance—*Consideration not Enforceable—Personal Liability.*]—A conveyance by a man, 84 years of age, of his farm, which was almost his only means, to his married daughter, subject to a provision that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance, was held to be a deed of gift, and only sustainable by the same evidence as is necessary in equity to maintain a deed of gift. *Beeman* v. *Knapp*, 13 Gr. 398.

A like deed, made two days afterwards to the grantor's son, who had managed the farm for some years along with farms of his own: the consideration for the conveyance being the son's personal bond to maintain the grantor and his wife during the rest of their lives, without any other security:—Held, not valid, unless shewn to have been made freely and voluntarily after independent and proper advice. Held, also, that such a conveyance, unless so made, was not made good by evidence of a verbal agreement several years before, that the son should work the farm and maintain his father and mother, in consideration of the property being left to the son by will; a deed and will being essentially different. *Ib.*

Mistake—*Deception.*]—In an action to restrain waste it was shewn that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The court reversed the decree pronounced by the court below (sub nom. Dunlap v. Dunlap, 6 O. R. 141), directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled. *Dunlop* v. *Dunlop*, 10 A. R. 670.

No Explanation or Advice.]—A conveyance of land from a man ninety years old to his son was prepared on the instructions of the latter, and recited that the son had agreed to pay his father $10 a month for his life, but no such agreement had in fact been made, and there was no other consideration. The deed was not explained to the father, and the solicitor's clerk who witnessed it could not say that he had even read it over to him. There was no direct fraud, but the father, who had become childish, was under the influence of his son and had acted without advice:—Held, affirming 27 Gr. 567, that the deed, having been executed without proper advice, should be set aside. *Lavin* v. *Lavin*, 7 A. R. 197.

Onus of Proof.]—Where a father made a deed of gift of all his property to his son, and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences; and the deed was upheld. *Armstrong* v. *Armstrong*, 14 Gr. 528.

In suits to set aside instruments on the ground of undue influence it is not necessary that there should be proof of the exercise of influence; it rests upon the party obtaining the benefit to rebut the presumption that arises when such a transaction takes place between a parent and child, or others standing in a position where it is presumed influence may exist on the part of the grantee over the grantor. P. died intestate in England entitled to real and personal estate situate there of considerable value, leaving E., an only daughter, his heir-at-law, who came to Canada on her attaining twenty, and went to reside with her mother and stepfather. Within one year thereafter, and on her attaining twenty-one, she executed an instrument in favour of her stepfather, agreeing to give him one-fourth

share or part of all her real and personal property, " in consideration of my late father dying without making a will . . . and leaving my mother unprovided for." E. married a few days afterwards, and survived about two years, when she died, leaving an only son, who shortly after attaining twenty-one instituted proceedings, in which his father joined, to set the instrument aside. The court, in the absence of evidence, other than that of defendant, to rebut the presumption of undue influence, decreed a cancellation of the instrument, with costs. *Delong* v. *Mumford*, 25 Gr. 586.

Presumption.]—There is ordinarily no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied at the time, a relation of confidence and influence; but if that is proved, the gift may need for its support the same evidence as a gift to any other person occupying such relation. *McConnell* v. *McConnell*, 15 Gr. 20.

Special Facts.]—Semble, that the evidence more fully set out in the report of this case, shewed that the transaction in this case was one which a court of equity would set aside as having been entered into by the father improvidently, and by reason of undue influence practised upon him by the plaintiff. *McKay* v. *McKay*, 31 C. P. 1.

Undervalue.]—The defendant having received from the plaintiff, his father, money to buy land, bought a party's interest in an unpatented lot, and took an assignment in his own name. When the father afterwards came to this country with his wife and family, they all settled on the lot; the mother died five years afterwards, and a few days after her death, and while the plaintiff was in a state of mental depression, the defendant, with the assistance of another son, in whom the father had confidence, induced the father to consent to defendant retaining the lot so bought, in consideration, among other things, of defendant agreeing to pay for another lot which had been bought, and of his procuring a deed of half this lot to the father, and of the other half to the son, who was acting for the father. This consideration was not adequate; the transaction was otherwise an improvident one for the father; and there was considerable doubt whether the father had understood the bargain to be as stated by the defendant:—Held, not binding in equity, and that the plaintiff was entitled to a conveyance on payment of the sums which the defendant had paid in pursuance of the alleged contract. *Johnston* v. *Johnston*, 17 Gr. 493, 19 Gr. 133.

Will.]—The plaintiff being old and infirm, was induced by his son, with whom he resided and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the court decreed the lease void, and the will revocable at the pleasure of the plaintiff. *Donaldson* v. *Donaldson*, 12 Gr. 431.

See GIFT.

VI. PRACTICE AND PROCEDURE IN ACTIONS.

Adding Plea of Fraud.]—S. had been treasurer of a municipal corporation, and a bond which he had given having been mislaid, the council being under the impression that he had given no security, required him to furnish it. The council, having examined his books, concluded that they were in his debt, as the books shewed, and the reeve believing this was the case represented to the defendant that S., defendant's son, "was all right on the books." Defendant on this signed a bond as surety for the due performance by S. of his duties which he said he would not have done but for the reeve's statement. The reeve also said that if defendant did not go his surety S. would lose his position. Afterwards, as S. had been drinking, defendant wrote to the council desiring to have his bond annulled, but he withdrew this letter at the request of S. After S. had been dismissed, and the deficiency in his accounts discovered, defendant said he would pay whatever had occurred since he signed the bond. Upon the first trial no plea of fraud was put in, and a new trial was granted on affidavits not raising this defence; but defendant gave notice that he would at the trial move to add such a plea. The learned Judge at the trial refused the application, holding that the plea could not be supported on this evidence, but he found that the bond was given upon the assumption and statement that the treasurer was not then in arrear:—Held, that the plea should have been added, and that defendant was entitled to a verdict upon it. *Village of Gananoque* v. *Stunden*, 1 O. R. 1.

Costs—*Charges of Fraud not Sustained.*]—See *Lavin* v. *Lavin*, 27 Gr. 567, 7 A. R. 197; *Irwin* v. *Young*, 28 Gr. 511; *Thompson* v. *Holman*, 28 Gr. 35; *Travis* v. *Bell*, 29 Gr. 150; *Freed* v. *Orr*, 6 A. R. 690; *Samson* v. *Haggart*, 25 Gr. 543; *Ashbough* v. *Ashbough*, 10 U. C. R. 433; *Hughson* v. *Davis*, 4 Gr. 588.

——— *Infant Guilty of Fraud.*] — See *Westgate* v. *Westgate*, 11 P. R. 62.

——— *Severing in Defence.*]—See *Conolly* v. *Hill*, 4 P. R. 441; *Petrie* v. *Guelph Lumber Co.*, 10 P. R. 600.

Evidence of Similar Fraud.]—In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant, C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible:—Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. *Waterloo Mutual Insurance Co.* v. *Robinson*, 4 O. R. 295.

Evidence—*Pleading.*]—In an action to set aside a conveyance made by the plaintiff in

favour of the defendant, it was charged that the conveyance in question was never executed or delivered by the plaintiff, but that the alleged execution thereof was obtained by the defendant's fraud, and that the plaintiff signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. There was also a general charge that the conveyance had been obtained by the fraud and undue influence of the defendant, but there were no specific allegations as to the nature of the fraud or undue influence. The statement of defence was a mere general denial of the allegations set out in the statement of claim. At the trial the plaintiff tendered evidence as to the defendant having induced him to drink to excess about the time of the transaction in question, as to the plaintiff's want of education or business capacity and other evidence of that nature, and also evidence as to the position of the wife's estate and as to transactions between the parties in connection with it, but the trial Judge ruled that this evidence could not be introduced under the general allegations contained in the statement of claim, and at the end of the case gave judgment in favour of the defendant:—Held, that the exclusion of evidence had been pushed too far, and that for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties, which could throw any light on conduct or motive, and the court ordered a new trial, costs to abide the final result, each party having leave to amend. *McDonald* v. *Johnston*, 16 A. R. 430.

Evidence of fraud when fraud not set up as a defence. See *McPherson* v. *Wilson*, 15 A. R. 294.

Particulars.]—Particulars will be ordered of the fraud charged in a plea to a declaration, alleging the breach of an agreement. It is sufficient if the affidavit on which the application is founded, is made by the attorney on the record. *Bain* v. *McKay*, 5 P. R. 465.

Parties — *Fraudulent Grantee's Wife.*]—The inchoate right of dower at law, obtained by a wife in land conveyed to her husband, makes her a proper party defendant to a suit to set aside a conveyance, procured by fraud, by herself and her husband. *McFarland* v. *McFarland*, 9 P. R. 73.

Pleading.]—A declaration that defendant falsely, deceitfully, fraudulently, and wilfully represented the maker and indorser (without naming them) of a promissory note, to be good:—Held, bad, on demurrer, for uncertainty. *Newman* v. *Kissock*, 8 C. P. 41.

In an action for false representation of the credit of a firm, the statement complained of was that the parties were worth from £4,000 to £5,000 between them, out of which they owed defendant and others £1,000; and the plaintiff alleged that they were not worth from £1000 to £5,000 (not adding between them); and that they were not then indebted to the defendant and others in £1,000, but in £3,000:—Held, that the denial of their worth was not more extensive than the statement, and that it was sufficiently alleged that they were indebted in more than £1,000; 2. that it was sufficient to allege that the defendant wrongfully and falsely made such statements, knowing them to be false, without adding fraudulently, for fraud is included in the allegation; 3. that in the declaration, set out, it appeared that the plaintiff had given credit to the firm in question. *Fowler* v. *Benjamin*, 16 U. C. R. 174.

Declaration, that the defendant and one L. did unlawfully and fraudulently combine, conspire, and agree together to defraud the plaintiff of $100, and in pursuance and furtherance of said combination and conspiracy the said L. did procure and induce the plaintiff to lend him $100 on his promissory note, and in pursuance and by means of such combination and agreement the said L. procured the said $100 from the plaintiff, without any intention of repaying the same, and with intent to defraud the plaintiff, whereby the plaintiff lost the said $100:—Held, insufficient, on demurrer, for not shewing what representations were made or means used, or what the facts were which constituted the alleged fraud or cause of action. *Armstrong* v. *Lewin*, 34 U. C. R. 629.

The obligor of a bond which, by the plaintiff's own shewing, is clearly fraudulent, need not plead fraud to prevent a recovery on it. *Smith* v. *Dittrich*, 8 U. C. R. 589.

Where fraud is objected the distinction between sealed instruments and simple contracts will avail nothing. *Ib.*

The averment of a conspiracy in an action on the case is no objection, though the facts stated would not support an action for conspiracy, if on the whole declaration a good ground of action on the case is shewn. *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 556.

To a declaration on the common count for freight, defendant pleaded on equitable grounds as to $398, part of the money claimed, and being the difference between 90 cents and $1 per ton, that the plaintiffs falsely and fraudulently represented to defendant's agent that defendant had agreed to pay them freight at $1 per ton, and had chartered their vessel at that rate, whereas defendant had refused to pay them more than 90 cents per ton; that on the faith of such representations the agent delivered to them the coal and received a bill of lading expressing the freight to be $1 per ton, and the plaintiffs carried the coal and delivered it to the agent before defendant could forbid them:—Held, a good plea on demurrer, though unnecessary, the defence being admissible under never indebted. *Hammond* v. *Conger*, 37 U. C. R. 547.

Scope of Examination.]—The bill alleged that the defendant assisted in the fraud by which the plaintiff was induced to convey certain land to her husband, the other defendant. She answered the bill, denying all charges of fraud, disclaiming all interest in the subject matter of the suit, and asking for her costs:—Held, that it was competent for the plaintiff on cross-examining the defendant on her answer, and disclaimer to establish, if possible, the fraud out of her own mouth. *McFarland* v. *McFarland*, 9 P. R. 73.

In this action the plaintiff, in her statement of claim, charged her brother, the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and

that after her father's death D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes:—Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted. *MacGregor* v. *McDonald*, 11 P. R. 386.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD. No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application:—Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to shew cause why they should not be produced. *Ib.*

In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books relating to such transactions. *Colter* v. *McPherson*, 12 P. R. 630.

See EVIDENCE, VII., XII.

Status of Plaintiff—*Pleading—Parties.*]—The plaintiffs, A. and J., filed a bill for the purpose of having a deed made to the defendant by J. declared void, as having been obtained by fraud and misrepresentation. The bill alleged that J. had subsequently made a deed of the same property to A., for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant, the bill alleging that such deed to A. was made to him "as trustee for the heirs of A. M.," who had died seized. The bill in no place alleged that A. was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said A. M., who are the rightful owners of the said land," &c.:—Held, that notwithstanding the absence of any express allegation of A. being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was overruled with costs. *McLean* v. *Bruce*, 29 Gr. 507.

A demurrer ore tenus for misjoinder of plaintiffs, it appearing by the bill that J. had no interest in the question raised, was allowed, without costs. Roche v. Jordan, 29 Gr. 573, followed. *Ib.*

See sub-title, III., 3, *ante.*

See CRIMINAL LAW, IX. 23—LIMITATION OF ACTIONS, II. 15—PRINCIPAL AND AGENT, V. 2—RELEASE, II. 3—REVENUE, II. 3—SPECIFIC PERFORMANCE, V. 7.

FRAUDULENT CONVEYANCE.

See FRAUD AND MISREPRESENTATION, III.

FRAUDULENT JUDGMENT.

See FRAUD AND MISREPRESENTATION, IV.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, I. 8, V. 4, VI. 5 — COMPANY, X. 5 — FRAUD AND MISREPRESENTATION, III., IV.

FRAUDS, STATUTE OF.

See AUCTION AND AUCTIONEER — CONTRACT, II. 4—EVIDENCE, XIII.—LANDLORD AND TENANT, XXV.—MASTER AND SERVANT, II. 3—PRINCIPAL AND SURETY, I. 2 (d) —SALE OF GOODS, V.—SPECIFIC PERFORMANCE, V. 18 — TIMBER AND TREES, I. 6—TRUSTS AND TRUSTEES, II. 2 (a)—VENDOR AND PURCHASER, I.

FREE GRANTS ACT.

See CROWN, II. 4.

FREIGHT.

See SHIP, II. 6.

FRIENDLY SOCIETY.

See INSURANCE, V. 4.

FRONTIER (OUTRAGES UPON).

See CRIMINAL LAW, IX. 24.

FUTURE RIGHTS.

See SUPREME COURT OF CANADA, II. 8.

GAME.

Fishing and Shooting Rights—*Private Ownership.*]—The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs and defendant, and allowed to run at large upon the land:—Held, that the deer was ferae naturæ and, having been shot by the defendant upon his own land, belonged to him:—Held, also, that neither the Act incorporating the plaintiffs, 29 & 30 Vict. c. 122, nor R. S. O. 1887 c. 221, s. 10, vested the absolute property in the deer in the plaintiffs. *Re Long Point Co.* v. *Anderson*, 19 O. R. 487, *See S. C.*, 18 A. R 401.

Ownership of land or water, though not enclosed, gives to the proprietor under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such cases the public can use the water solely for bonâ fide purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting. Where such waters have become navigable owing to artificial public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage. *Beatty* v. *Davis*, 20 O. R. 373.

——— *Prosecution of Trespasser.*]—The defendant was convicted before one justice of the peace on an information under 55 Vict. c. 10, s. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish:—Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded $30, and, therefore, under ss. 25 and 26 of the Act, the prosecution should have been before a stipendiary or police magistrate or two or more justices of the peace, or one justice and a fishery overseer. Only one offence is created by s. 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken. *Regina* v. *Plows*, 26 O. R. 339.

Game Laws—*Permitting Deer Hounds to Run at Large.*]—A summary conviction of the owner of a hound or other dog for permitting "such hound or dog to run at large in any locality where deer are usually found," contrary to the provisions of the Ontario Game Protection Act, is bad unless it states that the dog was "known by the defendant to be accustomed to pursue deer;" and cannot be amended under s. 889 of the Criminal Code, unless the evidence shews knowledge of the owner of such habit of the dog. A statement in a deposition that "dogs were at large on defendant's premises" is not evidence that they were either running or permitted to run at large contrary to the statute. Costs withheld, as the bona fides of the magistrate had been unsuccessfully attacked. *Regina* v. *Crandall*, 27 O. R. 63.

——— *Seizure of Furs of Animals Killed out of Season.*]—Under Article 1405 read in connection with Article 1409 R. S. Q., a game keeper is authorized to seize furs on view on board a schooner, without search warrant, and to have them brought before a justice of the peace for examination. 2. A writ of prohibition will not lie against a magistrate acting under ss. 1405-1409 R. S. Q., in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure. *Company of Adventurers of England* v. *Joannette*, 23 S. C. R. 415.

See CONSTITUTIONAL LAW, II. 25—FISHERIES.

GAMING.

I. IN GENERAL, 2978.

II. BETTING, 2979.

III. DISPOSAL OF PROPERTY BY MODE OF CHANCE, 2980.

IV. HORSE RACING, 2983.

I. IN GENERAL.

Broker—*Speculative Sale.*] — Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money for which they sued. Defendants having refused to settle for losses sustained:—Held, that, assuming the state law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing, and this defence not having been clearly proved, judgment was given for the plaintiffs. *Rice* v. *Gunn*, 4 O. R. 579.

Article 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. c. 109, s. 18 (Imp.) and renders null and void all contracts by way of gaming and wagering. A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment on behalf of a principal whose object was not investment but speculation:—Held, that these were not gaming contracts within the meaning of the Code. *Forget* v. *Ostigny*, [1895] A. C. 318.

Cheque for Gambling Losses.]— A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within s. 53,

s.s. 3, R. S. O. 1877 c. 47, and such a security is void under 9 Anne c. 14, even in the hands of a bonâ fide holder for value. *In re Summerfeldt* v. *Worts*, 12 O. R. 48.

Contracts.]—Acceptance for money to be used in carrying on gambling contracts. See *Bank of Toronto* v. *McDougall*, 28 C. P. 345.

Insolvent Act—*Fraud.*]—Gambling, by a person who subsequently claims the benefit of the Insolvent Act, is not fraud within the meaning of the Insolvent Act of 1864; and quære, whether gambling is fraud at all under that Act. *In re Jones*, 4 P. R. 317.

Judgment Debtor—*Gambling Transactions.*]—Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. *Harvey* v. *Aikins*, 17 P. R. 71.

Note for Gambling Debt.]—In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value also after it was due, it is no defence that the note was assigned to the plaintiff's transferror in payment of a gambling debt and through fraud. *Barr* v. *Marsh*, M. T. 4 Vict.

No penalty can be recovered under 27 & 28 Vict. c. 4, s. 9, for not affixing stamps to a promissory note for money lost at play, for such note under 9 Anne c. 14, is utterly void. *Taylor* v. *Golding*, 28 U. C. R. 198.

II. Betting.

Privileges on Race Course.]—The object of the Legislature in enacting the latter part of s.s 2 of s. 204 of the Criminal Code, apparently was to reserve the race courses of incorporated associations as places where bets might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section. An agreement for the sale of betting and gaming privileges at a race meeting by an unincorporated association, who are the lessees of an incorporated association, the owners of the race course, is not illegal. *Stratford Turf Association* v. *Fitch*, 28 O. R. 579.

Recovery from Stakeholder.]—Plaintiff and A. bet upon a horse race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified not to do so:—Held, that the plaintiff might recover back the amount from defendant as money had and received. *Anderson* v. *Galbraith*, 16 U. C. R. 57; *Sheldon* v. *Law*, 3 O. S. 85; *Battersby* v. *Odell*, 23 U. C. R. 482.

See Davis v. *Hewitt*, 9 O. R. 435.

When the money has been paid by the stakeholder to the winner of a bet as to the result of an election, the loser cannot recover the amount from the stakeholder. *Walsh* v. *Trebilcock*, 23 S. C. R. 695.

III. Disposal of Property by Mode of Chance.

Information to Forfeit Land.]—Where an information was filed by a common informer, under 12 Geo. II. c. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession, and had not been served with the information, to come in and defend. Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant. *Mewburn* v. *Street*, 21 U. C. R. 306.

An information to forfeit land sold by lottery contrary to 12 Geo. II. c. 28, may be filed by a private individual, and need not be by the attorney-general or any public officer. No writ or process is necessary, the information being the commencement of the proceeding; and at all events the want of it could not be objected to on demurrer, after defendant had appeared and pleaded. The plaintiff filed his information more than five years after the sale complained of:—Held, too late, for that the case came within 31 Eliz. c. 5, by which he was limited to one year. No precedent having been found of such an information, the court suggested that it might be necessary to consider in any future case, whether it should not be shewn that the party exposing the land to sale by lottery had been properly convicted of the offence, whether the information must not be served on the party in possession of the land, whether all claiming title should not be called upon by proclamation or otherwise to come in and defend, and whether any preliminary proceedings were requisite. Semble, that the land is not liable to forfeiture after it has got into the hands of a bonâ fide purchaser for value, without notice of the illegality, or except in a proceeding against the person guilty of the offence, or one in possession who had acquired the land illegally. *S. C., ib.* 498.

Lottery—*Form of Declaration.*]—A declaration under 10 & 11 Wm. III. for playing at a lottery, is insufficient if it state the charge for playing at a game "called" a lottery, without further specification. *Clarke* v. *Donelly*, T. T. 5 & 6 Vict.

12 Geo. II. c. 28 supersedes 10 & 11 Wm. III. with respect to lotteries of horses, carriages, and other personal chattels. *Ib.*

——— *Imperial Act.*]—The Imperial statute against lotteries, 12 Geo. II. c. 28, held to be in force in this country. *Corby* v. *McDaniel*, 16 U. C. R. 378; *Cronyn* v. *Widder*, 16 U. C. R. 356; *Marshall* v. *Platt*, 8 C. P. 189.

——— *Note for Price of Ticket.*]—Assumpsit on a note made by A. payable to B., indorsed by B. to C., and by C. to plaintiff. A. pleaded, 5, that he gave the note to the payee as part of the consideration for the

purchase of a lottery ticket, contrary to the statute; and, 6, the same defence, with the averment that the plaintiff became indorsee with full knowledge:—Held, both pleas bad. Held, also, that under the facts and pleadings set out in the case, there was no defence under the statutes against gambling. *Wallbridge* v. *Becket*, 13 U. C. R. 395.

——— *Provincial Legislature.*]—The Provincial Legislatures have no power to permit the operation of lotteries forbidden by the criminal statutes of Canada. *Association St. Jean-Baptiste de Montreal* v. *Brault*, 30 S. C. R. 598.

——— *Securities for Price of Ticket.*]—Held, that under the statute 12 Geo. II. c. 28, securities given for the price of tickets are not void in the hands of a bonâ fide holder for value. *Evans* v. *Morley*, 21 U. C. R. 547, 20 U. C. R. 236.

Where the jury found that the plaintiffs had not notice of the illegality, the court refused a new trial, holding the defence not one to be favoured. *Ib.*

Raffle—*Impeaching Title.*]—Where defendant sold for the plaintiff a pair of horses won by plaintiff at a raffle, and received the purchase money:—Held, that he could not refuse to pay it over, on the ground that the plaintiff had obtained the horses by gambling. *Jamieson* v. *Sherwood*, 14 U. C. R. 282.

Sale of Land.]—The first count of the declaration claimed £100, being the consideration for the assignment by plaintiff to defendant of his interest in an agreement for the purchase of certain freehold property. Second count, for money payable for land bargained and sold by plaintiff to defendant, on an account stated, and for interest. J., the owner of 50 acres, agreed to convey certain lots, in accordance with a lottery, to be held by one D. Lot No. 107 in the lottery was the prize, and was supposed to have a mill privilege upon it. One V., the holder of ticket No. 35, became entitled to No. 107, and he requested J. to convey it to plaintiff, which was done. Subsequently C. (defendant) agreed to purchase the mill privilege from plaintiff, but not being satisfied with his title, he took a quit claim deed from J., paying him £15 7s., which he said he would deduct from the amount he was to pay plaintiff. Plaintiff had drawn another lot, and obtained a conveyance of it upon giving his notes for the purchase money, which notes J. gave to defendant when he conveyed the mill pond to him. These notes formed no part of plaintiff's payment for lot 107:—Held, that the evidence did not support the declaration, inasmuch as if the lot mentioned therein was the mill pond, plaintiff had no right or title to it, and could not therefore bargain to sell it: and if it related to lot 107, the transfer alleged in the declaration was not proved, because plaintiff, at the commencement of the suit, was the holder of it. Held, also, that the evidence did not support a claim upon an account stated. *Lloyd* v. *Clark*, 12 C. P. 320.

A sale of land by lot in which there were two prizes: Held, within 12 Geo. II. c. 28. *Marshall* v. *Platt*, 8 C. P. 189.

The plaintiff having illegally sold land to A., by lottery, this agreement was cancelled, and a new one made with B., to whom A. had sold. B. afterwards sold to defendant, to whom the plaintiff subsequently gave a deed, receiving a mortgage for the balance of purchase money. Neither B. nor defendant was concerned in the lottery. The mortgage was sold by the plaintiff, and an action brought upon it in his name:—Held, that the mortgage was not connected with the first illegal sale, and that the plaintiff might recover. *Cronyn* v. *Griffiths*, 18 U. C. R. 396.

Action on covenants for title in a conveyance by defendant to plaintiff. Plea, that one W., acting for defendant, sold the land in question by lottery, and disposed of the tickets for £30 each: that the plaintiff bought one of the tickets from W., knowing that he acted for defendant, &c. (setting out the scheme of sale). And the defendant averred that the plaintiff drew the land in the conveyance declared upon mentioned as his prize in said lottery: that defendant in pursuance of the illegal agreement executed said indenture: and that the plaintiff took it with full knowledge of the circumstances:—Held, on demurrer, plea good, the agreement set out shewing a lottery within the statute. *Power* v. *Canniff*, 18 U. C. R. 403.

Declaration for £100, agreed to be paid by defendant to plaintiff for his right to certain land. Plea, that one J. sold by way of lottery, contrary to the statute, to one V., whose right with full knowledge of the lottery plaintiff purchased, and sold to defendant with J.'s consent, who conveyed to defendant:—Held, plea good, as shewing a contract void under 12 Geo. II. *Lloyd* v. *Clark*, 11 C. P. 248.

Plaintiff sold a tract of land to H., giving an agreement to convey on payment of the purchase money at certain periods, and H. re-sold it in lots by a lottery, which the plaintiff was aware of, but had nothing to do with. After the drawing, it was arranged that the plaintiff, instead of H., should enter into agreements with the persons purchasing by the tirage to convey to them the lots which they had drawn on the terms there agreed upon, and that the sums payable by them should be received by the plaintiff on account of the purchase money due to him by H. In an action by the plaintiff on the covenant to pay, contained in one of such agreements:—Held, that the sale by lottery was illegal, under 12 Geo. II. c. 28, which must be treated as in force here, notwithstanding our Act, 19 Vict. c. 49; and that the agreement declared upon, being an adoption of such sale, could not be enforced. *Cronyn* v. *Widder*, 16 U. C. R. 356.

See Scanlon v. *London and Port Stanley R. W. Co.*, 23 Gr. 559.

Trust for Creditors — *Disposition by Lottery.*]—A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, and failing in that plan of disposition, then in trust to sell as the trustees should deem most advantageous: — Held, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared. *Goodeve* v. *Manners*, 5 Gr. 114.

IV. Horse-racing.

Imperial Acts.]—A trotting match for £50 between two horses in sleighs on the ice, is legal within 13 Geo. II. c. 19, and 18 Geo. II. c. 34. *Fulton* v. *James*, 5 C. P. 182.

Recovery of Deposit from Stockholder.]—D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P., who, default being made by D., handed over the amount of D.'s deposit to H., although D. had previously demanded it back. D. now brought this action against H. and P. to recover the amount of the deposit:—Held, that the race was an illegal one under 13 Geo. II. c. 19, one of the participants not being the owner of the horse he bet upon, and therefore D. could not recover back from H. the deposit money, being himself in pari delicto:—Held, however, that inasmuch as P. should have handed back D.'s deposit on demand made before disposal, D. could now recover amount of the same from P. *Davis* v. *Hewitt*, 9 O. R. 435.

See sub-title II., *ante*.

Recovery of Prizes.]—Defendant, being the treasurer of a turf club by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted him for advances which he had previously made:—Held, that plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Denison*, 28 U. C. R. 323.

The proprietor of a race course is not responsible for the purses run for, unless upon an express undertaking. *Gates* v. *Tinning*, 3 U. C. R. 295, 5 U. C. R. 540.

A winner has no right to recover his entrance money because the purse has not been paid over to him. *S. C.*, 3 U. C. R. 295.

Special Rules.]—Two parties, W. and L., each deposited £50 in defendant's hands, to be run for by their horses on the following terms: L.'s horse (Butcher) was to distance W.'s horse (Warrior) three times out of five, in mile heats. Two heats were run; the first Butcher distanced Warrior, the second Warrior distanced Butcher, when Warrior's owner contended that he had won the race, as, by the usual rule of racing, a distanced horse could not run again:—Held, that this rule was properly held inapplicable, and that the race was not won. *Wilson* v. *Cutten*, 7 C. P. 476.

Steward's Decision.]—Where, according to the rule of a race, for one hundred guineas, the decision of the stewards was to be final, and the plaintiff's horse won the first heat, and came in first in the second, but, in consequence of alleged foul riding, was adjudged by the stewards to have been distanced, and another horse was pronounced the winner:—Held, that the plaintiff could not contest such a decision in an action for money had and received against the treasurer of the race, who had not paid over the purse. *Gorham* v. *Boulton*, 6 O. S. 321.

See Criminal Law, IX. 25.

GARNISHMENT.

See Attachment of Debts.

GAS COMPANY.

See Assessment and Taxes—Company, IX. 2.

GENERAL AVERAGE.

See Insurance, VI. 2.

GENERAL SESSIONS.

See Sessions.

GIFT.

I. In General, 2984.

II. Between Husband and Wife, 2987.

III. Donatio Mortis Causa.

I. In General.

Annuity—*Revocation.*]—A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made orally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage and death of the son. *Long* v. *Long*, 17 Gr. 251; 16 Gr. 239.

Bonus.]—Held, that the word "bonus" in 36 Vict. c. 48, s. 372, s.-s. 5 (O.), does not necessarily import a gift. *Scottish American Investment Co.* v. *Village of Elora*, 6 A. R. 628.

Canada Temperance Act Fines.]—The order in council directing that all fines received under the Canada Temperance Act within any city or county which had adopted the Act, which would otherwise belong to the Crown, should be paid to the treasurer of such city or county for the purposes of the Act, operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a completed transaction, nor retract that which had been actually done under it. *United Counties of Leeds and Grenville* v. *Town of Brockville*, 17 O R. 261. But see this case in appeal: 18 A. R. 548.

Conditional Gift—*Rideau Canal Act—Ordnance Vesting Act—Conditions—Forfeiture.*]—See *Magee* v. *The Queen*, 3 Ex. C. R. 304.

Goods—*Delivery.*]—Held, that a gift from S. to the plaintiff, in this case of certain mares, not being accompanied by delivery, did not vest the property in the mares in the plaintiff. *Scott* v. *McAlpine*, 6 C. P. 302.

To make a valid gift of personal property inter vivos, an actual delivery and change of possession is not necessary; it is sufficient that the conduct of the parties should shew that the ownership has been changed. *Regina* v. *Carter*, 13 C. P. 611.

In trover for a stump machine, it appeared that the plaintiff had worked on a farm for defendant, his uncle, since he was ten years old almost continuously until of age. Defendant had stated that he intended to give the machine to the plaintiff if he remained with him until he came of age, and the plaintiff swore that after he came of age the defendant said "the machine was the plaintiff's," but he (defendant) wished the plaintiff to let him work it until he got the stumps out. The defendant denied this, and the machine had never been taken away by the plaintiff. It also appeared that when taxed with selling the machine, defendant said he was about to sell his farm, and would then pay the plaintiff:—Held, that if the jury believed the plaintiff's account, there had been a complete gift inter vivos, and a verdict for the plaintiff was upheld. *Viet* v. *Viet*, 34 U. C. R. 304.

Money — *Knowledge of Donee.*] — Money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons on the bank to pay over. The order was issued on the 17th August, thirteen days before the bank agency at the place where the debtor resided was advised of the deposit:—Held, that the amount could not be attached. Semble, that the father might revoke the gift, and therefore it was not a debt. *Caisse* v. *Tharp*, 5 P. R. 265.

——— *Promissory Notes — Delivery.*]—A testator, who was suffering from an incurable disease, went to stay with his married daughter, one of the defendants, and was tended and nursed by her, and was afterwards joined by his wife, who remained with him until his death which took place shortly after. Nearly three months after he had been at defendant's house, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but pointing to a box in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's to do what she liked with, and that there was sufficient for all. No change was made in the possession of the box and its contents, it continuing in his possession up to the time of his death, he taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never otherwise alluded to:—Held, that neither a good donatio mortis causâ nor gift inter vivos to defendant was shewn, but that the testator's intention was that the defendant should be paid for her services, and she was accordingly allowed for his board and her attendance on him as well as for the board of his wife. *Brown* v. *Davy*, 18 O. R. 559.

See Freeman v. *Freeman*, 19 O. R. 141; *Turner* v. *Prevost*, 17 S. C. R. 283.

Mortgage—*Delivery—Interest.*]—An oral gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him. Therefore, where the mother of the defendant, while on her deathbed, gave to another son, J., the key of a drawer containing a mortgage in her favour executed by the defendant directing J. to give the instrument to the defendant in the event of her not again seeing him, and the defendant was subsequently summoned by telegraph to see his mother, and he thereupon again visited her, when she told him that his mortgage was in the drawer, and that when he went home he should take it with him; but he did not on this occasion take possession of or see it, and after the mother's death (intestate) J., as directed by her, handed the mortgage to the defendant:—Held, affirming 8 O. R. 516, that there had not been such a complete delivery of the security as to constitute a gift inter vivos or a donatio mortis causâ, and therefore that the money due on the mortgage formed part of the personal assets of the deceased. Watson v. Bradshaw, 6 A. R. 656, observed upon. *Travis* v. *Travis*, 12 A. R. 438.

The mother had signed and given to defendant a year before her death a receipt for interest on the mortgage, and had indorsed a similar receipt on the mortgage, but no money was paid:—Held, a valid gift of the interest. *S. C.* 8 O. R. 516.

Parent and Child — *Fiduciary Relationship—Influence—Presumption — Onus — Absence of Independent Advice.*] — For fifteen years before his father's death the defendant managed his father's business generally, and did all his banking under a power of attorney. After the death of the father, at the age of 78, in September, 1898, the son claimed a sum of $20,000, represented by a bank deposit receipt, dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children, and which he obtained by drawing as his father's attorney a cheque for the amount in his own favour upon his father's account. The father died intestate, leaving the defendant and two other children. The sum of $20,000 represented more than one-fourth of the value of the estate:—Held that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice or adopted the transaction after the influence was removed or some equivalent circumstances. Morley v. Loughnan, [1893] 1 Ch. 736, Rhodes v. Bate, L. R. 1 Ch. 252, and Liles v. Terry, [1895] 2 Q. B. 679, followed. The rule is not confined to the case of trustee and cestui que trust, but is applicable to every case where confidence has been reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle. Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children,

and that both notes had been destroyed:—Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the $20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father, at the time the transaction was carried out, in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore, that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered. *Trusts and Guarantee Co.* v. *Hart*, 31 O. R. 414.

Promissory Note — *Delivery.*] — The plaintiff had performed services for one P. in his lifetime, and he, intending to make some recognition thereof told her that a certain promissory note payable to himself or bearer, which he produced, was hers, saying: "Here is your note; take it when you want it." The plaintiff told him to keep it for her, as she had no place in which to keep it herself, and he did so;—Held, that this constituted a complete gift inter vivos, there being a gift, and an acceptance of it by the donee, and actual delivery not being necessary as in the case of a donatio mortis causâ:—Held, also, that the plaintiff's evidence was, upon the facts stated in the report, sufficiently corroborated. *Watson* v. *Bradshaw*, 6 A. R. 666.

Title to Land — *Gratuitous Donation — Neglect to Register—Quebec Law.*] — See *Lacoste* v. *Wilson*, 20 S. C. R. 218.

II. Between Husband and Wife.

Assignment for Creditors — *Wife's Claim.*]—M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it:—Held, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the court of appeal, this, the second appellate court, would not interfere with such finding. *Warner* v. *Murray*, 16 S. C. R. 720.

See Vinden v. *Fraser*, 28 Gr. 502; *O'Doherty* v. *Ontario Bank*, 32 C. P. 285.

Bond—*Consideration.*]—W. G. gave to his wife, M. G., a bond conditioned as follows: "That my executors shall pay M. G. $200 in one year, and $200 in two years after my decease, and these payments to be made as above stated to M. G. I bind myself to make full provision for her in my will to be hereafter made. And should I not make a will, this shall be full authority to my executors to make such payments. When my executors fulfil the above named obligation by making said payments the above obligation to be null and void, otherwise to remain in full force and virtue." W. G. died leaving a will, which, however, did not specially mention the above obligation. M. G. alleged that she had left the home of the testator for good cause, and that this bond was given to induce her to return and live with him, which she did: but the Judge found otherwise, and that the bond was wholly without consideration in fact. M. G. now sued the executors of W. G. for the $400 mentioned in the bond:—Held, that M. G. could not recover, for that if the action were considered as an action at law on the bond, the bond was void, since at law husband and wife could not contract; while if considered as a suit in equity it was equivalent to a suit for specific performance, or the enforcement of an imperfect gift, and in either case equity would not aid a volunteer, neither did the presence of a seal make any difference:—Held, also, that the bond could not be regarded as a declaration of trust. *Glass* v. *Burt*, 8 O. R. 391.

Chose in Action—*Knowledge of Transfer.*]—Since the Married Woman's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge if made in proper form vests the property in him at once, subject to his right to repudiate it when informed of it. *Sherratt* v. *Merchants Bank of Canada*, 21 A. R. 473.

See McCabe v. *Robertson*, 18 C. P. 471.

Evidence.]—The only proof of the receipt of certain moneys by the wife during the life of her husband was her own evidence, but she also stated that the money had been given to her by him. The court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Gr. 373.

Incomplete Assignment of Mortgage.]—The holder of a mortgage security while labouring under an attack of sickness, of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed, but did not affix his seal thereto, although the memorandum was expressed to be under seal:—Held, that the wife took no interest under such assignment, either as a gift inter vivos, or as a donatio mortis causâ; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs. *Tiffany* v. *Clarke*, 6 Gr. 474.

Insurance Premiums Paid by Wife.]—Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—Held, that under these circumstances the onus was on the executor to prove that the moneys were a gift to the deceased, and that it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in

order to recover. *Elliott* v. *Bussell*, 19 O. R. 413.

In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and wife as shews that the money was so paid to him as a gift. *Ib.*

See Rice v. *Rice*, 27 A. R. 121.

Money.]—The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the bank agent's suggestion, was deposited in both their names subject to withdrawal by either of them, and it remained on deposit uninterfered with by the husband up to the time of his death, which occurred some months after:—Held, that there was a good gift inter vivos to the wife. *Payne* v. *Marshall*, 18 O. R. 488.

One J. O'B., and B. O'B., his wife, were the holders of a certain deposit certificate of the Bank of British North America to the following purport: "Received from J. O'B. and B. O'B. the sum of $2,800, for which we are accountable to either with interest at current rate," &c. Three or four days before his death J. O'B. called his wife to his bedside, and in the presence of P., gave the certificate to her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her:—Held, J. O'B. having died, that his wife was entitled to the money in the bank. *O'Brien* v. *O'Brien*, 4 O. R. 459.

Subsequently to the coming into force of the Married Woman's Property Act, R. S. O. 1887 c. 132, a married woman on the day of entering into a money bond, deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which, as against him, she had the absolute disposal by his consent and wish:—Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland* v. *Neville*, 21 O. R. 412.

Where a husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately:—Held, that she was entitled as survivor to the whole fund. *Re Ryan*, 32 O. R. 224.

Piano.]—The evidence shewed that the husband had purchased a piano, and had made a present of it to his wife by putting it in the house where they lived, and subsequently recognizing her right to it:—Held, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift inter vivos of this description of property, so as to prevent its passing to his personal representatives; and that there was no evidence of intention on his part to constitute himself a trustee of the piano for his wife. *Schaffer* v. *Dumble*, 5 O. R. 716.

Promissory Note — *Evidence.*] — The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not indorsed by him. The evidence, in the master's office, on the taking of the accounts of the estate, shewed that the wife had taken possession of this and other notes belonging to her husband during his lifetime. The master found that under the circumstances appearing in the report of the case (29 Gr. 443), the testator had intended the note to belong to the widow, and that it did not form part of the assets of the estate, which finding was reversed on appeal by a Judge:—Held, per Spragge, C.J.O., and Morrison, J. A., (reversing the order then pronounced) that the evidence established a valid gift inter vivos. Per Burton and Patterson, JJ.A.:—that even if the facts shewn in the evidence failed to establish a good gift inter vivos, the testator under the circumstances had constituted himself a trustee for his wife of the note. Per Burton, J.A.:—The mere delivery of such a note, and indorsed, could not take effect as a gift inter vivos. Per Spragge, C. J.O.:—There is no distinction in this respect between a gift inter vivos and a donatio mortis causâ. Tiffany v. Clarke, 6 Gr. 474, remarked upon. *Re Murray, Purdham* v. *Murray*, 9 A. R. 368.

Transfer of Indebtedness.] — Before 1859 a husband received a sum of money bequeathed to his wife, upon receipt of which he made an entry in an account book indicating what the money was and the source from which he had received it. He mixed this money with his own, using it in the erection of buildings upon lands seemingly his own, but treating the money as money to the usufruct of which his wife was entitled. In 1863 one of his sons, W., was indebted to him in an amount about equal to such legacy, and with the view of accounting to her for such legacy and with her assent, he made entries in his books transferring such indebtedness of W. to his wife:—Held, that the transfer of the son's debt was a good gift inter vivos from the husband to the wife. *Kerr* v. *Read*, 23 Gr. 525.

Undue Influence.]—Distinction between undue influence in cases of gifts inter vivos and testamentary gifts referred to. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

See FRAUD AND MISREPRESENTATION, III. 2 (b), (c)—HUSBAND AND WIFE, IV. X.

III. DONATIO MORTIS CAUSA.

Bank Deposit Book.]—A banker's pass book, which is numbered, and in which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of donatio mortis causâ, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death. *Brown* v. *Toronto General Trusts Corporation*, 32 O. R. 319.

Delivery of Keys of Box and Rooms Containing Valuables.] — Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash-box, which was then in the actual possession of his solicitor, and of two rooms,

in which were contained securities for money and chattels, accompanying the delivery with words of gift, having reference to the articles actually delivered:—Held, (20 O. R. 168), upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash-box and its contents, and of the rooms and their contents; and upon the law that the intention of the deceased should be given effect to, and a valid donatio mortis causâ declared. Held, reversing 20 O. R. 168, that as regards the contents of the box and the property in the rooms, the alleged gift had not been made out, and no donatio mortis causâ was established, otherwise decision affirmed. *Hall* v. *Hall*, 20 O. R. 684; 19 A. R. 292.

Delivery of Keys of Box.]—The testator during his last illness handed to his wife the key of his cash-box containing sundry papers, together with a promissory note for $400, which he intended to give to her for her own benefit, but the box and its contents remained as much in the possession of the testator as before the alleged gift; and the note, with other papers, came to the hands of the executors after the death of the testator:—Held, that there had not been a valid donatio mortis causâ. *Young* v. *Derenzy*, 26 Gr. 509.

See Lee v. *Bank of British North America*, 30 C. P. 255.

Delivery to Third Person—*Delivery of Key.*]—To effect a donation mortis causâ delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent or server of the donor. The assent of the donee or even his knowledge of the delivery is not requisite. Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of the dominion over the same. *Walker* v. *Foster*, 30 S. C. R. 299.

Deposit Receipt.]—Shortly before the execution of his will a testator handed to his daughter a deposit receipt, which was at her instance transferred to her name, and she used part of the money. The testator stated that he wanted her to take care of him, and that he was going to have a will drawn:—Held, that the gift of the deposit receipt was a valid donatio mortis causâ. *Freeman* v. *Freeman*, 19 O. R. 141.

Plaintiff's wife held a bank deposit receipt for $1,000. Shortly before her death she directed the trunk containing this receipt to be sent for, or sent for it herself, at the same time expressing her intention of giving the receipt to the wife of defendant, and also delivering to her the key of the trunk. The trunk did not, however, arrive until after her death:—Held, assuming that the plaintiff's wife could dispose of the money as if she were sole, that the instrument, not having been actually delivered by the donor before her death, did not pass to the defendant's wife as a donatio mortis causâ:—Held, also, that even if there had been an actual gift of the deposit receipt, with the intention of passing the money mentioned in it, as a gift inter vivos, and it had been accepted, though there were no actual delivery, the gift, being a mere chose in action, would not pass as a gift inter vivos. *McCabe* v. *Robertson*, 18 C. P. 471.

Mortgage.]—See *Tiffany* v. *Clarke*, 6 Gr. 474, sub-title II., *ante*.

Promissory Note.]—A testator, having agreed to sell part of his real estate, had taken the vendee's note for $900, being the interest accrued due on the purchase money. This note and the papers relating to the sale the testator had been frequently heard to say he intended to give to his son, who was named as an executor of his will. Shortly before his death, and in anticipation of it, he desired the case containing his papers to be brought to him, and from them directed certain notes to be selected, and delivered them to his wife for her own use; the rest of the papers, including the note for $900, and the papers relating to the sale, together with several notes and documents including his will, testator handed to his son, with a direction that if he recovered they were to be brought back; but in the event of his death then that he (the son) should keep them:—Held, not a good donatio mortis causâ of any of the securities. *Blain* v. *Terryberry*, 9 Gr. 286.

B., who died in 1874, had a made a will in which there was a devise to the plaintiff, his illegitimate daughter; but this having given offence to his family he destroyed the will and made another, and at the same time signed a promissory note, payable to the plaintiff, for $2,000. He placed this note in a pocket-book, where it remained till after his death, but shortly before his death he shewed it to a witness, and said it was to be paid after his death, and then handed it with the pocket-book to the witness, but afterwards took them back. He told this witness that he would talk more about it to her another time, and asked her to tell P., his legitimate daughter and his executrix, that he had shewn the witness the note, which the witness did, and told the testator that she had done so. It was proved also that he said he had made provision for the plaintiff—Held, that the plaintiff could not recover, for the note could not be claimed by her either as a donatio mortis causâ or as a gift inter vivos, there having been no delivery of it by the testator. Quære, whether such a note may, by manual delivery, be the subject of a gift. *Rupert* v. *Johnston*, 40 U. C. R. 11.

See Re Murray, Purdham v. *Murray*, 9 A. R. 369, sub-title II., *ante*.

Quebec Law.]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid:—Held, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to shew that the transaction was actually for good consideration (dation en paiement), and consequently legal and valid. *Valade* v. *Lalonde*, 27 S. C. R. 551.

——— *Future Succession—Illegal Consideration—Ratification by Will—Power of Executor—Scisin.*]—See *Consumers Cordage Co.* v. *Converse*, 30 S. C. R. 618.

Wheat in Mill.]—A. agreed with B. to work a mill on shares—A., who owned the mill, to have two-thirds and B., who worked it, one-third of the toll. After some years, B. was taken dangerously ill, and about an

hour before his death sent for A. and told him (having first requested those about him to leave the room) that there were about 300 bushels of toll wheat in the mill undivided, 100 of which under the agreement would be his, B.'s; that as he, B., owed him, A., for money lent, he begged he would accept this 100 bushels, and also a promissory note, which he sent for and handed him. Witnesses who overheard part of the conversation swore to the 100 bushels, and the note being given by B., not as a gift, but, as they heard B. say, in payment of a debt:—Held, in trover by B.'s administratrix to recover from A. the wheat and note, that upon these facts the question of delivery as upon a donatio mortis causâ did not arise, the transaction being nothing more than an ordinary sale, for a valuable consideration; and that if it had, the wheat being already in A.'s own mill, no further delivery could be required. *Ralph* v. *Link*, 5 U. C. R. 145.

GLEBE LANDS.

See CHURCH, I. 3.

GOOD CAUSE.

See COSTS, II. 5.

GOODS, CARRIAGE OF.

See CARRIERS, III.—RAILWAY, V.—SHIP, II.

GOODS IN CUSTODIA LEGIS.

See DISTRESS, III. 10 (b).

GOODWILL.

Agreement not to Compete.] — The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into business there again. The plaintiff afterwards sold out to one C., and entered into a like agreement with him:—Held, that the plaintiff after this sale had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law. *Jones* v. *Wooley*, 16 Gr. 106.

Expropriation.]—Where the land itself upon which a trade is carried on is expropriated, damage to the goodwill may be a proper subject of compensation. Ricket's Case, L. R. 2 H. L. 175, distinguished. *Re McCauley and City of Toronto*, 18 O. R. 416.

Implied Obligation not to Compete.] —Defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London, in this Province, under the name of "Mason's Hotel," or "Western Hotel":—Held, that such sale implied an obligation, enforceable in equity, that defendant would not thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel;" and would not resume or carry on such business under any name or in any manner, in the premises in question: and would not hold out in any way that he was carrying on business in continuation of or succession to the business formerly carried on by him under the said names, or either of them. *Mossop* v. *Mason*, 18 Gr. 453; 17 Gr. 360; 16 Gr. 302.

Partnership — *Forfeiture of Interest.*]—Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of partnership, the others orally notified him that he must leave the firm, and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business, and the assignee brought an action against the remaining partners for the value thereof:—Held, reversing the judgments below, sub nom. Mead v. O'Keefe, 15 O. R. 84, and 15 A. R. 103, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from shewing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited. Held, also, that if it was a dissolution by one partner voluntarily retiring, no claim could be made by the retiring partner in respect of goodwill, as the account to be taken under the partnership articles in such cases did not provide therefor. Semble, that the goodwill consisted wholly of the trade name of the firm. *O'Keefe* v. *Curran*, 17 S. C. R. 596.

Profession—*Administration.*]—The goodwill of a professional business, as a surgeon's, may be sold by the personal representative, and the contract enforced, where the price has been agreed upon, or any other means of fixing its value provided. It is therefore an asset of the estate, to be accounted for in the ordinary course of administration. Semble, however, that the personal representative could not be compelled to offer it for sale. *Christie* v. *Clarke*, 16 C. P. 544. See *S. C.*, 27 U. C. R. 21.

Sale of Business.]—S. and H., trading as partners, sold out their business to E. under a written agreement, as follows:—"S. and H. do hereby bind themselves to E. under a penalty of $2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.:—Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt. *Elliott* v. *Stanley*, 7 O. R. 350.

See Williamson v. *Ewing*, 27 Gr. 596; *Electric Despatch Co. of Toronto* v. *Bell Telephone Co. of Canada*, 17 O. R. 495, 501; 17 A. R. 292; 20 S. C. R. 83.

See CONTRACT, II. 3.

GOVERNOR-GENERAL.

See CONSTITUTIONAL LAW, I., III.

GOVERNMENT RAILWAYS.

See CROWN.

GRAMMAR SCHOOLS.

See SCHOOLS, COLLEGES, AND UNIVERSITIES, II.

GRANT.

See LICENSE, I. 1.

GUARANTEE.

See PRINCIPAL AND SURETY, I. 2.

GUARANTEE INSURANCE.

See INSURANCE, IV.

GUARDIAN.

See INFANT, III.—LUNATIC, IV.

GUARDIAN AD LITEM.

See INFANT, VI. 3.

HABEAS CORPUS.

I. IN WHAT CASES, 2995.

II. PRACTICE AND PROCEDURE, 2998.

III. MISCELLANEOUS CASES, 3003.

I. IN WHAT CASES.

Attachment.]—A verdict was taken in a cause at nisi prius subject to a reference, and the rule of reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity; and the defendant, against whom the award was made, did not make any motion in this court in proper time, but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which writs of habeas corpus were subsequently issued. The court refused to entertain a motion to set aside those writs or suspend proceedings upon them. *Regina* v. *Maddock*, *In re Manners* v. *Clarke*, 1 U. C. R. 322.

Capias.]—Where it appeared that the prisoner was in custody under a writ of capias, issued out of the county court, regular on its face, but which, it was contended, had been improperly issued, a Judge in chambers refused to discharge the prisoner. *In re Bigger*, 10 L. J. 329.

Committal for Contempt.] — An application by the defendant committed for contempt for a fiat or order that he be brought before the court for the purpose of moving in person for his discharge from custody was refused. Ford v. Nassau, 9 M. & W. 793, and Ford v. Graham, 10 C. B. 369, followed. Semble, a habeas corpus for the purpose would be refused, and a fortiori a fiat or order; for the sheriff would not be bound to obey it, and if the party were removed from prison under it, he would not in the meantime be in proper and legal custody. *Roberts* v. *Donovan*, 16 P. R. 456.

Convict—*Witness.*]—A writ of habeas corpus ad testificandum may be issued to the warden of the penitentiary to bring up a convict for life, to give testimony on behalf of the Crown in a case of murder. *Regina* v. *Townsend*, 3 L. J. 184.

County Judge's Criminal Court.] — The prisoner was convicted before a county Judge's criminal court. On an application for a habeas corpus:—Held, that the court was a court of record, and that under R. S. O. 1877 c. 70, s. 1, there was therefore no right to the writ. *Regina* v. *St. Denis*, 8 P. R. 16.

The county court Judge's criminal court being a court of record, its proceedings are not reviewable upon habeas corpus, but only upon writ of error. *Regina* v. *Murray*, 28 O. R. 549.

County Judge's Discretion.]—When a county Judge has jurisdiction in the premises a superior court Judge will not in general (if at all) exercise a power of appeal by habeas corpus, which was never intended as a means of appealing from the discretion of a county Judge. *Runciman* v. *Armstrong*, 2 C. L. J. 165.

Criminal Charge.]—29 & 30 Vict. c. 45 had in view and recognizes the right of every man committed on a criminal charge to have the opinion of a Judge of a superior court upon the cause of his commitment by an inferior jurisdiction. *Regina* v. *Mosier*, 4 P. R. 64.

Debtor.]—It is not illegal to issue a writ of habeas corpus to bring up a debtor in custody on an attachment for the non-payment of costs, and the sheriff cannot therefore justify an escape from the attachment on the ground that the debtor was brought up by habeas corpus by the plaintiff, and that it would have been illegal for the sheriff afterwards to detain him, and so he was permitted to leave his custody. *Graham* v. *Kingsmill*, 6 O. S. 584.

A deputy Judge of a county court declined, on the ground that he was the partner of the plaintiffs' attorney, to entertain an application by the defendant for a supersedeas because he had not been charged in execution within the term next after judgment:—Held, that the defendant was entitled to be discharged from custody under a writ of habeas corpus. *Reid* v. *Drake*, 4 P. R. 141.

Doubtful Jurisdiction.]—Where a person is restrained of liberty under a statute, he should be discharged, unless the Judge is satisfied by unequivocal words in the statute that the imprisonment is warranted. *In re Slater and Wells*, 9 L. J. 21

Held, that in favour of liberty, it is the duty of a Judge on a habeas corpus, when doubting the sufficiency of a warrant of commitment, to discharge the prisoner. *In re Beebe*, 3 P. R. 270.

Felony.]—After a conviction of felony by a court having general jurisdiction over the offence charged, a writ of habeas corpus is an inappropriate remedy. *In re Sproule*, 12 S. C. R. 140.

Offender in Another County.]—Though an offender for whose arrest a magistrate's warrant is issued be in a different county, and a prisoner for debt in close custody, he may be removed under writs of habeas corpus and recipias. *Regina* v. *Phipps*, 4 L. J. 109.

Order to Commit—*County Court*—"*Process.*"]—An order made by a Judge of a county court in chambers for the commitment to close custody of a party to an action in that court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, is "process" in an action within the meaning of the exception in s. 1 of the Habeas Corpus Act, R. S. O. 1887 c. 70; and where such a party was confined under such an order, a writ of habeas corpus granted upon his complaint was quashed as having been improvidently issued. *Re Anderson* v. *Vanstone*, 16 P. R. 243.

Preliminary Investigation Pending.]—Held, that a writ of habeas corpus should not issue where the accused is in custody pending a preliminary investigation before a magistrate, during a remand to enable the prosecution to supply evidence in support of the charge. *Regina* v. *Cox*, 16 O. R. 228.

See Regina v. *Goodman*, 2 O. R. 468.

Previous Proceedings.] — Writ held to have been issued improvidently when the matter in controversy had been decided and the legality of the detention of the prisoner established in previous proceedings. *In re Hall*, 32 C. P. 498; 8 A. R. 155.

Prisoner Brought up for Sentence.]—A prisoner having been sent to the penitentiary upon a judgment which was afterwards reversed, as having been pronounced upon two counts, one of which was defective, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 U. C. R. 106.

Quarter Sessions.]—The proper proceeding to reverse a judgment and sentence of the court of quarter sessions is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 U. C. R. 215.

Question of Fact.]—Held, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the supreme court could not go behind the conviction and inquire into the merits of the case by the use of a writ of habeas corpus, and thus constitute itself a court of appeal from the magistrate's decision. *In re Trepanier*, 12 S. C. R. 111.

Questions of Practice.]—Remarks as to the inconvenience, if not danger, of making the writ of habeas corpus a mere method of appealing from other tribunals on points more of practice than affecting the merits. *In re Munn*, 25 U. C. R. 24.

Second Warrant.]—Where a prisoner is under a writ of habeas corpus discharged from close custody on the ground that the warrant of commitment charges no offence, he is not, under 31 Car. II. c. 2, s. 6, entitled to his discharge as against a subsequent warrant correctly stating the offence, upon the alleged ground that the second is for "the same offence" as the first arrest. *In re Carmichael*, 1 C. L. J. 243.

Sessions — *Larceny.*] — A habeas corpus will not be granted to bring up a prisoner under sentence at the sessions for larceny. *Regina* v. *Crabbe*, 11 U. C. R. 447.

Supreme Court of Canada.]—The right to issue a writ of habeas corpus being limited by s. 51 of the Supreme and Exchequer Courts Act, to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case of common law. *In re Sproule*, 12 S. C. R. 140.

Warrant Issued in Quebec — *Conspiracy—Locality of Offence.*]—A Judge cannot, upon the return to a habeas corpus where a warrant shews jurisdiction, try on affidavit evidence the question where the alleged offence was committed. Sections 4 and 5, R. S. O. 1887 c. 70, are not intended to apply to criminal cases where no preliminary examination has taken place. Section 752 of the Criminal Code, 55 & 56 Vict. c. 29 (D.), only applies where the court or Judge making the direction as to further proceedings and inquiries mentioned therein has power to enforce it, and a court or Judge in Ontario has no power over a Judge or justice in Quebec to compel him to "take any proceedings or hear such evidence," &c. *Regina* v. *Defries*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Summary Trial of Indictable Offences.]—A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of habeas corpus and certiorari. *Regina* v. *St. Clair*, 27 A. R. 308.

II. Practice and Procedure.

Affidavits—*Procedure.*]—The affidavit upon which an order for a habeas corpus is moved, should be intituled in one of the superior courts. As a general rule it should be made by the prisoner himself, or some reason, such as coercion, &c., shewn for his not making it. It is discretionary with the Judge to receive an affidavit of a different kind. *In re Ross*, 3 P. R. 301.

Quære, can a Judge in chambers rescind his order for a habeas corpus, or quash the writ itself, on the ground that it issued improvidently. *Ib.*

Quære, has he power to call upon the prosecutor or magistrate to shew cause why a habeas corpus should not issue, instead of at once ordering the writ. *Ib.*

Appeal.]—As to the right of appeal to the court of appeal from a decision of a Judge on a motion to discharge a prisoner. See *In re Boucher*, 4 A. R. 191.
See In re McKinnon, 2 C. L. J. 324.

The Act 29 & 30 Vict. c. 45 apparently substituted the right of appeal in habeas corpus cases for successive applications from court to court. *In re Hall*, 8 A. R. 135.

——— *Judge in Chambers.*]—Under R. S. O. 1887 c. 70, s. 1, the writ of habeas corpus may be made returnable before "the Judge awarding the same, or, before a Judge in chambers for the time being, or before a divisional court;" and by s. 6 an appeal is given from the decision of the said court or Judge to the court of appeal—Held, that the right of appeal must be exercised in the manner provided by the statute, and therefore an appeal from a Judge in chambers must be to the court of appeal. *Re Harper*, 23 O. R. 63.

Application to Quash.]—An application to the court to quash a writ of habeas corpus as improvidently issued may be entertained in the absence of the prisoner. *In re Sproule*, 12 S. C. R. 140.

Contradicting Record.]—If the record of a superior court, produced on an application for a writ of habeas corpus, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. *In re Sproule*, 12 S. C. R. 140.

Defective Warrant.]—The course to be taken by the court on return of a habeas corpus, shewing prisoner detained under a defective warrant in execution of a conviction of a justice of the peace, discussed. *Arscott* v. *Lilley*, 11 O. R. 153.

Depositions — *Amendment.*]—Quære, 1. As to the power of a Judge sitting in chambers, on an application of a prisoner for his discharge on a bad warrant, to remand him, and in aid of the prosecution to order the issue of a certiorari to bring up the depositions, &c.; 2. As to power of a court or Judge, upon reading the depositions, to amend a bad warrant of a coroner, or issue a new one for the purpose of detaining a prisoner in custody. *In re Carmichael*, 10 L. J. 325.

Evidence.] — The provision in R. S. O. 1887 c. 70, s. 6, that the court or Judge before whom any writ of habeas corpus is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation, is permissive only, and a Judge has power in such a case to direct that the evidence shall be taken vivâ voce before him. In this matter it was directed, as in Re Murdoch, 9 P. R. 132, that the evidence should be taken vivâ voce, and it was further ordered that a foreign commission should issue to take evidence abroad, and that the parties to the application should be at liberty to examine each other for discovery before the hearing. The costs of the demurrer to the return (11 P. R. 482) were given against the father of the infant in any event of the proceeding. *Re Smart Infants*, 12 P. R. 2.

Examining Proceedings.]—The Judges of the superior courts are bound when a prisoner is brought before them under 29 & 30 Vict. c. 45, to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge him if there does not appear sufficient cause for his detention. The evidence in this case warranted the magistrate in requiring bail. *Regina* v. *Mosier*, 4 P. R. 64.

Investigation of Facts.]—The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen street, in the said city," and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the commitment, conviction, information, and depositions were brought up. On application for her discharge:—Held, no objection that there was no evidence to warrant the conviction—for when a proper commitment is returned to a habeas corpus, and there was evidence, the court will not enter into the question whether the magistrate has drawn the right conclusion from it. Semble, that on such an application affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but that such conduct may furnish ground for a criminal information. Quære, with regard to some of the objections, whether the court, on such an application, can go behind the warrant of commitment. *Regina* v. *Munro*, 24 U. C. R. 44.

Judge in Chambers.]—As to the right of a Judge sitting in chambers in Upper Canada to order the issue of a writ of habeas corpus, where the custody is not for criminal or supposed criminal matter; the Imperial statute 56 Geo. III. c. 100, not being in force in this colony. In re Hawkins, 9 L. J. 298, doubted. *In re Bigger*, 10 L. J. 329.

A Judge in practice court cannot grant a rule nisi for a habeas corpus ad subjiciendum. *Regina* v. *Smith*, 24 U. C. R. 480.

A Judge in chambers, under orders of 1853, may grant a writ of habeas corpus. *Re Paton*, 4 Gr. 147.
See Regina v. *Arscott*, 9 O. R. 541.

Request.]—Semble, that a prisoner is not entitled to a writ of habeas corpus under the statute of Charles unless there be "a request made in writing by him or any one on his behalf, attested by two witnesses who were present at the delivery of the same." *In re Carmichael*, 1 C. L. J. 243.

Return Day.]—Held, that at common law the Judges of the superior courts of common law can order writs of habeas corpus ad subjiciendum in vacation, returnable either in term or vacation. *Re Hawkins*, 3 P. R. 239.

Semble, that when a Judge in a Province has the right to issue a writ of habeas corpus returnable in term as well as in vacation, a Judge of the supreme court might make the writ he authorizes returnable in said court in term as well as immediately. *In re Sproule*, 12 S. C. R. 140.

Return—*Copy of Warrant.*]—It is sufficient to return to a writ of habeas corpus a copy of the warrant under which the prisoner is detained, and not the original. *In re Ross*, 3 P. R. 301.

Held, that the person to whom a habeas corpus is directed, commanding him to return "the cause of taking and detainer," must return the original, and not merely a copy of the warrant. In re Ross, 3 P. R. 301, to the contrary, doubted. *In re Carmichael*, 10 L. J. 325.

——— *Custody of Infants.*]—A return was made by the mother of the infants, in whose custody they were, to a writ of habeas corpus obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. 1877 c. 130, s. 1:—Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law. Re Murdoch, 9 P. R. 132, explained and followed. *Re Smart Infants*, 11 P. R. 482.

——— *Form—Filing.*]—A habeas corpus directed to a gaoler was sent to the clerk of the Crown with a return stating that he held the prisoners under a warrant of committal annexed, but was unable to produce them for want of means to pay for their conveyance. This return having been marked by the clerk, "Returned and filed," a Judge allowed these papers to be withdrawn for the purpose of having another return made. The prisoners were afterwards produced with the writ, to which the foregoing return was annexed, and another stating that the prisoners were held under the warrant already spoken of and a subsequent warrant, by which an alleged defect in the first was intended to be cured:—Held, 1. That the first return was in fact no return, merely alleging matters of excuse for not making a return; 2. that a return cannot be filed until it has been read before the Judge; and that the second return was unauthorized. *Regina* v. *Reno*, 4 P. R. 281.

——— *Sheriff.*]—A return by the sheriff to the writ setting out the conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. *In re Sproule*, 12 S. C. R. 140.

Review of Facts.]—Held, that where the proceedings before a magistrate are removed under 29 & 30 Vict. c. 45, s. 5, the Judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found the fact, then the evidence may be looked at to see whether there was anything to support his findings upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal. *Regina* v. *Green*, 12 P. R. 373.

Right to One Writ—*Appeal.*]—A person confined or restrained of his liberty is now limited to only one writ of habeas corpus to be granted by a Judge of the high court, returnable before himself or before a Judge in chambers, or before a divisional court, with a right of appeal to the court of appeal, whose judgment is final; and where no such appeal is taken, the judgment which might have been appealed against becomes final and conclusive, and may be pleaded as res judicata. *Taylor* v. *Scott*, 30 O. R. 445.

Supreme Court of Canada.]—Section 51 of the Supreme and Exchequer Courts Act does not interfere with the inherent right which the supreme court, in common with every superior court, has, incident to its jurisdiction, to inquire into and judge of the regularity or abuse of its process, and to quash a writ of habeas corpus and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a Judge of said court. The section does not constitute the individual Judges of the supreme court separate and independent courts, nor confer on the Judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the Judge but by the court, which alone can issue an attachment for contempt in not obeying its process. Per Strong, J.—The words of s. 51 expressly giving an appeal when the writ has been refused or the prisoner remanded, must be attributed to the excessive caution of the Legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from, and revise, rescind and vary, orders made under this section. *In re Sproule*, 12 S. C. R. 140.

As regards habeas corpus in criminal matters, the Supreme Court has only concurrent jurisdiction with the Judges of the superior courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any Judge or court, or any appellate court, because the prisoner can come direct to any Judge of the supreme court individually, and upon that Judge refusing the writ or remanding the prisoner, he could take his appeal to the full court. *In re Boucher, Cassels' Dig.* 182.

The only appellate power conferred on the supreme court in criminal cases is by s. 49 of the Supreme and Exchequer Court Act, and it could not have been the intention of the Legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.—Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of certiorari to accompany a writ of habeas corpus granted by a Judge of the supreme court in chambers; and as the proceedings before the court on habeas corpus arising out of a criminal charge are only by way of appeal from the decision of the Judge in chambers, the said section does not authorize the court to issue a writ of certiorari in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court. *In re Trepanier*, 12 S. C. R. 111.

Semble, that c. 70 of the revised statutes of Ontario relating to habeas corpus does not apply to the supreme court of Canada. *Ib.*

For the purpose of an appeal to the supreme court of Canada in a habeas corpus case the first step is the filing of the case in appeal with the registrar. The judgment of the court of appeal in a habeas corpus proceeding was pronounced on 13th November, 1888. Notice of intention to appeal was immediately given but the case in appeal was not filed in the supreme court until 18th February, 1889:—Held, that the appeal was not brought within sixty days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it. *In re Smart Infants*, 16 S. C. R. 396.

The jurisdiction of a Judge of the supreme court of Canada in matters of habeas corpus in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte James W. Macdonald*, 27 S. C. R. 683.

By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal:—Held, that the matter was coram non judice, and there was no necessity for a motion to quash. *In re Lazier*, 29 S. C. R. 630.

III. Miscellaneous Cases.

Effect of Discharge.]—Held, in this case that the discharge of the plaintiff from custody on habeas corpus was not a quashing of the conviction. *Hunter* v. *Gilkison*, 7 O. R. 735.

Effect of Warrant.]—The mere fact of the warrant of commitment having been countersigned, under 31 Vict. c. 16 (D.) by the clerk of the Privy Council, does not withdraw the case from the jurisdiction of a Judge on a habeas corpus. The prisoner may contradict the return to the writ by shewing that one of the persons who signed the warrant was not a legally qualified justice of the peace. *Regina* v. *Boyle*, 4 P. R. 256.

Penalty—*Warrant.*]—The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions. The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L. under advice of defendant H., the county crown attorney. Upon return to habeas corpus she was discharged from custody under the latter warrant, upon the ground that it did not take into account the two days' imprisonment she had suffered prior to her appeal. Thereupon she was detained under a third warrant, on which nothing turned, and she was again arrested under a fourth warrant issued by defendant L. upon the original conviction. In an action brought by the plaintiff for the penalty of £500 awarded by s. 6 of the Habeas Corpus Act, 31 Car. II. c. 2:—Held, that s. 6 of the Habeas Corpus Act, 31 Car. II. c. 2, has no application to a case in which the prisoner is confined upon a warrant in execution:—Held, also, that the warrant in execution, issued by the convicting justice upon the discharge of the prisoner from custody for defects in the former warrant, was the legal order and process of the court having jurisdiction in the cause:—Semble, that the warrant issued after the dismissal of the appeal by the sessions, which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection. *Arscott* v. *Lilley*, 11 O. R. 153; 14 A. R. 297.

See Regina v. *Arscott*, 9 O. R. 541.

Re-Commitment — *Gaoler's Fees.*] — The court refused to discharge a prisoner out of custody, on the ground that the gaoler had taken him to a magistrate upon suspicion of his having committed a larceny in gaol. *Robinson* v. *Hall*, Tay. 482.

The court refused to commit a prisoner brought by habeas corpus from a county gaol to the custody of the sheriff of York. *Ib.*

Held, not unreasonable for a gaoler to charge 6d. per mile, both going and returning with a prisoner by habeas corpus. *Ib.*

Substitution of Procedure.]—A father was proceeding by habeas corpus to obtain an order awarding him the custody of his infant children:—Held, that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the habeas corpus proceedings. Such a direction was given where it appeared to be in the interest of the infants and all concerned. This order was affirmed by the chancery division and the court of appeal with one variation, viz., the habeas corpus to run concurrently with the petition directed to be filed, and to be disposed of with it. The court of appeal held that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order. Semble, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, O. J. Act, is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular. *Re Smart Infants*, 12 P. R. 312, 435, 635.

See Sessions, III. 4—Supreme Court of Canada, VII.

HABENDUM.

See Deed, III. 7.

HANDWRITING.

See Evidence, XV. 2.

HARBOURS, CANALS, AND DOCKS.

I. In General, 3005.

II. Special Companies and Works.

1. *Niagara Harbour and Dock Company*, 3006.

2. *Rideau Canal*, 3006.

3. *St. Lawrence Canal*, 3006.

4. *Toronto Harbour*, 3006.

5. *Welland Canal*, 3007.

I. In General.

Breach of Regulations for Navigation.]—The declaration set out certain regulations, made in pursuance of the statute, for the proper use of the Welland canal, directing that boats waiting to enter a lock should lie in single tier, and advance in the order in which they lay; and that all vessels approaching a lock, while any other vessel going in a contrary direction was about to enter it, should be stopped and made fast as directed, and remain there until such vessel should have passed, under a penalty named. It then alleged that defendant's vessel, which was waiting to enter a lock with two other vessels, passed them out of its order, and endeavoured to enter first, and while it was so approaching, the plaintiffs' steamboat, going in a contrary direction, was in the lock; but defendant did not stop or make fast his vessel, but wrongfully, and in violation of the regulations, went on and endeavoured to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured:—Held, bad, for the contravention of the regulations formed no cause of action, and no negligence on the defendant's part was alleged. *Jacques* v. *Nicholl*, 25 U. C. R. 402.

Bridge.]—A railway company had the control of a swing-bridge over a canal. The plaintiff's ship was in the canal when trains were crossing and recrossing the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the company's servants by signal that the bridge could not then be swung, and the plaintiff's vessel was injured by running against the bridge while it remained closed:—Held, that as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge and were not liable for such injury, to which the plaintiff had contributed by his own negligence. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536.

An Act of Parliament having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep and maintain, a safe and commodious bridge across the canal, and the bridge after being erected having become unsafe through the default of the canal company, an incorporated road company, which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would impede the navigation of the canal:—Held, reversing 17 Gr. 31, that they had no right to do so, and a permanent injunction was granted. *Town of Dundas* v. *Hamilton and Milton Road Co.*, 18 Gr. 311.

See Desjardins Canal Co. v. *Great Western R. W. Co.*, 27 U. C. R. 363. *Cataraqui Bridge Co.* v. *Holcomb*, 21 U. C. R. 273; *Gilmour* v. *Bay of Quinte Bridge Co.*, 20 A. R. 281.

Delegating Powers.]—As to the power of a canal company to lease the concern or delegate its powers. See *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Execution Sale.]—Injunction granted, at the suit of the creditors of a canal company, who had a lien on the canal, against a sale thereof under a subsequent execution. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Gr. 27.

Natural Flow of Water.] — The law applicable to natural streams was—Held, applicable to a canal in which was a natural flow of water, though in an artificial channel. *Diamond* v. *Reddick*, 36 U. C. R. 391.

Wharf—*Proof of Ownership.*]—Held, that under the evidence in this case, the ownership and possession by defendants of the wharf in question was sufficiently shewn to sustain an action against them by the plaintiff for injuries occasioned to him by not keeping it in repair; and that the damages given were not excessive. *Johnson* v. *Port Dover Harbour Co.*, 17 U. C. R. 151.

II. Special Companies and Works.

1. *Niagara Harbour and Dock Company.*

See Hamilton v. *Niagara Harbour and Dock Co.*, 6 O. S. 381.

2. *Rideau Canal.*

Rideau Canal Act—*Land Taken and not used—Revesting—Right to Damages—Statutory Bar—Limitation of Actions—Ordnance Vesting Act.*]—See *Tylee* v. *The Queen*, 7 S. C. R. 451; *McQueen* v. *The Queen*, 16 S. C. R. 1; *Magee* v. *The Queen*, 3 Ex. C. R. 304; 4 Ex. C. R. 63.

See, also, *Phillips* v. *Redpath*, Dra. 68; *Mittleberger* v. *By*, 2 O. S. 345; *Gould* v. *Jones*, 3 O. S. 53; *Doe d. Malloch* v. *Principal Officers of Her Majesty's Ordnance*, 3 U. C. R. 387; *Gardiner* v. *Chapman*, 6 O. R. 272.

3. *St. Lawrence Canal.*

See Tait v. *Hamilton*, 6 O. S. 89.

4. *Toronto Harbour.*

See Hood v. *Commissioners of the Harbour of Toronto*, 34 U. C. R. 87; 37 U. C. R. 72.

5. *Welland Canal.*

See Welland Canal Co. v. *Warren*, 5 O. S. 20; *Griffiths* v. *Welland Canal Co*,. 5 O. S. 686.

See CONSTITUTIONAL LAW, II. 21—WATER AND WATERCOURSES, X.

HARBOUR DUES.

See MUNICIPAL CORPORATIONS, XXVIII.

HAWKERS.

See MUNICIPAL CORPORATIONS, XXIX. 5.

HEARSAY EVIDENCE.

See EVIDENCE, I. 5.

HEIR AND DEVISEE COMMISSION.

Effect of Finding.]—The heir and devisee commission having reported that the heirs-at-law of A. were entitled to a patent of certain lands in the Indian reserves, Charlottenburgh, the governor in council afterwards, upon a report of the solicitor-general in favour of B., a brother of A., issued a patent to B. for the lands. The heirs of A. thereupon filed a bill to have the patent set aside and a new patent issued to themselves, upon the ground of the patent having been issued to B. under an error. The court having found there was no error of fact:—Held, that the patent was properly issued to B. notwithstanding the finding of the commission. *McDiarmid* v. *McDiarmid*, 9 Gr. 144.

Semble, this court may, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission. *Ib.*

False Claim.]—An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury, and with knowledge of his claim:—Held, in such an action, that the allegations were not supported; and that, admitting them all to be true, no ground of action would be shewn. *Shields* v. *DeBlaquiere*, 12 U. C. R. 386.

Rules of Law.]—The commissioners under the Heir and Devisee Act, in deciding upon claims brought before them, are not bound by the strict rules applicable to courts of law. Where, therefore, a purchaser from the Crown devised land, for which the patent had not yet issued, to his wife for life, with power of appointment amongst his descendants in tail; and she by her will devised her estate to one of such descendants in fee, who applied to the heir and devisee commission; and the commissioners recommended a grant in tail to the person named as devisee, and the Crown acting upon such recommendation, issued a patent in favour of such devisee—to a bill afterwards filed to set aside the patent as having been issued in error, or through improvidence, a demurrer ore tenus at the hearing for want of equity was allowed. *Scane* v. *Hartrick*, 7 Gr. 161.

HEIRSHIP.

See DEVOLUTION OF ESTATES ACT—DISTRIBUTION OF ESTATES — ESTATE, VII. — EVIDENCE, XV. 3—PARTIES, II., 6.

HIGH COURT OF JUSTICE.

I. GENERAL JURISDICTION, 3008.

II. DIVISIONAL COURT, 3012.

I. GENERAL JURISDICTION.

Appearance — *Defence—Subject Matter of Action.*]—The defendant having been served with process out of the jurisdiction entered an appearance and subsequently by his statement of defence objected to the jurisdiction of the court, upon the ground that the relief sought by the plaintiff, viz., priority as to certain assets in Quebec, in the hands of another defendant could not be granted by a court in Ontario:—Held, that under the circumstances the question of jurisdiction could be raised, the appearance not necessarily giving the court jurisdiction over the subject matter of the action. *Wilmott* v. *MacFarlane*, 16 C. L. T. Occ. N. 83.

Bicycle Race—*Protest—Award of Trophy—Private Tribunal.*]—Where a challenge cup, to be won in a bicycle race between competing clubs, was held by trustees under an instrument of trust by which all arrangements pertaining to the course, race, protests, and matters "connected with the welfare of the cup" were to be decided by the trustees according to certain rules, the court, upon the mere allegation of fraud, and before any decision of the trustees, refused to exercise jurisdiction restraining the trustees from parting with the cup to an alleged winner under protest, upon the ground that one of the winning riders did not go round the course, that being a matter of fact for the decision of the trustees. Brown v. Overbury, 11 Ex. 715; Ellis v. Hopper, 3 H. & N. 768; and Newcomen v. Lynch, Ir. R. 9 C. L. 1; Ir. R. 10 C. L. 248, followed. *Ross* v. *Orr*, 25 O. R. 595.

Company—*Expulsion of Members—Domestic Forum.*]—See COMPANY, V., 5.

Contract — *Breach out of Province.*]—The plaintiff, at Kingston, Ontario, having on the 20th October, ascertained from the defendant in reply to his inquiry the price for forging a cross-head for an engine, wrote on the same day to the defendant at Montreal, Quebec, enclosing a drawing and asking him to ship the cross-head to him at Kingston as soon as finished, per G. T. R. In answer defendant wrote that the matter would have immediate attention, "and as soon as ready I

will ship to your address." The cross-head was subsequently shipped to plaintiff at Kingston as directed, when a defect in the forging was discovered, and after being used on the plaintiff's steamer for some months it broke at the defective point. On a motion to set aside the service of the writ herein the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein, within R. S. O. 1877 *c.* 50, s. 49:—Held, reversing 31 C. P. 164, that the contract being to forge and deliver on the Grand Trunk Railway at Montreal, was a contract made in the Province of Quebec, and the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existing when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff therefore must be nonsuited. *Gildersleeve* v. *McDougall*, 6 A. R. 553.

See Offord v. *Bresse*, 16 P. R. 332, and *Bell* v. *Villeneuve*, 16 P. R. 413.

The plaintiff, desiring to bring an action against an incorporated company having its head office outside of this Province, for breach of a contract, obtained, ex parte, from a local Judge, an order for leave to issue a writ of summons for service out of the jurisdiction. The particular breach upon which the plaintiff relied was not set out either in the affidavit upon which the order was granted, nor in the writ when issued, nor in the statement of claim which accompanied it when served on the company abroad, and, looking at the terms of the contract, which was made an exhibit to the affidavit, there were two possible breaches upon which the plaintiff might have relied, viz., the agreement of the defendants to pay a sum of money at a place in this Province, or their agreement to allot certain shares, which might have been performed outside the Province for all that was provided to the contrary:—Held, that if the former were the breach relied on, the action was properly brought in this Province; if the latter it was not. An order having been made by a Judge in chambers setting aside the order of the local Judge and the writ and service, the plaintiff appealed to a divisional court, which permitted him to file a further affidavit making out a primâ facie case of a breach in this Province entitling him to sue here, and make a substantive order allowing the service, upon proper terms as to amendment and costs, and an undertaking by the plaintiff to shew at the trial a breach of the contract within Ontario, or be nonsuit. *Franchot* v. *General Securities Corporation*, 18 P. R. 291.

Controverted Elections.]—See *In re Russell Election (Dom.)*, *Henderson* v. *Dickenson*, 1 O. R. 439; *Mitchell* v. *Cameron*, 8 S. C. R. 126; *Montmorency Election (Dom.)*, *Valin* v. *Langlois*, 3 S. C. R. 1.

Criminal Law—*Bail.*]—A Judge of the high court has power under s. 83 of the Criminal Procedure Act (R. S. C. c. 174), to admit to bail in cases where the accused has not been finally committed for trial if he thinks it right to do so. *Regina* v. *Cox*, 16 O. R. 228.

Electoral Franchise Act.]—There is no jurisdiction in the high court of justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act." The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the Province." Re Simmons and Dalton, 12 O. R. 565, not followed. *Re North Perth*, *Hessin* v. *Lloyd*, 21 O. R. 538.

Final Court of Appeal—*Following Decision.*]—Although the high court may be a final court of appeal it will defer to previous cases decided affirming the validity of a patent and follow the court of appeal in refusing to disturb a decision in the exchequer court. Earlier and later American cases commented on. *Toronto Auer Light Co.* v. *Colling*, 31 O. R. 18.

Foreign Land — *Foreclosure.*] — As to power to grant judgment of foreclosure or direct a sale of land beyond the territorial jurisdiction of the court. See *Strange* v. *Radford*, 15 O. R. 145.

——— *Fraudulent Conveyance.*]—An action will not lie in this Province by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province. Although the court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns* v. *Davidson*, 21 O. R. 547.

——— *Fraudulent Mortgage.*]—A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the Province in which the action was brought. Burns v. Davidson, 21 O. R. 547, approved and followed. Judgment below, 23 A. R. 9, sub nom. Pavey v. Davidson, reversed. *Purdom* v. *Pavey*, 26 S. C. R. 412.

——— *Redemption.*]—A creditor who has recovered judgment in Manitoba, and who has by virtue of an Act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien. Judgment of the Queen's bench division, 23 O. R. 327, reversed. *Henderson* v. *Bank of Hamilton*, 20 A. R. 646. Affirmed by the supreme court, 23 S. C. R. 716.

——— *Redemption.*]—Action to have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption.

The grantee in 1883 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—Semble, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but held, that the court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country. *Gunn* v. *Harper*, 30 O. R. 650.

——— *Title.*]—The courts in this Province have no jurisdiction to entertain an action for determining the title to lands in the North-West Territories, even though the parties be resident here. Re Robertson, 22 Gr. 449, distinguished. *Ross* v. *Ross*, 23 O. R. 43.

——— *Trespass.*]—The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled, and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate:—Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action therefore, so far as the house was concerned, could not be entertained by the Ontario court; but aliter as to the furniture, on abandonment of the claim for destruction of the house. Companhia de Mocambique v. British South Africa Co., [1892] 2 Q. B. 358, [1893] A. C. 602, followed. Campbell v. McGregor, 29 N. B. Reps. 644, not followed. *Brereton* v. *Canadian Pacific R. W. Co.*, 29 O. R. 57.

——— *Trespass—Timber.*] — Trespass or trover will lie here for timber cut in the Province of Quebec, (the declaration not charging any trespass to the realty), although it may be necessary in such action to try the title to the land on which it was cut. *McLaren* v. *Ryan*, 36 U. C. R. 307.

See, also, *Stuart* v. *Baldwin*, 41 U. C. R. 446.

See FOREIGN LAW.

Local Judge — *Injunction.*] — Where the solicitors for both parties reside in the same county the local Judge has jurisdiction to grant an injunction until the trial. Kohles v. Costello, 16 C. L. T. Occ. N. 84, declared to be no longer law owing to changes made in the arrangement of the rules. *Dougall* v. *Hutton*, 19 C. L. T. Occ. N. 190.

Negligence in another Province.]—In an action brought here against the Canadian Pacific R. W. Co., by the personal representative, appointed in this Province, of a person killed in British Columbia through the negligence there of servants of the company, the writ may be served on the defendants in this Province in accordance with the provisions of consolidated rules 159 and 160. Judgment in 29 O. R. 654, affirmed. *Tytler* v. *Canadian Pacific R. W. Co.*, 26 A. R. 467.

Quo Warranto — *Information* — *High School Trustee.*]—A motion for an information in the nature of a quo warranto is the proper proceeding to take to inquire into the authority of a person to exercise the office of a high school trustee. Askew v. Manning, 38 U. C. R. 345, 361, followed. Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in court, by way of motion upon notice. *Regina ex rel. Moore* v. *Nagle*, 24 O. R. 597.

Railway Act—*Award.*]—As to jurisdiction to set aside an award made under the Railway Act of 1888, 31 Vict. c. 28 (D.). See *In re Horton and Admaston and Canada Central R. W. Co.*, 45 U. C. R. 141.

Restraining Arbitrator from Acting.]—The high court has power to prevent a non-indifferent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply for leave to revoke the submission if another arbitrator be not substituted. Malmesbury R. W. Co. v. Budd, 2 Ch. D. 113, and Beddow v. Beddow, 9 Ch. D. 89, followed. *Township of Burford* v. *Chambers*, 25 O. R. 663.

Revocation of Letters of Administration—*Surrogate Court.*]—The high court of justice for Ontario has no jurisdiction to revoke the grant by a surrogate court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Succession Duty Act — *Declaration of Right.*]—When the provincial treasurer and the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the surrogate registrar, with the right of appeal given by the Act. The high court has no jurisdiction to decide the question in a stated case. The court of appeal refused, therefore, to entertain an appeal from the judgments in 27 O. R. 380, and 28 O. R. 571. Questions of law which cannot properly arise in, or as incidental to an action, or other proceeding in court, cannot be made the subject of a special case under rule 372 in order to obtain the opinion of the court thereon. Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the court under s. 57, s.-s. 5, of the Judicature Act, in an action which the court has no jurisdiction to entertain. *Attorney-General* v. *Cameron*, 26 A. R. 103.

Unnecessary Action.]—Remarks as to the plaintiff's conduct in bringing actions of trespass and ejectment on the same day. *Stubbs* v. *Broddy*, 27 C. P. 234.

II. DIVISIONAL COURT.

Chancery Division—*Criminal Matters.*]—On a motion to make absolute a rule nisi in a criminal matter before the chancery divisional court the members of the court were divided in opinion as to their jurisdiction. *Regina* v. *Birchall*, 19 O. R. 697. Subsequently it was held that there was no jurisdiction. *Regina* v. *Davis*, 22 O. R. 652.

Consent.]—The words "other cases where all parties agree that the same may be heard before a divisional court" in rule 219 do not include appeals from a Judge in court; and the consent of all parties cannot give a divisional court jurisdiction to hear such an appeal. Beatty v. O'Connor, 5 O. R. 731, 737, not followed. *Re Wilson and County of Elgin*, 16 P. R. 150.

Court of Assize—*Supreme Court of Judicature.*]—An indictment was found against the defendants in the high court of justice at its sittings of oyer and terminer and gaol delivery, and on being called upon to plead the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants, and the indictment, demurrer, and joinder were removed to the Queen's bench division. Upon the return the Crown took out a side-bar rule for a concilium, and the demurrer was set down for argument. Defendants moved to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead de novo in this division:—Held, that the court of assize of oyer and terminer and general gaol delivery is now, by virtue of the Judicature Act, the high court of justice; that the indictment was found, and the defendants appeared and demurred thereto in the high court of justice; and that it was not necessary to plead de novo to the indictment. *Regina* v. *Bunting*, 7 O. R. 118.

Per Armour and O'Connor, JJ.:—The supreme court of judicature is not properly a court, and ought more properly to have been called the supreme council of judicature. The divisions of the high court are not themselves courts, but together constitute the high court, which is thus divided for the convenience of transacting business; and the Judges sit as Judges of the high court, and exercise the jurisdiction and administer the jurisdiction of the high court. *Ib.*

Court Order.]—A divisional court has no jurisdiction to entertain an appeal from an order of a Judge, made in court on motion, except by consent. Re Galerno, 46 U. C. R. 379, followed. *McTiernan* v. *Frazer*, 9 P. R. 246.

Criminal Law—*Order Nisi.*]—The jurisdiction to hear motions for orders nisi in criminal matters vested in the common pleas division of the high court of justice is the original jurisdiction of the court of common pleas prior to Confederation, and by virtue of s. 5 of C. S. U. C. c. 10, the court "may be holden by any one or more of the Judges thereof in the absence of the others." On the return of an order nisi to quash a conviction, the court was composed of two of the Judges thereof, the third Judge being absent:—Held, that the court was properly constituted to dispose of the order. *Regina* v. *Rauchy*, 18 O. R. 478.

Division of Opinion.]—The two Judges who composed the divisional court at the hearing of this case disagreeing, a motion to set aside the judgment of the trial Judge in favour of the plaintiff was dismissed. *Cousineau* v. *City of London Fire Ins. Co.*, 15 O. R. 329.

Effect of Decision.]—By the effect of the Judicature Act a decision of any one division is a decision of the high court. *In re Hall*, 8 A. R. 135.

Executors and Trustees—*Appeal from Surrogate Court Judge.*]—By virtue of R. S. O. 1897 c. 59, s. 36, an appeal lies to a divisional court from an order of a surrogate court Judge allowing compensation to an executor under the Trustee Act, R. S. O. c. 129, s. 43. *In re Alexander*, 31 O. R. 167.

Facts and Law.]—Rules 274 and 317, O. J. Act, restrict the jurisdiction of the divisional court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the Judge therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the court of appeal. *Trude* v. *Phœnix Ins. Co.*, 29 Gr. 426.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard. *Ib.*

Interpleader Issue.] — An interpleader issue arising out of an action in the chancery division of the high court of justice was sent to a county court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (O.), rather than under the interpleader jurisdiction of the old court of chancery; and that being so, that a divisional court of the high court of justice had no jurisdiction to hear an appeal from the judgment of the county court on such issue, and that such appeal should have been to the court of appeal under R. S. O. 1877 c. 54, s. 23. *Close* v. *Exchange Bank*, 11 P. R. 186.

See INTERPLEADER.

Interlocutory Order.] — Held, notwithstanding s. 28, s.-ss. 2 and 3, O. J. Act, that the divisional court had jurisdiction to hear an appeal from the order made by a Judge in this case, having regard to the language of rule 254, O. J. Act, and of the order itself. *Bull* v. *North British Canadian Loan and Investment Co.*, 11 P. R. 83, 12 P. R. 284.

Order at Assizes.] — An order of a Judge sitting at the assizes changing the place of trial on leave given by the master in chambers, who refused the application, to so appeal from his decision, was held to be an order of the Judge and not of the high court, and could therefore be reviewed by the divisional court. *Sarnia Agricultural Implement Manufacturing Co.* v. *Perdue*, 11 P. R. 224.

Petition.]—Pending proceedings under an order for the winding-up of a company under 45 Vict. c. 23 (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a Judge in court, and was adjourned by him for the sake of convenience before the Judge holding the Port Arthur assizes, who heard the evidence orally and pronounced judgment thereon:—Held, that the

proceeding at Port Arthur was not the trial of an action, and therefore and also having regard to the provisions of 45 Vict. c. 23, s. 78 (D.), that no appeal lay to a divisional court. *Re Rainy Lake Lumber Co.*, 12 P. R. 27.

Quashing By-law.]—Where a Judge in single court had, before the Judicature Act, decided applications to quash a by-law and to set off judgments:—Held, that under the Act there could be no appeal to a divisional court. *In re Galerno and Township of Rochester; Grant* v. *McAlpine*, 46 U. C. R. 379.

Quashing Convictions.]—The jurisdiction of the full court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the divisional courts. *Regina* v. *Fee*, 13 O. R. 590.

Railway Act.]—No appeal will lie to a divisional court from the decision of a Judge acting under R. S. C. c. 109, s. 8, s.-s. 28. *Re McQuillan and Guelph Junction R. W. Co.*, 12 P. R. 294.

Trial Judge Sitting on Appeal.]—An action having been tried before a Judge with a jury, the judgment was directed to be entered by the Judge upon the answers to questions put by him to the jury, and the damages were assessed by the jury. The defendants subsequently moved before the three Judges of the divisional court to set aside the judgment directed to be entered, but the divisional court, when giving judgment upon the motion, consisted of two Judges only, one of them being the Judge at the trial:—Held, that a court so constituted had by reason of s. 29, s.-s. 5 of the Judicature Act, no power to give judgment, and there being therefore nothing to appeal from leave to appeal was refused. *Cochrane* v. *Boucher*, 8 A. R. 555.

See COURT OF APPEAL— COURT OF CHANCERY—COURT OF QUEEN'S BENCH—FOREIGN LAW.

HIGH SCHOOLS.

See SCHOOLS, COLLEGES, AND UNIVERSITIES, III.

HIGHWAY.

See MUNICIPAL CORPORATIONS — RAILWAY, VII. G—WAY, III., IV., V., VI., VII., VIII., IX.

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HUSBAND AND WIFE.

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XII. Practice and Procedure in Actions against and by Married Women.

1. *At Law*, 3100.
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I. Alimony.

1. *Amount.*

Guiding Principles.]—The rule that the conduct of the wife should weigh much in determining the amount of alimony, is reasonable; still the court, under the circumstances of this case, adopted the husband's income as the proper guide. *Severn* v. *Severn*, 7 Gr. 109.

Increase of Income.] — Allowance increased from £25 to £200 per annum, it being shewn that the husband's income had so increased as to justify the addition. *Severn* v. *Severn*, 7 Gr. 109.

One-Third Rule.]—The rule as to allowing one-third of income, how far applicable to this country considered. *McCulloch* v. *McCulloch*, 10 Gr. 320.

Defendant owned real estate of the annual value of about £112 10s., but subject to a debt of £100; he had also household furniture and farm stock, and he worked his farm. The plaintiff with her eight children lived apart from him on account of his cruelty, and with no means. On a reference to the master to fix permanent alimony, he allowed £37 10s., which on appeal was increased to £80 per annum. *Ib.*

Reducing Amount.]—On an application to reduce the amount of alimony payable by the defendant to the plaintiff, the property of the defendant was variously estimated (lands and personalty) at from $2,938 to $6,000, and the evidence of the defendant, when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the court refused to interfere with the report of the master fixing the amount which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against the defendant on any other motion he should be advised to make. *Holway* v. *Holway*, 29 Gr. 41.

Reference to Master.]—The court, under the circumstances, referred it to the master to fix an amount to be paid during such time as the parties continued to live separately. *English* v. *English*, 6 Gr. 580.

Sum in Gross.]—The purpose of allotting alimony is to enable a wife to support herself whilst living apart, but as the law does not contemplate a separation for life the court will not sanction the payment of a sum in gross in lieu of an annual sum. *Hagarty* v. *Hagarty*, 11 Gr. 562.

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2. *Costs and Disbursements in Alimony Actions.*

General Rule.]—A plaintiff succeeding is entitled as a general rule to her full costs. *Soules* v. *Soules*, 3 Gr. 113.

Counsel Fees.]—The senate has no power to award alimony; the plaintiff cannot recover his counsel fees for promoting a bill for that purpose. *McDougall* v. *Campbell*, 41 U. C. R. 332.

An order was made in an alimony suit for payment to the plaintiff, before the trial, of $22.35, on acount of her disbursements for witness fees, and of $40 on account of counsel fee:—Quære, whether the counsel fee should be paid in advance if the plaintiff's solicitor acts as counsel. *Ingram* v. *Ingram*, 10 P. R. 569. See, also, *Magurn* v. *Magurn*, 10 P. R. 570; *Bradley* v. *Bradley*, 10 P. R. 571.

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

See Lalonde v. *Lalonde*, 11 P. R. 143; *Knapp* v. *Knapp*, 12 P. R. 105.

Death of Husband.]—R. S. O. 1887 c. 40, s. 48, does not apply when a distinct and substantive action is brought by the plaintiff's solicitor for his costs, as for necessaries supplied to the wife. A solicitor held entitled on the death of the husband before judgment in an alimony action to recover full costs against the executors of the husband's estate as for necessaries. *Kerr* v. *Rickard*, 8 C. L. T. Occ. N. 335.

Dismissal of Bill.]—In a suit by the woman for alimony brought seventeen years after the marriage on the ground of refusal by the man to receive her as his wife, he set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The court while finding there was a valid marriage directed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the costs between solicitor and client. *Roblin* v. *Roblin*, 28 Gr. 439.

Foreign Marriage—*Foreign Divorce.*]—When a foreign divorce of a foreign marriage is set up as a defence to an action for alimony, and its validity is disputed on grounds which would render it void, if true, the defendant must bear the expense of the litigation to determine the right to alimony, and an order for interim alimony is therefore proper. *Magurn* v. *Magurn*, 3 C. L. T. 39.

Husband's Offer to Receive Wife back.] — The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to his house:—Held, that the action should stand over for six weeks to see if this offer was carried out, and that the plaintiff was in any event entitled to her full costs of suit. *Ferris* v. *Ferris*, 7 O. R. 496.

Husband Receiving Wife back.]—In answer to a bill for alimony, founded principally on the ground of desertion, the defendant alleged that he had always been, and still was, ready to receive his wife and

children, and support them. At the hearing, instead of calling evidence the plaintiff agreed to accept the defendant's offer, whereupon a decree to that effect was drawn up, whereby the defendant was ordered to pay full costs; and in pursuance of such decree the plaintiff returned with her children to the house of defendant, who received them, and provided for their support. The court, on re-hearing, refused, under the circumstances, to vary the decree as to costs, although it would seem that the costs to which the plaintiff was strictly entitled, under the statute (32 Vict. c. 18) were only the cash disbursements properly made by her solicitor. *Keith* v. *Keith*, 25 Gr. 110.

Order 491.]—On a question arising under 32 Vict. c. 18 (O.), and the general order 491, it was held, that the plaintiff in an alimony suit is not entitled to the $40 mentioned in the order. *Gibb* v. *Gibb*, 2 Ch. Ch. 402.

Prospective Disbursements — *Undertaking.*]—Notwithstanding the language of rule 1144—"only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed. *Stevenson* v. *Stevenson*, 19 P. R. 48.

Settlement of Action.] — Application to compel the defendant to pay the costs of the plaintiff's solicitors in an action for alimony. The action was settled before trial, the plaintiff refusing to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs:—Held, that before the Act 32 Vict. c. 18 (O.), (R. S. O. 1877 c. 40, s. 48), the defendant would have been liable to pay costs:—Held, under the wording of s. 2 of the above Act, that the plaintiff had not failed to obtain a decree for alimony, and that the defendant was therefore liable to pay costs. *Moore* v. *Moore*, 10 P. R. 284.

The plaintiff, during the pendency of a motion for interim alimony, returned to her husband:—Held, that the defendant must pay the costs as between solicitor and client of the plaintiff's solicitor. *Leonard* v. *Leonard*, 9 P. R. 450.

A reconciliation and return of the wife to the husband is not equivalent to a decree for alimony within the meaning of R. S. O. 1877 c. 40, s. 48, and does not entitle the wife's solicitors to full costs. Leonard v. Leonard, 9 P. R. 450, and Moore v. Moore, 4 C. L. T. 404, 10 P. R. 284, overruled. Keith v. Keith, 25 Gr. 110, considered. *Ringrose* v. *Ringrose*, 4 C. L. T. 497, 10 P. R. 299, 596.

Settlement of Action—*Counsel Fees.*]—See *Bucke* v. *Bucke*, 21 Gr. 77.

Test for Allowing.]—The test as to allowance of costs appears to be whether or not they have been vexatiously incurred. Therefore—where notice of examination and hearing was given and afterwards countermanded, upon its coming to the knowledge of the wife that the husband intended to produce a witness from abroad to prove adultery on her part while on ship-board—what was done having been done in good faith, so that she might be prepared to rebut so serious a charge, the costs in relation to such notice and countermand were allowed. *Glennie* v. *Glennie*, 1 Ch. Ch. 155.

Witness Fees.]—Where the plaintiff, in an alimony suit, is without means, she is not entitled as of course to have the witness fees necessary to enable her to bring the case on to a hearing paid in advance by defendant. Such an application must be made at the hearing. *Haffey* v. *Haffey*, 7 P. R. 137.

——— *Counsel Fees.*]—This was an application in an alimony suit for an order for payment of witness fees and counsel fees by the defendant to the plaintiff, in order to enable her to go to a hearing. There was not the usual provision for disbursements in the order for interim alimony. The counsel for the defendant asked that the motion be dismissed with costs, to be paid by the plaintiff's solicitor, on the ground that similar applications had been made and dismissed. The referee thought that he could not make the order, as the moneys asked for had not been actually paid; but that as no similar case had been reported he could not order the plaintiff's solicitor to pay the costs. Under the circumstances he thought that the motion should be dismissed, with costs. *Carley* v. *Carley*, 13 C. L. J. 209.

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3. *Enforcing or Relieving from Payment.*

Assignment for Creditors.]—The precedence given to an assignment for the general benefit of creditors by R. S. O. 1887 c. 124, s. 9, over "all judgments and all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. 1887 c. 44, s. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant. *Abraham* v. *Abraham*, 19 O. R. 256; 18 A. R. 436.

Condonation — *Subsequent Cruelty.*] — Where the plaintiff, after an order for interim alimony had been made, returned to her husband's house, and resided there for some time, but afterwards left by reason of cruelty, a motion to set aside the interim order on the ground of condonation, was refused with costs. *Maxwell* v. *Maxwell*, 1 Ch. Ch. 27.

Default in Payment—*Judgment for Arrears.*]—Where after the recovery and registration of judgment in an alimony action directing payment to the wife of a yearly sum in quarterly instalments, she, on default being made in payment of two of the instalments, brought an action therefor in the county court, and recovered judgment, she was, notwithstanding, held entitled to the usual order for the sale of the husband's lands for the realization of the alimony. Semble, that the judgment recovered in the county court was a nullity. *Lee* v. *Lee*, 27 O. R. 193.

Default Order—*Reference.*]—Where, in an alimony case, no one appearing for defendant, an order had been made for interim alimony for the amount indorsed on the bill, which defendant considered excessive: on a

motion by him to set the order aside, a reference was directed on payment of the costs (gives costs) of the application. *Hooper* v. *Hooper*, 3 Ch. Ch. 114.

Master's Report—*Execution.*]—Where a reference is directed to the master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. Lewis v. Talbot Street Gravel Road Co., 10 P. R. 15, approved and followed. *Boeck* v. *Boeck*, 16 P. R. 313.

Offer to Receive and Maintain.]—A husband against whom his wife has obtained alimony on the ground of desertion, is not entitled, as of right, to have the decree vacated or suspended, on his afterwards offering to receive and maintain her. *Cronk* v. *Cronk*, 19 Gr. 283.

Payments under Separation Deed.]—In May, 1875, a deed of separation was executed between defendant and plaintiff, husband and wife, by which defendant was to pay the plaintiff $100 a year, quarterly, as maintenance. Afterwards in September, 1875, the plaintiff objecting to the security offered, filed a bill for alimony, and defendant served a notice, agreeing to allow her $100 a year, quarterly, for interim alimony. The plaintiff accepted the notice, and defendant paid this alimony, until May, 1876, when a decree was made for specific performance of the agreement, but the plaintiff was ordered to pay defendant's costs:—Held, that the plaintiff must give credit for the sums paid as interim alimony; and executions issued for the whole sum payable under the agreement, were set aside. The costs payable by plaintiff were also ordered to be set off against the allowance, though such set-off was not asked for in the notice of motion. *Maxwell* v. *Maxwell*, 7 P. R. 63.

Sale of Defendant's Land.]—Where in a suit for alimony a decree was obtained and registered in the counties in which the defendant owned lands, pursuant to R. S. O. 1877 c. 40, s. 44, and writs of fieri facias against the goods of the defendant had been issued and returned nulla bona, on application by petition, setting forth the facts, an order was made declaring the plaintiff to have a lien upon the lands of the defendant affected by the registration of the decree, and for an immediate sale of the said lands, the proceeds to be paid into court, and applied in payment of alimony. *Forrester* v. *Forrester*, 9 P. R. 338.

Subsequent Adultery of Wife.]—After a decree had been made, and alimony paid for several years under it, the court entertained and afterwards granted a petition by the husband to be relieved from the decree, on the ground of the wife's subsequent adultery. *Severn* v. *Severn*, 14 Gr. 150.

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4. Grounds for Granting or Refusing.

General Rule.] — The only bar, under R. S. O. 1887 c. 44, s. 29, to an action for alimony against a husband who is living separately from his wife, is cruelty or adultery on the part of the applicant. Where a husband, who had been insane for years, at intervals, and during such periods of insanity had been confined in an asylum, afterwards declined to live with his wife, being under the suspicion that by doing so he might again be confined in an asylum:—Held, that she was entitled to alimony, as, upon the evidence, he was living separate from her without any sufficient cause, and under such circumstances as would have entitled her by the law of England, as it stood on 10th June, 1857, to a decree for restitution of conjugal rights. *Nelligan* v. *Nelligan*, 26 O. R. 8.

Condonation—*Subsequent Adultery—Misconduct of Wife.*]—Condonation of matrimonial offences is always on the condition that there shall be no repetition of any matrimonial offence in the future; and the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty. The evidence of one witness, by confession of loose character, is not sufficient to prove adultery unless corroborated. Proof of grave misconduct, short of adultery by a wife will not disentitle her to alimony. A woman both in law and in morals is justified in leaving and in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her; and proof of that offence would be sufficient upon which to award alimony. *Aldrich* v. *Aldrich*, 21 O. R. 447.

Cruelty.]—Where a few days after leaving her husband's house, the wife was found with severe bruises and injuries upon her person, and the evidence raised a strong presumption that they were inflicted by him, the court decreed alimony. *Jackson* v. *Jackson*, 8 Gr. 499.

——— *Condonation—Subsequent Misconduct.*]—The condonation by a wife of acts of cruelty and ill-treatment by the husband which would justify her leaving him and claiming alimony, is conditional on non-recurrence of such misconduct, and is removed by subsequent ill-treatment and threats after such condonation. Legal cruelty considered and defined. *Bavin* v. *Bavin*, 27 O. R. 571.

Desertion.]—Held, that under the circumstances set out in this case, the wife was entitled to a decree for alimony. Although in England the mere fact of desertion by the husband would not so entitle her; still, as in this country the court cannot decree restitution of conjugal rights, semble, that desertion would be sufficient to warrant a decree for alimony. *Severn* v. *Severn*, 3 Gr. 431.

Desertion, although insufficient in itself to warrant a decree in England, does, when coupled with other acts of cruelty, form a material ingredient in determining a wife's right to relief. *Ib.*

——— *Offer to Receive Wife Back.*]—In an action for alimony, on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the court must be satisfied that it is made bonâ fide, and not merely set up to prevent the pronouncement of judgment against him. Crothers v. Crothers, L. R. 1 P. & D. 568, specially referred to. *Rae* v. *Rae*, 31 O. R. 321.

Disagreement without Cruelty—*Husband's Offer to Receive Wife Back.*]—A woman left her husband in consequence of disagreements, without any threats of personal violence, or any well founded apprehension on

her part of violence; and the husband expressed his readiness and willingness to receive her back. The wife failed to return, however, and the husband left this Province and went to reside permanently in the United States. The wife, without any communication having passed from her to her husband, or any intimation of a desire on her part to renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion:—Held, that in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence. *Edwards* v. *Edwards*, 20 Gr. 392.

Excluding from Home.]—The right of a wife is to reside with her husband in his home, or in the joint home of both. Where, therefore, it appeared that the husband resided with his children by a former wife, and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shewn, made a decree for alimony; and that although it was shewn that during such time the husband had been in the habit of visiting and remaining with his wife. *Weir* v. *Weir*, 10 Gr. 565.

Excluding Wife from House—*Adultery of Husband.*]—In consequence of a wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, and locked the door:—Held, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony, independently of the fact that during such exclusion of the wife the husband entered into a formal marriage with another woman, with whom he continued to live until after the institution of this suit; and, quære, whether adultery per se by the husband is not a ground entitling the wife to alimony. *Lowery* v. *Howey*, 27 Gr. 57.

Foreign Divorce.]—Where one obtained a divorce from his wife in a foreign state, in which he was bonâ fide domiciled, by proceedings of which notice was served personally on the wife living here, which were not collusive, nor contrary to natural justice, and for adultery on the wife's part:—Held, that entire credit must be given to the foreign divorce in this Province, although the wife at the time of the divorce proceedings resided here, for the domicile of the husband was the domicile of the wife, and the validity of the divorce depended on the law of the domicile of the parties. *Guest* v. *Guest*, 3 O. R. 344.

In an action for alimony the defendant relied upon a divorce granted on his own petition by the circuit court of St. Louis county, Missouri, where he then resided; the wife (the present plaintiff) having made no defence thereto though notified of the proceedings. It appeared that the domicile of the husband at the time of the marriage and of the divorce was Canadian, though the marriage was celebrated at Detroit, and the wife was an American citizen. It was proved that the evidence of desertion by the wife as alleged by the husband, and on which the decree for divorce was founded, was untrue:—Held, that the decree, having been obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony. Held, also, that the non-feasance of the wife in failing to appear or defend the action for divorce did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that action. *Magurn* v. *Magurn*, 11 A. R. 178.

Held, affirming 3 O. R. 570, and following Harvey v. Farnie, 5 P. D. 153; 6 P. D. 35; 8 App. Cas. 43, that the jurisdiction to divorce depends upon the domicile of the parties, that is, of the husband—and this being Canadian, the Missouri court had no jurisdiction. *Ib.*

Per Hagarty, C.J.O.—There is no safe ground for distinction between domicile for succession, and for matrimonial purposes, or a domicile by residence. *Ib.*

An action by a husband, who had been married in Ontario, in a foreign state for a divorce a vinculo, on the ground of the adultery and cruelty of his wife, resulted in favour of the latter, and judgment dissolving the marriage was granted to her, and by it she was awarded a sum of money as alimony. Subsequently the wife sought in this action to recover the amount of the alimony, and it was contended by the husband that as he had never acquired the necessary domicile to give the foreign court jurisdiction to grant the divorce the judgment was invalid:—Held, that as he had invoked and submitted to the jurisdiction of the foreign court, he had precluded himself from setting up want of jurisdiction. Held, however, were this not so, that in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction the production of the record was primâ facie evidence entitling the wife to recover in this action, and although the presumption in favour of the judgment might be rebutted, clear proof of the facts to shew want of jurisdiction must be adduced. Held, also, that the wife was entitled to judgment for payment of alimony, although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario. Semble, had the foreign judgment provided for the division in specie of the husband's property in Ontario it would not have been invalid. Judgment below, 31 O. R. 81, reversed. *Swaizie* v. *Swaizie*, 31 O. R. 324.

See In re Kinney, 6 P. R. 245; *Re Davis*, 25 O. R. 579.

Foreign Judgment for Alimony.]—A foreign judgment for alimony, puts an end to any implied liability on the husband's part to pay for his wife's maintenance subsequently to the date from which alimony was to be paid under such judgment. *Hughes* v. *Rees*, 9 O. R. 198.

Isolated Act of Violence—*Apprehension of Ill-treatment.*]—The ecclesiastical courts in England will not, for an isolated act of personal violence, declare the wife entitled to a separation a mensâ; and this court, following the same principle, will not, as a rule, for only one act of violence make a decree for alimony. But where a husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of delirium tremens, during which he became very violent; and his wife had, on one occasion when he became intoxicated, been compelled by reason of his violence

to leave home and go to a neighbour's house, where she remained all night, and on the following day, in company with two of her neighbours, had returned to her husband with a view of inducing him to abstain from drinking, when he assaulted her with a stick, inflicting several blows on her head; whereupon she ran away and he followed her, kicked at her, and told her to be gone, and otherwise conducted himself in a very violent manner, although this was the only instance in which he had, during eighteen years they had been married, ever struck her, the court made a decree for alimony, the wife swearing that she was apprehensive of further ill-treatment if she were to return to live with her husband; which decree on rehearing was affirmed by the full court. *Rodman* v. *Rodman*, 20 Gr. 428.

Offer to Support.]—An offer by a husband to support his wife separately is no bar to a suit for alimony, and an affidavit of the husband shewing his willingness to support his wife separately cannot be received. *Weir* v. *Weir*, 1 Ch. Ch. 194.

Onus of Proof.]—The wife must prove herself aggrieved, or the court cannot decree alimony. Where defendant in his answer denied the cruelty charged against him, and it was not proved, but at the hearing defendant consented to a decree for alimony, the court, on the grounds of public policy, refused to interfere. *Gracey* v. *Gracey*, 17 Gr. 113. See *Craig* v. *Craig*, 1 Ch. Ch. 41.

Settlement of Action—*Subsequent Adultery.*]—A woman filed a bill for alimony on the ground of adultery and desertion, which suit was ultimately arranged by the husband agreeing to pay a sum of money, which the plaintiff accepted in payment of all past or future claims for alimony; and a decree was drawn up stating this arrangement, and that it was agreed to dismiss the bill; and that such dismissal should be treated as a dismissal on the merits:—Held, that such decree furnished no defence to a bill afterwards filed by the wife for alimony on the ground of subsequent desertion and adultery. *Henderson* v. *Henderson*, 19 Gr. 464.

Unfounded Charge of Adultery—*Excluding Wife from House.*]—In an alimony action the defendant in his defence alleged that he had refused, and still refused, to support the plaintiff by reason of her having committed adultery with M. At the trial it appeared that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she actually departed, he forbade her to go. The defendant persisted in the charge of adultery, but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim:—Held, that the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part, and he must be taken to have dispensed with the necessity for the plaintiff offering to return. *Ferris* v. *Ferris*, 7 O. R. 496.

Voluntary Absence.]—Where it appeared that the plaintiff's absence from her husband's residence was voluntary, and caused chiefly by her own violent temper, and that her husband was still willing to receive and support her, the court dismissed the bill, but ordered defendant to pay costs. *Mckay* v. *Mckay*, 6 Gr. 380.

5. *Interim Alimony.*

General Rule.]—On an application for interim alimony the merits cannot be discussed. The order is made, as a matter of course, on an allegation of the marriage, and the admission thereof by the defendant. *Keith* v. *Keith*, 7 P. R. 41.

Adultery.]—The question whether the plaintiff has been guilty of adultery cannot be raised on an application for interim alimony. *Campbell* v. *Campbell*, 6 P. R. 128.

Consent Judgment in Former Action — *Payment — Separation Deed—Change of Circumstances.*]—In 1897 a wife brought an action against her husband for alimony and to set aside a judgment pronounced by consent in a former action for alimony begun in 1884 under which the wife had received $200. The defendant pleaded the judgment as a bar, and also adultery by the wife, and a deed of separation. The plaintiff disputed the deed of separation, and impeached the judgment as obtained by fraud and without her knowledge or consent; the payment of $200 she attributed to a release of dower given by her. She also alleged expulsion and desertion by her husband, and that he had been living in adultery after the judgment:—Held, that under these circumstances, the plaintiff was entitled to an order for interim alimony. Atwood v. Atwood, 15 P. R. 425, distinguished. Henderson v. Henderson, 19 Gr. 464, followed. *Lafrance* v. *Lafrance*, 18 P. R. 62.

Delay.]—Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony; it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a bonâ fide intention to go to a hearing, and had made offers to change the venue, with a view to enable the cause to be speedily heard. *Peterson* v. *Peterson*, 6 P. R. 150.

——— A writ was issued in an alimony suit on 27th December, 1882, and served on the 4th January, 1883. The statement of claim was filed on 11th April, 1883, and a sittings of the court held on 2nd April, 1883. On the application of the plaintiff on the 15th May, 1883, interim alimony was allowed her from the 1st May, 1883, her delay in proceeding not being satisfactorily accounted for. *Thompson* v. *Thompson*, 9 P. R. 526.

Desertion—*Offer to Resume Cohabitation.*]—A wife is not entitled to interim alimony and disbursements where she sues on the ground of desertion not alleging cruelty, and where the husband offers by his defence and by affidavit to resume cohabitation with her. *Snider* v. *Snider*, *Snider* v. *Orr*, 11 P. R. 140.

Indorsement of Bill.]—An omission to make the indorsement directed by consolidated order 488 to be made upon the office copy of the bill served, does not disentitle the plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion. *Peterson* v. *Peterson*, 6 P. R. 150.

Marital Relationship de Facto.]—The principle which underlies all the decisions is, that the allotment of alimony pendente lite depends upon the marital relationship of the parties existing de facto. *Walker* v. *Walker*, 10 P. R. 633.

The court exercises a discretion in granting or withholding alimony pendente lite which is regulated by the circumstances of each case. And the defendant in this action by his own act and conduct having clothed the plaintiff with the reputation of being his wife, although he denied the marriage, the decision of the master awarding interim alimony was not interfered with. *Ib.*

Offer to Receive Plaintiff back.]—In an alimony case where the marriage is admitted, or proved, interim alimony will be granted almost as of course, though defendant swears he is willing to receive and maintain the plaintiff. *Carr* v. *Carr*, 2 Ch. Ch. 71.

Plaintiff's Refusal to Return to Defendant.]—The fact that the plaintiff has left the defendant, and refuses to return to him although he is willing to take her back to live with him, is no answer to an application for interim alimony. *Wilson* v. *Wilson*, 6 P. R. 129.

Proof of Marriage.]—On an application for an order for interim alimony, the affidavit as to the marriage should state such particulars (by whom solemnized, &c.) that the court may judge whether it has been duly solemnized or not. *Taylor* v. *Taylor*, 1 Ch. Ch. 234.

Interim alimony will be granted on primâ facie proof of marriage, although the validity of the marriage is disputed. *McGrath* v. *McGrath*, 2 Ch. Ch. 411.

Proof of Marriage de Facto—*Want of Means.*]—On an application for interim alimony, the validity of the alleged marriage cannot be tried. If a marriage de facto is proved, it is sufficient. But the plaintiff must shew she is in want of means of support. Where the parties had been living separate for four years, and the wife did not allege she was in want, and the husband swore she was better off than he was, an order was refused. *Bradley* v. *Bradley*, 3 Ch. Ch. 329.

Proof Required.]—On an application for interim alimony and costs, proof of the marriage is all that is required; it is not necessary to prove any of the other allegations in the bill. *Nolan* v. *Nolan*, 1 Ch. Ch. 368.

A plaintiff makes out a primâ facie case for interim alimony by producing (1) an office copy of the bill (which need not be verified by affidavit), and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can shew the contrary to be the case, her application will be refused. *Smith* v. *Smith*, 6 P. R. 51.

Separate Income of Wife.]—The peculiar practice of awarding interim alimony and disbursements in alimony suits is founded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the presumption is done away with; and the court will on application for interim alimony, consider the question of the wife's ability to maintain herself out of separate estate or other sources of income, such as her earnings and allowances from friends. *Knapp* v. *Knapp*, 12 P. R. 105.

Where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and by taking boarders, and through assistance rendered by members of her family, the court refused to award interim alimony, but directed the husband to pay the prospective cash disbursements of the plaintiff's solicitors upon their undertaking to account. *Ib.*

The change in the status of married women under recent legislation has no effect upon the law as to disbursements in actions for alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony. *Ib.*

Separation Deed—*Agreement not to Sue for Alimony.*]—The granting of interim alimony rests in the sound discretion of the court in view of all the circumstances. A husband and wife had executed a deed, reciting unhappy differences, and agreeing to live apart. The consideration was $800—a down payment of $100 and an annual provision of like amount for seven years. Stipulation by the wife not to sue for alimony or to seek restoration of conjugal rights. The deed was executed after advice given to the wife by a separate solicitor. After the expiration of seven years she brought an action for alimony, and in applying for interim alimony did not shew fraud or duress:—Held, that the application must be refused. Semble, that the wife's stipulation was not limited to the seven years, but extended to her future life, and a provision to arise de anno in annum was not essential to uphold the deed. Semble, also, that a husband and wife may validly agree inter se to live apart, and the wife's engagement not to sue for alimony nor to claim restoration of marital intercourse, if founded on valuable consideration, will be enforceable against her and may be set up in bar of her action. *Atwood* v. *Atwood*, 15 P. R. 425. Affirmed by a division of opinion, 16 P. R. 50.

Staying Payment.] — Interim alimony was stayed until the plaintiff had produced on oath, books, papers, &c., belonging to her husband, which she had taken with her when leaving his house, and which deprived him of the means of paying it. *Old* v. *Old*, 9 P. R. 552.

Time for Allowance.]—Semble, that the court will grant it in a proper case, pendente lite. *Soules* v. *Soules*, 3 Gr. 113.

Where in a suit for a separate maintenance interim alimony had not been applied for, the court refused to allow alimony from a date before making the decree. *Ib.*

Interim alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application. *Howe* v. *Howe*, 3 Ch. Ch. 494.

Time for Application.]—An application for interim alimony cannot be made until defence is filed, or the time for filing it has expired. *Peck* v. *Peck*, 9 P. R. 299.

Wife in Occupation of Husband's Farm.]—An order of the local master directing the defendant in an alimony action based upon desertion to pay interim alimony was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of interim alimony, and the defendant not shewing that she was in receipt of any income from the farm. An

order directing the defendant to pay forthwith interim disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor, who intended to act as counsel at the trial. *Lalonde* v. *Lalonde*, 11 P. R. 143.

See the next sub-head.

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6. Practice in Alimony Actions.

Consent Order.]—The defendant consented to an order for alimony, a motion for the order was refused, as it would amount to a decree. It should be brought before the full court. *Craig* v. *Craig*, 1 Ch. Ch. 41.

Such application must be upon notice. *Swinarton* v. *Swinarton*, 2 Ch. Ch. 453.

Extending Time for Hearing.]—The usual undertaking given by the plaintiff on obtaining the order for interim alimony, (viz., to proceed to a hearing at the first possible sittings,) was extended to the next sittings, where the defendant had failed, and wilfully refused, to pay interim alimony and disbursements which he had been directed to pay. *Bourslaugh* v. *Bourslaugh*, 6 P. R. 200.

Lis Pendens.]—A certificate of lis pendens should not be issued in a suit brought for alimony only. *White* v. *White*, 6 P. R. 208.

Opening Publication.]—The principle laid down in Waters v. Shade, 2 Gr. 218, in respect to opening publication, applies as well to suits for alimony as to other cases. *McKay* v. *McKay*, 6 Gr. 279.

An order on a motion to dismiss, giving leave to go to examination, has the effect of opening publication. *Weir* v. *Weir*, 1 Ch. Ch. 194.

Particulars.]—The statement of claim in an alimony suit contained the following clause: "The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises." The plaintiff was ordered to give particulars of the acts of adultery intended to be proved within a month, and limited to those only at the hearing. In default no evidence to be given under the general charge. Such an allegation, without specifying particulars, is bad. *Roscnstadt* v. *Rosenstadt*, 9 P. R. 311.

Pleading — *Amendment.*]—In a suit for alimony the particular act of violence by the husband was stated in the bill to have occurred on the 30th August, and the evidence showed that it had been committed on the 31st of that month:—Held, that this was not such a variance as would disentitle the plaintiff to prove the act alleged; and if necessary an amendment would be allowed so as to state the date correctly, as it could not be considered that the defendant had been misled by the mistake in the date. *Rodman* v. *Rodman*, 20 Gr. 428.

Where with the view of obtaining a decree for alimony it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specifically in the bill, in order that the husband may have notice of the acts charged against him, and so that he may, if he can, adduce evidence in rebuttal or explanation thereof; and this rule cannot be said to operate oppressively upon the wife, as the facts and circumstances charged, if true, must be all within her knowledge. *Ib.*

A bill for alimony should allege that the husband has refused to receive his wife. It is not sufficient to allege merely that they are living apart. *Walsh* v. *Walsh*, 1 Ch. Ch. 234.

Security for Costs.]—An order for security for costs will not be made in an alimony suit. *Bennett* v. *Bennett*, 7 P. R. 54; *Knowlton* v. *Knowlton*, 8 P. R. 400.

Service out of Jurisdiction.] — The right to alimony is not based on contract, but on the special statutory provisions now found in s. 29 of the Judicature Act, R. S. O. 1887 c. 44. Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of s. 28 of the Law Courts Act, 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario; it is that allowance to which a married woman is entitled upon separation from her husband. Magurn v. Magurn, 3 O. R. 579; Keith v. Keith, 25 Gr. 113; and Hooper v. Hooper, 3 Sw. & Tr. 256, followed. Service of writ of summons out of the jurisdiction in an action for alimony disallowed. *Wheeler* v. *Wheeler*, 17 P. R. 45.

See Allen v. *Allen*, 15 P. R. 458.

Venue.]—Change of venue in action of alimony. *See Fogg* v. *Fogg*, 12 P. R. 249.

Writ of Arrest.]—Although 22 Vict. c. 33, s. 2, (C. S. U. C. c. 24, s. 10) authorizes the arrest of a defendant for two years' allowance for future alimony and arrears, still, if the court has obtained funds of the defendant through any default of his, it may refuse payment of them to him without first securing the future payment of alimony. *Gott* v. *Gott*, 10 Gr. 543.

The court in an alimony suit, on a motion to discharge defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff can reasonably expect to succeed in her case, and if not, or if defendant displace the primâ facie case made by her on obtaining the writ, he will be discharged. *Macpherson* v. *Macpherson*, 2 Ch. Ch. 222.

A writ of arrest had been granted on plaintiff's affidavit, alleging violence and ill-treatment by defendant, and shewing that he had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the cruelty was denied. The plaintiff was shewn to be a young, robust woman, the defendant an old man of sixty-eight; and the conduct of the plaintiff to have been violent and very immoral and unchaste. On defendant's denial of any intention to leave the Province, the writ was ordered to be set aside. *Ib.*

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked, paid into court, to be applied from time to time in payment of the alimony and costs; and, semble, that upon such payment the sureties are entitled to be discharged from their bond. *Needham* v. *Needham*, 29 Gr. 117.

Writ of Ne Exeat.]—Amount of bail on issue of writ of ne exeat provinciâ, under 20 Vict. c. 58, s. 3, in a suit for alimony. *Harn* v. *Harn*, 4 L. J. 261.

The writ of ne exeat granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife. *Macdonald* v. *Macdonald*, 5 L. J. 66.

Where, in an alimony suit, the statutory bond under a writ of ne exeat has been given the plaintiff is entitled to have the moneys deposited as collateral security therefor paid into court and applied in discharging arrears of alimony. *Richardson* v. *Richardson*, 8 P. R. 274.

See the preceding sub-head.

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7. *Miscellaneous Cases.*

Collusive Action against Husband.]—Where a suit for alimony was pending, and it was alleged, that an action brought against the husband was so brought for the purpose of defeating the suit for alimony and depriving the wife of her dower, an order was made admitting the wife to defend the action. *Ferris* v. *Ferris*, 9 P. R. 443.

Compromise.]—The compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife. *Adams* v. *Loomis*, 22 Gr. 99.

Custody of Children.]—On a bill for alimony and the custody of children under twelve, the court can grant the latter relief without a petition. *Munro* v. *Munro*, 15 Gr. 431.

Jurisdiction of the Court.]—The court of chancery having since its first establishment (1837) exercised jurisdiction in cases of alimony, refused to question the right. *Soules* v. *Soules*, 2 Gr. 299.

Settlement — *Insolvency.*] — A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and he had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother. The wife was advised to take proceedings against him under the statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. To compromise these threatened proceedings, the husband made a settlement in favour of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof:—Held, that the settlement could not be impeached under the statute 13 Eliz. *Mason* v. *Scott*, 20 Gr. 84.

Separation Allowance.]—Separation of husband and wife. Reference to settle the allowance in lieu of alimony. Declaration on submission bond. Special demurrer. *Beasley* v. *Stegman*, Tay. 498.

Security—*Assignment.*]—A bond given to a trustee, by a husband and his surety, to secure payment of alimony to the wife, in pursuance of a decree of the court of chancery, was held not to be assignable by the trustee and the wife, such assignment being contrary to public policy, and tending to lessen the inducement of reconciliation. The plaintiff declared as assignee of such bond. Defendant pleaded, on equitable grounds, the decree in chancery for alimony; that the bond was given in pursuance thereof to the obligee, who had no beneficial interest therein, and the assignment was in fraud of the decree, against the will of the husband, and could not be maintained in equity. The plaintiff replied that the wife by deed assigned her beneficial interest to him. Semble, that the replication was not a departure. *Reiffenstein* v. *Hooper*, 36 U. C. R. 295.

II. Breach of Promise of Marriage.

Arrest.]—Arrest of defendant under ca. re. Statement of damage. Corroboration. See *Donegan* v. *Short*, 12 P. R. 589.

Damages.]—In an action for breach of promise of marriage the jury gave $4,500 damages; and the case having been fully and fairly brought before them, and there being evidence to justify their verdict, the court, though considering the amount unusually large, refused to interfere. *Woodman* v. *Blair*, 30 C. P. 452.

Discharge in Insolvency.]—A discharge in insolvency is a bar to a judgment in an action for breach of promise of marriage. See *Forrester* v. *Thrasher*, 9 P. R. 383; 2 O. R. 38.

Effect of Jury's Finding.]—In an action for breach of promise of marriage, the only two witnesses examined were plaintiff's brothers, who swore that the plaintiff being pregnant, they spoke to defendant, who said he was going to marry her, and always so intended, and that he would get the license on the next day but one—the sister was not then present; that on the day named, Thursday, defendant came to the house, but was kept there by a rain storm, and promised to get the license and marry her on Monday, to which the plaintiff, who was present, apparently assented; that on Monday he said he was very ill, but it would be all right when he got better; but that this was the end of it, and they then instructed this suit, and an action for seduction. The plaintiff was not present, and no witnesses were called for the defence. The jury having found for defendant, the plaintiff moved for a new trial on the evidence, filing no affidavit of her own; but the court refused to interfere:—Held, also, that a misdirection as to damages would form no ground for a new trial, the jury having found against the cause of action. *Morrison* v. *Shaw*, 40 U. C. R. 403.

Evidence of Promise — *Pleading.*]—In an action for breach of promise of marriage it was proved that the defendant, on being charged by the plaintiff's father with having got her in the family way, and having promised to marry her—the plaintiff having been seduced, and had a child by him—replied: "I will marry her if it is mine," and also that he could not do anything until he got some land from his father when he would marry her. It further appeared that the defendant had admitted some time previously having got fifty acres from his father. There was no proof of an actual promise on the plaintiff's part, but

on the cross-examination of the plaintiff's father he stated that before speaking to the defendant about marrying his daughter she had told him she was going to get married to the defendant:—Held, that there was sufficient evidence of a mutual promise to marry to go to the jury, and a verdict for the plaintiff was upheld. *Fisher* v. *Graham*, 31 C. P. 285.

In the first count of the declaration the promise alleged was to marry within a reasonable time; and in the second count on a day now past:—Held, both counts sustainable on the evidence, but especially the second. *Ib.*

Evidence of Promise—*Corroboration—Statute of Limitations.*]—In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but when that time had arrived he excused his doing so, because he said he had not his house built, and he agreed not to marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another woman, and this action was brought. The defendant denied the promise. In his examination before the trial, he admitted visiting the plaintiff and talking to her of marriage, but he said it was not of their marriage, but that of other persons; that when he visited her she was alone, and that he kissed her. In corroboration of the plaintiff's evidence, a witness stated that in the fall of 1882, he had a conversation with the plaintiff, who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring, or the following one, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said he supposed plaintiff and defendant would soon make a match, to which the defendant made no reply. At the trial it was objected that there was no evidence to corroborate the plaintiff's evidence as to the alleged promise and that the action was barred by the Statute of Limitations. The learned Judge overruled the objection, and left the case to the jury:—Held, that the action was not maintainable. Per Cameron, C. J.—There was evidence to go to the jury corroborative of the promise stated by plaintiff; but, per Cameron, C. J., and Rose, J., the action was barred by the Statute of Limitations, the latter expressing no opinion as to the corroborative evidence. Per Galt, J., without dissenting as to the Statute of Limitations, the plaintiff's evidence was not sufficiently corroborated. *Costello* v. *Hunter*, 12 O. R. 333.

——— *Corroboration — Presumption of Moral Relationship.*]—In an action for breach of promise of marriage the plaintiff swore to the promise, and the defendant denied it, and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who shewed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in 1880, and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent presents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages:—Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony required by R. S. O. 1887 c. 81, s. 6. *Yarwood* v. *Hart*, 16 O. R. 23.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry:—Held, that the presumption was in favour of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise. *Ib.*

——— *Corroboration—Infancy.*] — In an action for breach of promise of marriage the defendant admitted a promise but said that he was an infant when he made it, and that there was no ratification in writing after majority, as required by R. S. O. 1887 c. 125, s. 6. The plaintiff insisted that there was no engagement between her and the defendant until he became of age on the 20th August, 1887. The jury found that the promise to marry was first made on that day. There being evidence to sustain that finding, and also evidence upon which the jury might have found a previous promise, the court refused to interfere with the finding. There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence being not inconsistent with the precise engagement sworn to by the plaintiff as having been entered into on the 20th August, 1887:—Held, that this evidence satisfied the requirements of R. S. O. 1887 c. 61, s. 6, and it was not necessary that it should go so far as to negative the promise which the defendant admitted he made before majority. *Smith* v. *Jamieson*, 17 O. R. 626.

Examination of Parties.] — Since the passing of 45 Vict. c. 10, s. 3 (O.), the parties to an action for breach of promise of marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act. *McLaughlin* v. *Moore*, 10 P. R. 326. Superseding *Woodman* v. *Blair*, 8 P. R. 179, *Jones* v. *Gallon*, 9 P. R. 296.

Judgment by Default — *Damages.*] — The defendant having allowed judgment by

default is entitled, in mitigation of damages, to cross-examine the plaintiff's witnesses respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 493.

Justification for Breach.]—Want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to shew that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of damages, although general evidence of reputation may perhaps be admissible. *Grant* v. *Cornock*, 16 O. R. 406, 16 A. R. 532.

Personal Representatives.]—The court refused to arrest judgment on a verdict against executors for a breach of promise of marriage by testator, on the ground that such an action could not lie against personal representatives. *Davy* v. *Myers*, Tay. 89.

Release.]—In an action for breach of promise of marriage the plaintiff's evidence was that after promising to marry her in 1885, the defendant in March, 1886, visited her and repudiated his promise, whereupon she ordered him out of her house, and refused afterwards to renew the engagement. The trial Judge nonsuited the plaintiff on the ground that this amounted to an absolute release, and that the relationship between the parties was terminated:—Held, that the defendant having previously violated his engagement, the matter should have been left to the jury, who might have reasoned that the plaintiff chose to consider the connection at an end, and that she was not willing to subject herself to the pain and mortification of being again deceived. *Reynolds* v. *Jamieson*, 19 O. R. 235.

Rescission by Guardian.]—To a count in assumpsit for a breach of promise of marriage, defendant pleaded a rescission before breach by the defendant and plaintiff's guardian, with the plaintiff's concurrence, plaintiff being then an infant:—Held, bad, for the contract could only be avoided by the act of the infant, and not of the guardian. *Parks* v. *Maybee*, 2 C. P. 257.

Services Rendered in Expectation of Marriage.]—Where services were rendered by plaintiff to defendant in expectation that the defendant would marry her, but there was no contract of hiring, and the plaintiff expressly said that she was not to receive, and did not expect wages or pay:—Held, that on the defendant's refusal to marry the plaintiff, no action would lie as upon an implied promise to pay the value of such services in money. *Robinson* v. *Shistel*, 23 C. P. 114.

Statute of Frauds.]—The plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August:"—Held, that this was not an agreement not to be performed within a year, and was therefore not void under the Statute of Frauds, although not in writing. *Smith* v. *Jamieson*, 17 O. R. 628.

Statute of Limitations — *Successive Promises*]—In an action for breach of promise of marriage the jury found that there was at first a mutual promise to marry in six months, and a subsequent promise to marry on the death of the defendant's father. The jury were also asked: "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered, "yes." The division of the father's estate did not take place till December, 1887:—Held, that the answer to the question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was not barred by the Statute of Limitations at the time the action was brought in 1888. The several mutual promises were all independent contracts, the promise of the one party being the consideration for the promise by the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run. Costello v. Hunter, 12 O. R. 393, distinguished. *Grant* v. *Cornock*, 16 O. R. 406, 16 A. R. 532.

III. Criminal Conversation and Alienation of Affections.

Adultery of Plaintiff—*Ill-treatment of Wife.*]—Action for criminal conversation. Pleas, 1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently: 2. that the plaintiff's wife had, while so living apart from him, obtained an order for protection under the statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force:—Held, that the pleas shewed a good defence. *Patterson* v. *McGregor*, 28 U. C. R. 280.

Alienation of Husband's Affections—*Support of Wife.*]—When a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means of support, an action lies at common law by the wife against such woman. The Married Woman's Property Act, R. S. O. 1887 c. 132, by allowing a wife to sue without her husband and by making the damages recovered the separate property of the wife, removes the former difficulty in enforcing such a cause of action. Review of English and American decisions. *Quick* v. *Church*, 23 O. R. 263.

Neither at common law, nor under the Married Woman's Property Act, R. S. O. 1887 c. 132, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, and for committing adultery with him. Quick v. Church, 23 O. R. 262, overruled. *Lellis* v. *Lambert*, 24 A. R. 653.

Condonation.]—In an action for criminal conversation:—Held, that the fact of plaintiff, having, after verdict in his favour, from mere motives of compassion and consideration for their child, taken back his wife to live with him, was not such a condonation as would induce the court to grant a new trial. *McMillan* v. *Jelly*, 17 C. P. 702.

Damages — *Statute of Limitations.*] — Criminal conversation is a continuing wrong, and where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the Statute of Limitations. *Bailey* v. *King*, 27 A. R. 703.

Evidence of Adultery.]—It is not necessary that direct evidence of adultery should be given; it is sufficient to prove proximate acts and circumstances:—Held, therefore, that the fact of defendant having supplied the plaintiff's wife, while living apart, with a bedstead and mattress at her boarding house; that he, an unmarried man, visited her at all hours of the day; that he was in the habit of driving and walking with her; that he admitted he kept a woman; and that he wrote a telegram from her to the plaintiff, calling her by his own name, were strong evidence of adultery. *Frank* v. *Carson*, 15 C. P. 135.

Examination for Discovery.] — In an action for criminal conversation with the plaintiff's wife, the defendant cannot be compelled to submit to examination for discovery. Construction of s. 7 of R. S. O. 1887 c. 61, and difference between it and s. 3 of the Imperial Act 32 & 33 Vict. c. 68 pointed out. *Mulholland* v. *Misener*, 17 P. R. 132.

In an action for criminal conversation the defendant cannot be compelled to submit to examination for discovery. Mulholland v. Misener, 17 P. R. 132, followed. But where in the action damages are also claimed for the alienation of the affections and loss of the society of the plaintiff's wife, the defendant can be examined upon that branch of the case. Construction of s. 7 of R. S. O. 1887 c. 61, and difference between it and s. 3 of the Imperial Act 32 & 33 Vict. c. 68 pointed out. *Taylor* v. *Neil*, 17 P. R. 134.

An action for criminal conversation and for alienating the affections of the plaintiff's wife, is an action instituted in consequence of adultery, within the meaning of s. 7 of the Evidence Act, and a defendant in such an action cannot be compelled to submit to examination for discovery. *Fleury* v. *Campbell*, 18 P. R. 110.

Particulars — *Examination of Wife.*] — In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant shewing his innocence and ignorance of the ground of complaint. Keenan v. Pringle, 28 L. R. Ir. 135, followed. In such an action there is no power, having regard to R. S. O. 1887 c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery. *Murray* v. *Brown*, 16 P. R. 125.

Plea of Not Guilty.]—To a declaration alleging that defendant debauched and carnally knew the wife of the plaintiff, defendant pleaded only not guilty:—Held, not necessary to prove that the woman was the plaintiff's wife. *Ford* v. *Langlois*, 19 U. C. R. 312.

Proof of Marriage.]—In trespass for criminal conversation the plaintiff must give strict proof of his marriage. Mere casual conversations of defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient. *Campbell* v. *Carr*, 6 O. S. 482.

Taking away Wife from Husband—*Parents.*]—An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society; and substantial damages may be awarded in such a case. The mere harbouring, by her parents, of a wife who has left her husband, without any evidence of influence or persuasion on their part, is not sufficient to sustain an action against the parents. Review of English and American decisions. *Metcalf* v. *Roberts*, 23 O. R. 130.

IV. Dealings and Actions between Husband and Wife.

Appointment—*Undue Influence.*]—Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children:—Held, that these appointments were authorized by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband further inquiry was directed. *Fenton* v. *Cross*, 7 Gr. 20.

Bar of Dower—*Purchase Money Invested for Wife's Benefit.*]—A. being about to sell a certain property, in order to induce his wife, B., to bar her dower, entered into an agreement under seal, that all money to be received as purchase money for the same, as well as all rents received from a certain farm of A.'s, should be invested in the joint names of A. and one C., and the income paid over by C., who was authorized to draw the same, to B. "as she may require it for the maintenance of A. and B. and their family:"—Held, a valid agreement, and not opposed to public policy. *Lavin* v. *Lavin*, 2 O. R. 187.

Business Carried on by Husband and Wife.] — Defendant, during several years prior to and for part of the year 1862, had a shop which he and his wife, who lived with him, attended, the shop being divided into two

parts, in one of which defendant carried on a confectionery and saloon business, and in the other a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862, defendant gave up the confectionery, &c., business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him $5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionery, &c., business there, though he was frequently seen on the premises. In 1869, the wife gave an order for the goods in question, just as she had always previously to 1862 been in the habit of doing:—Held, that the business must be considered defendant's, and that he was liable to the plaintiff for the goods ordered in 1869:—Held, also, that the Married Woman's Act, C. S. U. C. c. 73, had no application to the case. *Foulds* v. *Curtelett*, 21 C. P. 368.

Chattels Transferred by Husband to Wife — *Change of Possession.*]—A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof, as required by the Bills of Sale Act. *Hogaboom* v. *Graydon*, 26 O. R. 298.

Competing with Husband's Creditors.]—Claim by married woman as executrix of her first husband against creditors of her second husband — Evidence necessary to support such claim. See *Paton* v. *Ramsay*, 10 L. J. 277.

Conveyance by Husband to Wife.]—A husband and wife were respectively residuary devisees under a will, and they together with the other residuary devisees united in a conveyance purporting to transfer the property to the wife and her heirs, so that none of the other parties should have any estate, right, title, or interest therein:—Held, that the conveyance was inoperative at law so far as it assumed to pass the interest of the grantee's husband, but that it had the effect of constituting the husband a trustee of the legal estate in favour of the wife: that in equity the wife had an absolute estate in the whole property to her separate use, and had therefore the same power of devising it as if she had been a single woman. *Davison* v. *Sage*, 20 Gr. 115.

A husband, on 2nd September, 1885, by deed of bargain and sale, made in pursuance of the Act respecting Short Forms of Conveyances, conveyed to his wife certain lands, the consideration being "natural love and affection and $5," the receipt of the consideration being also admitted in the deed, besides the usual marginal receipt of the $5: habendum to the wife, her heirs and assigns, for her and their sole and only use forever:—Held, that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned, and an order was, therefore, made vesting in the wife all the estate and interest of the husband at the date of this deed to her. *Whitehead* v. *Whitehead*, 14 O. R. 621.

A conveyance direct from husband to wife is not necessarily void to all intents and purposes; in equity it may be valid. *Jones* v. *McGrath*, 15 O. R. 189.

The defendant being the owner of the equity of redemption in certain lands, executed a deed on October 18th, 1884, purporting to convey them directly to his wife for a consideration of $100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff, who claimed by conveyance from the wife, brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore, void. The plaintiff purchased bonâ fide without notice of there having been no consideration:—Held, that under 49 Vict. c. 20, s. 10 (O.), the acknowledgment of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not dispute the consideration. *Jones* v. *McGrath* (2), 16 O. R. 617.

49 Vict. c. 20, s. 10 (O.), is not to be restricted to claims upon alleged vendors' liens and the like. *Ib.*

Semble, that even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient. *Ib.*

——— *Possession by Husband.*]—A husband who was married in 1854, made a conveyance of lands direct to his wife in 1870, which was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered:—Held, affirming 20 O. R. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife. A gift from a husband to a wife is not an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband. Re Breton's Estate, 17 Ch. D. 416, commented upon. The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband:—Held, reversing 20 O. R. 158, that the Real Property Limitation Act did not apply so as to extinguish the right of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife: and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant

children and as their natural guardian; and this being so his possession and receipt were the possession and receipt of his wife, and after her death, of his children and those claiming under them; and the statute, therefore, never began to run. Wall v. Stanwick, 34 Ch. D. 763; In re Hobbs, 36 Ch. D. 553; Lyell v. Kennedy, 14 App. Cas. 437, followed. Hickey v. Stover, 11 O. R. 106; Clark v. McDonnell, 20 O. R. 564, not followed. *Kent* v. *Kent*, 20 O. R. 445; 19 A. R. 352.

Conveyance by Wife to Husband.]—A married woman is not entitled by the Married Woman's Real Estate Act, 1873, 36 Vict. c. 18 (O.), to convey land to her husband. The requirement that the husband shall be a party to and execute such deed, means that he must be a grantor. *Ogden* v. *McArthur*, 36 U. C. R. 246. See *Davison* v. *Sage*, 20 Gr. 115.

Quære, as to the effect upon ss. 2, 3 and 4 of C. S. U. C. c. 85, of the repeal, by 36 Vict. c. 18, of 34 Vict. c. 24, which repealed them. *Ib.*

Where by an agreement before marriage made in Montreal between the intending husband and wife, it was provided that each should enjoy all property, real and personal, which either might possess at the time of, or acquire during the marriage in any way, as his or her separate property, and should have the absolute control and management thereof free from the debts and demands of the other, and after marriage the wife acquired certain land of which she and her husband executed a mortgage, and the wife conveyed to the husband in fee:—Held, that by the agreement the land was vested in the wife as her proper separate estate, and there was no incongruity in the husband being the grantee of the wife. Ogden v. McArthur, 36 U. C. R. 346, distinguished. *Sanders* v. *Malsburg*, 1 O. R. 178.

Conveyance to Supposed Husband — *Resulting Trust.*] — A woman while living with a man to whom she believed herself to have been lawfully married but who, it was afterwards discovered, was at the time of the pretended marriage with her, a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name:—Held, that there was not any resulting trust in favour of the woman. *Street* v. *Hallett*, 21 Gr. 255.

Creditor's Rights—*Preferential and Voluntary Transactions.*] — See BANKRUPTCY AND INSOLVENCY, I. 8, V. 4, VI. 5—FRAUD AND MISREPRESENTATION, III. 2 (b), (c).

Deposit at Wife's Credit.]—After the death of a man and his wife, a sum of money was found deposited in a bank at the credit of the wife, which had been so deposited in the lifetime of the husband, but it did not appear by whom. The wife survived the husband; and after her death, a question being made to whose estate the fund belonged:—Held, that it belonged to the estate of the wife. *Peers* v. *Hamilton*, 9 Gr. 362.

Examination for Discovery — *Communication During Marriage.*]—See *Connolly* v. *Murrell*, 14 P. R. 187.

Gift by Husband to Wife.]—The only proof of the receipt of certain moneys by the wife during the life of her husband, was her own evidence, but she also stated that the money had been given to her by him. The court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Gr. 373.

Since the Married Woman's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee. A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it. *Sherratt* v. *Merchants Bank of Canada*, 21 A. R. 473.

See GIFT, II.

Gift by Wife to Husband.]—A gift by a married woman to her husband of her separate property, must be established by clear evidence of her intention to destroy the separate use. *Butler* v. *Standard Fire Ins. Co.*, 4 A. R. 391.

Gift of Chattels — *Onus—Evidence.*]—When a wife claimed as against her husband's creditors certain chattels, as a gift from him while living together:—Held, that the onus of proof of title to the goods was on him, and there being no writing or witnesses, her own evidence, although corroborated by her husband, was not sufficient to satisfy the onus. *Thompson* v. *Doyle*, 16 C. L. T. Occ. N. 286.

Husband as Wife's Trustee.]—Appointment of husbands as trustees for their wives. See *McLachlin* v. *Usborne Magee* v. *Usborne*, 7 O. R. 297.

Income — *Payment to Husband.*] — A married woman having separate estate paid over her income therefrom to her husband who treated it as his own, and used it towards paying the ordinary family expenses without keeping a separate account, paying her no interest and giving no acknowledgment, all her business matters being under his management. After many years of this kind of dealing, the husband, who had for some time been largely indebted to the plaintiff, being pressed for payment, immediately made a conveyance of his property to his wife without her knowledge, and without her being informed of the fact, the alleged consideration being the payments to the husband which, it was contended, had been made as loans:—Held, that the onus of proof that payments of income to her husband were by way of loan, and not of gift, was on the wife, and that the evidence of both defendants, being without corroboration, did not support the allegation, and the conveyance was set aside as fraudulent against creditors. *Rice* v. *Rice*, 31 O. R. 59; 27 A. R. 121.

Indorsement of Wife.]—Semble, that a defendant's indorsement made by his wife, though in her own name, but afterwards recognized by defendant, would make him liable to an action on the bill. *Ross* v. *Codd*, 7 U. C. R. 64.

Declaration on a note made by defendant, payable to D. or order, and by D. indorsed to

plaintiffs. Plea, that D. when the note was made was, and still is, defendant's wife. Replication, that defendant made the note with the intent that D. should indorse it away, and that she indorsed it to the plaintiffs by his authority:—Held, bad on demurrer. *McIver* v. *Dennison*, 18 U. C. R. 639.

Injunction to Restrain Husband's Interference with Business.]—The plaintiff, a married woman, carried on business as an hotel-keper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business or with the servants or agents, or removing any of the plaintiff's chattels:—Semble, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly* v. *Donnelly*, 9 O. R. 673.

Loan by Wife to Husband.] — The widow of the intestate claimed against his estate a sum of $700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock-in-trade. The money was deposited in a bank at the time of the marriage, which took place before C. S. U. C. c. 73:—Held, that C. S. U. C. c. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar. *Re Laws, Laws* v. *Laws*, 28 Gr. 382.

A woman, married to her husband in 1880 without marriage settlement, afterwards advanced certain moneys to him, which she now sought to recover as money lent. She failed, however, to prove a contract for repayment:—Held, that she could not recover. *Hopkins* v. *Hopkins*, 7 O. R. 224.

A wife claimed to be allowed a sum of $1,500, which she alleged she had advanced to her husband as a loan, to be used in the purchase of a property and in building thereon:—Held, that as no contract for repayment was shewn, no security being taken and no attempt having been made to collect the amount although many years had passed, the transaction could not be treated as a loan, and the wife could not recover or be allowed the amount so claimed. *Dufresne* v. *Dufresne*, 10 O. R. 773.

Claim by wife of insolvent for money lent and used in his business. See *Warner* v. *Murray*, 16 S. C. R. 720.

Mortgage—*Bar of Dower—Insolvency of Mortgagor.*]—Where a wife joins in a mortgage, and on the death of the husband there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Gr. 113; *White* v. *Bastedo*, 15 Gr. 546.

Note by Husband to Wife.] — Note given by husband payable to wife—Action on, by wife's administrator against husband's administrator—Evidence. See *Denham* v. *Brewster*, 28 C. P. 607.

Nova Scotia Act—*Action by Wife against Husband.*] — Under the Married Women's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband. *Michaels* v. *Michaels*, 30 S. C. R. 547.

Purchase of Goods by Wife and Chattel Mortgage thereof by Her.] — The plaintiff went to British Columbia nine years before this action, leaving his wife here, to whom he wrote and occasionally sent money. She procured the defendant to indorse a note made by her for the price of furniture to carry on a boarding house, (which she subsequently carried on with the plaintiff's knowledge), and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued defendant in trespass and trover:—Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture, and to do all that was necessary to acquire it. Held, also, assuming that she exceeded her authority in giving a mortgage under seal, yet as the mortgage would be valid without a seal in her own name the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of. Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement. Semble, that the wife standing by and permitting the sale of the property under the mortgage, was some evidence under the plea of leave and license. Under C. S. U. C. c. 73, the wife had power to buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right, she could give a mortgage by deed in her own name as if a feme sole. *Halpenny* v. *Pennock*, 33 U. C. R. 229.

Purchase of Land by Wife—*Re-sale—Garnishment of Purchase Money—Debt of Husband.*]—D. having entered into an agreement to purchase land, had the conveyance made to his wife, who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money had not been paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts, the purchase money of said transfer was garnished in the hands of M. and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into court. The judgment creditors

claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the re-sale as trustee for D.:—Held, that under the evidence given in the case, the original transfer to the wife of D. was bonâ fide; that she paid for the land with her own money and bought it for her own use; and that if it was not bonâ fide the supreme court of the territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity. Held, further, that even if the proceedings were not bonâ fide, the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt, it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action on in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit. *Donohoe* v. *Hull*, 24 S. C. R. 683.

Purchase by Wife from Husband—*Expenditure by Husband.*]—A purchase by a wife from her husband, the consideration being paid out of her separate estate, was held to be maintainable against creditors of whose debts she had no notice. The husband, after the purchase, expended money in improving the property:—Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought. *Hill* v. *Thompson*, 17 Gr. 445.

Quebec Law.]—*Communauté de Biens.*]—See *McCorkill* v. *Knight*, 3 S. C. R. 233; *Pilon* v. *Brunet*, 5 S. C. R. 318.

——— *Advances by Husband to Child out of Deceased Wife's Estate.*]—See *Eddy* v. *Eddy*, [1900] A. C. 299.

——— *Community — Personal Injuries — Right of Action—Pleading—Exception à la forme.*]—See *McFarren* v. *Montreal Park and Island R. W. Co.*, 30 S. C. R. 410.

——— *Community—Continuation of Community—Inventory—Procès-verbal de carence —Tripartite Community.*]—See *King* v. *McHenry*, 30 S. C. R. 450.

Savings Deposit.]—Where a husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately:—Held, that she was entitled as survivor to the whole fund. *Re Ross*, 32 O. R. 224.

Separate Estate—*Husband's Interest—Renunciation.*]—A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R. S. O. 1887 c. 127, s. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself. And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest. The administrator of the wife's estate has a status to set up the husband's renunciation in answer to a claim made by him to a share in the estate. The husband, before marriage, signed a writing as follows: "This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects:"—Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage, and was sufficient to protect her estate from any claim of his, after the separate use of the property to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased by her death in 1896. *Dorsey* v. *Dorsey*, 29 O. R. 475.

Settlement of Action.]—A married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms in settlement of such a suit, such contract can be enforced against the defendant by the plaintiff suing in her own name without a next friend. And so in the present case where, by way of compromising such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement; that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon* v. *Vardon*, 6 O. R. 739.

Settlements on Marriage.]—*See* subtitle X., *post.*

Title to Goods—*Execution against Husband.*]—In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S. 5th ser. c. 74, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that A.'s right to the goods seized was acquired from her husband after marriage which would not make them her separate property under the Act:—Held, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment;

Hannon v. McLean, 3 S. C. R. 706, followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. *Croce* v. *Adams*, 21 S. C. R. 342.

Transactions between Husband and Wife—*Creditors' Rights.*]—See BANKRUPTCY AND INSOLVENCY — FRAUD AND MISREPRESENTATION—GIFT.

Trover by Wife against Husband.]—A married woman, married in 1870, who had without any just cause left her husband's house, and was living apart, demanded from him chattels and household furniture which, having been her property before marriage, came into his possession upon and by virtue of the marriage, and had been used by them jointly in his dwelling house, and on his refusal brought trover:—Held, under C. S. U. C. c. 73, and 35 Vict. c. 16, that the action could not be maintained. *McGuire* v. *McGuire*, 23 C. P. 123.

Undue Influence.]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition was greatly impaired, he subsequently becoming an incurable lunatic, was set aside. The doctrine of undue influence and fiduciary relationship discussed. Distinction between undue influence in cases of gifts inter vivos and testamentary gifts referred to. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

Held, upon the evidence in this case, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife and without independent advice, and was rightly set aside. *Hopkins* v. *Hopkins*, 27 A. R. 658.

Wife Acting as Husband's Agent.]—Where a wife took an active part in her husband's business and had the custody of his money, sums paid to her were treated as paid to the husband. *Robinson* v. *Cognc*, 14 Gr. 561.

Plaintiff, being indebted to defendant for rent and otherwise, left the country with the intention, as he said, of going to Manitoba to look for land. On his way he wrote the following letter to his wife: "Dear Polly—I am very sorry indeed. I suppose you think it strange I have not been home; but so many demands upon me at this time, I found I could not meet them. The first hint is, I have gone across the water to Manitoba, and went on Thursday. As regards Mr. Milligan's affairs, I wish you to do the best you can; but tell Mr. Milligan not to be afraid of me. I will see him all right * * Now if Mr. Milligan will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will be the same to him." The lease, under which the rent was due, was for seven years from 1st January, 1877, and the plaintiff left in October, 1878, having done no summer fallowing, as he was bound by the lease to do, and no fall ploughing, and leaving money enough at most only to pay the rent. On receipt of this letter plaintiff's wife sold his chattels to defendant at a valuation, and executed a surrender to him of the demised premises, of which defendant then resumed possession. Plaintiff returned in four or five weeks, when defendant gave him notice of the valuation and that he intended to sell the goods on a day named, and held them until then subject to plaintiff's direction, and that the premises were open for the plaintiff for two months to enter and fulfil his lease; but the plaintiff would have nothing to do with this offer, and sued defendant in trespass and trover, as also on the covenant for quiet enjoyment in a lease:—Held, that he could not recover, for that, coupled with the evidence, more fully set out in the report, the letter to his wife clothed her with authority to part with the property, and surrender the premises to defendant. *Wheeldon* v. *Milligan*, 44 U. C. R. 174.

Wife's Land Built upon by Husband.]—The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the land in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for $2,000, and expended it on improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of writ:—Held, following Donnelly v. Donnelly, 9 O. R. 673, the plaintiff was entitled to possession; but could only recover for the use and occupation since the service of the writ. Held, also, that the defendant could not claim for the moneys expended by him on the land. *Till* v. *Till*, 15 O. R. 133.

See GIFT, II.

V. DIVORCE, DISSOLUTION OF MARRIAGE, AND SEPARATION DEEDS.

Declaration of Nullity—*Duress—Marriage of Minor.*]—The high court of justice in this Province has jurisdiction, where a marriage correct in form is ascertained to be void de jure by reason of the absence of some essential preliminary, to declare the same null and void ab initio; but nothing short of the most clear and convincing testimony will justify the interposition of the court. *Lawless* v. *Chamberlain*, 18 O. R. 296.

Where duress is alleged, it must be manifest that force perpetrated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment:—Held, on the evidence, that his consent to the marriage was proved. *Ib.*

Held, also, that s. 11 of 26 Geo. II. c. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this Province. *Ib.*

See Wadsworth v. *McCord*, 12 S. C. R. 466; *McMullen* v. *Wadsworth*, 14 App. Cas. 631.

Foreign Divorce.]—See sub-title I., 4, *ante*.

Future Separation.] — Semble, that a provision of a deed of separation that the maintenance secured to the wife for life, and her children during their residence with her, should continue notwithstanding a renewal of cohabitation, and that in the event of the parties again separating for any the like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation. *Meredith* v. *Williams*, 27 Gr. 154.

Where a deed after reciting an agreement for separation between husband and wife; that she was to have the custody of the children until twelve years old, and that he in consideration of her releasing her dower in his lands, had agreed to pay her a certain sum for her own and the children's maintenance, secured to the wife for her separate maintenance a yearly sum of $600, and a further yearly sum of $200 for the maintenance of each of the children so long as they should continue in her custody, and provided, that in the event of a reconciliation taking place the annuity for the wife and allowance for the children should not be thereby defeated or revoked; and in case of any future separation of the parties for any of the same causes (which were such as to justify a separation), the whole of the provisions of the deed should be revived and be in full force:—Held, that such deed, upon a fair construction of it, was not open to objection as providing for a future separation; and, semble, if it had provided for such separation for the causes mentioned, it would not have been void. *Ib.*

Intoxication—*Conspiracy to Induce Marriage.*]—In order to render void a ceremony of marriage, otherwise valid, on the ground that the man was intoxicated, it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about. *Roblin* v. *Roblin*, 28 Gr. 429.

Semble, a combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shewn that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage. *Ib.*

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed. *Ib.*

Three years after the ceremony of marriage, which the man alleged he had been induced to enter into while under arrest and intoxicated, an action at law was brought against him for necessaries furnished to the woman, and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue. Before the cause was called on for trial, the man signed a memorandum indorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action:—Held, that if the marriage was previously voidable, it was thereby confirmed. *Ib.*

Separation Deed — *Collateral Security.*]—Where in a deed of separation the husband covenanted to pay his wife £150, and appointed trustees, who, being indebted to the husband in that amount, gave him their separate notes for payment to his order, which he indorsed in blank, and returned to them for the benefit of his wife, and one of the trustees then gave to the wife the notes signed by him, with an indorsement that they were not to be sold by her, and she assigned them to the plaintiff:—Held, that he could not recover against the trustee on the notes, as they having been returned by the husband to the trustee were cancelled; and that the wife had, at any rate, no power to transfer them. *Wilson* v. *McQueen*, E. T. 3 Vict.

——— *Reconciliation—Annuity.*]—An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent reconciliation of the parties; or by the wife's leaving her husband afterwards without cause. *Walker* v. *Walker*, 19 Gr. 37.

——— *Reconciliation—Interest of Children.*]—A deed of separation between husband and wife, where the estate is conveyed to the wife for life, with remainder to the children of the marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interests of the children intervene to preserve the deed. *McArthur* v. *Webb*, 21 C. P. 358.

Semble, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and subsequent separation, at his instance, the deed is thereby revived. *Ib.*

Although the policy of the law is to induce a man and wife to resume cohabitation notwithstanding they may have agreed to a separation, and that on such renewal of cohabitation a deed of separation will be held void; still where property was conveyed to a trustee for the support and maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterwards renewed cohabitation, but the husband subsequently deserted his wife and family, the court refused, at the instance of the husband, to set aside the deed. *McArthur* v. *Webb*, 13 Gr. 305.

——— *Jointure — Election.*] — On the 24th July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees "that the said (wife) will, whenever called upon, release her dower in any lands of which he, the said (husband), may hereinafter (sic) acquire title." The husband died in January, 1898, having acquired, and being at the time of his death seised of, other lands, and in August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868:—Held, that the deed of 1868 provided a jointure for the wife within the provisions of s. 7 of 27 Hen. VIII. c. 10; that the acceptance of the deed and the benefits thereby conferred was an election by her within that Act to accept

the jointure; and that, therefore, she was not entitled to dower in the after acquired lands. Judgment below, 30 O. R. 689, affirmed. *Eves* v. *Booth*, 27 A. R. 420.

——— *Benefits under Husband's Will.*]—A husband in a separation deed covenanted to pay his wife an annuity of $200 as follows: $100 on the 1st June and December in every year; and charged it on certain land, the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband by his will, subsequently executed, directed his executors to pay his wife $400 annually; $200 on the 1st June and December in each year during her life; and added, "which provision in favour of my said wife is made in lieu of dower:"—Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 32 O. R. 114.

VI. Estate by the Curtesy.

Canonical Marriage.]—It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685.

Death of Wife before Possession.]—A testator devised his property to trustees in trust to pay the rents and profits to his wife durante viduitate, and if she married again she was to have an annuity, and the property was to be applied as directed for the benefit of the children, and divided among them when the youngest came of age. One daughter married, and died before the period of division, leaving a husband and two children. The testator's widow married again before the death of the daughter:—Held, that the husband of the daughter was tenant by the curtesy of her share. *Jones* v. *Dawson*, 8 P. R. 481.

Deed in Fee.]—Deed in fee made by tenant by the curtesy. Effect of. See *McGregor* v. *McGregor*, 27 Gr. 470.

Effect of Possession.]—In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died, in 1871, seized of certain lands of which L. remained in continuous possession until 1883, the time of action brought:—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heir-at-law of the wife. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685.

Entry.]—Where a married woman claims under letters patent from the Crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent, suo vigore, constituting seisin in fact. *Weaver* v. *Burgess*, 22 C. P. 104.

Estate of Inheritance—*Surrender.*]—Held, that the husband of a deceased wife cannot be tenant by the curtesy, except of lands of which his wife was seised of such an estate as that her issue by him would inherit, as heir to her; and that as between the reversioner and tenant by curtesy, a conveyance from the tenant by curtesy operates as a surrender of the life estate, and the freehold in law vests in the assignee before entry; and the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died. *Wigle* v. *Merrick*, 8 C. P. 307.

See Furness v. *Mitchell*, 3 A. R. 510, *Archer* v. *Urquhart*, 23 O. R. 214.

See sub-title XI. 2, *post*.

VII. Husband's Liability for Necessaries and Support.

Defence to Action.]—In an action by a tradesman against a husband for the value of goods supplied to his wife, whom he has without cause turned out of his house, the question is, whether the articles furnished were really necessaries, and to disprove this defendant may shew that she had been already supplied by others with similar goods. *Archibald* v. *Flynn*, 32 U. C. R. 523.

Expensive Goods—*Wife not Living with Husband.*]—In an action against a husband for goods supplied to his wife, it appeared that up to February, 1872, when the husband received an appointment worth $1,200 a year, he had been in embarrassed circumstances and owed debts amounting to $3,000. In May, 1870, his wife being in delicate health went to live with her father at Brantford, and continued to reside with him for two years, with the exception of an occasional visit to her husband, who lived in St. Catharines, during which time the father expended on her and her son upwards of $1,000. In May, 1872, when visiting her husband she complained for the first time of wanting clothes; the husband appearing to have always furnished her with money and clothes whenever she asked for them, and also to have paid for their son's board and clothes. The husband then gave her what articles she required and what money he possessed, at the same time expressly telling her not to incur any debts in Brantford. In the following month, however, she incurred the debt now sued for, the price of silks, valuable laces, and shawls, amounting to the husband's salary for a quarter, the plaintiff at the time being aware that she was not living with her husband, but with her father:—Held, that the husband was not liable, and a verdict for the plaintiff was set aside. *Zealand* v. *Dewhurst*, 23 C. P. 117.

Maintenance of Wife.]—The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her:—Held, that the defendant, by turning his wife out of his house, sent her forth as his delegated agent to pledge his credit for the necessaries of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife. And such claim can be maintained up to the date of a judgment allowing alimony to the defendant's wife. *Hughes* v. *Rees*, 10 P. R. 301.

Non-Support of Wife—*Lawful Excuse.*]—Upon an indictment of the prisoner

under s. 210, s.-s. 2, of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement, at the time of the marriage, between him and the person who became his wife, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance. *Regina* v. *Robinson*, 28 O. R. 407.

Notice of Non-Responsibility.]—A husband having given notice to the plaintiff that he would not be responsible for goods furnished to his wife, who had withdrawn herself from his protection, was held not liable for goods furnished to her by the plaintiff without his knowledge after she had returned to him again. *Weaver* v. *Lawrence*, E. T. 2 Vict.

Recognition as Wife.]—A recognition by a person that A. is his wife is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated, and although she may not strictí juris be his wife. *Hawley* v. *Ham*, Tay. 385.

Refusal to Provide for Family—*Evidence.*]—Evidence of husband and wife upon prosecution of husband for refusal to provide for family. See *Regina* v. *Bissell*, 1 O. R. 514; *Regina* v. *Meyer*, 11 P. R. 477.

Voluntary Separation.]—Where there has been a voluntary separation without provision for the wife's support, she is entitled to pledge her husband's credit for necessaries. *Tait* v. *Lindsay*, 12 C. P. 414.

Where a husband's conduct towards his wife is such that she is unable safely or comfortably to remain in his house, she has a right to pledge his credit for the suitable maintenance of herself and children; and the person furnishing such support may recover therefor, though he is the father of the wife, and furnished it without any immediate intention of making a claim for his outlay. *Griffith* v. *Paterson*, 20 Gr. 615.

Where in such a case a father had for several years supported his daughter and grandchildren, but made no claim against the husband during his lifetime, and after his death made a claim against his estate, the court, although it considered him entitled to be paid his demand, thought the executor, under the peculiar circumstances, was justified in having pressed payment of the demand without the sanction of the court; and that in the administration of the estate the executor would be entitled to be paid his costs of litigation. *Ib.*

VIII. HUSBAND'S LIABILITY AND RIGHTS AS REPRESENTING WIFE.

Ejectment by Husband.]—Though the wife own the fee, the husband may maintain ejectment on his own demise alone, but he must prove his marriage. *Doe d. Peterson* v. *Crook*, 5 U. C. R. 135.

A husband entitled to land in the right of his wife, may bring ejectment without her being joined in the action. *Doe d. Eberts* v. *Montreuil*, 6 U. C. R. 515.

Under 59 Geo. III. c. 3, a deed executed by husband and wife, but without an examination of the wife and certificate thereof, is void; so that, notwithstanding the deed, the husband may maintain ejectment during the coverture. *Doe d. McDonald* v. *Twigg*, 5 U. C. R. 167.

Semble, however, that under the more recent Act, 1 Wm. IV. c. 2, the grantee's possession cannot be disturbed during the life time of the husband. *Ib.*

Fraudulent Preference—*Tort.*]—To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:—Held, on demurrer, that since the passing of the Married Woman's Property Act, 1872, the husband was not a necessary or proper party. Semble, that such a dealing on the part of a married woman was a "tort," within the meaning of the above Act, for which she could be proceeded against as if unmarried. *McFarlane* v. *Murphy*, 21 Gr. 80.

In a proceeding against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party. Where, therefore, a trader in contemplation of insolvency had purchased lands, the conveyance of which he took in his wife's name with the fraudulent design of withdrawing part of his estate from his creditors, and thereupon a bill was filed by the official assignee for the purpose of obtaining a conveyance or sale of the property, to which bill the husband was made a party defendant, the court allowed a demurrer thereto by the husband, on the ground that he was not a necessary party. *Boustead* v. *Whitmore*, 22 Gr. 222.

Husband's Action for Seizure of Wife's Goods.]—An action by the husband alone will lie against a party seizing separate goods of his wife out of the possession of her husband. *Krasmer* v. *Gless*, 10 C. P. 470.

Husband Suing on Covenant in Wife's Favour.]—On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of £70 paid, being proceeds of the sale of her own lands, obtained from defendant a lease of certain premises, to hold to her own use during her life, defendant covenanting at the expiration of the lease to pay her, her heirs or assigns, £50:—Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant; and that having assented to the demise to his wife, he could not sue for the consideration money paid for the lease, either as money lent or as money had and received to his use. *Healey* v. *Bongard*, 1 C. P. 212.

Husband Suing for Debt Due to Wife.]—Defendant delivered to the deceased wife of the plaintiff a note in payment of a legacy bequeathed to her, and she died before payment of the note:—Held, that a plea, that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action. *Robinson* v. *Cripps*, 6 C. P. 381.

Illegal Sale of Liquor by Wife.]—Sale of liquor by a wife to Indians. Liability of husband. See *Regina* v. *McAuley*, 14 O. R. 643.

Lord Campbell's Act.]—Action by husband on behalf of himself and children against a railway company, claiming damages under Lord Campbell's Act for death of wife. See *Lett* v. *St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545; 11 A. R. 1; 11 S. C. R. 422.

Tort of Wife—*Marriage Prior to 1884—Joinder of Husband as Defendant.*]—Action against a husband and wife alleged to have been married before 1884, for a tort committed by the wife:—Held, on demurrer, that the husband was properly joined as a party. Amer v. Rogers, 31 C. P. 195, and Seroka v. Kattenburg, 17 Q. B. D. 177, considered. *Lee* v. *Hopkins*, 20 O. R. 666.

Trover.]—Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but that the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration:—Held, that the plaintiff, and not his wife, was the proper person to sue. *Filschie* v. *Hogg*, 35 U. C. R. 94.

IX. Marriage.

1. *In General.*

Banns—*Onus of Proof.*]—In ejectment it appeared that M., one of the defendants, was married to N., 7th February, 1866, on one calling of banns, a dispensation having been procured from the Roman Catholic Archbishop for the other two calls, both parties belonging to that faith. The husband had immediate and continued possession of the land in question under deed to him. Of this marriage was born, 20th February, 1867, an only daughter. N. died 3rd May, 1868, and his widow M., on 11th October, 1870, intermarried with the defendant K., and they continued in uninterrupted possession until the issue of the writ herein. On 11th January, 1886, the daughter of M. and N. intermarried with the plaintiff, to whom was born, in wedlock (3rd July, 1886), though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff and his infant daughter against M. and her husband, the defendant K., they claimed title by possession and denied the validity of the marriage between M. and N., on the ground of the non-publication of banns:—Held, (1) that the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II. c. 33 was in force in Canada as to publication of banns. (3) That 37 Vict. c. 6, s. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favour of marriage. *O'Connor* v. *Kennedy*, 15 O. R. 29.

Full effect is given to the proviso of s. 1 of 37 Vict. c. 6 (O.), by reading it as limited to preserving the invalidity of a marriage illegally solemnized, when either of the parties to such illegal marriage has since, during the life of the other, contracted marriage according to law. *Ib.*

Deceased Wife's Sister.]—The intestate, H. M., was married in this Province in 1850 to the sister of his deceased wife, by whom he had children, and died in 1856:—Held, that though the marriage was voidable during the lives of both parties to it, yet not having been called in question till after the husband's death, it must now be treated as indissoluble, and that the issue thereof were entitled as heirs. *Hodgins* v. *McNeil*, 9 Gr. 305.

Held, also, that Lord Lyndhurst's Act, 5 & 6 Wm. IV. c. 54, does not extend to the colonies. *Ib.*

By English law as adopted in this Province in 1792, marriage with a deceased wife's sister was not ipso facto void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vict. c. 42 (D.), which removed all disabilities. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685.

Imperial Act.]—Marriages contracted in Ireland between members of the Church of England and Presbyterians, celebrated by ministers not belonging to the Church of England, are legalized by the Imperial statute 5 & 6 Vict. c. 26; and such marriages celebrated before that Act, are legal marriages in this country. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

Infant — *Marriage Act.*] — Where banns have been published and no dissent then expressed by parents or guardians, the husband being under age is no objection, even by the English Marriage Act, 26 Geo. II. c. 33; but quære, whether that Act is in force here. *Regina* v. *Secker*, 14 U. C. R. 604.

Semble, that the Act is not in force here. *Regina* v. *Bell*, 15 U. C. R. 287.

It is illegal as it was in England before 26 Geo. II. c. 33, to marry by license, where either of the parties is under twenty-one, without consent of parents or guardians; and the want of consent is a breach of the bond given on obtaining such license. *Regina* v. *Roblin*, 21 U. C. R. 352.

Semble, however, that s. 11 of the statute is not in force here, and that such marriage therefore is not void. *Ib.*

Section 11 of 26 Geo. II. c. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license without the consent of parent or guardian, was absolutely void, is not in force in this province. *Lawless* v. *Chamberlain*, 18 O. R. 286.

See *Wadsworth* v. *McCord*, 12 S. C. R. 466; *McMullen* v. *Wadsworth*, 14 App. Cas. 631.

Invalid Marriage — *Subsequent Statute.*]—H. P., patentee of the land in question, was married to one G. by a Methodist minister, who had at that time no right to solemnize the ceremony of marriage. She conveyed to M., but being told that her marriage was illegal, executed the deed by the name of Pringle, as if she were sole, her husband Green being the witness. After the passing of 11 Geo. IV. c. 36, her heir brought ejectment, contending that that statute confirmed the marriage, so as to avoid the conveyance executed as a feme sole:—Held, that the Act had not such a retrospective effect as to destroy the deed. *Pringle* v. *Allan*, 18 U. C. R. 575.

Jewish Marriage.]—Held, that a written contract was not essential to the validity of

a Jewish marriage, which had been solemnized with all the usual forms and ceremonies of the Jewish service and faith; and that such a marriage was valid, though there existed in relation to it a written contract not produced. *Frank* v. *Carson*, 15 C. P. 135.

Place of Solemnization.]—It is not necessary that marriages should be solemnized in a church. *Regina* v. *Secker*, 14 U. C. R. 604.

Slaves.]—The plaintiff in ejectment claimed as heir of his father, H., who, it appeared, while a slave in the State of Virginia, had in 1825 been married to the plaintiff's mother, S., also a slave. The marriage was celebrated by a Baptist minister with the usual ceremony, and with all the formalities practicable to make it binding, but without a license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there. It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying: that to constitute a strict legal marriage between free persons, a license was essential; but that slaves could not obtain it or in any way contract a legal marriage, being regarded by the law as property only, not persons. It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia arising from the law of slavery, which our law could not recognize; but, Held, otherwise; for the parties not being British subjects, as in Ruding v. Smith, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated. *Harris* v. *Cooper*, 31 U. C. R. 182.

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2. *How Proved.*

Acknowledgment in Deed—*Certified Copy of Register.*]—A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of the registry of marriage, from the parish registry in Ireland:—Held, sufficient against infant defendants, the adult defendants, by their answer, admitting the marriage. *Craig* v. *Templeton*, 8 Gr. 483.

Bigamy—*Proof of First Marriage.*]—Upon an indictment for bigamy the first marriage must be strictly proved as a marriage de jure. Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted. *Regina* v. *Ray*, 20 O. R. 212.

See CRIMINAL LAW, IX. 4.

Certificate—*Reputation.*]—A certificate of marriage by a magistrate in the following form: "I do hereby certify that I have this day married A. and B. according to the Church of England," dated in 1801, with proof of cohabitation and reputation, but without proof of publication of banns:—Held, sufficient to establish the marriage against the evidence of cohabitation and reputation of marriage with another person alive at the time of the second marriage, defects of form in such cases being cured by 11 Geo. IV. c. 36. *Doe d. Wheeler* v. *McWilliams*, 2 U. C. R. 77.

Conflicting Evidence.]—Where the evidence as to the fact of marriage was conflicting, the court offered the plaintiff an opportunity of obtaining better evidence or an issue to try the question, and if refused directed the bill to be dismissed. *Baker* v. *Wilson*, 6 Gr. 603.

Criminal Conversation — *Proof Required.*]—In trespass for crim. con. the plaintiff must give strict proof of his marriage. Mere casual conversations of defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient. *Campbell* v. *Carr*, 6 O. S. 482.

Declarations of Deceased Husband.]—In proof of the celebration of a marriage, evidence was given that the husband who had gone from this Province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying $20 to her father, and that after the marriage they cohabited and lived together as man and wife, and were recognized by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents and cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter and another child who died. About 1879 the husband returned to this Province, bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, and that the daughter was his legitimate child: and that he had brought her up as such:—Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and legal heir. *Robb* v. *Robb*, 20 O. R. 591.

Description in Patent.]—The patent from the Crown issued in 1848 to M. A. T., describing her as the wife of B. T. In 1853 she conveyed to L., not describing herself as a widow:—Held, that the description in the patent was some evidence of her being married when it issued; but the court, being left to draw inferences as a jury, presumed in favour of the validity of her deed made in 1853, that she was then sole and competent to convey. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253.

Marriage in Fact—*Reputation of Prior Marriage.*]—Where a marriage in fact has been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage. *Doe d. Wheeler* v. *McWilliams*, 3 U. C. R. 165.

Presumption.] — The declaration contained four counts: 1. for breach of promise by defendant, an unmarried man, to marry the plaintiff within a reasonable time; 2. for deceit, that the defendant, an unmarried man, falsely, &c., persuaded plaintiff to go with him to T. for the purpose of having a legal marriage celebrated between them, and to enter into a pretended marriage, and pretended that

said marriage was lawful, and thereby persuaded plaintiff to cohabit with him as his wife; 3, that defendant, &c., pretended to plaintiff that he was unmarried, and desirous of marrying her, and by false pretences caused her to submit to a pretended marriage with him; and falsely, &c., persuaded her that it was a lawful marriage, and thereby induced her to cohabit with him; 4, for an assault. Evidence was given of attentions to plaintiff by defendant, and of letters; but it appeared that defendant was then married, and plaintiff was aware of it. It was also proved that defendant had said he would persuade plaintiff that he was divorced, and take her away, to spite her children; and that plaintiff had said she would have nothing to do with him till he was free. Defendant was never divorced, and his wife was still living at the time of the trial. Defendant and plaintiff subsequently went to a hotel in W., and afterwards took a house there, passing as man and wife, and resided there for a short time. There was no positive evidence of any marriage ceremony:—Held, that there was no evidence to go to a jury on any of the counts; 2, that the presumption of innocence, that defendant had not been guilty of conspiracy, was an answer to any presumption of a marriage ceremony from the cohabitation proved. *Wright* v. *Skinner*, 17 C. P. 317.

——— *Evidence of One Party.*]—The presumption which arises of a marriage having taken place between the parties by reason of a man and woman having for many years cohabited and lived together as husband and wife is a rebuttable one; and after the death of the man the evidence of the woman alone, on which the court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of marriage, because, if married at the time alleged, the will, under which she claimed all the property of the man, would, under the Act, have been revoked. *Preston* v. *Lyons*, 24 Gr. 142.

——— *Reputation.*] — The presumption arising from reputation may be rebutted by proof that the woman formerly lived with another man so as to raise the same presumption of marriage with him. The plaintiff having put in a will, in which the testator spoke of H. as his wife, was not estopped from denying the marriage. *George* v. *Thomas*, 10 U. C. R. 604.

——— *Reputation.*]—Reputation and cohabitation for twenty or thirty years is sufficient in ejectment, and if the presumption therefrom is to be rebutted, it must be by positive testimony. *Doe d. Breakey* v. *Breakey*, 2 U. C. R. 349.

——— *Reputation.*]—The testimony of a woman of the ceremony having been performed, and evidence of respectable witnesses of general reputation:—Held, sufficient, without proof that the clergyman who performed the ceremony was duly authorized; and that evidence of reputation alone was sufficient. *Baker* v. *Wilson*, 8 Gr. 376.

——— *Reputation.*]—When it is sought to establish the fact of marriage by repute, it is essential that such repute should be general and uniform; a divided repute will not suffice for that purpose. *Henderson* v. *Weis*, 25 Gr. 69.

Recognition as Wife.]—A recognition by a party that A. is his wife, is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated; and although she may not strictí juris be his wife. *Hawley* v. *Ham*, Tay. 385.

X. Marriage Settlements.

Advances—*Set-off.*]—A father, before his daughter's marriage (in 1857) wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one-fourth of his residuary estate at his death. In 1858, and before she came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband and wife, and intended, if the same was not repaid, to set off the amount against his daughter's share of his estate:—Held, in a suit by the wife in the husband's lifetime for the administration of the estate, that the executors had a right to set off the advance against the wife's share:—Held, that such right was not affected by the fact that the father by his will, made after the marriage, but before the advance, had directed that any advances he should make were to be deducted from the £2,500; the reason of this provision appearing to be that the testator did not contemplate making any advances to an amount exceeding £2,500:—Held, also, that such right was not affected by the fact that on a demand being made on the father for the whole £2,500, when his daughter came of age, he, in time, reluctantly yielded to the demand, not releasing, however, or agreeing or intending to release, his right against the husband for his previous advance. *Torrance* v. *Chewett*, 12 Gr. 407.

After Acquired Property—*Reversion.*]—By an ante-nuptial settlement it was recited that the intended wife was seized in fee of certain lands, &c., and had also a claim to other property over which she had not then an absolute control; and that it had been agreed that her intended husband should enter into such covenants, &c., concerning all such real and personal estate as should be acquired from time to time by her during the coverture, as were therein contained concerning the lands of which she was then seized, which were thereby conveyed to trustees. And the intended husband covenanted to allow her during her coverture to receive to her own use the rents and profits of the lands, &c., so conveyed; and also, if he should become interested, in right of his intended wife, in any real or personal estate which should thereafter be given or bequeathed, or descend to her, he would allow the same to remain at her entire disposition, and that he would join with her in "conveying, assigning, and assuring, all such property as shall hereafter descend to, or be given or bequeathed to her, to the trustees upon the same trusts, and subject to the same provisoes, &c., as are expressed herein relative to the lands, &c., hereinbefore conveyed":—Held, that this bound the wife to bring property afterwards given or devised to her into settlement, but that it did not bind lands of which she was then seized in reversion. *Ridout* v. *Gwynne*, 7 Gr. 505.

Ante-nuptial Contract by Letters—*Post-nuptial Conveyance of Lands.*]—A young man under twenty-one made an offer of marriage by letter to a young woman, and in the

letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given. Gilchrist v. Herbert, 20 W. R. 348, followed. Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned. Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors. *Stuart* v. *Thomson*, 23 O. R. 503.

Appointment—*Undue Influence.*]—Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children:—Held, that these appointments were authorized by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further inquiry was directed. *Fenton* v. *Cross*, 7 Gr. 20.

Construction—*Mortgage — Direction.*]—The owner of real estate conveyed the same to trustees for his daughter, E. S., one of whom was her husband, to dispose thereof "in such manner as the said E. S., her heirs and assigns, may at any time advise or direct, and to make such leases, and further to make such conveyances in fee simple of the said lands, &c., as the said E. S., her heirs, &c., may at any time advise or direct." The trustees created a mortgage in which E. S. joined:—Held, that the conveyance to the trustees effected a settlement to the separate use of E. S.; that her joining in the mortgage was a sufficient direction to the trustees; that the mortgagee was not bound to see to the application of the money; and that in default of payment he was entitled to foreclose. *Place* v. *Spawn*, 7 Gr. 406.

——— *Power to Convey.*] — J. B. conveyed certain lands to trustees, to hold to the use of himself for life, then to the use of his wife for life, then to the use of their children, as he and his wife should appoint, and in default of any joint appointment as the survivor should appoint, and in default of any appointment, to the use of himself in fee, with a proviso, that after the death of J. B. and his wife, until the eldest child should come of age, the trustees might apply so much of the rents and profits as should be necessary towards the education of the children. A power of leasing for a certain sum was given, with a restriction that there should be no conveyance made of the reversion; and lastly it was provided that J. B. and his wife, with the trustees, should have such further and other powers for the disposition, control and management of the property, as the said J. B. and his wife might at any time thereafter by deed, &c., direct and appoint, the consideration for the settlement, as recited in it, being the release by J. B.'s wife of her dower in other lands. J. B. and wife first mortgaged the land, and then conveyed the equity of redemption to the assignee of the mortgage, from whom the plaintiff purchased:—Held, that such conveyance was unauthorized by the settlement, and that the plaintiff's title was bad. *Stewart* v. *Wallbridge*, 14 U. C. R. 312.

——— *Vesting.*]—By ante-nuptial settlement made in 1881, as reformed afterwards by decree of this court, C. G. being possessed of $25,000, and also of £1,000, conveyed these sums to trustees on trust after the marriage to pay the income to her, to her separate use, and after her decease to pay the said income, or such part as she should appoint, to R. G., her intended husband, during his life, and after his death, on trust, "to and for any child or children of the said intended marriage, share and share alike if more than one, and if only one, then to such one in trust to apply the yearly income, revenue and increase arising from the said trust funds and estate towards the maintenance, support and education of such children during their respective minorities, each child to receive his or her share of the principal of said trust fund and estate on his or her attaining the age of twenty-one years, or in case of females on attaining such age or being married." The marriage took place, and C. G. died in 1884, leaving R. G. her surviving, and two children, issue of the marriage, H. R. G. G. and A. G. G. the former of whom, however, died in 1886, under age:—Held, that H. R. G. G. took a vested interest at birth in the moiety of the sums of $25,000 and £1,000, and that R. G., his father, was entitled, as next of kin of H. R. G. G. to a moiety of said amounts, and that letters of administration should be taken out to his estate before the same could properly be paid to R. G. *Gill* v. *Gilmour*, 14 O. R. 129.

By a marriage settlement certain land was conveyed to trustees in trust to sell and convey, as the husband and wife might appoint, and to invest the money and pay the interest to the wife during life, and in case the husband survived the wife, and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay the whole to such child, and in case of the death of the wife without issue to pay the money to the husband, and in case the husband and wife did not make any appointment, then in trust to support the contingent remainders thereinafter limited, and to pay the rents on the same trusts as the money. Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving. On the death of the mother:—Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share. *Lazier* v. *Robertson*, 30 O. R. 517, 27 A. R. 114.

Creditors' Rights.]—See BANKRUPTCY AND INSOLVENCY, I., 8—V. 4—VI. 5—FRAUD AND MISREPRESENTATION, III. 2 (b), (c).

Dower — *Lower Canada Marriage Contract.*]—By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "customary, prefix, or stipulated," no mention being made of lands in Upper Canada:—Held, that this did not preclude her from claiming dower out of lands in Upper Canada held by her husband during her coverture; and that dower, notwithstanding the contract which was entered into, would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. *Jamieson* v. *Fisher*, 2 E. & A. 242; 12 C. P. 601.

Discretion of Trustees—*Personal Confidence.*]—By a clause in a marriage settlement it was stipulated that trustees should at their option, during the life of the intended husband, permit him or the intended wife to take and use the rents, issues and profits of the trust estate to their own use; and a subsequent clause provided that new trustees should be appointed in certain contingencies. Upon a bill filed by the wife to appoint a new trustee by reason of the residence of one out of the jurisdiction:—Held, that this trust was one of personal confidence, and could not be executed by a trustee appointed by the court. And the husband not having been heard of for upwards of four years, the court appointed a new trustee, and directed him to pay one half of the rents to the plaintiff, and the other half to be invested for the benefit of the husband. *Tripp* v. *Martin*, 9 Gr. 20.

Equity to a Settlement.]—Semble, wife entitled to a provision out of her equitable inheritance, the husband not maintaining her, and his assignee seeking the aid of the court to make her interest available. *Gillespie* v. *Grover*, 3 Gr. 558.

Foreign Law—*Present and Future Property.*]—The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate:—Held, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or Quebec. The ante-nuptial contract in question was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so:—Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Taillifer*, 21 O. R. 337.

Implied Statutory Rights.]—See *Leys* v. *McPherson*, 17 C. P. 266; *Lett* v. *Commercial Bank*, 24 U. C. R. 552.

Personal Property — *Registration.*] — Settlement of personal property. Registration of instrument as bill of sale. Affidavit of bona fides. Wife maintaining claim, without joining trustee in the settlement, to goods in interpleader issue. See *Connell* v. *Hickock*, 15 A. R. 518.

Quebec Law—*Don Mutuel.*]—See *Martindale* v. *Powers*, 24 S. C. R. 597.

Reconveyance to Settlor.]—The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, &c., to her own use during her natural life, and upon her death, if she should leave a child or children surviving her, in trust to convey the lands, &c., unto such child or children, their heirs, &c., for ever, freed and discharged of the trust mentioned in the deed; and in case of her death, before her husband, without any child, in trust to permit him to receive the rents, &c., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands. The husband died in 1879, there never having been any child of the marriage, and the plaintiff, who was then fifty-three years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage, but held, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance; the costs of the trustees to come out of the estate. *Farrell* v. *Cameron*, 29 Gr. 313.

Revocation of Gift.]—A parent was not permitted to recall a gift which, in view of the marriage of one of her two sons, she had made orally to the two, of certain arrears of an annuity which had accrued from them while she lived with them: the attempt to recall the gift not having been made until after marriage and death of the son. *Long* v. *Long*, 17 Gr. 251, 16 Gr. 239.

Sale Subject to Wife's Interest.]—An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage, settled certain lands (the subject of the suit) in trust, to the use of the wife for life, with power of sale to the trustee, to be exercised with the husband's consent. The legal estate was in one R., who had a primary charge on the premises. Under these circumstances, it was decreed that the plaintiff was entitled to redeem R.; that the wife's estate was exempt from every charge other than that of R.; that of this charge she must either keep down the interest or pay a proportionate share of the principal; that she was entitled to a provision out of her life estate; that subject to her interest, the property, on R. being paid, should be sold; and an inquiry was directed as to other judgments, in order to a proper application of the proceeds. *Pemberton* v. *O'Neil*, 2 Gr. 263.

Setting aside—*Construction.*]—A settlor filed a bill to set aside a settlement on his

wife and her heirs, alleging fraud by the trustees in inducing him to make the settlement. The wife died, leaving no children by him, but leaving children by a former husband. The allegations of the bill failed, and it was accordingly dismissed, but it was—Held, that, this settlement only vested a life estate in the trustees; and semble, that the settlor could defeat the settlement by sale. *Crafford* v. *McDonagh*, 5 L. J. 187.

——— *Power of Revocation.*]—The absence of a power of revocation in a voluntary settlement is not a ground for setting it aside. The plaintiff, who had just come of age, being about to marry, applied to her solicitor, who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage:—Held, that it was not a voluntary settlement, and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake. *Hillock* v. *Button*, 29 Gr. 490.

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

See Taillefer v. *Taillefer*, 21 O. R. 337.

See sub-title IV., *ante*.

XI. Married Woman's Liabilities and Rights.

1. *In General.*

Bond.]—The plaintiff declared upon a bond dated 4th June, 1858, made by the defendant L. R. and two others, without her husband, when sole and unmarried, by the name of L. M., to the governor-general, for £500, conditioned for the due administration of the estate of A. M., alleging the issue of letters of administration, that goods and chattels of A. M. amounting to £250 came into her hands to be administered on the 1st July, 1858; that she wasted the same, and disposed thereof to her own use; and that the bond was assigned, by order of the Judge, to the plaintiff as trustee for the next of kin, who thereupon became entitled to sue thereon, &c. After assessment of damages on judgment by default:—Held, on motion by defendants J. R. and L. R. in arrest of judgment, that the case came within s. 18 of C. S. U. C. c. 73; that her husband was properly joined; and that it was necessary to allege that the cause of action accrued before marriage, and that she had separate estate. *Kirchoffer* v. *Ross*, 11 C. P. 467.

Co-contractor.]—A married woman having separate estate may enter into a contract along with others. Semble, if she having no separate estate is not liable under such a contract, the other contractors are liable without her. *Dingman* v. *Harris*, 26 O. R. 84.

Concealment of Coverture.]—A married woman, owner of real estate, representing herself to be, and selling the property as, a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women. *Graham* v. *Mencilly*, 16 Gr. 661.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife, under an assumed name, the real wife living in the neighbourhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Hoig* v. *Gordon*, 17 Gr. 599.

Conspiracy to Induce Marriage.]—Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract:—Held, that the action being without precedent and contrary to public policy was not maintainable. *Brennen* v. *Brennen*, 19 O. R. 327.

Consent to Breach of Trust.]—Quære, whether a married woman consenting to a breach of trust can afterwards complain of it; and semble, that if she make a representation and encourage another to act upon it, she will be compelled to make it good. *Hope* v. *Beard*, 8 Gr. 380.

Constitutional Law—*North-west Territories.*]—The provisions of ordinance No. 16 of 1889, respecting the personal property of married women, are intra vires of the Legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the lieutenant-governor in council was authorized to legislate by the order of the governor-general in council passed under the provisions of the North-west Territories Act. The provisions of said ordinance No. 16 are not inconsistent with ss. 36 to 40 inclusive of the North-west Territories Act, which exempt from liability for her husband's debts the personal earnings and business profits of a married woman. The words "her personal property" used in the said ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by

women married before it was enacted. Brittlebank v. Gray-Jones, 5 Man. L. R. 33, distinguished. *Conger* v. *Kennedy*, 26 S. C. R. 397.

Conversion.]—Where the plaintiff proved a joint wrongful occupation and conversion of the rents and profits of his land by a husband and wife:—Held, that the husband and wife were jointly liable to the plaintiff, and the plaintiff was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability. *Barker* v. *Westover*, 5 O. R. 116.

Corporator.]—Quære, whether a married woman can be one of the five persons required for the formation of a road company under R. S. O. 1877 c. 152. See *Hamilton and Flamborough Road Co.* v. *Townsend*, 13 A. R. 534.

Costs.]—See *Clark* v. *Creighton*, 9 P. R. 125; *Cameron* v. *Heighs*, 14 P. R. 56; *Hammond* v. *Keachie*, 17 P. R. 565.

Custody of Children.]—See INFANT, I.

Debt Contracted before Marriage— *Judgment Summons.*]—A married woman was sued in a division court for a debt contracted before marriage, and judgment was given against her personally for the amount of the debt:—Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; and an application, upon habeas corpus, to discharge her from custody under an order made in the division court for her committal for failure to attend upon an after-judgment summons, was refused. Scott v. Morley, 20 Q. B. D. 123, followed. Re McLeod v. Emigh, 12 P. R. 450, distinguished, and doubted in view of Aylesford v. Great Western R. W. Co., [1892] 2 Q. B. 626. Quære, whether such an order to commit is by way of punishment or execution. *Re Teasdall* v. *Brady*, 18 P. R. 104.

Devise to Wife of Witness.]—A devise by a testator, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution to the will:—Held, void, notwithstanding the provisions of the Evidence Act of 1852 (16 Vict. c. 19). *Crawford* v. *Boyd*, 22 Gr. 398.

Distribution of Intestate Estate— *Feme Covert—Husband's Right to Residuum —Next of Kin.*] — The legislature of New Brunswick, by 26 Geo. III. c. 11, ss. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. II. c. 10 (Statute of Distributions) as explained by s. 25 of 29 Car. II. c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of femes coverts dying intestate, but that their husbands should enjoy their personal estate as theretofore. When the statutes of New Brunswick were revised in 1854 the Act 26 Geo. III. c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a feme covert her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission:—Held, that the personal property passed to the husband and not to the next of kin of the wife. Per Strong, J.—The repeal by the revised statutes of 26 Geo. III. c. 11, which was passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law of New Brunswick. Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and a fortiori by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III., c. 11 (N. B.), it was not necessary to enact the interpretation section of the Statute of Frauds, and its omission in the revised statutes did not affect the construction to be put upon the whole Act. Held, per Ritchie, C.J., Fournier, Gwynne, and Patterson, JJ., that the Married Woman's Property Act of New Brunswick, C. S. N. B. c. 72, which exempts the separate property of a married woman from liability for her husband's debts, and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Ejectment.]—As to making married woman defendant in ejectment see *Warren* v. *Cotterell*, 8 C. L. J. 245, *Woodward* v. *Cummings*, 6 P. R. 110.

False Representation of Agency.]—A declaration alleged that the defendant, the wife of one K., by falsely and fraudulently representing to the plaintiff that she was authorized by her husband to order certain goods for her daughter's wedding outfit, and to pledge his credit therefor, induced the plaintiff to furnish the goods, and to charge the same to the husband; and that she had in fact no such authority, as was decided by the court of appeal, who gave judgment for the husband, reversing the judgment of the county court in an action brought by the present plaintiff against the husband for the value of the goods, and his costs incurred in the county court and in appeal. Defendant pleaded coverture:—Held, plea good: that the A. J. Act could not assist the plaintiff, and that ss. 6, 20, of the Married Woman's Act, R. S. O. 1877 c. 125, do not create any new liability against a married woman for her torts or quasi torts, but merely allow her to be sued alone, where formerly she could have been sued with her husband, and the authorities shewed that if so sued the action would have failed. *Stone* v. *Knapp*, 29 C. P. 605.

Husband in Prison.]—During the husband's imprisonment for felony the wife can contract, at all events as to what might be regarded as goods and chattels, as a feme sole; and semble, that she may execute a deed of land without her husband joining. *Crocker* v. *Sowden*, 33 U. C. R. 397.

Illegal Sale of Liquor.] — Where the husband, the occupant of the house in which the sale took place, was in gaol:—Held, that his wife might be convicted under 37 Vict. c. 32, s. 35 (O.), for selling liquor there without license. *Regina* v. *Williams*, 42 U. C. R. 462.

The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence

shewed that she was the more active party, and she was the occupant of the premises on which the sale took place:—Held, having regard to R. S. O. 1887 c. 194, s. 112, s.-s. 2, that even if the presumption that the sale was made through the compulsion of the husband had not been removed by s. 13 of the Code, it would have been rebutted by the circumstances. Regina v. Williams, 42 U. C. R. 462, distinguished. *Regina* v. *McGregor*, 26 O. R. 115.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. 1877 c. 181:—Held, that she was liable to be fined under s. 83 of the Act, although the sale of the liquor took place in her absence. *Regina* v. *Campbell*, 8 P. R. 55.

Indemnity.] — Where a married woman procured the plaintiff to indorse for her a bill of exchange, promising to indemnify him, and after the husband's death renewed the promise:—Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use. Lee v. Muggeridge, 5 Taunt. 36, held to be in effect overruled. *Dixie* v. *Worthy*, 11 U. C. R. 328.

Indorsement of Note — *Notice of Protest.*]—The indorser, a married woman, died intestate during the currency of the note, and notice of protest was sent to "James Bell, executor of the last will and testament of M. A. Bell, Perth," and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted:—Held, that the notice was sufficient, and the interest of the husband as tenant by the curtesy was directed to be exhausted before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiff's claim, and paid out of the estate if not realized against the husband. *Merchants Bank* v. *Bell*, 29 Gr. 413.

Joint Contract.] — Quære, whether a married woman can be liable on a joint contract. *Horner* v. *Kerr*, 6 A. R. 30.

Libel—*Evidence.*] — Refusal of husband and wife to answer questions that might criminate each other in an action of libel. See *Millette* v. *Little*, 10 P. R. 265.

Misrepresentation.]—Where a married woman joined with her husband in making misrepresentations to the executor of a deceased person in order to obtain possession of a chattel belonging to the testator, the court held her responsible for such misrepresentation equally with a person sui juris, and overruled an objection to the finding of the master, charging her with the value of the chattel. *Blain* v. *Terryberry*, 11 Gr. 286.

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

Purchase of Goods — *Judgment against Husband and Wife.*]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both husband and wife, but on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in a county court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—Held, that the proper inference was, that the husband's note was not taken in satisfaction of the debt, nor was it an election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action; but that they could not have judgment against both husband and wife, and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under the Married Woman's Property Act, R. S. O. 1897 c. 163. Wagner v. Jefferson, 37 U. C. R. 551, distinguished. *Davidson* v. *McClelland*, 32 O. R. 382.

Quarantine.] — Quarantine extends only to the mansion or dwelling-house in which the widow is entitled to reside concurrently with the heir. *Doe d. Callaghan* v. *Callaghan*, 1 C. P. 348.

Held, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attendance and companionship, and an action will therefore lie for the eviction of such companion or attendant. *Lucas* v. *Knox*, 3 O. R. 453.

Quebec Law—*Wife Giving Security for Husband's Debts.*]—See *Klock* v. *Chamberlin*, 15 S. C. R. 325.

Removal of Disability by Marriage.]—See *Cameron* v. *Walker*, 19 O. R. 212.

Representation as to Age.]—A married woman, while yet under 21 years of age, but representing herself to be of full age, conveyed land to a bonâ fide purchaser for value, and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his vendee (the same day) created a mortgage thereon:—

Held, that the married woman, notwithstanding her non-age, was bound by her representations as to her being of age; and that the other parties, having acquired their interests with full knowledge of the existence of the deed by her to the purchaser and after the registration thereof, took subject to all the rights of the purchaser; and the court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them. And quære, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith. *Beunetto* v. *Holden*, 21 Gr. 111.

See Confederation Life Association v. *Kinnear*, 23 A. R. 497.

Right to Act as Next Friend.]—The disabilities of a married woman are not removed by recent legislation to such an extent as to enable her to act as prochein amy. *Giles* v. *Benjamin*, 6 P. R. 70.

An action was brought in the name of the plaintiff, a lunatic not so found, confined in a public asylum, by his wife as next friend, to set aside a conveyance of land made by him as improvident, etc.:—Held, that the action, being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend; and, although a married woman cannot fill such an office, the fact that in this case she did so did not make her proceedings void; and the defendant's only remedy was to apply to remove her and to stay proceedings until a proper next friend should be appointed. Held, also, that the objection that the action should have been brought by the inspector of prisons and public charities could not prevail, for it was discretionary with him to institute proceedings or not. *Mastin* v. *Mastin*, 15 P. R. 177.

Share in Estate—*Chose in Action—Reduction into Possession.*]—See *Sievewright* v. *Leys*, 28 Gr. 498.

Slander.] — Slander of married woman—Special damage. See *Palmer* v. *Solmes*, 45 U. C. R. 15; *Campbell* v. *Campbell*, 25 C. P. 368.

See DEFAMATION.

Submission to Arbitration.]—A bond of submission to arbitration, signed by the wife as well as the husband, is a valid bond. *McGill* v. *Proudfoot*, 4 U. C. R. 40.

A. having devised certain real estate, in separate parcels, to B. and C., afterwards incumbered these lands. B. was a feme covert, and questions having arisen between B. and C. as to the amount of the incumbrance to be borne by each, they, by mutual bonds, in which B. and her husband joined, agreed to refer such questions; and an award was made between these parties:—Held, that B. being a feme covert could not enter into such an agreement to refer: that the statutes as to conveyances by married women of their real estates, did not apply to such agreements; and that therefore the agreement and award were not binding on her. *Bagley* v. *Humphries*, 11 Gr. 118.

See, also, *Great Western R. W. Co.* v. *Baby*, 12 U. C. R. 106.

Surety.]—Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin* v. *Pasco*, 8 P. R. 372.

Wild Animal Confined by Husband on Wife's Property.]—A bear belonging to one of the defendants escaped from premises, the separate property of his wife, the other defendant, where it had been confined by him without objection from her, and attacked and injured the plaintiff on a public street:—Held, that the wife having under R. S. O. 1887 c. 132, ss. 3 and 14, all the rights of a feme sole in respect of her separate property, might have had the bear removed therefrom, and not having done so she was liable to the plaintiff for the injury complained of. The principle of Fletcher v. Rylands, L. R. 1 Ex. 282, L. R. 3 H. L. 330, applied. *Shaw* v. *McCreary*, 19 O. R. 39.

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2. *Dealings with and Rights in Real Estate.*

(a) *In General.*

Agreement to Charge.] — A husband agreed to purchase certain land, and his wife, who was married to him in 1866 without any marriage settlement, and had acquired real estate in 1870 under a deed to her, her heirs and assigns, "to and for her and their sole and only use forever," joined in the agreement for the purpose of securing its being carried out and charged her land with a portion of the purchase money:—Held, that the wife's land was separate estate and was properly charged. *Dame* v. *Slater*, 21 O. R. 375.

Compromise — *Consideration for Deed—Concurrence of Husband.*] — Held, affirming 22 Gr. 99, that the compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife. *Adams* v. *Loomis*, 24 Gr. 242.

Held, also, that a wife's conveyance of her equitable estate is valid without the husband joining in the deed; and, the husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband. *Ib.*

The Married Woman's Property Act, 1872, applies to cases where lands have been acquired by married women after the passing of that Act, although the marriage took place before that Act came into force. *Ib.*

Concurrence of Husband.] — Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. B.'s marriage took place in 1876, and the land was held by her to her separate use:—Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance. *Bryson* v. *Ontario and Quebec R. W. Co.*, 8 O. R. 380.

The real estate of a married woman, married after March 2nd, 1872, whether owned

by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her without the joinder of her husband. *Ib.*

J. H., by his will dated 14th April, 1874, devised certain property to his daughter, M. A. J., for life, with remainder to her children, and died soon after making the will. M. A. J. died about 1880, leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J., married one C., and C. in 1870 deserted his wife and had not been heard of afterwards:—Held, that M. J. C. could convey her interest in the property without the concurrence of her husband. *Re Coulter and Smith*, 8 O. R. 536.

Where a woman, married in 1867 without marriage settlement, acquired lands in 1879, by deed of conveyance to her in fee simple absolute:—Held, that she could convey the said lands to a purchaser without the concurrence of her husband. *Re Konkle*, 14 O. R. 183.

A woman married between 1859 and 1872, who had issue living and capable of inheriting, acquired before the year 1872 a vested remainder in fee in land subject to a life estate, and in 1886, the life tenant still being alive, conveyed her remainder by deed without her husband joining therein:—Held, that the conveyance was valid to pass her whole interest freed from any right, interest, or control of her husband, and the life tenant having died, a good title in fee simple under the conveyance could be made. *Re Gracey and Toronto Real Estate Co.*, 16 O. R. 226.

The effect of the Married Woman's Property Act, 1859," as to property not excepted thereby, is that all interference on the part of the husband during their joint lives is ended. *Cameron* v. *Walker*, 19 O. R. 212.

In an action for specific performance by a married woman, the question was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain land of the plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance. The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879, and the remainder in 1882:—Held, that the case was governed by R. S. O. 1877 c. 125, ss. 3 and 4, similar to ss. 2 and 3 of s. 4 of R. S. O. 1887 c. 132, and the land could not be conveyed by the plaintiff alone, unless by virtue of an order under 51 Vict. c. 21 (O.), so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made:—Semble, the wife alone could convey her own estate in the land. Re Konkle, 14 O. R. 183, and Adams v. Loomis, 24 Gr. 242, considered. *Wylie* v. *Frampton*, 17 O. R. 515.

The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession. One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance:—Held, that the conveyance was wholly inoperative, and was not validated by 59 Vict. c. 41 (O.), as the action was begun before the passing of the Act, and s. 2 excepts pending litigation; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seisin, the plaintiff's case disclosed his title and shewed that the true title was in the married woman. *Hartley* v. *Maycock*, 28 O. R. 508.

Semble, that the words in the Act, "free from the debts and obligations of her husband and from his control and disposition without her consent," are not to be construed as giving the wife absolute control and disposition without his consent; and remarks upon the danger to her of a different construction. *Balsam* v. *Robinson*, 19 C. P. 263.

Applications under 36 Vict. c. 18, s. 4 (O.), for orders allowing married women to execute conveyances without their husbands being also parties, should be made to a Judge in chamber, not to the referee. *Re Nolan*, 6 P. R. 115.

Conveyance by Husband alone.]—Quære, whether a deed by a husband alone of his wife's land will operate as an effectual transfer of the husband's marital rights therein. *Wallis* v. *Burton*, 5 Gr. 352.

Held, that it will. *Allan* v. *Levesconte*, 15 U. C. R. 9.

Conveyance of Husband's Interest.]—Semble, that care should be taken that the deed should expressly convey the interest of the husband; for if the deed merely shew that he joins for conformity, and to manifest his assent to his wife parting with the estate, his interest will not pass. *Doe d. McDonald* v. *Twigg*, 5 U. C. R. 167.

Conveyance to Husband and Wife.]—The effect of C. S. U. C. c. 82, s. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy:—Held, therefore, that a conveyance of land to a husband and wife in fee did not make them tenants in common; but that they held, as before the statute, by entireties, and that on the husband's death the wife took the whole estate. *In re Shaver* v. *Hart*, 31 U. C. R. 603.

Where a deed in a chain of title had been made to a husband and wife as joint tenants:—Held, following Shaver v. Hart, 31 U. C. R. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And when the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband:—Held, that the husband's deed conveyed the fee. *Re Morse*, 8 P. R. 475.

Land was conveyed in 1874 to a husband and wife, who were married in 1864:—Held, that they took like strangers, not by entireties, but as tenants in common. Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were

no debts of the wife to pay. Martin v. Magee, 19 O. R. 705, distinguished. *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397.

See Re Young, 9 P. R. 521.

Curtesy.]—Under 35 Vict. c. 16 (O.), a husband was not deprived of an estate by the curtesy in any lands of his wife which she had not disposed of inter vivos or by will. *Furness* v. *Mitchell*, 3 A. R. 510.

See sub-title VI., *ante*.

Devise.] — Quære, whether a married woman, under R. S. O. 1877 c. 106, s. 6, can devise or bequeath her separate property to one of several children to the exclusion of the others. *Munro* v. *Smart*, 26 Gr. 37. Held, that she could not. *S. C.*, *ib.* 310.

A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before the 4th May, 1859, was held to be good. *Re Hilliker*, 3 Ch. Ch. 72.

The statute does not authorize a married woman, who has any child or children, to devise or bequeath her property otherwise than to or among such child or children; any disposition in favour either of her husband or other parties is void. *Mitchell* v. *Weir*, 19 Gr. 508.

See as to effect of attempted devise in 1828. *Smith* v. *Smith*, 5 O. R. 630.

Devise to Woman before Marriage.]—One of the plaintiffs having married since the devise to her of the land in question:—Held, that she was not entitled by the Act to sue alone in ejectment, but that her husband must join. *Scouler* v. *Scouler*, 19 U. C. R. 106.

Devise to Woman and Husband.]—Quære, whether the effect of the Married Woman's Acts may not be to do away with the estate by entireties and make husband and wife, when devisees, tenants in common. *Griffin* v. *Patterson*, 45 U. C. R. 536.

Dispensing with Husband's Concurrence.]—Section 44 of C. S. U. C. c. 83, "An Act respecting the assurance of Estates Tail," applies only to cases arising under that statute, and does not authorize the court in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her. *In re McElroy*, 32 U. C. R. 95.

Execution against Husband.]—A married woman jointly with her husband conveyed her estate absolutely to a trading company, which at the same time covenanted to re-convey upon certain conditions, which they accordingly did several years afterwards; but while the estate was vested in the company, and before the passing of the Act for the relief of married women, a judgment was recovered against the husband and duly registered:—Held, that this registration bound the estate of the husband; and his interest being equitable, was not affected by a sale of his interest under an execution at law at the suit of other creditors. *Ferrie* v. *Kelly*, 9 Gr. 262.

Expropriation of Land.]—When land is taken under authority of legislative provisions similar to revised statutes of Nova Scotia (4th series), c. 36, s. 40, et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney* v. *Kean*, 3 S. C. R. 332.

Free Grants Land.]—Mortgage—Necessity for wife joining under R. S. O. 1877 c. 24. See *Canada Permanent L. & S. Co.* v. *Taylor*, 31 C. P. 41.

Husband's Agreement.]—On an application against a railway company to compel them to arbitrate as to certain land taken, it appeared that the land belonged to a married woman, and that the company had taken possession of it upon an arrangement with her husband, which would have been an answer to the application if he had been the owner. An arbitration was ordered. *In re Benson and Port Hope, Lindsay, and Beaverton R. W. Co.*, 29 U. C. R. 529.

Husband in Possession with Wife.]—Though a man has been in possession for 20 years of land granted to his wife for life, he does not thereby acquire an absolute title, for he is merely seised with her by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, if his wife should so long live. *Nolan* v. *Fox*, 15 C. P. 565.

Husband in Prison.] — Semble, that a married woman may execute a deed without her husband joining, during the imprisonment of the husband as a felon. *Crocker* v. *Sowden*, 33 U. C. R. 397.

Husband's Right to Possession.] — Quære, as to the effect of C. S. U. C. c. 73, upon the husband's right to possession of his wife's land where he is not tenant by the curtesy. *Scouler* v. *Scouler*, 19 U. C. R. 106.

Infant.]—Held, that a deed executed by a man and his wife (she owning the estate) under C. S. U. C. c. 85, while the wife was under the age of 21, was good and valid, independently of the statute, to pass the husband's interest in the land, although not sufficient to bar the wife's. *Doran* v. *Reid*, 13 C. P. 393.

The effect of legislation now embodied in R. S. O. 1887 c. 127, s. 3, has been to give to the conveyance of an infant feme covert the same characteristics as are by law attributed to the conveyances of male infants, i. e. if such deeds are of benefit to the infant or operate to pass an estate or interest they are voidable not void. *Whalls* v. *Learn*, 15 O. R. 481.

When a little more than two months after coming of age, a married woman sought to set aside conveyances for value made by her, while an infant feme covert, to the defendants, who were ignorant of her disability, and under which defendants had taken possession, it was:—Held, that she was entitled to such relief; but before the same could be granted, she must make complete restoration to the defendants of the specific or an equivalent value of that which she had received from them during her infancy. Mere acquiescence for about two and a-half months, after attaining majority was considered insufficient to operate as a ratification of the conveyance. *Ib.*

Section 6 of R. S. O. 1887 c. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment. *Confederation Life Association* v. *Kinnear*, 23 A. R. 497.

Invalid Conveyance—*Second Valid Conveyance to One Party Interested.*]—A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed to the purchaser was a conveyance by the husband only, with a bar of dower by the wife. The error was not discovered until after the property had been disposed of in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties, and the grantor (the husband being dead) the grantee in the second deed was declared to be a trustee for all the parties interested. *Grace* v. *MacDermott*, 13 Gr. 247.

Lease.]—Land of a married woman was leased by her alone to the grantor for his life, and defendant having cut timber upon it she and her husband sued for injury to their reversion:—Held, that they could not recover, for the husband was a necessary party to the lease; that C. S. U. C. c. 73, recognizes his estate in her land during coverture, and has made no change in the conveyance by married women of their real estate; and even if the lease could have any operation as between the parties to it, it could not establish the plaintiffs' reversion as against a stranger. *Emerick* v. *Sullivan*, 25 U. C. R. 105.

Lease by Husband.]—M. conveyed the land in question to J., the wife of R. R. alone executed a lease to defendant, and died during the term before his wife:—Held, that on R.'s death the term expired, and that the plaintiff, claiming under a conveyance from R. and his wife, could eject defendant without notice to quit or demand of possession. *Burns* v. *McAdam*, 24 U. C. R. 449.

Lease to Husband and Wife.]—Held, in ejectment, that the Married Woman's Acts did not affect the property in question which had been leased to husband and wife, for their lives, and which by law they held by entireties; that a repudiation of the lease during coverture would not be binding on the wife, but that she might still assert her right thereto after her husband's death, as she in fact did; but that no such repudiation was proved, for the evidence at the most shewed that she merely objected to T. S. getting the land, and not to the lease. *Britton* v. *Knight*, 29 C. P. 507.

A lease for life to a husband and wife makes them tenants by entireties, so that the whole accrues to the survivor. *Leitch* v. *McLellan*, 2 O. R. 587.

Life Estate.]—A grant to a married woman of a life estate in land, does not require the assent of her husband to pass the title to her; and unless he repudiate it in some way, both will be seized in her right. *Nolan* v. *Fox*, 15 C. P. 565.

Mortgage—*Dower.*]—See DOWER, VI.

Mortgage — *Rights inter se of Husband and Children.*]—A mortgage had been created by a married woman upon her estate; after her death, a suit praying a sale of the mortgaged premises was brought against her husband and her children; and the court, in directing a sale of the mortgaged property, refused to make the estate of the children liable to arrears of interest for more than six years; but, directed payment to the mortgagee out of any excess after payment of principal money, costs, and six years' interest of so much of his balance as would represent the husband's interest as tenant by the curtesy in such balance. *Taylor* v. *Hargrave*, 19 Gr. 271.

Nuisance.]—Application to restrain nuisance where the title to property injured is in the wife. See *Hathaway* v. *Doig*, 6 A. R. 264.

Personal Liability for Repairs.] — Held, that a married woman having separate real property is not entitled by the Act to contract debts for its improvement so as to make herself liable individually, or jointly with her husband. *Wright* v. *Garden*, 28 U. C. R. 609.

The declaration alleged that the woman married before the 4th May, 1859, without a settlement, and having separate real estate, and after her marriage employed the plaintiff to repair a house on it, for which neither she nor her husband would pay:—Held, on demurrer, that the action would not lie. *Ib.*

Possession by Wife—*Statute of Limitations.*]—Absence of husband from wife and farm for 30 years—Second marriage of wife—Possession of land—Rights of husband on his return — Statute of Limitations. See *McArthur* v. *Eagleson*, 43 U. C. R. 406, 3 A. R. 577.

Quit Claim by Heir to Widow.]—A. died in possession intestate in July, 1851, leaving his widow, and the plaintiff his eldest son. The plaintiff, on the 15th October, 1851, by deed poll, in consideration of £50, "remised, released, and forever quitclaimed" the land in fee simple, to his mother, who was still living on the place. Defendants claimed under her:—Held, that the deed could take effect as a release only: that the widow, being a tenant at sufferance, had no estate upon which it could operate; and that it therefore passed nothing. *Acre* v. *Livingstone*, 26 U. C. R. 282.

Real Estate in Husband's Possession —*Interest as Trustee.*]—The plaintiff was married to her present husband in 1859, without any marriage settlement, and he, before that year, had reduced into possession the land in question:—Held that she was not entitled to sue for it without joining her husband in ejectment, either under C. S. U. C. c. 73, or 35 Vict. c. 16 (O.), such land not being her separate property, and the husband's interest not being divested by the last mentioned Act; and that she would not have been entitled even if her husband had not reduced it into possession. The patent issued in 1836 to C., who apparently had made some agreement for sale to D., who transferred it to the plaintiff. The plaintiff in 1846 conveyed the lands to her sons, and in 1862 a deed, for a

nominal consideration, was executed by C. to the plaintiff. It was proved that this last deed was made to the plaintiff as a trustee to enable the title of her sons to be perfected:—Held, that on this ground also the land could not be her separate estate. *Johnstone* v. *White*, 40 U. C. R. 369.

Real Estate Owned before Act of 1872.]—Section 1 of 35 Vict. c. 16, so far as regards "the real estate of any married woman which is owned by her at the time of her marriage," applies only to marriages which take place after the passing of the Act. Where, therefore, the plaintiff, who married in 1854, had lived upon the land in question, which was his wife's property, from 1852 until 1861, and had then joined with his wife in a lease to defendant for ten years:—Held, that on the expiration of such lease the plaintiff alone might maintain ejectment. *Bingman* v. *Austin*, 33 U. C. R. 190.

Receipt of Rent after Term.]—The receipt of rent by the wife, with the husband's assent, from a tenant of her estate, after the expiration of a term, creates a tenancy from year to year. *Johnston* v. *McLellan*, 21 C. P. 504.

Release to Purchaser of Husband's Interest.]—The title acquired by a purchaser at sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon. *Beattie* v. *Mutton*, 14 Gr. 686.

Representation as to Celibacy.]—A married woman, owner of real estate, representing herself to be, and selling as, a spinster, is not entitled to set up that the sale was void because of the conveyance not having been executed in conformity with the statute. *Graham* v. *Mcncilly*, 16 Gr. 661.

Settled Estates Act — *Examination of Wife.*]—Upon a petition under the Settled Estates Act, the court dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction. The Married Woman's Property Act, 1884 (O.), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the passing of the former Act. *Re English*, 11 P. R. 198.

Special Act.]—Under the statutes passed to remedy an erroneous public survey in Binbrook, 1 Wm. IV. c. 8, 7 Wm. IV. c. 59, an inhabitant living in the front concession cannot be dispossessed by ejectment after a prior submission to arbitration by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these Acts apply. *Doe d. Crooks* v. *Ten Eyck*, *Doe d. Crooks* v. *Calder*, 7 U. C. R. 581.

Void Deed—*Actual Possession.*]—In 1834, C. A., a married woman, purported to convey to one T., in fee, the east half of a lot of land granted to her by the Crown, but the conveyance was invalid by reason of the want of the usual certificate by justices of the peace on the deed. T. never took possession, but in 1852 conveyed to H., through whom the plaintiff claimed. In or about the year 1866, the two sons of C. A. went and resided on the west half of the land upon the understanding and agreement with their mother that they were to have the whole lot, but no conveyance was executed to them until 1875. During the interval, however, the sons paid the taxes on the whole property, and cut timber at times on the east half:—Held, reversing 2 O. R. 352, that this was a sufficient "actual possession or enjoyment" of the east half of the lot to prevent the operation of s. 13 of R. S. O. 1877 c. 127 (36 Vict. c. 18, s. 12), by means of which such void deed would be rendered valid. *Elliott* v. *Brown*, 11 A. R. 228.

Wife's Mortgage Signed by Husband and not by Wife.]—A mortgage signed and sealed by the husband, but in which the wife was the only granting party:—Held, wholly inoperative. *Foster* v. *Beall*, 15 Gr. 244; *Doe d. Bradt* v. *Hodgins*, 2 O. S. 213

See sub-head 3, *post*.

(b) *Certificate and Examination.*

As to the effect of the deed, in the absence of a proper certificate and acknowledgment, upon the estate either of the husband or wife. See *Doe d. Wilson* v. *Wessells*, 5 O. S. 282; *Doe d. Vansickler* v. *Fairwell*, M. T. 4 Vict., R. & H. Dig. 152; *Doe d. McDonald* v. *Twigg*, 5 U. C. R. 167; *McKinnon* v. *Arnold*, 5 U. C. R. 604; *Doe d. Dibble* v. *Ten Eyck*, 7 U. C. R. 600; *Allison* v. *Rednor*, 14 U. C. R. 459; *Moffatt* v. *Grover*, 4 C. P. 402; *McGill* v. *Fraser*, 5 C. P. 404; *Malloch* v. *Derwan*, 22 U. C. R. 54; *Amey* v. *Card*, 25 U. C. R. 501; *Farquharson* v. *Morrow*, 12 C. P. 311; *Doran* v. *Reid*, 13 C. P. 393; *Sampson* v. *McArthur*, 8 Gr. 72; *Hope* v. *Beard*, 8 Gr. 380; *Graham* v. *Mcncilly*, 16 Gr. 661.

Who might give the certificate in Lower Canada under 7 Vict. c. 18, s. 16. See *Doe d. Park* v. *Henderson*, 7 U. C. R. 182.

Who might give it here in 1825. See *Amey* v. *Card*, 25 U. C. R. 501.

Requisites of execution of deed in Ireland before C. S. U. C. c. 105. See *Folinsbee* v. *Brown*, 12 C. P. 248.

Where the certificate indorsed on a deed, executed in Minnesota, was given by a person described as the Judge of the district court in that State, and under the seal of the court, but it was not stated in the certificate (which would have been enough,) or otherwise proved, that such court was a court of record:—Held, insufficient. *McCammon* v. *Beaupré*, 25 U. C. R. 419.

As to the validity of such certificates in point of form. See *Jackson* v. *Robertson*, 4 C. P. 272; *Monk* v. *Farlinger*, 17 C. P. 41; *Stayner* v. *Applegate*, 8 C. P. 133, 451; *McNally* v. *Church*, 27 U. C. R. 103; *Morgan* v. *Sabourin*, 27 U. C. R. 230; *Grant* v. *Taylor*, 28 U. C. R. 234; *Robinson* v. *Byers*, 13 Gr. 388.

As to defects cured by 22 Vict. c. 35, See *Monk* v. *Farlinger*, 17 C. P. 41; *Commercial Bank of Canada* v. *Smith*, 18 C. P. 214.

Defect cured by 2 Vict. c. 6. *McNally* v. *Church*, 27 U. C. R. 103.

As to what is an execution by the married woman "jointly with her husband." See *Burns* v. *McAdam*, 24 U. C. R. 449; *Monk* v. *Farlinger*, 17 C. P. 41.

The certificate and examination were unnecessary in the conveyance of a leasehold interest, which the husband alone could dispose of. *Sampson* v. *McArthur*, 8 Gr. 72.

The words, "duly examined," instead of examined "apart from her husband:"—Held, insufficient. *Stayner* v. *Applegate*, 8 C. P. 133, 451.

"Surrender and yield up:"—Held, equivalent to the statutory phrase "depart with." *Simpson* v. *Hartman*, 27 U. C. R. 460.

Held, immaterial that the certificate was not indorsed on the deed, but written in the margin on the face of it; that the venue sufficiently shewed where the examination took place; and that an admission which was made of the justices' authority must be taken to mean their authority as justices for that district. *Ib.*

Where some evidence was given to shew that the deed had been acknowledged before a Judge of this court:—Held, that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time. *Tiffany* v. *McCumber*, 13 U. C. R. 159.

The certificate indorsed on a deed bearing date 18th May, 1826, was that at the court of general quarter sessions, holden at, &c., "on Tuesday, the 16th day of May, 1826, personally appeared, &c.," in the usual form:—Held, sufficient, for it should be assumed that the 16th was the first day of the sessions, which might have been continued and the certificate signed after the execution of the deed. *Allison* v. *Redmor*, 14 U. C. R. 459.

With regard to a deed thirty years old:—Held, that from the certificate it was to be presumed, primâ facie, that everything was done by the Judge who made the same to justify him in certifying what he professed to certify. *Orser* v. *Vernon*, 14 C. P. 573. Followed in *Monk* v. *Farlinger*, 17 C. P. 41.

As the names of the two witnesses to the deed were the same as those of the justices, and the handwriting similar, and the date of the deed and certificate the same:—Held, that it might be inferred that the execution took place in their presence. *Simpson* v. *Hartman*, 27 U. C. R. 460.

Held, that as the Judge could not have certified that the deed was executed in the presence of the witnesses who subscribed it without being himself present, the inference was that the certificate was executed in his presence. *Commercial Bank of Canada* v. *Smith*, 18 C. P. 214.

The solicitor of the husband, being city recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land. *Romaines* v. *Fraser*, 17 Gr. 267, 16 Gr. 97.

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified. *Ib.*

Where, after the decease of one of the justices by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate notwithstanding the evidence. *Ib.*

A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place:—Held, that the registration was sufficient under the statute; but that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority over an instrument which had been subsequently executed by the husband and wife, and duly registered. *Beattie* v. *Mutton*, 14 Gr. 686.

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3. *Separate Estate.*

Accommodation Note.]—Declaration on a promissory note made by the defendant, not stating that she was feme covert, payable to R. or order, and indorsed by R. to the plaintiffs. Third plea, that at the time of making the note the defendant was the wife of T. R. Replication, that the note was and is the separate engagement and contract of the defendant; on which issue was joined:—Held, that the plaintiffs could not recover upon proof of the note only, without shewing that it was made in respect of some employment or business in which she was engaged in her own behalf, or that she was possessed of separate estate. Quære, whether they could recover in any event, the note having been made merely for the accommodation of the defendant's son, and apparently without consideration. Quære, also, whether the replication could be looked upon as a short form importing an allegation of all the alternative conditions mentioned in the statute to enable the defendant to contract. Per Burton, J.A., an accommodation note is not a contract which a married woman is authorized to enter into under the Act. Per Patterson, J.A., the replication was not in the proper form. It should have set out the facts relied on to make the contract binding; and the defendant, instead of taking issue, should have demurred or moved against it. *Darling* v. *Rice*, 1 A. R. 43.

A married woman in August, 1874, gave a promissory note with her husband, to the plaintiffs, for money due by him, which they accepted on the representation, which was true, that she had separate estate, the only consideration being their forbearance of the husband's debt:—Held, that she was liable, under 35 Vict. c. 16 (O.). *Kerr* v. *Stripp*, 40 U. C. R. 125.

A married woman, possessed of separate estate, acquired by her after the Married Woman's Act of 1872, indorsed a note for the accommodation of her husband, member of a firm to whom credit was given on the faith of such separate estate and her indorsement in reference thereto:—Held, that she was liable. Kerr v. Stripp, 40 U. C. R. 125, approved. *Frazee* v. *McFarland*, 43 U. C. R. 281.

A married woman married after the 2nd March, 1872, possessed of separate estate, and contracting in reference thereto, made a promissory note to her husband for his accommodation, which the husband indorsed for value to the plaintiffs:—Held, that she was liable upon such note; but, following Lawson v. Laidlaw, 3 A. R. 77, that the judgment must be a qualified one against her separate estate. *Consolidated Bank of Canada* v. *Henderson*, 29 C. P. 549.

Administration.]—The rule of the court is, that it will not restrain a married woman from dealing with her separate estate pending suit; but if she die seised thereof, the court will administer her estate for the satisfaction of her debts:—Held, therefore, that the estate of a married woman, deceased, in the hands of her infant heirs, was liable to the payment of a note on which she was indorser as surety for her husband. *Merchants Bank* v. *Bell*, 29 Gr. 435.

Admission on Note.]—A wife who joined in a note with her husband, was held, under the facts stated in the report, not to be possessed of separate estate, and therefore not liable, notwithstanding her admission indorsed on the note that the payee had advanced the money on the faith of such separate estate. *Bell* v. *Riddell*, 2 O. R. 25.

Building Erected on Wife's Land.]—A married woman owned land under the will of her father who died in 1865, having devised all his real estate to his widow for life, and on her death, to his children in fee. By deed of partition between his daughters, of whom the defendant, who married in 1865, was one, and to which defendant's husband and the widow were parties, certain lots were conveyed to defendant in severalty, "to and for her separate use for ever." Defendant's husband employed the plaintiff to build on this land, and the plaintiff rendered his account to the husband, knowing nothing so far as appeared of defendant in the matter:—Held, that the defendant was not liable; for although the land was her separate estate, it could not be said that this work was done at her request or on her credit, or that there was any contract with her. *Wagner* v. *Jefferson*, 37 U. C. R. 551.

Chattels Acquired before Marriage.]—A woman had been long in possession of chattels said (but not proved) to have been left to her by her deceased husband, using them with her children. She then married the co-plaintiff. These goods were seized by a creditor of his:—Held, that her title before marriage was primâ facie sufficient, and after her second marriage the goods were protected, under the Act, against her second husband's creditors. *Corrie* v. *Cleaver*, 21 C. P. 186.

Chattels Purchased by Wife.] — The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff; who with the rents and profits thereof, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband:—Held, that the chattels were her separate property within the meaning of R. S. O. 1877 c. 125, s. 1, and free from the debts of her husband. *Trotter* v. *Chambers*, 2 O. R. 515.

Contract by Implication.] — Held, reversing 19 O. R. 739, that a power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby:—Held, also, that the implied obligation to pay off the incumbrance which in the case of a conveyance of land to a person sui juris is imposed by a court of equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property. *McMichael* v. *Wilkie*, 18 A. R. 464.

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate. *Small* v. *Thompson*, 28 S. C. R. 219.

Conveyance — *Contracts.*]—Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property free from the control of her husband and not liable for the payment of his debts, does not, except in the case specially provided for, enlarge her power of disposing of such property or allow her to enter into contracts which at common law would be void. Moore v. Jackson, 22 S. C. R. 310, referred to. Lea v. Wallace, 33 N. B. Rep. 492, reversed. *Wallace* v. *Lea*, 28 S. C. R. 595.

Covenant — *Action after Husband's Death.*]—In 1894 a married woman, possessed of separate estate, entered into a covenant for payment of money. In an action against her upon the covenant, after the death of her husband, but before the passing of 60 Vict. c. 22 (O.):—Held, that under s. 3, s.-ss. 2, 3, and 4, of the Married Woman's Property Act, R. S. O. 1887 c. 132, the liability which she undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing and thereafter acquired during coverture; and that the judgment against her should be in the usual form, to be levied out of such property so far as the same might not have been disposed of by her. *Hammond* v. *Keachie*, 28 O. R. 455.

——— *Mortgage—Estoppel.*]—Personal estate settled upon a married woman for her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, no income therefrom having accrued due at the time of contracting is not separate property in reference to which the married woman can be presumed to have contracted. A married woman may shew in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of

her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken by her merely as trustee for her husband, and not for her benefit; and this although the mortgagee or those claiming under him had no knowledge of her position. *Gordon* v. *Warren*, 24 A. R. 44.

Covenant by Lessor — *Reversion Conveyed to Wife.*]—In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs and assigns, as lessor of certain lands, to pay, at the expiration of the lease, for a certain malthouse, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest for A. F.:—Held, affirming 12 O. R. 459, that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malthouse, and until the expiration of the lease. Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. c. 34, or not, privity of estate is not tantamount to privity of contract so as without more to affect the separate estate of a married woman as if she had especially contracted with reference thereto. *Ambrose* v. *Fraser*, 14 O. R. 551.

Debt Incurred before Act of 1872.]—Under 35 Vict. c. 16, s. 9 (O.), an action at law may be maintained against a married woman in respect of a debt incurred by her upon the faith of her separate estate before the passing of the Act. *Merrick* v. *Sherwood*, 22 C. P. 467.

Quære, as to the means of enforcing the judgment in such an action, where the separate estate consists of money to be paid into her hands by trustees. *Ib.*

Division Court—*Separate Real Estate.*]—In an action in a Division Court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property the defendant had when the note was made. *In re Widmeyer* v. *McMahon*, 32 C. P. 187.

Dower.]—In an action against a married woman, married in 1871, on a promissory note made by her, the only property she was proved to have was a right to dower in certain land owned by a former husband. Judgment was entered for the plaintiff for the amount of his claim, with a direction for the recovery of the same out of the separate property then and at the date of the making of the note vested in defendant, or in any person in trust for her, with which amount such separate estate was charged. *Wallace* v. *Hutchison*, 3 O. R. 398.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Woman's Property Act, 1884, was passed:—Held, reversing 6 O. R. 581, that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. 1877 c. 125, s. 3, and she not having the jus disponendi without her husband's concurrence, her interest was not liable to be sold under execution against her. *Douglas* v. *Hutchison*, 12 A. R. 110.

——— *Interest in Former Husband's Estate.*]—The defendant, a married woman, married to her present husband in 1877, or 1878, and carrying on business separately from him by farming one of her former husband's farms, in 1883 and 1884 contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realizing a large sum, and also to her share in his personal estate, neither of which she had received:—Held, that the Act of 1884, 47 Vict. c. 19 (O.), had not the effect of repealing the prior Acts, and that it was not necessary to shew that the defendant had married or had acquired separate estate since the Act of 1884 came into force: that it was sufficiently shewn that she was possessed of separate estate, and that she intended it should be bound. The plaintiff was, therefore, held entitled to have judgment against it. *Robertson* v. *Larocque*, 18 O. R. 469.

R. S. O. 1887 c. 132, s. 5, s.-s. 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest separate property. *Ib.*

Effect of Consolidated Statute.]—G. having recovered a judgment in a division court against one D., on a note made by her after her marriage to K. (the present plaintiff), under execution founded thereon seized goods, &c., which were the separate property of D. (wife of K.) under C. S. U. C. c. 73, for the detention of which goods this action was brought:—Held, 1. That the statute does not enable a married woman to bind herself as a feme covert to a greater extent than she was able to do before the passing thereof; 2. that an action on a contract made by a married woman before marriage, will not lie against her without her husband being joined with her therein as a party, he being a resident within the Province. *Kraemer* v. *Gless*, 10 C. P. 470.

The purpose of this Act was to preserve to a married woman for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement. *Leys* v. *McPherson*, 17 C. P. 266.

L., a few days before his marriage, in 1865, executed to his intended wife a bill of sale of his furniture and household goods, and had it duly filed. It recited the intended marriage, and that it had been agreed that the goods should be assigned to make some provision for the support of the intended wife, and purported to be made in pursuance of the said agreement and in consideration of 5s.:—Held, that the bill of sale was not a contract or settlement within the meaning of C. S. U. C. c. 73, s. 1, but was a valid transfer of the goods to the intended wife before marriage, and in consideration of it; and that her title to the goods was therefore, when the marriage took place, protected by the statute, notwithstanding her coverture. *Ib.*

Quære, whether C. S. U. C. c. 73, s. 2, applies to personal property acquired after 4th May, 1859, by a married woman who was married prior thereto. *Black* v. *Coleman*, 29 C. P. 507.

Effect of Act of 1872.]—Under 35 Vict. c. 16 (O.), a married woman is liable only upon contracts entered into on the credit of her separate estate. *McCready* v. *Higgins*, 24 C. P. 233.

The real estate of a woman married before 1859, not settled by any marriage settlement or deed, is not her separate estate; and s. 1 of 35 Vict. c. 16, which applies only to marriages after that Act, does not make it so. Where the plaintiffs furnished goods for such a married woman, having such real estate, upon the strength of her having it, and took her bond, without the consent or concurrence of her husband:—Held, that she was not liable upon it under 35 Vict. c. 16, during her husband's lifetime. *Ib.*

Equitable Interest.]—A married woman who was equitably entitled, as cestui que trust, to a life estate in certain lands, joined with her husband in a note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill seeking to enforce his claim against the title of the wife:—Held, that the Act had not the effect of increasing the interest of the wife so as to render her estate liable for the debt. *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 412.

A married woman who has separate estate which is vested in trustees, cannot on that account be sued for a legal debt contracted before her marriage. In such a case a creditor has no locus standi in equity, until he has obtained judgment at law. *Chamberlain* v. *McDonald*, 14 Gr. 447.

Funeral Expenses.]—The separate estate of a married woman is liable for her funeral expenses. *Re Gibbons*, 31 O. R. 252.

Goods Ordered by Husband.]—B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a grocer, either on his or her order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate:—Held, that the plaintiff was entitled to recover. *Hessin* v. *Baine*, 2 O. R. 302.

House Built at Husband's Instance on Wife's Land.]—Plaintiff agreed with J. R. to build a house on certain land for 885*l*. After building the house he discovered that the land belonged not to J. R. but to J. R.'s wife, who, at the time of the agreement, was an infant, and was in no way a party to it. Afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the 885*l*, and now brought this action to recover the balance from the wife of J. R., or the amount by which the building had enhanced the value of the land:—Held, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her. *Kincaid* v. *Reid*, 7 O. R. 12.

Household Goods.]—Action against husband and wife for the price of goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement, and who lived with her husband and family. The husband and wife were devisees in fee of land under a devise to them in 1866, and the sheriff had, in 1874, assumed to sell to the wife the husband's interest in the land under an execution against the husband:—Held, that the wife's interest in the land was not such as to entitle the plaintiff to a remedy against it. Held, also, that she was not liable to the plaintiff for the goods sold. The fact of a woman (living with her husband and family) ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent; and the interest of the husband, being inalienable, was not saleable under execution under R. S. O. 1877 c. 66, s. 39. *Griffin* v. *Patterson*, 45 U. C. R. 536.

Husband's Creditors.]—The property of a woman married before the 4th May, 1859, without any marriage contract or settlement, is protected as against creditors of her husband, whose claims were contracted after 4th May, 1859, and not otherwise. But where the seizure for debt contracted before the 4th May, 1859, was not made in the lifetime of the wife, it was held that the property having passed by her death to the next of kin, under the Statute of Distributions, was not liable to be seized by the creditors of the surviving husband. His interest, however, under the statute, as husband surviving, and that interest only, was held to be liable to the execution. *Ramsay* v. *Carruthers*, 10 L. J. 299.

Where, on a debt contracted in 1855, the plaintiff, on 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of the amount of a legacy deposited by the wife of M. in her own name in the bank of the garnishees, she having been married on the 28th May, 1859. *Hope* v. *Muir*, 1 C. L. J. 275.

The Act does not exempt personal property of a wife who was married on or before the 4th May, 1859, from liability for debts contracted by the husband before that date. Where a wife, who was married before the 4th May, 1859, purchased after that date property in her own name, and paid for it (as was alleged) with money theretofore given to her by her son, it was held, as between her and a creditor of her husband, whose debt was contracted before the 4th May, 1859, that the money so given to the wife became instantly her husband's money, and that the land bought with it was liable to the creditor. *Fraser* v. *Hilliard*, 16 Gr. 101.

Interest as Cestui que Trust.]—In an action on a promissory note made by the defendant G., a feme covert, married after 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay certain incumbrances on the trust estate, it appeared that the testator had devised his real estate to his trustees in trust to sell as one B. should deem expedient, and out of the proceeds to pay debts and invest the residue, and to expend the income in the maintenance of the trustee and his other children until the youngest should attain the age of twenty-one, and then equally to divide amongst all the children, the issue of deceased's children to represent their parent:—Held, that until the youngest came of age, C. had no separate

estate available in execution, and that she was not liable on the note. *Clarke* v. *Creighton*, 45 U. C. R. 514.

Interest in Annuity.]—A testator having bequeathed £500 per annum, payable out of the rents of his real and personal estate indiscriminately, for the support of his widow and family (the widow having become sole executrix), her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claim of the estate against her as executrix to be recouped for breaches of trust and the like; and, semble, that where there is no process whereby such a fund can be reached, the court of chancery has power under 22 Vict. c. 22. s. 288, to apply a remedy as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Gr. 486.

Interest in Fund in Court—*Promissory Note.*]—In 1852, the defendant C. A. L. became entitled as one of her father's heirs-at-law to a share in certain real estate, and she was married in 1854, without a marriage settlement. This property, which was never taken possession of either by her or her husband, was afterwards sold under a decree for the purpose of making partition. While the purchase money was in court, to part of which she was entitled, C. A. L., at her husband's request, joined him in making a promissory note to the plaintiff for groceries supplied to her husband, intending to pay it out of the money in court:—Held, that the plaintiff was entitled to recover. *Lawson* v. *Laidlaw*, 3 A. R. 77.

Per Patterson, J.A., the personal property enjoyed by a married woman under the statutes of 1859 and 1872, is her separate property at law, to the same extent and with the same incidents as property settled to her separate use was and is in equity. *Ib.*

A promissory note made by a married woman for a debt of her husband is not a debt binding upon her personally either at common law or under the statutes. *Ib.*

She may convey or charge her separate personal estate as a feme sole might do. *Ib.*

A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from anything in the statutes, and therefore has no effect except in equity. *Ib.*

When a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and intending that it shall be paid out of that property, and if she had power to dispose of that property equity will make it liable for payment of the debt. *Ib.*

The property so made liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred. *Ib.*

Semble, that the above propositions apply equally to real property coming under the Act of 1872. *Ib.*

Form of judgment given, and remarks as to the nature of the execution. Royal Canadian Bank v. Mitchell, 14 Gr. 412, commented upon. *Ib.*

Interest under Will.]—A married woman having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death, before she had seen the will, and some weeks before it was proved. The will gave her a vested interest in the property bequeathed. She also owned a promissory note of her husband:—Held, that she was possessed of separate estate, and had contracted with respect to it. *Mulcahy* v. *Collins*, 24 O. R. 441, 25 O. R. 241.

Interference with Vested Rights.]—Semble, that such portions of the Married Woman's Property Act, 1872, as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights: while the portions of the Act which have not this effect, should go into operation as regards women married before, as well as after the 2nd March, 1872. *Adams* v. *Loomis*, 22 Gr. 99.

Judgment before Marriage.]—Section 18 of C. S. U. C. c. 73, applies only to cases where judgment has not been obtained against the woman before marriage. *Aylesworth* v. *Patterson*, 21 U. C. R. 269.

Jus Disponendi.]—Quære, whether a married woman has any and what jus disponendi in respect of her personal property, under the Act. *Chamberlain* v. *McDonald*, 14 Gr. 447.

Land in Possession of Husband and Wife.]—In an action against a married woman on a note made by her to her husband, and indorsed to the plaintiffs, it appeared that the only property she was possessed of was land derived under the will of her father, who died in 1849; that she married in 1858, while a minor; and that she and her husband had been in possession since she was twenty-one years old:—Held, following Johnstone v. White, 40 U. C. R. 309, that such land was not her separate estate, and that she was, therefore, not liable. Quære, whether a note given by a married woman to her husband to enable him to obtain goods purchased by him, and indorsed by him to the vendors, there being no other contract with her, is valid. *Thomson* v. *Dickson*, 28 C. P. 225.

Lunacy Proceedings—*Assignment for Creditors.*]—A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of creditors:—Held, that the costs of opposing the petition might be classed as necessaries which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrill*, 10 P. R. 216.

Money in Savings Bank—*Gift by Husband.*]—Subsequently to the coming into force of the Married Woman's Property Act, R. S. O. 1887 c. 132, a married woman on the day of entering into a money bond deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which as against

him, she had the absolute disposal by his consent and wish:—Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Succeland* v. *Neville*, 21 O. R. 412.

Onus of Proof—*Admissions.*]—To entitle a plaintiff to recover judgment on a contract entered into by a married woman it is necessary for him to shew that at the time the contract was entered into by her she owned separate estate in respect of which she is entitled by statute to contract. *Moore* v. *Jackson*, 16 A. R. 431.

The defendant, a married woman, indorsed certain notes held by the plaintiff and wrote him the following letter: "I hold 400 acres of land near W, which is worth $33,000 and is all in my own name and right. By your renewing of the note for $1,500 and the other for $600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage unless said notes are paid to you in full." The notes and the letter were proved at the trial, and the examination of the defendant before the trial in which she stated that at the time she signed the notes she owned property on her own account, was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her:—Held, that there was not sufficient evidence to entitle the plaintiff to recover. *Ib.*

See S. C. on the merits: 20 O. R. 652; 19 A. R. 383; 22 S. C. R. 310

Upon a motion by the plaintiffs for summary judgment against a married woman under con. rule 739:—Held, following Moore v. Jackson, 16 A. R. 431, that the plaintiffs were bound to prove the existence of some separate property at the time of entering into the alleged contract, and that this was not shewn by the affidavit; and the motion for judgment was refused. *Canadian Bank of Commerce* v. *Woodcock*, 13 P. R. 242.

Personal Articles.]—Where, at the time of a contract being entered into by a married woman, the only property possessed by her consisted of her engagement and wedding rings, a silver watch and chain and her clothing:—Held, that this was not separate estate with respect to which she could be reasonably deemed to have contracted. *Abraham* v. *Hacking*, 27 O. R. 431.

Proof Required—*Available Property—Parties.*]—To enable a married woman to be sued separately from her husband, under C. S. U. C. c. 73, and 35 Vict. c. 16, she must be proved to have separate property to her own use available by execution for the plaintiff's demand, which demand, if in the nature of a contract, must arise by reason and upon the faith of her having such separate property. *Field* v. *McArthur*, 27 C. P. 15.

Under a deed of separation and settlement certain real and personal property was conveyed by the husband to trustees for the sole and separate use of the wife during her life; but until the children, the issue of the said marriage, should attain the age of twenty-one years, the property was to be used for the maintenance and support of herself and children. And it was proved that the youngest child was only thirteen:—Held, that during the minority of the children this was not such property as was available by execution for the plaintiff's demand; and that the court could not pronounce judgment in the plaintiff's favour, to be enforced by him on the youngest child attaining twenty-one. The plaintiff, suing the married woman upon her promissory note, was therefore nonsuited. Per Gwynne, J.—Where property is vested in trustees to the separate use of a married woman, such trustees are necessary parties. *Ib.*

Property not Included in Settlement.]—It is evident from the scope of C. S. U. C. c. 73 that notwithstanding a marriage settlement any separate personal property of a married woman acquired after marriage and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without settlement. *Dawson* v. *Moffatt*, 13 O. R. 170.

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

Real Estate Acquired after the Act.]—Where real estate is acquired by a married woman after the passing of the Married Woman's Property Act of 1872, such property is liable for her contracts to the same extent as if she were a feme sole; but the court will not make any personal order against her, as would be done in the case of a man or a feme sole. *Kerr* v. *Stripp*, 24 Gr. 198.

Real Estate—*Admissions.*]—Defendant, a married woman, possessed of real estate in Ontario, but living with her husband in Montreal, purchased goods from the plaintiff there, for domestic purposes. There was no evidence of a settlement making the real estate separate estate, or that the marriage took place after the 2nd March, 1872; nor was the debt contracted with reference to her separate estate:—Held, that defendant was not liable for the price of the goods. *Brown* v. *Winning*, 43 U. C. R. 327.

The only evidence of defendant's ownership of real estate was her admission, signed by her when under examination in another suit:—Held, clearly admissible. *Ib.*

The effect of R. S. O. 1877 c. 125, s. 3 (R. S. O. 1887 c. 132, s. 4, s.-s. 5) is to deprive the husband of any estate, by the curtesy or otherwise, during the life of the wife, in the lands to which the section applies, being those acquired before or after marriage by a woman married between 5th May, 1859, and 2nd March, 1872. By s. 5 of 47 Vict. c. 19 (R. S. O. 1887 c. 132, s. 7), the jus disponendi was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate. The amendment made by s. 22 of 47 Vict. c. 19 (R. S. O. 1887 c. 134, s. 3), enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only and

not any estate to which her husband may be entitled by the curtesy after her death; while under s. 7 of c. 132 she can convey free from his estate by the curtesy. Where a woman married in 1869 acquired by conveyances from strangers, lands in Etobicoke in 1879 and 1882 and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887:—Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death, she dying seised intestate, for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim. *Moore* v. *Jackson*, 20 O. R. 652. See the next two cases.

A woman married in 1869, without any marriage settlement, acquired in 1879 and 1882 certain lands by conveyances from strangers, her husband then being living. This action was brought in September, 1889, her husband being still living, to recover the amount of certain promissory notes made by her in 1887:—Held, reversing 20 O. R. 652, that the lands in question were not the separate property of the married woman and were not subject to her debts. *Moore* v. *Jackson*, 19 A. R. 583. See the next case.

A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year, R. S. O. 1887 c. 132, came into force, she became liable on certain promissory notes made by her:—Held, reversing 19 A. R. 383, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1887, R. S. O. 1887 cc. 125, 127, and the Married Woman's Property Act, 1884, 47 Vict. c. 19, read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property. *Moore* v. *Jackson*, 22 S. C. R. 210.

Rent of Real Estate.]—The rents derived by a feme covert, married before 1859, from real estate acquired by her in 1865, were her separate estate. *Horner* v. *Kerr*, 6 A. R. 30.

Residuary Interest.] — A feme covert was held competent to bind her interest as residuary legatee by her written authority to executors, given and acted upon in good faith, to accept land in satisfaction of a debt due to the estate, without evidence of the husband having concurred in giving the authority. *McGregor* v. *McKinnon*, 15 Gr. 361.

Retroactive Effect of Statute.]—Declaration on a contract by plaintiff to build a house for defendant, alleging completion and non-payment; and on the common counts. Plea, that the making the contract and the contracting the debts were before the Married Woman's Property Act of 1872, and that at that time defendant was, and still is, the wife of T. H. Replication, that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate estate:—Held, following Merrick v. Sherwood, 22 C. P. 467, replication good, for that the Married Woman's Act of 1872, s. 9, was retrospective. *Steels* v. *Hullman*, 33 U. C. R. 471.

Semble, the right to sue given by 35 Vict. c. 16, s. 9, is a mere matter of procedure, and imposes no new liability on the married woman. *Ib.*

Reversionary Interest.] — Defendant, who was married in 1852, was, by virtue of her marriage settlement, entitled to the legal estate for life in certain lands after the death of her husband, and during his life indorsed a promissory note made by him to secure his liability to the plaintiffs. The land had been conveyed, but ineffectually, by the trustee under the settlement to one B., and the defendant signed with her husband a declaration that such conveyance was made at their request, to enable B. to sell the land and out of the proceeds to pay first the husband's debt to the plaintiffs. B. also wrote to the plaintiffs saying that the proceeds of any sales should be so applied:—Held, that the property in question was not her separate estate within the meaning of 35 Vict. c. 16, s. 1 (O.). *Standard Bank* v. *Boulton*, 3 A. R. 93.

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

Statute of Limitations.] — Notwithstanding R. S. O. 1877 c. 125, s. 20, a married woman is still entitled, under 21 Jac. I. c. 16, to bring an action in respect of her separate property within six years after becoming discovert. *Carroll* v. *Fitzgerald*, 5 A. R. 322.

Subsequent Discoverture.] — A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted; and cannot be enlarged by the debtor subsequently becoming a widow. *Re McLeod* v. *Emigh*, 12 P. R. 450.

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4. *Separate Earnings and Trading.*

Acquiescence of Husband.]—The plaintiff, a widow, had, during her coverture, lent the defendants a sum of money which she earned when living apart from her husband, who had never made any claim to this money or to any of her earnings:—Held, that the

plaintiff was entitled to recover, as the evidence shewed that the husband had acquiesced in her treating her earnings as her separate property; and that C. S. U. C. c. 73, which was in force when the money was lent, in no way abridged the power of the husband to make such a settlement by his acts or acquiescence as well as by a formal writing or distinct words. *Carroll* v. *Fitzgerald*, 6 A. R. 93.

Agency of Husband.]—Where a wife had purchased the estate of her husband, who had become insolvent, and thereafter authorized him by power of attorney to manage the same for her, and to make promissory notes in and about the said business:—Held, that notwithstanding the power of attorney the real scope of the husband's agency could be ascertained from any admissible evidence, and there was sufficient to justify a finding that the husband had authority to sign the notes in question, which were given to creditors for a debt due before his insolvency. *Cooper* v. *Blacklock*, 5 A. R. 535.

Business Managed by Husband.]—The plaintiff was a married woman whose husband, having been engaged in business, had become insolvent, and failed to obtain his discharge. Certain persons who had been his creditors and knew his inability to carry on business on his own behalf, furnished the plaintiff, who had no separate estate, with goods, taking her notes in payment. The business name used was that of the plaintiff, but the business was carried on entirely by the husband, acting under a power of attorney from her which enabled him to enter into all contracts and give notes, &c., in the plaintiff's name, and at an alleged salary of $10 a week. The wife and children all lived together and away from the place of business, which the plaintiff seldom visited, and never for business purposes. The goods having been seized under an execution issued by one of the husband's creditors, the plaintiff claimed them, and an interpleader was directed to be tried:—Held, that his wife was not entitled to the goods; that there was no separate trading of the plaintiff, within the meaning of the statutes; but that the whole thing was a device to enable the husband to carry on business in the plaintiff's name, and so defeat his creditors. *Meakin* v. *Samson*, 28 C. P. 355.

The plaintiff, a married woman, was married in Cincinnati, Ohio, in October, 1878, without any marriage settlement, and not possessed of any separate estate except about $200. Her husband carried on business there until December, 1878, when he failed, and an assignee was appointed. The plaintiff claimed that she then purchased the stock from the assignee, and carried on a business, similar to that carried on by her husband, on her own behalf and separately from him. Subsequently she removed to Hamilton, where her husband had previously gone, and the goods which remained unsold were sent to Hamilton, where with them she commenced and carried on, as she claimed, a similar business to that carried on in Cincinnati, purchasing new goods from time to time. Upon an interpleader issue to try her right to these goods as against execution creditors of her husband:—Held, on the evidence set out in the report, that not only did it appear that the business carried on in Cincinnati by the wife was in fact the husband's, but that according to the law of Ohio it must be deemed to be such in the absence of an order of protection, which was the case here. Held, also, that the business subsequently carried on in Hamilton, although $400 of her money had been put into it, was also in fact the husband's business, though carried on in the wife's name. *Lerine* v. *Claflin*, 31 C. P. 600.

In an interpleader issue to try the right to certain goods seized under an execution against A. and claimed by B., his wife, it appeared that since their marriage a store business had been carried on in the name of the wife, and that frequent trades and transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainor, and it was only when the bargains had to be carried out that the wife appeared in them; that the husband kept the store books, which she said she did not know much about, as she was no scholar; that the husband made nearly all the purchases of stock, and sold goods, and spoke and acted as if he were the owner; that he was not in receipt of wages, but took what money he wanted out of the store when he pleased, and in the transaction out of which the judgment and execution arose under which the stock was seized, he opened the negotiation by a letter signed by himself, referring to the property he offered in trade as his property, and when the bargain was closed took a deed of the store in his own name, and gave back a mortgage and his own note for the balance due. The jury, in the face of the Judge's charge in favour of the execution creditor, found that the stock was the property of the wife, that she did not act fraudulently, and that she carried on business separate from her husband. Upon a motion to set aside the verdict, and to enter a verdict for the defendant, or for a nonsuit, or for a new trial, on the ground that the verdict was contrary to the evidence and to the direction of the Judge, and perverse, and that it was against the weight of the evidence, it was:—Held, that the business was not one protected by R. S. O. 1877 c. 125, s. 7; that the verdict could not be sustained; and under rule 321 O. J. Act, and R. S. O. 1877 c. 50, s. 383, it was set aside and judgment entered for the defendant. Murray v. McCallum, 8 A. R. 277, referred to and distinguished. *Campbell* v. *Cole*, 7 O. R. 127.

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock-in-trade, which the vendors sold to her upon her credit exclusively, and not to her husband:—Held, affirming 14 O. R. 468, that even though the business might not be the business of the wife, carried on by her separately from her husband, within the meaning of s. 7, so as to protect the earnings from her husband's creditors, the goods so sold to the wife were her own property, under s. 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors. Whether this would be so with regard to goods purchased, and to be paid for out of earnings of such a business, quære? *Dominion Savings and Investment Society* v. *Kilroy*, 15 A. R. 487.

Debts Contracted.]—Held, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf, or separately from her husband, may be sued for as if she were an unmarried woman; that is, without regard to separate estate such as courts of equity recognize as that particular class of property. *Berry* v. *Zeiss*, 32 C. P. 231.

Where to a declaration on a promissory note made by a married woman she pleaded coverture, and the plaintiffs replied that the note was made in respect of a business in which defendant was employed on her own behalf separate from her husband, but did not allege that she had separate property:—Held, that the replication was good. *Ib.*

Farm Carried on by Husband—*Goods Purchased with Wife's Money.*]—In an interpleader issue, the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th May, 1859, without any settlement:—Held, in the absence of any evidence to the contrary, that the reasonable presumption was, that the husband was tenant of the land and, if so, the crops would be his; 2. as to the other property, that apart from the statute it would not be the claimant's merely because it had been purchased by money which belonged to her under the will; 3. that as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second section; and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts. *Lett* v. *Commercial Bank*, 24 U. C. R. 552.

In the county court it was left to the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession:—Held, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it. *Ib.*

Section 2 of 35 Vict. c. 16 (O.), exempting from the husband's debts all proceeds or profits of any occupation or trade carried on by the wife separately from the husband, applies to all married women, whether married before or after the passing of the Act. But this section does not apply to any occupation or trade in which the husband is held out to the world as the person conducting it, or which she cannot carry on without his active co-operation or agency. The husband need not be physically absent in order to make it her separate trade or occupation, but she cannot be properly held to carry it on separately from him, so long as he does all that is essential to its success. Where, therefore, the husband lived on the farm with his wife, and managed it, a finding that she was carrying on the farm for herself was set aside. As to the stock and farming utensils, which were claimed by the wife, it appeared that they had been sold under an execution against the husband to whom they then belonged, and had been purchased by his two brothers-in-law, one of whom paid a small part of the purchase money, the other nothing, and the remainder was paid by the husband, who remained in possession as before. One of the purchasers, it was said, afterwards transferred his interest to the wife, for the alleged consideration of a right to dower, which was not clearly shewn to exist, and the possession remained as before:—Held, that the whole dealings shewed a design to protect the husband's property against his creditors, and a finding in the wife's favour was reversed. *Harrison* v. *Douglas*, 40 U. C. R. 410.

Farm—*Crops.*]—A husband, who was in difficulties, agreed to purchase a lot of land in the name of his wife, who was not possessed of any separate estate or means enabling her to purchase. The farm was worked by the husband as his own, and the only instalment paid was paid out of the profits of the farm. The sheriff having seized on an execution against the husband certain crops raised upon the farm by the labour of the husband and persons hired by him, and paid out of the profits thereof:—Held, that these crops clearly were not the separate estate of the wife, so as to exempt them from liability for the husband's debts. *Irwin* v. *Maughan*, 26 C. P. 455.

A married woman, married before 1859, without any settlement, owned land about a mile from the farm on which she was living with her husband. The husband who managed this land sowed it with hay, the seed being his own, and the crop was afterwards cut at the expense of the wife, and taken to the husband's farm, where it was kept separate from his hay:—Held, that the hay belonged to the wife, and was not seizable under an execution against the husband. Lett v. Commercial Bank of Canada, 24 U. C. R. 552; Harrison v. Douglas, 40 U. C. R. 410; and Irwin v. Maughan, 26 C. P. 455, distinguished. *Plows* v. *Maughan*, 42 U. C. R. 129.

The plaintiff, a married woman, who had been married in 1864, lived on a 200 acre lot with her husband and children. The land had belonged to her husband's father, who died in 1874, having devised the east half to the plaintiff's son, a minor, and the west half to the plaintiff, there being then a judgment against the husband, which it was supposed was the testator's reason for such devise. The whole farm had been occupied and farmed together, the plaintiff being under the impression that she was entitled to the son's half until he came of age. The husband did some little work about the place, but it was generally known and understood by those who worked upon the farm, as well as by the public, that the place was hers and how it had been left to her. The crops having been seized under an execution issued upon the judgment

above mentioned:—Held, on an interpleader issue: 1. that the wife was not carrying on any occupation or trade separate from her husband, nor were these crops her wages or earnings, within s. 7 of the Married Woman's Property Act, R. S. O. 1877 c. 125; 2. that she was entitled to such crops as owner of the land, for the husband could not be said to be working the farm as head of the family, and the case was distinguishable therefore, from Lett v. Commercial Bank, 24 U. C. R. 552; 3. that the crops on both halves of the lot must be treated in the same way, the whole being managed in all respects as one farm. *Ingram* v. *Taylor*, 46 U. C. R. 52; 7 A. R. 246.

"Proprietary interest" in s. 5 of R. S. O. 1887 c. 132, means "interest as an owner," or "legal right or title." When a married woman rents a farm and employs her husband to work it, he has no "proprietary interest" in the grain raised thereon, and it is not liable to seizure by his creditors. *Cooney* v. *Sheppard*, 23 A. R. 4.

Land Conveyed in Satisfaction of Wages.]—A married woman, living apart from her husband, accepted some property for her wages:—Held, that the transaction was binding on the grantor, and all claiming under him. *Moore* v. *Davis*, 16 Gr. 224.

Letting Lodgings.]—Where a married woman living in a house furnished by her husband, and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest. Judgment in 27 O. R. 423, reversed. *Young* v. *Ward*, 24 A. R. 147.

Restraining Husband from Interfering.]—The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business, or with the servants, or agents, or removing any of the plaintiff's chattels. Semble, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly* v. *Donnelly*, 9 O. R. 673.

Separate Property.]—R. S. O. 1887 c. 132, s. 5, s-s 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest separate property. *Robertson* v. *Larocque*, 18 O. R. 469.

Separation from Husband not Essential—*Husband Employed by Wife.*]—In order that the property of a married woman who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside. *Murray* v. *McCallum*, 8 A. R. 277.

The plaintiff, who was possessed of a sum of money (about $3000), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel-keeping, and agreed to give her husband $15 a month for his services as barkeeper, the duties of which he discharged, and resided with her in the hotel. It was shewn that whilst thus engaged she had two partners in carrying on the hotel business. The defendant seized the goods in the hotel, and in an interpleader issue a verdict was rendered in favour of the plaintiff, which the court in banc refused to set aside. On appeal:—Held, per Spragge, C.J.O. and Cameron, J., that the facts shewed the plaintiff to have had a separate trade or occupation within the Act, the husband not having the control of the business, but being hired for a particular duty. Per Burton, J.A., it was not intended that there should be an inquiry under the Act as to the bona fides of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character. Per Burton and Patterson, JJ.A., that the interference of the husband with the business, as shewn by the evidence, was such in reality as to prevent its being treated as the separate business of the plaintiff. *Ib.*

Wages.]—Under 35 Vict. c. 16, s. 1 (O.), a married woman can maintain an action for her wages, earned whilst living with her husband, who as agent of the defendants employed her; and the husband is a competent witness in her behalf. *McCandy* v. *Tuer*, 24 C. P. 101.

XII. Practice and Procedure in Actions Against and by Married Women.

1. *At Law.*

See Soules v. *Doan*, 39 U. C. R. 337; *Field* v. *McArthur*, 25 C. P. 167; *Quebec Bank* v. *Howe*, 6 P. R. 347; *Smith* v. *Carder*, 11 U. C. R. 77; *Hunter* v. *Ogden*, 31 U. C. R. 132; *Breen* v. *McDonald*, 22 C. P. 208; *Campbell* v. *Great Western R. W. Co.*, 20 C. P. 345, 563; *Balsam* v. *Robinson*, 19 C. P. 263; *Shuter* v. *Marsh*, Tay. 172; *Howe* v. *Thompson*, M. T. 6 Vict., R. & J. Dig. 1682; *Shuberg* v. *Cornwall*, 6 O. S. 253; *Tucker* v. *Phillips*, 24 U. C. R. 626; *Henderson* v. *Wallace*, E. T. 2 Vict., R. & J. Dig. 1682; *Murphy* v. *Bunt*, 2 U. C. R. 284; *Doe d. Eberts* v. *Montreuil*, 6 U. C. R. 515; *Campbell* v. *Campbell*, 25 C. P. 308; *Read* v. *Wedge*, 20 U. C. R. 456; *Aylesworth* v. *Patterson*, 21 U. C. R. 269; *Warren* v. *Cotterell*, 6 P. R. 11; *Woodward* v. *Cummings*, 6 P. R. 110; *Jones* v. *Spence*, 1 U. C. R. 367; *Barkerville* v. *Corbett*, 3 C. P. 159; *Rischmuller* v. *Uberhaust*, 11 U. C. R. 425; *Jackson* v. *Kassel*, 26 U. C. R. 341; *Swan* v. *Cleland*, 2 L. J. 235; *Wilson* v. *West*, 11 C. P. 127; *Muldoon* v. *Bilton*, 10 C. P. 382; *Foley* v. *White*, 2 Gr. 51; *Rennett* v. *Woods*, 11 U. C. R. 29; *In re Linden* v. *Buchanan*, 29 U. C. R. 1; *Junkin* v.

Junkin, 7 P. R. 362; *Brown* v. *Capron*, 6 P. R. 263; *Standard Bank* v. *McGuaig*, 7 P. R. 356; *Adams* v. *Corcoran*, 25 C. P. 524.

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2. *In Equity.*

See Miller v. *Gordon*, 5 Gr. 134; *Gordon* v. *Weaver*, 5 L. J. 67; *Clarke* v. *McElroy*, 10 Gr. 210; *Anonymous*, 1 Ch. Ch. 9; *Sergeant* v. *Sharpe*, 1 Ch. Ch. 63; *White* v. *Church*, 2 Ch. Ch. 203; *Elliott* v. *Hunter*, 1 Ch. Ch. 158; *Walker* v. *Tyler*, 1 Ch. Ch. 189; *Bunn* v. *Barclay*, 1 Ch. Ch. 254; *Brandon* v. *Wheeler*, 1 Ch. Ch. 262; *Wright* v. *Morrow*, 1 Ch. Ch. 286; *Robinson* v. *Dobson*, 1 Ch. Ch. 302; *Keachie* v. *Buchanan*, 2 Ch. Ch. 42; *Dewar* v. *Folly*, 6 P. R. 135; *Wallis* v. *Burton*, 5 Gr. 352; *Macfie* v. *McDougall*, 1 Ch. Ch. 259; *Hare* v. *Smart*, 1 Ch. Ch. 316; *Gourlay* v. *Ingram*, 2 Ch. Ch. 237; *Marshall* v. *Widder*, 3 C. L. J. 24; *Baker* v. *Trainor*, 15 Gr. 252; *Tompkins* v. *Holmes*, 14 Gr. 245; *Walmsley* v. *Bull*, 15 Gr. 210; *Maughan* v. *Wilkes*, 1 Ch. Ch. 91; *Murcheson* v. *Donohoe*, 6 P. R. 138; *Cooney* v. *Girvin*, 1 Ch. Ch. 94; *Houlding* v. *Poole*, 1 Gr. 206; *McPherson* v. *McCabe*, 1 Ch. Ch. 250; *Rann* v. *Lawless*, 1 Ch. Ch. 333; *McBean* v. *Lilley*, 2 Ch. Ch. 247; *Storel* v. *Coles*, 3 Ch. Ch. 421; *Bennett* v. *Sprague*, 2 Ch. Ch. 194, *S. C.* 4 C. L. J. 45; *Poole* v. *Poole*, 2 Ch. Ch. 475; *Jessop* v. *McLean*, 15 Gr. 489; *Harvey* v. *Boomer*, 3 Ch. Ch. 11; *Blackburn* v. *McKinlay*, 3 Ch. Ch. 65; *Hancock* v. *McIlroy*, 18 Gr. 209; *Butler* v. *Church*, 18 Gr. 190; *Re Howland*, 4 Ch. Ch. 74; *Redman* v. *Brownscombe*, 6 P. R. 84; *Re McKim*, 6 P. R. 130; *Pruyn* v. *Soby*, 7 P. R. 44; *Hooper* v. *Maitland*, 7 P. R. 50; *Olmstead* v. *Rutherford*, 7 P. R. 146; *Mallory* v. *Mallory*, 7 P. R. 446; *Shelley* v. *Goring*, 8 P. R. 36; *Godfrey* v. *Harrison*, 8 P. R. 272; *VanWinkle* v. *Chaplin*, 2 Ch. Ch. 98; *Eastman* v. *Eastman*, 2 Ch. Ch. 183; *Poole* v. *Poole*, 2 Ch. Ch. 459; *Re S. and M.*, 8 C. L. J. 245; *In re Spencer*, 19 Gr. 467; *Webster* v. *Lews*, 5 O. R. 509; *Vardon* v. *Vardon*, 6 O. R. 719; *G*—— v. *R*——, 9 P. R. 174; *Heward* v. *Magahay*, 1 Ch. Ch. 366; *Meyers* v. *Barker*, 2 Ch. Ch. 407.

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3. *Since the Judicature Act.*

Division Court—*No Proof of Separate Personal Estate.*]—In an action in a division court against a married woman on a promissory note, the existence of separate real estate was proved, but no evidence was given of any separate personal estate. Judgment was rendered for plaintiff, the amount thereof to be paid out of the separate property she had when the note was made. Per Wilson, C.J. The Married Woman's Act is complied with by a general judgment or by a general judgment against her separate property, and under such judgment after acquired separate personal property can be followed. Per Osler, J. A married woman's separate personal estate, but not her real estate, may be charged and sold under a judgment against her in the division court. The omission to prove the existence of such separate personal estate, though it may be urged as a defence, does not affect the jurisdiction. Prohibition was therefore refused. *In re Widmeyer* v. *McMahon*, 32 C. P. 187.

——— *Judgment Summons—Committal.*]—A judgment against a married woman by virtue of the Married Woman's Property Act creates no general personal liability, but merely charges her separate estate: and the provisions of s. 177 of the Division Courts Act, R. S. O. 1877 c. 47, as amended by 43 Vict. c. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the division court, and even if liable to be examined, such a person is not liable to be committed to gaol under s. 182. Metropolitan L. & S. Co. v. Mara, 8 P. R. 355, distinguished. *Re McLeod* v. *Emigh*, 12 P. R. 450.

——— *Judgment Summons—Debt Contracted before Marriage.*]—A married woman was sued in a division court for a debt contracted before marriage, and judgment was given against her personally for the amount of the debt:—Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability: and an application, upon habeas corpus, to discharge her from custody under an order made in the division court for her committal for failure to attend upon an after-judgment summons was refused. Scott v. Morley, 20 Q. B. D. 123, followed. Re McLeod v. Emigh, 12 P. R. 450, distinguished, and doubted in view of Aylesford v. Great Western R. W. Co., [1892] 2 Q. B. 626. Quære, whether such an order to commit is by way of punishment or execution. *Re Teasdall* v. *Brady*, 18 P. R. 104.

Judgment Debtor — *Committal for Contempt.*]—Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for nonpayment of costs. *Pearson* v. *Essery*, 12 P. R. 466.

——— *Refusal to Attend for Examination —Committment.*]—An order may be made for the commitment of a married woman to gaol for refusal to attend for examination as a judgment debtor. Rules 926 and 932, and R. S. O. 1887 c. 67, s. 7, considered. *Metropolitan L. & S. Co.* v. *Mara*, 8 P. R. 355; *Watson* v. *Ontario Supply Co.*, 14 P. R. 96.

Security for Costs.]—Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife:—Held, that although suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. The case did not come within the class of cases where a nominal insolvent plaintiff is put forward whilst the substantial litigant keeps in the background in order to avoid liability for costs; and an order for security for costs was set aside. *McKay* v. *Baker*, 12 P. R. 341.

Security for costs will not be ordered in an action for alimony. *Bennett* v. *Bennett*, 7 P. R. 54; *Knowlton* v. *Knowlton*, 8 P. R. 400.

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

Setting aside Judgment.]—The original process in the action was served upon the defendant, the married woman, personally; she swore that she handed it to her husband, but never authorized anyone to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband, and judgment was signed against both defendants by consent of D., as her attorney, on an order made in chambers in 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate which she and her husband conveyed away after action brought and before judgment. No affidavit from the male defendant nor from D., the attorney, was filed:—Held, that after the long lapse of time and under the circumstances shewn the judgment should not be set aside. *McLean* v. *Smith*, 10 P. R. 145.

Summary Judgment—*Untaxed Bill of Costs — Retainer.*] — Summary proceedings upon specially indorsed writs do not apply where, the defendant being a married woman, the judgment can be only of a proprietary nature. Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill and interest:—Held, that the judgment was irregular and might have been set aside with costs if the defendants had applied promptly; and, under the circumstances, the judgment was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer. *Cameron* v. *Heighs*, 14 P. R. 56.

Where it is shewn that a married woman defendant has separate estate, judgment may be entered against her as to such separate estate, upon default or by order under rule 739. And where the writ of summons did not shew that one of the defendants was a married woman having separate estate, but the plaintiff's affidavit filed on a motion for summary judgment under rule 739 did shew it, the plaintiff was allowed to amend his writ, and to enter a proprietary judgment against her. *Nesbitt* v. *Armstrong*, 14 P. R. 366.

See JUDGMENT, X.

Writ of Fi. Fa.]—Quære, whether a writ of fieri facias is the appropriate remedy for reaching the separate property of a married woman. *Douglas* v. *Hutchison*, 12 A. R. 110. See, however, *Beemer* v. *Oliver*, 10 A. R. 636, at p. 661.

See BILLS OF EXCHANGE, VIII. 4—DOWER—EVIDENCE, I. 1 (b)—FRAUD AND MISREPRESENTATION, III. 2 (b)—GIFT, II.—PARTIES, II. 7.

ICE.

Navigation—*Carriage of Ice—Right to Cut Passage Through Harbour.*]—The cutting of a channel through ice formed on a water lot in a navigable harbour, to enable ice cut outside to be conveyed to the shore of the harbour, is a use of the water lot for the purpose of navigation; and the owner of the water lot, the grant of which was subject to the rights of navigation, cannot interfere with such user. *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 29 O. R. 247. Reversed in the court of appeal, 26 A. R. 411, but restored in the supreme court, 31 S. C. R. 130.

See MUNICIPAL CORPORATIONS — WATER AND WATERCOURSES.

IDENTITY.

See EVIDENCE, XV. 4.

IDIOT.

See LUNATIC.

ILLEGALITY.

See BILLS OF EXCHANGE, VII. 2 (b)—CONTRACT, II. 2—CHAMPERTY AND MAINTENANCE—GAMING—MONEY, II. 3, 4—TRUSTS AND TRUSTEES, II. 1 (b).

ILLEGAL DISTRESS.

See DISTRESS.

ILLEGAL VOTING.

See PARLIAMENT, I. 7 (b).

ILLEGITIMACY.

See BASTARD.

IMPERATIVE STATUTES.

See STATUTES, VI., VII.

IMPERIAL STATUTES.

See CONSTITUTIONAL LAW, I.—SHIP, XVI.

IMPERTINENCE.

See PLEADING—PLEADING IN EQUITY BEFORE THE JUDICATURE ACT, II. 2.

IMPLIED CONTRACT.

See CONTRACT, III. 3.

IMPLIED TRUSTS.

See TRUSTS AND TRUSTEES, II. 4.

IMPLIED WARRANTY.

See WARRANTY, IV.

IMPROVEMENTS.

I. MISTAKE OF TITLE OR BOUNDARIES, 3105.

II. MISCELLANEOUS CASES, 3113.

I. MISTAKE OF TITLE OR BOUNDARIES.

Bornage—*Common Error.*]—Where as the result of a mutual error respecting the division line, a proprietor has in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appears that his walls encroach slightly upon his neighbour's land,, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of a reasonable indemnity. In an action for revendication under such circumstances, the judgment previously rendered in an action en bornage between the same parties cannot be set up as res judicata against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions are different. An owner of land need not have the division lines between his property and contiguous lots of land established by regular bornage before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary. *Delorme* v. *Cusson*, 28 S. C. R. 66.

Colour of Right—*Purchase of Claims.*]—The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession. One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance:—Held, that the conveyance was wholly inoperative, and was not validated by 59 Vict. c. 41 (D.), as the action was begun before the passing of the Act, and s. 2 excepts pending litigation; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seisin, the plaintiff's case disclosed his title and shewed that the true title was in the married woman. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell:—Held, that the widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or, at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date. *Hartley* v. *Maycock*, 28 O. R. 508.

Damages.]—Damages may be assessed in ejectment under s. 53, C. S. U. C. c. 93, by a defendant for improvements made on lands not his own, in consequence of an erroneous survey. *Mozier* v. *Keegan*, 13 C. P. 547.

Defendant not Misled.]—Under what circumstances a defendant in ejectment can claim compensation for his improvements before he can be dispossessed under the judgment considered. Held, under the facts stated in the case, that defendant could not be said to have been misled by an erroneous survey. The object and effect of the statute discussed. *Doe d. Hare* v. *Potts*, 5 U. C. R. 492.

Where the government for any purpose has ordered a re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, and defendant has settled on a lot as marked by this survey, the defendant in ejectment will not be entitled to his improvements, under 59 Geo. III. c. 14, and 2 Vict. c. 17, if the jury find that the plaintiff is holding according to the posts planted at the front angles of his lot in the original survey. The defendant in such case cannot be said to have settled on the land in consequence of an unskilful survey. *Doe d. Moule* v. *Campbell*, 8 U. C. R. 19.

Ejectment — *Enforcement of Right.*]—Where in 1875, in an action of ejectment the

parties agreed in writing that a verdict be entered for the plaintiff, but not enforced until defendant had been paid $50 for costs and the value of his improvements, said value to be fixed by arbitration; and, though the $50 had not been paid, nor the said value so ascertained, plaintiff entered judgment on the verdict, and ejected the defendant, whose devisee now filed this bill, claiming possession, damages, a reference as to improvements, and an order for payment of the amount found due, and of the $50 for costs:—Held, that though the judgment could not be set aside, and possession given to plaintiff, the plaintiff was entitled to a reference as prayed, with costs. *Watson* v. *Ketchum*, 2 O. R. 237.

——— *Second Action.*]—When a claimant of certain lands commenced an action of ejectment, in which he afterwards entered a nolle pros., and then, subsequently, commenced a suit for the recovery of the same lands, and the defendant claimed compensation for improvements made under bonâ fide mistake of title:—Held, the defendant was entitled to compensation for improvements made before the ejectment action, and for those made between the nolle pros. and the commencement of the second suit, but not for those made during the pendency of the ejectment, or since the commencement of the second suit. *O'Grady* v. *McCaffray*, 2 O. R. 309.

Value of improvements set off against mesne profits. *Patterson* v. *Reardon*, 7 U. C. R. 326; *Lindsay* v. *McFarling*, Dra. 6. But see *Davis* v. *Snyder*, 1 Gr. 134.

Enforcing Lien.]—The rule that a party in good faith making improvements on property which he has purchased will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced actively in this court, as well where the purchaser is plaintiff as where he is defendant; and that although no action has been brought to dispossess him. *Gummerson* v. *Banting*, 18 Gr. 516.

Where in ejectment the defendant claims a lien for lasting improvements under 36 Vict. c. 22 (O.), his right thereto must be inquired into and adjudicated upon in the action. Quære, how such lien, if established, is to be enforced, and whether the possession can be changed until it is satisfied. *O'Connor* v. *Dunn*, 37 U. C. R. 430.

Enhanced Value—*Interest*]—The plaintiff being in possession of property—a flouring-mill—of which he believed his wife to be owner in fee as heiress of her father, expended upon it about $3,253. After her death the father's will was discovered, which gave her a life estate only. Upon a reference to the master to ascertain the amount of enhancement in value of the property, that officer, on the evidence adduced, found that its value at the death of the testator was $2,700, and that the value at the date of the report was $4,500:—Held, that he had, under the circumstances, properly found the enhanced value of the estate by reason of such expenditure to be $1,800, not $1,300—although upon a sale under a decree of the court the property had realized $4,000 only—and further, that the plaintiff was entitled to interest on such enhanced value from the time the money was expended. *Faucett* v. *Burwell*, 27 Gr. 445.

Semble, that a forced sale for cash is not a proper mode of determining the amount of the enhancement in value of an estate which has been improved by a person in possession under a bonâ fide mistake of title. *Ib.*

Equitable Defence—*Effect of the Act.*]—Held, that the equitable defence in ejectment in this cause, filed under the Administration of Justice Act of 1873, ss. 3 and 4, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, (fully set out in the report of this case) though probably not affording a good equitable defence should be allowed. *Carrick* v. *Smith*, 34 U. C. R. 389.

36 Vict. c. 22 (O.), as to improvements on land made in mistake before notice, and the lien therefor, discussed. *Ib.*

Invalid Lease.]—See *Townsley* v. *Neil*, 10 Gr. 72.

Invalid Sale by Executor.]—H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due him by the estate, executed a mortgage to W. W. died intestate, and F., five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, which he expressed to do as sole surviving executor, and then conveyed the estate to M.:—Held, affirming 13 O. R. 21, that the act of F., in executing a discharge of his own mortgage, had not the effect of releasing the land:—Held, also, reversing the same judgment, that M., the purchaser and his assigns, were not entitled to any lien for improvements on the lands during their occupancy thereof. *Beaty* v. *Shaw*, 14 A. R. 699.

Invalid Sale by Trustee.]—G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F. describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees by the direction of G. W. F., conveyed to E., under whom the defendants' claimed. E. F. now brought this action to recover the land:—Held, that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.; that this land was subject to

the trusts of the previous conveyance to them; that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover. Held, also, that there should be a reference to the master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved. Foott v. Rice, 4 O. R. 94, approved. *Foott* v. *McGeorge*, 12 A. R. 354.

Invalid Sale under Mortgage.] — The holder of a mortgage having become the purchaser of the mortgaged property under a power of sale contained in the mortgage, and afterwards under a sheriff's sale, sold and conveyed to a purchaser, who went into possession and made permanent improvements, on his purchase being set aside, it was:—Held, that his vendee was entitled to be allowed for his improvements. *McLaren* v. *Fraser*, 17 Gr. 567.

Semble, the same rule would apply if the mortgagee himself had made the improvements. *Ib.*

Remarks upon the effect of the statute in the case of a purchase by a mortgagee of the equity of redemption, supposed by all parties to be valid, and acquiesced in for many years, during which improvements were made, though in fact invalid on technical grounds. *Skae* v. *Chapman*, 21 Gr. 534.

The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:—Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as puisne incumbrancers, and that the purchasers were entitled to an inquiry as to the enhanced value of the property by reason of their improvements. *Weaver* v. *Vandusen*, *Wills* v. *Agerman*, 27 Gr. 477.

Knowledge of Defect.]—Where a person purchased land knowing that his vendor was a married woman, and his assignees put up a house thereon after being warned by her and forbidden to do so, of which the defendant was aware:—Held, in ejectment by the vendee of the husband, that the defendant, who claimed under the assignees, could claim no lien for such improvements under 36 Vict. c. 22 (O.) Semble, that the belief required by the statute must be a reasonable belief. *Smith* v. *Gibson*, 25 C. P. 248.

Quære, as to how the right to such lien is to be tried, and whether a defendant in ejectment can first deny the plaintiff's title and then claim a lien under the statute. *Ib.*

Purchase of land by defendant with notice of dedication for school purposes:—Held, not entitled to a lien. *See Corporation of Wyoming* v. *Bell*, 24 Gr. 564.

Held, under the facts stated in this case, that the plaintiff had knowledge of the defect in title before making his improvements, and that neither by the general doctrines of the court nor under 36 Vict. c. 22, was he entitled to a lien. *Russell* v. *Romanes*, 3 A. R. 635.

——— *Temporary Works—Special Profits —Crown.*]—The defendants, owners of land adjoining the bank of the Niagara river, built at great expense stairways and elevators, and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators, and paths were from time to time necessary, owing to their exposed condition, and the defendants knew that they had no title to the bank, which was vested in the Crown:—Held, that works of this kind were not lasting improvements within the meaning of s. 30 of R. S. O. 1887 c. 100, and that both on this ground, and on the ground that they knew they had no title, the defendants could not recover compensation. Semble, the section would not affect the Crown, and the title being in the Crown when the improvements were made, the Crown's grantee would take the land free from any lien. In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed, and the cost or value of the improvements is not the test. Held, also, that the defendants were not chargeable with the profits made by them, but only with a fair occupation rent for the land. *Commissioners for the Queen Victoria Niagara Falls Park* v. *Colt*, 22 A. R. 1.

Lien — *Belief.*]—Held, that the plaintiff was entitled to a lien for his improvements, as the evidence shewed that they were made under the belief that the land was his own. *McCarthy* v. *Arbuckle*, 29 C. P. 529.

Mortgagee's Rights—*Interest—Rent.*]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession:—Held, that the mortgagee was an "assign" of the person making the improvements within the meaning of s. 30 of R. S. O. 1887 c. 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce. Held, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage. Held, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life. *McKibbon* v. *Williams*, 24 A. R. 122.

Occupation Rent.]—No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor* v. *McGregor*, 5 O. R. 617.

Private Survey.]—59 Geo. III. c. 14, s. 2, applies as well to surveys made upon request of individuals as by public authority, and to surveys made as well since as before the Act, and although the occupation of defendant may have commenced since the Act. *Doe d. Gallagher* v. *McConnel*, 6 O. S. 347.

In ejectment defendant gave notice that he did not defend the title, but claimed compensation for his improvements, which were made on plaintiff's land in consequence of an errone-

ous survey made before the passing of the statute 12 Vict. c. 35;—Held, that defendant was entitled to the value of such improvements, although such survey was a private one, and made on defendant's own account. *Campbell* v. *Fergusson*, 4 C. P. 414. Followed in *Hutton* v. *Trotter*, 16 C. P. 367, and in *Morton* v. *Lewis*, 16 C. P. 485.

Where S. having purchased a lot of land, employed a public land surveyor to mark out the boundaries of it for him, and the surveyor, by reason of an unskilful survey, included in the lot, as marked out by him, land which should not have been so included, and S., misled thereby, effected improvements upon the land so erroneously included;—Held, on recovery of the said land by the rightful owner, that S. was entitled to compensation for the said improvements, under R. S. O. 1877 c. 51, ss. 29, 30. *Plumb* v. *Steinhoff*, 2 O. R. 614. But see *S. C.*, 11 A. R. 788; 14 S. C. R. 739.

Promised Gift.]—A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Gr. 135.

A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; but meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land;—Held, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. Quære, in such a case, whether the son is not entitled to an absolute decree for the land. *Bicha* v. *Bicha*, 18 Gr. 497. See *Hovey* v. *Ferguson*, 18 Gr. 498.

——— *Parent and Child — Agreement not Clearly Proved — No Allowance for Improvements.*]—See *Smith* v. *Smith*, 29 O. R. 309; 26 A. R. 397.

Promise to Convey—*Set-off of Rents.*]—Some time before 1863 the defendant M. at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same, relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to M. of the whole 300 acres, and this M. executed as grantee. The father died in 1873, and M. continued to reside on the property with the knowledge of his several brothers and sisters until 1877, when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1866 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the court being satisfied that the same had been obtained improperly set it aside with costs; but ordered M. to be allowed for his improvements, as having been made under bonâ fide mistake of title, he accounting for rents and profits since the death of the father. *McGregor* v. *McGregor*, 27 Gr. 470.

Quantum—*Invalid Sale under Mortgage.*]—Improvements made by a defendant under the belief that he was absolute owner, are allowed more liberally than to a mortgagee who improves knowing that he is but a mortgagee. *Carroll* v. *Robertson*, 15 Gr. 173.

A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:—Held, that as a condition of relief against him he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Ib.*

——— *Mode of Computing — Occupation Rent.*]—Improvements made under a mistake of title are not, since R. S. O. 1877 c. 95, s. 4, to be allowed for as liberally as improvements made by a mortgagee in possession. *Munsie* v. *Lindsay*, 10 P. R. 173.

The enhanced value of a farm, improved under a mistake of title, is found by deducting from the present value of the land, with the improvements, the estimated present value of the land without the improvements, plus any increase in value from other causes than such improvements. *Ib.* But see *S. C.*, 11 O. R. 520.

The occupation rent chargeable to a person improving land under a mistake of title is the rental value of the land without the improvements. *Ib.*

In fixing an occupation rent to be charged against one who had been occupying land under mistake of title and at the same time an allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case), then interest should be allowed on the actual cost of proper outlay for lasting improvements as an off-set. Manner of taking the account and contra account in such cases pointed out. *S. C.*, 11 O. R. 520.

In this action it was referred to the master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz., as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect of improvements, and of certain legacies charged by the will on the said land which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of some of the said legacies less than the face value thereof had been paid:—Held, that in computing interest on the sums so paid in respect of the legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent. *Ib.*

Set-off of Rents.]—Held, reversing 31 C. P. 227, that under R. S. O. 1877 c. 95, s. 4,

which entitles a defendant in ejectment to the value of the lasting improvements made on the land to the extent to which the value has been enhanced, the plaintiff is entitled to an account of the rents and profits to be set off against the value of such improvements. *McCarthy* v. *Arbuckle*, 31 C. P. 405.

See, also, *S. C., ib.* 48.

Staying Proceedings.]—Upon the facts in this case it was:—Held, that the court had no authority under s. 12 of 59 Geo. III. c. 10, to stay the proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe d. Short* v. *Bass*, 8 U. C. R. 147.

Survey—*Effect of Consolidated Statute.*]—Quære, whether C. S. U. C. c. 93, s. 53, applies only where parties have taken possession according to the original survey, or to all cases where a proprietor of land has been misled by an erroneous survey made by a licensed surveyor, either at the request of the proprietor or of some former owner of the land. *Swanston* v. *Strong*, 21 U. C. R. 279.

Tax Sale—*Retaining Land.*]—A purchaser at a sale of land for taxes, after the time for redeeming, went into possession and improved the property, but omitted to register his deed within the period prescribed by the statute, and the owner sold the same to a bonâ fide purchaser, who registered, and filed a bill to set aside the tax sale deed as a cloud on title:—Held, that under the circumstances defendant was entitled to be paid for his improvements, which the court, in order to prevent further litigation, settled at $200; but in the event of the plaintiff preferring that defendant should retain the land, paying him the value thereof, a reference was directed to ascertain its value. *Aston* v. *Innis*, 26 Gr. 42.

Held, in this case where a tax sale was set aside for irregularities in sale, that the defendant was entitled under R. S. O. 1877 c. 95, s. 4, though not under R. S. O. 1877 c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest, and expenses. *Haisley* v. *Somers*, 13 O. R. 699.

See, also, *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253; *Churcher* v. *Bates*, 42 U. C. R. 466.

What are Improvements.]—A well and rail fence:—Held, evidence to go to a jury of improvements. *Morton* v. *Lewis*, 16 C. P. 485.

II. Miscellaneous Cases.

Administratrix in Possession.]—The widow of an intestate, having obtained letters of administration, received and got in his personal estate, went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds or profits of the real estate come to her hands, must first be applied towards payment of debts, and then to reimburse her for sums spent in the infants' maintenance. No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with any increase in rental caused by such improvements. *In re Brazill, Barry* v. *Brazill*, 11 Gr. 253.

Breach of Trust.]—Where trustees with power of sale had in good faith, but erroneously, made a conveyance of a portion of the trust estate to one of the cestuis que trust, for the collateral advantage to the whole property to be derived from certain buildings and improvements to be made on the part conveyed—thus committing a technical breach of trust; upon discovering which the grantee joined with the trustees in a conveyance of the whole trust estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the court might consider him entitled to, and thereupon filed a bill for that purpose—the court, under the circumstances, directed the grantee to be allowed such sum as it should be made to appear the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever should be the lesser in amount, and referred it to the master to ascertain the amount; although the rule is that in such cases payment for improvements will not be allowed at the instance of the party making them. *Pegley* v. *Woods*, 14 Gr. 47.

Conveyance Set Aside for Improvidence—*Improvements by Grantee.*]—See *Shanagan* v. *Shanagan*, 7 O. R. 209.

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

Creditor of Person Making Improvements.]—A purchase by a wife from her husband, the consideration being paid out of her separate estate, was held to be maintainable against creditors of whose debts she had no notice. The husband, after the purchase, expended money in improving the property:—Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought. *Hill* v. *Thompson*, 17 Gr. 445.

A person in insolvent circumstances conveyed by way of settlement to his intended wife a lot of land, on which the settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in insolvency, the court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignees the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife

was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Gr. 156.

See FRAUD AND MISREPRESENTATION, III.

Dower Act—*Clearing Land.*]—The clearing of land for farming purposes is a permanent improvement under s. 3, s.-s. 2, of the Dower Act, R. S. O. 1877 c. 55. *Robinet* v. *Pickering*, 44 U. C. R. 337.

Executrix.]—An executrix, who had an annuity charged on the income of the estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was in consequence found largely indebted to the estate:—Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate. *Morley* v. *Matthews*, 14 Gr. 551.

Husband's Expenditure on Wife's Property.]—See *Till* v. *Till*, 15 O. R. 133.

Immoral Agreement.] — In ejectment, defendant claimed under an agreement based upon the immoral consideration of his marriage with the daughter of the plaintiff's testator, who, as he was aware, was already married, praying specific performance, or for a lien for the improvements made by him on the faith of such agreement:—Held, that the agreement could not be enforced, nor could there be any lien for such improvements. *Moon* v. *Clarke*, 30 C. P. 417.

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

Insurance on Buildings — *Mistake of Title.*]—See *Stevenson* v. *London and Lancashire Fire Ass. Co.*, 26 U. C. R. 148.

Issue of Patent.]—A patent was issued to A. in consideration of improvements on the land, but the benefit of these improvements had, on an arbitration between A. and B., been adjudged to B., and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the Crown to issue patents in such cases to those entitled to the improvements:—Held, that though the award was known to the officers of the government, the patent should be set aside at the suit of the attorney-general, as having been issued through fraud, and in error and improvidence. *Attorney-General* v. *McNulty*, 11 Gr. 281, 581.

Lease.]—Covenant in lease by lessor to pay for improvements. Construction of. See *Mason* v. *Macdonald*, 45 U. C. R. 113.

——— "*Buildings and Erections*"—*Earth-filling.*]—A covenant by the lessor in a lease of a parcel of land covered by water to pay, at the end of the term, for "the buildings and erections that shall or may then be on the demised premises," does not bind him to pay for crib-work and earth-filling done upon the parcel in question, by which it was raised to the level of the adjoining dry land, and made available as a site for warehouses. *Adamson* v. *Rogers*, 22 A. R. 415; 26 S. C. R. 159.

——— *Election.*]—Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors have the right to elect and the lessee must accept a renewal unless before the expiration of the term the lessors elect not to renew. Judgment below, 29 O. R. 729, affirmed. *Ward* v. *City of Toronto*, 26 A. R. 225.

Lessor Agreeing to Make Improvements.]—Trustees of real estate created a lease thereof, and verbally agreed to make certain improvements on the property, without which agreement the lessee would not have accepted the lease, but the improvements never were made:—Held, affirming 21 Gr. 166, that the stipulation as to improvements, upon which the lease was accepted, could be proved by parol. *In re Mason*, 21 Gr. 629. But on appeal this decision was reversed. *Mason* v. *Scott*, 22 Gr. 596.

Mortgagee—*Special Agreement.*]—Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements by her:—Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon. *Brotherton* v. *Hetherington*, 23 Gr. 187.

And where the mortgagors so entering into the agreement were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them:—Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements. *Ib.*

See MORTGAGE.

Partition—*Infants.*]—The adult co-heirs of an estate agreed to a partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein. Some of the co-heirs went into possession of their portions and made improvements; some released their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement:—Held, on that account, that the agreement was not binding on any of the parties to it; and a decree for partition was made; and the master was directed to have regard in partitioning to the possession and improvements by the parties. *Wood* v. *Wood*, 16 Gr. 471.

Patent — *Locatee.*] — On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of

such improvements, whereupon the commissioner of Crown lands directed that, before the patent issued, the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the master to inquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances made to them, after making all proper deductions:—Held, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements, etc., having regard to the object of the Crown lands department, the proper mode was to award such sum as in foro conscientiæ the defendant ought to receive. *Highland* v. *Sherry*, 32 O. R. 371.

Purchaser from Fraudulent Grantee.]—Where a deed is set aside as fraudulent as against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property. *Scott* v. *Hunter*, 14 Gr. 376.

See Buchanan v. *McMullen*, 25 Gr. 193.

Rectory Lease.]—By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the incumbent whenever the governor should erect a parsonage or rectory in Kingston, and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was erected in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842, this incumbent created a lease for twenty-one years (under which the plaintiffs claimed,) whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises:—Held, that the incumbent either as trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which a priori would extend the lease beyond the twenty-one years. *Kirkpatrick* v. *Lyster*, 13 Gr. 323; 16 Gr. 17.

Rival Applicants for Patent of Land—*Payment for Improvements.*]—See *Boulton* v. *Shea*, 22 S. C. R. 742.

Scale of Costs.]—A bill was filed for the specific performance of a contract for sale of land, for a sum less than $150. Before suit the plaintiff, the vendee, had entered upon the land and made improvements upon it, which increased its value to more than $200:—Held, that the subject matter involved was more than $200, and that the plaintiff was therefore entitled to costs according to the higher scale. *Kennedy* v. *Brown*, 12 L. J. 174.

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

Tenant for Life.]—J. T. S. devised certain lands to M. H. for life, and afterwards to any child of M. H. who might survive her, in fee. M. H. had one child, aged ten, when she petitioned under 19 & 20 Vict. c. 120 (Imp.), claiming to be allowed for expenditure made by her upon two houses upon the land for much needed repairs and lasting improvements, and also for $100, paid to a tenant for improvements made by him under a promise from the testator that he should be paid for them; and praying for a sale, or power to lease:—Held, that M. H. might be reimbursed the $100 from the testator's general estate, as this appeared to have been a debt due by the testator; but neither this nor the other expenditure could be charged on the land. Held, further, it appearing that there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H., and her child, it was a proper case for the sale or leasing of the estate, with a right to build. The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot charge the inheritance with them. *Re Smith's Trusts*, 4 O. R. 518.

Under the will of W. B. K. his widow, E. K., took a life estate in the whole of his real property (see 12 O. R. 469), and his son, W., the remainder in fee. A railway company, after the death of W. B. K., expropriated part of the lands and paid the compensation money to E. K., who had obtained letters of guardianship of her infant children. This money she expended in making improvements in the remaining portion of the lands. After W. attained full age, he sold this land with the improvements on it, E. K. joining in the conveyance in ignorance of her right to a life estate, and receiving no compensation in respect of it. W. afterwards died intestate, and in taking the accounts in this action as against E. K. in respect to the moneys received by her as above from the railway company, the heirs of W. sought to charge E. K. with the whole of the said money (less the value of her life estate), without regard to the sums spent by her on the improvement of the rest of the land:—Held, that if W. were living and making this claim, E. K. could have answered it by shewing that he had already got the equivalent by the sale of the other property long before the termination of her life estate at a value enhanced by the improvements, and that, besides, she had released to his purchaser her life estate, which further enhanced the amount of purchase money received by him, and since his heirs (the present claimants) could have no higher claim than he would have had if living, E. K. could answer the claim now made by them in the same way. E. K. could not be said to occupy the position only of a tenant for life seeking to charge the estate with the value of a permanent improvement made by her, or seeking to charge the remainderman with such value or part of it. *Wilson* v. *Graham* (2), 13 O. R. 661.

Tenant in Common—*Occupation Rent.*]—One of several tenants in common or joint tenants making improvements in a joint estate, is not entitled to be paid therefor unless, on the other hand, he consents to be charged with occupation rent. *Rice* v. *George*, 20 Gr. 221.

The right of a tenant in common, in an action for partition of the property, to be paid for improvements executed by him thereon, is restricted to such as are made by him after his tenancy in common has commenced in fact. And where a tenant in common, in remainder, by an agreement with the tenant for life, went into possession of the property, and during the life tenancy expended a large sum of money in permanent improvements at the request of the tenant for life:—Held, that he was not entitled to the value of such improvements. *Lasby* v. *Crewson*, 21 O. R. 255.

A tenant in common who holds possession of, manages, and receives the rent of, the common property, which is subject to an incumbrance, is entitled when called on for an account by his co-tenant, to be allowed for advances properly and reasonably made by him, for repairs and improvements, and for principal and interest on the incumbrance, with interest from the time the advances are made. The mode of taking the account and computing interest discussed. Judgment below, 17 P. R. 379, affirmed. *In re Curry, Curry* v. *Curry*, 25 A. R. 267.

True Owner Standing by.]—Where the owner of an estate was present, and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, and made improvements, and being afterwards ejected by the owner of the property filed a bill for the payment of the value of those improvements, the court allowed a demurrer for want of equity. *Davis* v. *Snyder*, 1 Gr. 134.

Semble, that this court in a proper case has jurisdiction to decree compensation for improvements where the vendor is unable to complete the title to the purchaser, but the court will not make such a decree where specific performance of the contract can be compelled. *Ib.*

Trustee—*Infant*—*Cestui que Trust.*]—The principle that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant cestui que trust. *Beris* v. *Boulton*, 7 Gr. 39.

——— *Buildings.*]—Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building, when an increased income can be obtained thereby. It is, however, for the trustees to determine for themselves whether the circumstances are such as to justify such expenditure, and that the amount is proper. *Re Henderson's Trusts*, 23 Gr. 45.

The court under special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 8 P. R. 389.

Uncompleted Purchase.]—A vendor who was unable to complete his contract for sale of real estate, by reason of his title being defective, had, notwithstanding, instituted proceedings at law to enforce payment of the purchase money. Thereupon the purchaser filed a bill alleging his willingness to perform the contract if a good title could be made, but that a good title could not be made; and that he had paid part of the purchase money and made improvements on the property. The court refused the plaintiff any allowance in respect of the improvements made by him. *Kilborn* v. *Workman*, 9 Gr. 255.

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

Where a purchaser died after paying three-fourths of the purchase money leaving an infant heir, who was entitled to specific performance of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. *Forsyth* v. *Johnson*, 14 Gr. 639.

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

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

See ASSESSMENT AND TAXES, X. 6—MORTGAGE, XII. 8 (a)—PARTITION, II.

IMPROVIDENCE.

See FRAUD AND MISREPRESENTATION, V. 2.

INCOME QUALIFICATION.

See PARLIAMENT, I. 12 (d).

INCUMBENT.

See CHURCH, I. 1, 2—IV. 3.

INDEMNITY.

Action on Note—*Equitable Plea.*]—An equitable plea in an action upon a note that the plaintiff had covenanted to pay defendant's debts, which he had broken, whereby defendant was damnified to an amount equal to the amount of the note, was held bad, and was struck out as embarrassing. *Griffith* v. *Griffith*, 6 P. R. 172.

Assignment of Lease—*Breach.*]—Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and according to some of the witnesses, having sanctioned the defence:—Held, that under defendant's covenant the plaintiff was entitled to recover the damages and costs in that suit, but not interest. *Spence* v. *Hector*, 24 U. C. R. 277.

Bailiff—*Enforcing Execution.*]—The plaintiff declared on a special agreement, not under seal, whereby in consideration that the plaintiff, then being a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, the defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty: that he did afterwards, as the law directed, seize and sell the crops on the said farm, by virtue of a warrant issued on said judgment, and that afterwards several persons claimed the said goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay: yet that the defendant, having notice of all this, refused to indemnify according to his agreement. A verdict having been found for the plaintiff:—Held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out not to be a legal execution of the process, and therefore that the agreement was not illegal:—Held, also, that sufficient consideration appeared for the promise. *Robertson* v. *Broadfoot*, 11 U. C. R. 407.

Bond—*Trouble and Expense.*]—A person giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify as well against the legal result of any such actions, as for the trouble and expense occasioned by them to the person to be indemnified. *Hamilton* v. *Davis*, 1 U. C. R. 176.

——*Interest.*]—See *McMahon* v. *Ingersoll*, 6 O. S. 301.

Broker—*Purchase of Bank Shares*—*Double Liability.*]—See *Boulthee* v. *Gzowski*, 28 O. R. 285; 24 A. R. 502; 29 S. C. R. 54, *ante* Vol. I., col. 855.

Costs.]—If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Meriden Britannia Co. v. Braden, 17 P. R. 77, followed. This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors where the defending solicitors continued to act upon the retainer of the guarantee company. *Walker* v. *Gurney-Tilden Co.*, 19 P. R. 12.

Covenant—*Assignment.*]—C. executed a mortgage on his lands in favour of B., with the usual covenant for payment. He afterwards sold the equity of redemption to D. who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and assigned the three respective covenants to the mortgagee, who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage:—Held, reversing 24 A. R. 492, that the mortgagee being the sole owner of the covenant of D. with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage. *McCuaig* v. *Barber*, 29 S. C. R. 126.

——*Construction.*]—Covenant to indemnify "generally and without exception" against a charterparty, which defendants had assumed:—Held, under the circumstances of the case, to mean rather without exception as to the description of claim, than as to time; and that defendants would be liable only for moneys accruing due under it during their co-partnership, and thence to the expiration of the charter. *Jones* v. *Walker*, 9 U. C. R. 136.

——*Liquidating Amount.*]—When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering:—Quære, whether, when sued on the covenant, he can dispute the liability of the covenantee to damages so recovered. *Spence* v. *Hector*, 24 U. C. R. 277.

——*Release.*]—A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from

all loss, costs, charges, and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability. *Smith* v. *Pears*, 24 A. R. 82.

Damages—*Action Quia Timet.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against unliquidated damages for an alleged breach the liabilities, contracts and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover of agreement has been brought against the firm. Mewburn v. Mackelcan, 19 A. R. 729; and Leith v. Freeland, 24 U. C. R. 132, distinguished. Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Debts—*Advances.*] — Construction of an indemnity bond, as to whether it made the obligor liable for old debts, or only for new advances from the date of the bond. *Wright* v. *Benson*, 6 U. C. R. 134.

Dissolution of Partnership—*Covenant —Construction.*] — The plaintiffs being indebted to defendant in $80,000, and to other parties (whether partnership or individual debts) in an amount not exceeding $2,160, by deed dated October, 1859, in consideration of a release of the $80,000, and of $4,000 paid, assigned to defendant all their stock in trade, book debts, and assets (except household furniture) with a covenant on defendant's part to indemnify the plaintiffs from all debts and demands not exceeding $2,160, and a further covenant by both plaintiffs and defendant for $4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed. Upon an action brought upon the covenant to indemnify, and reference to arbitration, it appeared that the defendant had paid plaintiffs' liabilities to the amount of $1,857, and claimed the sum of $356, he having settled that sum by setting off with the creditors of the plaintiffs to whom the said debts were due sums of money due from those creditors to the plaintiffs and assigned to defendant by the deed above stated:—Held, that the sum so set off ($356) was not part of the debts against which defendant had covenanted to indemnify, and that the plaintiffs were entitled to a verdict for that amount. *Rutherford* v. *Stovel*, 12 C. P. 9.

Form of Action.]—An action for money paid will not lie against a person who has engaged to indemnify another against the costs of an action brought against him for the amount of these costs, after they had been paid by the party indemnified. The action should be special on the indemnity. *Miller* v. *Munro*, 6 O. S. 166.

Fraud — *False Valuation — Indemnity to Person Injured.*]—See *Moberly* v. *Brooks*, 27 Gr. 270.

Impeaching Judgment against Plaintiff.]—Debt on a bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A. to the plaintiff, through the agency of B., and which sum was also claimed to have been paid to the plaintiff by one C., and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified of his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C., for the said sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shewn that the recovery by C. had been on admissions made by plaintiff after the execution of the bond:—Held, not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. *Powell* v. *Boulton*, 2 U. C. R. 487.

Indorsement of Notes—*Renewal.*]—The plaintiff indorsed notes for W. B., which were discounted at two different banks, and W. B. indemnified plaintiff against these indorsements by mortgage. The notes were paid when due, at these banks, with the proceeds of other notes of W. B., indorsed by plaintiff, and discounted at a third bank:—Held, that the indemnity secured the plaintiff against the last mentioned indorsements. *Burnham* v. *Burnham*, 10 Gr. 485.

Semble, that indemnity given to an indorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker, to keep the amounts of the notes outstanding. *Ib.*

Lease.]—A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and repair, the lessor sues the lessee, who sues the assignee:—Held, that case would lie for the rent and damages the plaintiff had been obliged to pay the lessor. *Ashford* v. *Hack*, 6 U. C. R. 541.

Married Woman.]—Where a married woman procured the plaintiff to indorse for her a bill of exchange, promising to indemnify him, and after the husband's death renewed the promise:—Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use. Lee v. Muggeridge, 5 Taunt. 36, held to be in effect overruled. *Dixie* v. *Worthy*, 11 U. C. R. 328.

Measure of Damages.]—W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., and an action of ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances W. executed to his vendee a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R. respecting his claim:—Held, that W.'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise. *Hart* v. *Bown*, 7 Gr. 97.

See Hamilton v. *Davis*, 1 U. C. R. 176; *Raymond* v. *Cooper*, 8 C. P. 388.

Mortgage — *Application for Summary Judgment.*]—See *Wilkes* v. *Kennedy*, 16 P. R. 204, and *Davidson* v. *Gurd*, 15 P. R. 31.

——— *Assignment of Right.*]—The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys. *Campbell* v. *Morrison*, 24 A. R. 224. Affirmed in the supreme court sub. nom. *Maloney* v. *Campbell*, 28 S. C. R. 228.

——— *Costs.*]—M. being seized in fee of land mortgaged to the plaintiff, and then sold to D. expressly subject to the mortgage. D. sold to one Maybe in the same manner, and Maybe sold to defendant, who had notice of the title, covenanting against incumbrances. The plaintiff proceeded against M. and the defendant, and obtained judgment for sale on non-payment and costs, whereupon defendant paid the plaintiff's claim for debt, interest, and costs, and took an assignment of the judgment and mortgage:—Held, that the defendant had no right under such judgment to levy from M. any portion of the costs so paid, for if he were allowed to do so, M., by the effect of the conveyance, would have a remedy over for them against the land, defendant's property, and could then force defendant to pay them back. *Kempt* v. *Macaulay*, 9 P. R. 582.

——— *Creditor's Right to Enforce.*]—A judgment creditor of a mortgagor upon covenants in the mortgage cannot obtain a receivership order to enforce payment by the purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he sue and make the application on behalf of himself and all other creditors of the mortgagor. *Palmer* v. *McKnight*, 31 O. R. 306.

The protection of 13 Eliz. c. 5 is not confined to creditors only, but extends to creditors and others who have lawful actions; and in this case, where, before the impeached conveyance was made, all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage; and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage. *Oliver* v. *McLaughlin*, 24 O. R. 41.

——— *Foreign Judgment—Bona Fides of Claim Indemnified Against.*]—See *Paisley* v. *Braddy*, 11 P. R. 202.

——— *Implied Indemnity.*] — A sale of land for $275 on which there was a mortgage for $1,100, the conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against which the vendor was entitled to be indemnified by the purchasers; and the plaintiff having acquired an assignment of such right of indemnity, he was entitled to enforce it against the purchasers. *Gooderham* v. *Moore*, 31 O. R. 86.

——— *Interest—Division Court Jurisdiction.*]—Sub-section 2 of s. 79 R. S. O. 1897 c. 60, permitting separate actions for principal and interest on a mortgage, applies only to an action brought upon the mortgage by a person to whom the money is payable thereon, and does not apply to an action brought by the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it. *Re Real Estate Loan Co.* v. *Guardhouse*, 29 O. R. 602.

——— *Married Woman.*]—The equitable obligation does not arise as against a married woman purchasing land subject to mortgage. *McMichael* v. *Wilkie*, 18 A. R. 464.

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon and a covenant to the same effect with the vendor, his executors, administrators, and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate. *Small* v. *Thompson*, 28 S. C. R. 219.

——— *Nominee of Purchaser — Mesne Purchasers.*] — The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore where at the request of the actual purchaser the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor. It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title. Application of con. rules 328, 329, 330, 331, 332, discussed. Lockie v. Tennant, 5 O. R. 52, approved. *Walker* v. *Dickson*, 20 A. R. 96.

——— *Purchaser Trustee for Third Person.*]—L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon; C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property C. F. was brought in as third party to

indemnify L. F., his vendor, against a judgment in said action:—Held, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf but for the company, and the company and not C. F. was liable to indemnify the vendor. *Fraser* v. *Fairbanks*, 23 S. C. R. 79.

——— *Rebuttable Presumption.*]—When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract. Waring v. Ward, 7 Ves. 332, explained. *Beatty* v. *Fitzsimmons*, 23 O. R. 245.

Although when a mortgagor conveys his equity of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary. A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter. *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664.

Replevin Bond.]—The consolidated rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the statute 48 Vict. c. 13, s. 8 (O.), imported into the rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff. *Harper* v. *Toronto Type Foundry Co.*, 31 O. R. 422.

Right of Action—*Payment.*] — Upon a bond by the retiring partner on a dissolution, conditioned to save harmless and keep indemnified the continuing partner against all actions, charges, damages, &c., which might be commenced against him, or which he might have to pay or become subject or liable to, by reason of the debts of the late firm:—Held, that the obligee was entitled to recover the full amount of judgments obtained against him afterwards for partnership debts, though he had paid nothing on them:—Held, also, that the facts stated in the case with regard to one of the judgments formed no ground for diminishing the amount to be recovered against defendants on account of it. *Smith* v. *Teer*, 21 U. C. R. 412.

The plaintiff and M. having been in partnership, on its dissolution M., with the two other defendants, agreed to pay the debts of the firm, and to relieve the plaintiff therefrom; in consideration of which the plaintiff assigned to defendants all accounts, &c., due to the firm. In an action against defendants for certain debts due by the firm, which the plaintiff alleged defendants had not paid, and for some of which the plaintiff had been sued, and judgment recovered; — Held, that the plaintiff had no right of action unless he had himself paid such debts. *Gray* v. *McMillan*, 22 U. C. R. 456.

Where A. is liable to pay B. a certain sum on a particular day and C. covenants with A. to pay it, A. on default may recover the whole sum from C., although he has paid nothing. The plaintiff conveyed land to B. subject to a mortgage to one S., which contained a covenant to release in parcels. The plaintiff had previously sold to N. part of the land mortgaged, and B. agreed to release this part by a day named, and pay off the mortgage as it should fall due. Defendant gave his bond to plaintiff conditioned that B. should do this. To an action on the bond, averring B.'s default in both respects, defendant pleaded, on equitable grounds, that the bond was given only to indemnify the plaintiff from damage by B.'s non-performance; that the plaintiff had not paid or been called upon to pay anything, and had suffered no damage; that the defendant was ready to indemnify him according to the true meaning of the bond; and that he ought not in equity to enforce it until he had been damnified:—Held, on demurrer, no defence:—Held, also, that such a bond was clearly within 8 & 9 Wm. III. c. 11. *Leith* v. *Freeland*, 24 U. C. R. 133.

A party giving an absolute covenant for title, and a bond conditioned to pay off a mortgage upon the land by a day named, is liable for the amount of the mortgage, though no legal proceedings have been taken on it by which the party is damnified. *Carlisle* v. *Orde*, 7 C. P. 456.

Held, that the value of goods sold under a judgment recovered upon a mortgage made by the plaintiffs, against which they held a bond of indemnity from defendants, did not form the measure of damages, but they were held entitled to recover the amount of such judgment. *Raymond* v. *Cooper*, 8 C. P. 388.

Held, also, that the action accrued on the bond upon defendants' default, according to the covenant in the mortgage, and it was not necessary to shew a payment. *Ib.*

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

The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should save, defend, and keep harmless and fully indemnify the plaintiff from all loss, costs, charges, damages, and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non-payment by the husband of the liabilities of the firm as

the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm." Judgments were recovered by creditors of the firm against them, and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them:—Held, that he was entitled to have the judgments and costs paid, and the amounts necessary were for that purpose ordered to be paid into court by the defendants. *Boyd* v. *Robinson*, 20 O. R. 304.

Under a bond conditioned to be void if the person on whose behalf it is given "shall indemnify and save harmless (the obligee) from payment of all liability of every nature and kind whatsoever," a right of action against the sureties arises in favour of the obligee as soon as judgment is recovered against him on a claim coming within the security. Payment of such claim by him is not a condition precedent. Boyd v. Robinson, 20 O. R. 404, approved. *Mewburn* v. *Maclellan*, 19 A. R. 729.

Sheriff—*Attorney's Undertaking.*]—Held, that a promise of indemnity to a sheriff by an attorney is binding on his client, when the attorney had the conduct of the suit in the course of which the promise was made, and the subsequent acts of the client shewed that he had adopted the attorney's proceedings. *Muirhead* v. *Shirreff*, 14 S. C. R. 735.

——— *Oral Undertaking.*]—Sheriffs recommended to take precise written engagements from attorneys when they mean to hold them liable in cases they had nothing to do with except professionally, though the court, where the attorney has orally agreed to indemnify, if the agreement is admitted, will enforce it. *In re Corbett* v. *O'Reilly*, 8 U. C. R. 130.

——— *Trespass.*]—A person who indemnifies the sheriff for seizing goods does not by that act become liable as a trespasser. *McLeod* v. *Fortune*, 19 U. C. R. 98.

See Corbett v. *Hopkirk*, 9 U. C. R. 479; *Fortune* v. *Cockburn*, 22 U. C. R. 359; *Donnelly* v. *Hall*, 7 O. R. 581.

Special Agreement.] — See *Boulton* v. *Boulton*, 28 S. C. R. 592; *Crooks* v. *Torrance*, 6 Gr. 518, 8 Gr. 220.

Statute of Limitations.]—Where in assumpsit on a promise to indemnify, the defendant pleaded that more than six years had elapsed since the promise accrued, the plea was held bad on general demurrer. *Ives* v. *Ives*, T. T. 3 & 4 Vict.

Third Party—*Action for Negligence.*]—The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity:—Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged. An order was therefore made in chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

In an action to recover damages for injuries sustained by the plaintiff in the defendants' factory in October, 1897, the negligence charged was that there was a defect in the lugs holding fast the doors of a retort, whereby they were broken by the force of steam, and the plaintiff thereby injured by the escape of hot air, &c., and that the retort was dangerous because not furnished with a safety valve, whereby the lugs were exposed to an undue pressure of steam. The defendants sought to bring in as third parties the manufacturers of the retort, which was made in January, 1896, under written contracts, which contained no warranty, and from which it appeared that the defendants undertook to provide and put in their own fittings, including the safety valve:—Held, that the object of the rules permitting a third party to be brought into an action is to prevent the same question, common as between the plaintiff and defendant and the defendant and the third party, from being tried on different occasions and in different forums, and there was no such identity here; there could be no claim for indemnity against the manufacturers; if the defendants could recover at all, their damages would be assessed on a different principle from those of the plaintiff; and no relief over could be obtained. *Wilson* v. *Boulter*, 18 P. R. 107.

——— *Agreement.*]—The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs:—Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within rule 209; and therefore the defendants should not have been allowed to serve a third party notice. Held, also, that the proper practice in moving against a third party notice, is to move without entering an appearance. Leave to appeal refused. *Windsor Fair Grounds and Driving Park Association* v. *Highland Park Club*, 19 P. R. 130.

——— *Breach of Contract.*]—Rule 328 applies only to claims to indemnity as such, either at law or in equity, and does

not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself. Birmingham and District Land Co. v. London and North-Western R. W. Co., 34 Ch. D. 261, followed. Page v. Midland R. W. Co., [1894] 1 Ch. 11, distinguished. And where an action was brought against lessees of a road for a declaration that they had no right to exact tolls, &c., and the defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease:—Held, not a case in which leave should be given to issue a third party notice. *Payne* v. *Caughell*, 17 P. R. 39.

——— *Costs.*] — The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs:—Held, that the defendants were entitled to be paid by the third parties their costs of defence to be taxed between solicitor and client, and their costs of the claim over against the third parties to be taxed between party and party. Hartas v. Scarborough, 33 Sol. J. 661, followed. *King* v. *Federal Life Assurance Co.*, 17 P. R. 65.

——— *Counterclaim.*]—In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he had failed to carry out and had afterwards assigned the mortgage to the plaintiff, his wife:—Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee, within the meaning of that word as used in rule 328, as amended by rule 1313; and a third party notice served upon him was set aside. Semble, a proper case for a counterclaim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

——— *Deceased Partner — Action against Surviving Partner.*]—At law, as well as in equity, before the Judicature Act, a partnership debt was in strictness, joint and not several, and up the death of one partner the only liability existing at law was that of the surviving partner; the estate of the deceased partner being only made available through the equities existing in favour of the surviving partner, which the partnership creditors were allowed to make use of; and the act has not converted into a joint and several debt that which had theretofore been merely joint. Kendall v. Hamilton, 4 App. Cas. 504, and In re Hodgson, 31 Ch. D. 177, followed. And in an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner. Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over in respect of the plaintiffs' claim, must be made in the administration proceedings and not in the action under the third party procedure. Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her as a security to him against his liability to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of the instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party. *Campbell* v. *Farley*, 18 P. R. 97.

Trustee—*Right of Mortgagee to Enforce Right of Indemnity Between Trustee and Cestui que Trust.*]—Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his cestui que trust. *Williams* v. *Balfour*, 18 S. C. R. 472.

Unlawful Act.]—Held, that the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as, for instance, in this case, of a wrongful distress; and that the plaintiff could not be allowed to impeach the judgment of a competent court by which he was held to be a wrongdoer. *Irwin* v. *Township of Mariposa*, 22 C. P. 367.

Vendor and Purchaser—*Mortgage.*]—Declaration on a bond conditioned to convey to the plaintiffs, within three months, a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1. not conveying within three months; 2. an eviction by one O. S. G. under a mortgage derived from defendants. Pleas, to the first breach, that said steamboat was mortgaged to J. H. C. at the execution of the bond, for the same amount as plaintiffs had agreed to pay defendants, and that defendants had handed him the notes given by plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiffs thereupon discharged defendants from procuring such conveyance. Plea, to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an incumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corby* v. *Cotton*, 7 C. P. 209.

See BILLS OF EXCHANGE, II.—MORTGAGE, XII. 10 (a) — MUNICIPAL CORPORATIONS, XVIII.—PRINCIPAL AND AGENT, VIII. 2—PRINCIPAL AND SURETY, VI.—SHERIFF, X.—VENDOR AND PURCHASER, VII. 5.

INDIAN.

I. In General, 3133.

II. Indian Lands, 3134.

I. In General.

Action against and by.]—A debt contracted by an Indian while C. S. C. c. 9 was in force, cannot be sued for under 32 & 33 Vict. c. 6. *McKinnon* v. *VanEvery*, 5 P. R. 284.

Quære, whether a judgment can be obtained against an Indian even under the latter Act. *Ib.*

On an application which was granted under rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve:—Held, that since the repeal of C. S. C. c. 9 there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, s. 77 (19), the judgment will not bind any property of the Indian except that described in s. 75. *Bruce* v. *Salt*, 11 P. R. 112.

Canada Temperance Act.]—As to right of electors on Indian lands to vote under Canada Temperance Act, 1878. *Regina* v. *Shaw-cheer*, 11 O. R. 727.

The Canada Temperance Act can have no operation where the Indian Act is in force. *Re Metcalfe*, 17 O. R. 357.

Half-breed Claims.]—Claims of half-breeds. See *Burns* v. *Young*, 10 A. R. 215.

Indian Act—*Appeal.*]—The words "appeal brought" in s. 108 of the Indian Act, R. S. C. c. 43, are satisfied by the giving of notice and perfecting the appeal by the giving of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant from a conviction under that Act to bring his appeal to a hearing within the time limited by s. 108. In re Hunter v. Griffiths, 7 P. R. 86, not followed. Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute. *Regina* v. *McGauley*, 12 P. R. 259.

Intoxicating Liquors — *Sale to Indian.*]—See that title.

Municipal Office.]—An Indian who is a British subject, and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount) has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving as an Indian a portion of the annual payments from the common property of his tribe. *Regina ex rel. Gibb* v. *White*, 5 P. R. 315.

Murder—*Pagan Indian—Delusion.*]—See *Regina* v. *Machekequonabe*, 28 O. R. 309.

Treaties — *Contingent Annuities.*]—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently, should be taken into account and included in the debt of the late Province of Canada mentioned in s. 112 of the British North America Act, 1867:—Held, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of Attorney-General of Canada v. Attorney-General of Ontario [1897] A. C. 199, and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec* v. *Dominion of Canada, In re Indian Claims*, 30 S. C. R. 151.

Will—*Male or Female Indian.*]—An Indian, male or female, may make a will, and may by such will dispose of real or personal property, subject to the provisions of the Indian Act, R. S. C. c. 43, or other statute. Quære, whether the last part of s. 20 of the Indian Act, R. S. C. c. 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male, or female, to the superintendent-general, so that his decision, and not that of the court, should determine such questions. *Johnson* v. *Jones*, 26 O. R. 109.

Witness—*Form of Oath.*]—On a trial for murder, an Indian witness was offered, and on his examination by the Judge it appeared that he was not a christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a supreme being who created all things, and in a future state of rewards or punishments according to their conduct in this life. He was then sworn in the ordinary way:—Held, that his evidence was admissible. *Regina* v. *Pah-Muh-Gay*, 20 U. C. R. 195.

II. Indian Lands.

Action for Seizing Lumber.]—An action against a commissioner of Indian affairs for seizing and selling lumber cut on Indian land must be brought within six months from the seizure, not from the sale. *Jones* v. *Bain*, 12 U. C. R. 550.

Agent for Sale.]—The agent for the disposing of the Indian lands on the Grand river does not come under the designation of a district agent of the commissioner of Crown lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sale Acts. *Young* v. *Scobie*, 10 U. C. R. 372.

Animals Running at Large.]—Application to quash a by-law regulating animals running at large in municipalities in which are situate Indian lands. See *In re Millay and Township of Onondaga*, 6 O. R. 573.

Dominion and Provincial Rights.]—Section 109 of the British North America Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown subject to such rights as the Dominion can maintain under ss. 108 and 117. Attorney-General of Ontario v. Mercer, 8 App. Cas. 767, followed. By royal proclamation in 1763, possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as not having been ceded to or purchased by the Crown were reserved "for the present" to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing:—Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the good will of the Crown; that the lands were thereby, and at the time of the Union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the Province in the same," within the meaning of s. 109. Held, also, that by force of the said surrender the certain beneficial interest in the lands subject to the privilege was transmitted to the Province in the terms of s. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. Judgments in courts below 13 S. C. R. 577; 13 A. R. 148; 10 O. R. 196, affirmed. *St. Catharine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46.

Evidence of Non-cession.] — Under 2 Vict. c. 15, s. 1, parol testimony by one witness, deposing, to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to Her Majesty, is sufficient primâ facie evidence of these facts. *Regina* v. *Strong*, 1 Gr. 302; *Regina* v. *Johnston*, *ib.*, 409.

Farming Land on Shares.]—Defendant entered into a verbal agreement to farm the land of an Indian woman on shares for five years, and took possession. He was found guilty of a misdemeanour under 13 & 14 Vict. c. 74. *Regina* v. *Hagar*, 7 C. P. 380.

Form of Conviction.]—Form of conviction by commissioners appointed under 2 Vict. c. 15, for illegally taking possession of Indian lands. *Little* v. *Keating*, 6 O. S. 265.

Semble, that the recital in a warrant by the commissioners, under the Act, to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *Ib.*

Grant by Governor.]—A grant of lands, in 1784, by the then governor of the Province of Quebec, and under his seal at arms, to the Mohawk Indians and others, conveyed no legal estate: 1. as not being by letters patent under the great seal: 2. for want of a grantee or grantees capable of holding. *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. 105.

Hay—*Costs.*] — The defendant was convicted for moving hay from Indian lands contrary to s. 26 of the Indian Act, R. S. C. c. 43:—Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated. Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in the conviction the costs of commitment and conveying to jail. *Regina* v. *Good*, 17 O. R. 725.

Indian Roads.]—The 12th clause of the Highway Act, 50 Geo. III. c. 1, cannot be taken to mean that every bye-road or short cut, used by the Indians across the plain or flats, is to be established as a permanent highway. It only means that roads which, under the provisions of that Act, are to acquire the character of legal highways, should have that same legal character where they pass through Indian lands as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, nor had any public money expended or statute labour performed on them. *Byrnes* v. *Bowen*, 8 U. C. R. 181.

Indian Superintendent Acting as Justice of the Peace.]—Held, that the defendant, who was a visiting superintendent and commissioner of Indian affairs for the Brant and Haldimand reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian reserve in the county of Brant. *Hunter* v. *Gilkison*, 7 O. R. 735.

Inquisition.]—Where an inquisition had been found against defendant, under our statute 54 Geo. III. c. 9, the court refused to set the same aside on the ground that the lands vested in the Crown thereby had been granted by the Mohawk Indians to defendant for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children. *Rex* v. *Phelps*, Tay. 47.

Lease by Chief of Tribe.]—Held, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorized agent in the name and on behalf of the tribe, shewed no power in him so to act; and therefore a lease signed by him as agent, &c., conveyed nothing. And, consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, and vested in the commissioners of forfeited estates, under 59 Geo. III. c. 12. *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. 105.

Liquor License Act.] — The Liquor License Act applies to Indian land under lease from the Crown to a private individual. *Regina* v. *Duquette*, 9 P. R. 29.

Negativing Exceptions.]—In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners, under 2 Vict. c. 15, and 12 Vict. c. 9, or by express evidence, to negative the exceptions specified in the latter of these statutes. The finding of the commissioners, under these statutes, is not bad for not adjudging that possession should be relinquished by the trespasser. *Regina* v. *Strong*, 1 Gr. 392.

Purchase — *Conviction.*] — 13 & 14 Vict. c. 74 prohibits the buying or contracting to buy from Indians, not merely any lands of which they are in actual possession, but any lands held by the government for their use or benefit; but, quære, whether the clauses of the Act relating to trespasses on Indian lands extend to any lands not actually possessed by them. Held, that the indictment in this case, after verdict, sufficiently averred the lands purchased by defendant to be Indian lands, i.e., lands held by the Crown for them; and, quære, whether the Act extends only to lands so held, or as well to the lands purchased by Indians from individuals. Held, also, that no variance was shewn between the land described in the indictment and that which the defendant was proved to have contracted for. Held, also, no objection that the purchase was alleged to have been from certain Indians named, whereas it was in fact from the tribe through their council. Held, also, that the evidence in this case was sufficient to sustain the conviction. Semble, that the meaning of the statute is, that no one shall attempt to bargain with the Indians for the purchase of their lands until he has first obtained the consent of the government, and that it is therefore contrary to the Act to make even a conditional agreement, subject to their approval; the proposal should be made to government in the first instance. *Regina* v. *Baby*, 12 U. C. R. 346.

Rescission of Contract.]—A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand river, and to set aside the assignment executed in pursuance thereof, on the ground of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands:—Held, that as the whole estate both legal and equitable was in the Crown, it was not a case in which the court would interfere even if the plaintiff had established the case stated in the bill by evidence. *Bown* v. *West*, 1 O. S. 287.

Selling Wood.] — An Indian may sell cordwood cut by him on unsurrendered Indian reserve land, of which he was in occupation as a member of the tribe. *Fegan* v. *McLean*, 29 U. C. R. 202.

Surrender of Indian Lands — *Precious Metals.*]—A treaty of surrender of Indian territory to the Dominion of Canada in 1873, provided that certain lesser reserves in the lands surrendered, were to be defined and set apart, and thereafter to be administered and dealt with, and with the consent of the Indians first obtained, sold, leased, or otherwise disposed of by the Dominion for the benefit of the Indians. Part of one of these lesser reserves so set apart, and situate in the Province of Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880, 43 Vict. c. 28 (D.), in trust to sell the same upon such terms as the Dominion might deem most conducive to the welfare of the Indians; and of this, the lands in question were patented by the Dominion to the plaintiffs, including the precious metals therein. The defendants asserted title in fee to the same lands by virtue of an Ontario patent of 1889. It appeared that in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited:—Held, that after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario. Semble, a Province is not to be held bound by alleged acts of acquiescence of various departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government and are not manifested by any order in council or other authentic testimony. *Ontario Mining Co.* v. *Seybold*, 31 O. R. 386.

Timber—*Larceny.*]—The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 66 (D.), and was convicted:—Held, that he ought not to have been convicted, because, per Armour, J., the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, per O'Connor, J., the affidavit required by s. 64, had not been made, and was a condition precedent to a seizure. *Regina* v. *Fearman*, 10 O. R. 660.

But see *Regina* v. *Johnson*, 8 C. L. T. Occ. N. 334.

Timber Act.]—The Act respecting Indian lands, 23 Vict. c. 151, authorized the governor in council to declare applicable thereto the Act respecting timber on public lands. An order in council was issued accordingly. Eight years afterwards another Act was passed, 31 Vict. c. 42, which contained a clause authorizing the governor in council to declare the Timber Act applicable to Indian lands, and to repeal any such order in council and substitute others and another clause authorizing the governor in council to make regulations and impose penalties for the sale and protection of timber on Indian lands:—Held, that the Timber Act continued in force until revoked or altered by a new order in council. *Attorney-General* v. *Fowlds*, 18 Gr. 433.

Timber Cut by Indians.]—Semble, that the commissioners for restraining trespasses on Indian lands are not authorized to seize and sell timber cut by the Indians themselves, or by white people with their consent. *Vanvleck* v. *Stewart*, 19 U. C. R. 489.

Title in Individual.] — 13 & 14 Vict. c. 74, which prohibits the sale of land by Indians, applies only to lands reserved for

their occupation, and of which the title is still in the Crown, not to lands to which any individual Indian has acquired a title. *Totton* v. *Watson*, 15 U. C. R. 392.

Trespass—*Conviction.*] — Commissioners appointed under 2 Vict. c. 15, for the protection of the lands of the Crown in this Province from trespass and injury, to receive informations and inquire into complaints that may be made to them against any person for illegally possessing himself of the lands, must shew upon the face of a conviction by them under that Act, that the lands of which illegal possession had been taken had been actually occupied and claimed by some tribe or tribes of Indians, and for the cession of which no agreement had been made with the government. A conviction alleging that the party convicted had unlawfully possessed himself of Crown lands is bad, as they have no general jurisdiction over such lands. *Little* v. *Keating*, 6 O. S. 265.

Semble, that the recital in a warrant by the commissioners under the Act to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *S. C., ib.* 270.

See CONSTITUTIONAL LAW, II. 13 — INTOXICATING LIQUORS, V. 2.

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See CERTIORARI, II. 1—CRIMINAL LAW, VIII. 4—NUISANCE, III.—WAY, V. 1.

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I. CUSTODY.

Agent of Father.]—The father of the infant children (under 12 years of age) was a Protestant, and the mother a Roman Catholic. She left him, taking the children, alleging cruelty on his part, and they both made statements complaining of each other's conduct. The husband afterwards took the children from her, placed them in the care of a Presbyterian minister (the respondent), and left the country, it was said for a temporary purpose. On an application by the mother for the custody of the children:—Held, that she could not, under the circumstances, succeed against the father of the children; and therefore could not get an order against the respondent, his custody being that of the father. *In re Ross*, 6 P. R. 285.

Children's Protection Act—*Appeal.*]—There is no appeal to the general sessions from an order for the custody and care of children under s. 13 and subsequent sections of 56 Vict. c. 45 (O.), "An Act for the Prevention of cruelty to and better Protection of Children," made by two justices of the peace sitting under s. 2 of 58 Vict. c. 52 (O.), amending the former Act. *In re Granger and Children's Aid Society of Kingston*, 28 O. R. 555.

Compliance with Order.]—The order of the court commanding the wife to deliver the child to the husband, is sufficiently complied with by her placing the child in charge of the husband. If the child return of her own will to the mother, and is not afterwards forcibly detained, the court will not further interfere. *Regina* v. *Sheriff*, 7 U. C. R. 403.

Discretion of Court.] — On the application of a husband against his wife for a writ of habeas corpus in respect of their three children, two of them being above twelve years of age, and therefore not being within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income:—Held, that the courts below exercised a right discretion in discharging the writ and remanding the children to the custody of their mother. The father's legal power was controlled as to the youngest child by a statute which gave absolute authority to the court; it was materially affected as regards the other two by breach of marital duty, by consideration with respect to their welfare, and the objection to separating them from

each other. *Smart* v. *Smart*, [1892] A. C. 425.

Election by Infant.]—A girl aged thirteen years and ten months, who had lived with her aunt from her infancy, was allowed, on an application by her father for her custody, on allegations that she was ill-treated by her aunt, to elect whether she would remain with her aunt, or go to her father. *In re Kinne*, 5 P. R. 184.

Semble, that if the child had recently left or been taken away from her father, she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen. *Ib.*

Enforcement of Order—*Maternal Right — Separation Deed.*]—A married woman living apart from her husband, petitioned under C. S. U. C. c 74, s. 8, for the custody of her children under the age of 12. A deed of separation was also filed executed between them in 1852, which gave her the sole control of her children, then or thereafter to be born. An ex parte order was made upon the ground stated in the petition, verified by affidavits, for the delivery of the children to the petitioner, which order upon a subsequent application the Judge refused to rescind. Numerous affidavits were filed on both sides, the substance of which appears in the report. A writ of attachment for contempt in not obeying the original order was by order of the Judge issued from the court of Queen's bench; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it, he could not be heard; but:—Held, that he might nevertheless defend himself by objections to the process if irregular:—Held, 1, that an appeal would lie to the court from the Judge's order. The cases in, and the principles upon which, an appeal is or is not allowed, reviewed; 2, that admitting the right to make an ex parte order in case of necessity, no sufficient ground was shewn for it here; 3, that the facts had not been properly stated in the first application, the real reason for the applicant leaving her husband's house and the arrangement then made between them having been withheld; 4, that the subsequent hearing of both sides upon the merits, did not preclude him from taking advantage of these objections against the original order, which was therefore set aside. Per A. Wilson, J., that upon the whole case enough was not shewn to warrant an order for depriving the father of the custody of the children; and the deed of 1852 could not be given effect to as regarded children born by a cohabitation renewed after it and continued ever since. In reply to the affidavits filed by the wife in shewing cause to the summons to rescind the first order, the husband desired to file affidavits in answer to the recriminatory charges which had been made on her part; but the learned Judge refused this. Per A. Wilson, J., this was a matter within his discretion. *In re Allen, Regina* v. *Allen*, 31 U. C. R. 458; 5 P. R. 443.

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order, it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so if time were given him. To the demand made for the children, the father replied that they were not in his custody:—Held, that he was not excused from obeying the order, and was in contempt. *Regina* v. *Allen*, 5 P. R. 453.

Father — *Access by Mother—Religion.*]—A father having secreted two of his children, aged respectively eight and eleven years, from their mother to prevent their being brought up in the Roman Catholic religion, to which she belonged, upon the petition of the mother under C. S. U. C. c. 74, praying for the custody of the children, the court ordered that the husband should disclose the whereabouts of the younger child, and that the petitioner should be allowed access to him four times a year in the presence of the master of the school where he was being educated. As the other child was nearly twelve years of age, no order was made as to him. *Re Keith, Keith* v. *Keith, Keith* v. *Lynch*, 7 P. R. 138.

——— *Incapacity to Support.*]—While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts. Under the circumstances of this case, stated in the report, the court refused on the application of the father, to take the child out of the custody of its grandmother and her brother-in-law. *Re Ferguson*, 8 P. R. 556.

——— *Intemperate Habits — Religious Training.*]—Upon an application by the father of two infants under the ages of five and three respectively, for a habeas corpus to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill-treated her that she was justified in leaving him, while she was a moral and sober woman. It was also shewn that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so:—Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present. *Re Dickson Infants*, 12 P. R. 659.

It was urged that the father had a right to have the children brought up as Presbyterians, and that the mother and her mother were both members of the Salvation Army:—Held, that this question was not a pressing one owing to the tender age of the infants; the father might raise it again. *Ib.*

Held, also, that having regard to the wide discretion given by R. S. O. 1887 c. 137, s. 1, the Judge was freed from any possible obligation to make, upon the application of the father an order which would be reversed on the application of the mother. *Ib.*

Father's Agreement.]—Where a father enters into a contract whereby he parts with the custody and control of his child, with the bonâ fide intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy; and although, where such a contract is executory on both sides, the court cannot decree specific

performance, by reason of the want of mutuality, yet where the contract has been faithfully performed so far as the father and child are concerned, so that their status has become altered, the court will, if possible, enforce in specie the performance of the contract by the other party to it. *Roberts* v. *Hall*, 1 O. R. 388.

Where, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter, the plaintiff, then six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was bonâ fide intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will:—Held, that the agreement could be enforced against H.'s representative, and that it must be decreed accordingly:—Held, also, that inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name. *Ib.*

Father's Direction.]—A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining 21 years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother, or in the event of the death of his mother, then that she should in like manner reside with his sister; and in the event of the death of his sister before the period named, he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions, he devised the estate to other parties. On a bill filed to obtain the construction of the will, the court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a court of equity could afford no relief; and that the estate devised to the daughter, unless the conditions were complied with, would be forfeited. A wife had obtained from the court an order giving to her the custody of her infant daughter, until she had attained the age of 12 years:—Held, that this did not prevent the father of the infant appointing testamentary guardians of the infant. *Davis* v. *McCaffrey*, 21 Gr. 554.

Foreign Divorce.]—The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the United States courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that, by the law of the State of Michigan, she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of 12 years, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive (23 Vict. c. 24), it was competent to consider the "cause assigned" by the father; and so it was held (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, should not, under the present facts, have it re-delivered to her. *In re Kinney*, 6 P. R. 245.

———*British Subjects.*]—The parents of a child seven years old, British subjects and married in this Province, where the child was born, removed to the United States, where the husband took out naturalization papers. In consequence of the husband's alleged intemperance and adultery, the wife left him, and on the ground of such adultery, she applied to the court there and obtained a decree granting her a divorce, and the custody of the child. Shortly before the decree was pronounced, and with the object of escaping its effect, the husband returned to this Province, bringing the child with him. On an application by the wife for the custody of the child an order was made granting her such custody. *Re Davis*, 25 O. R. 579.

Form of Application.]—Quære, as to the proper form of application to the court, as against the mother, by the father, for the custody of his child. *Regina* v. *Sheriff*, 6 U. C. R. 197.

On a bill by a wife for alimony and the custody of children who are under twelve years of age, the court has jurisdiction to grant the latter relief without petition. *Munro* v. *Munro*, 15 Gr. 431.

Guardian.]—This court will, upon the petition of the guardian duly appointed by the court of probate or surrogate, interfere summarily, and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending in court respecting the infant's estate. *Re Gillrie*, 3 Gr. 279.

Habeas Corpus—*Return.*]—A return was made by the mother of the infants, in whose custody they were, to a writ of habeas corpus obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. 1877 c. 130, s. 1:—Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law. Re Murdoch, 9 P. R. 132, explained and followed. *Re Smart Infants*, 11 P. R. 482.

——— *Substitution of Petition.*]—A father was proceeding by habeas corpus to obtain an order awarding him the custody of his infant children (see 12 P. R. 2):—Held, that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the habeas corpus proceedings. Such a direction

was given where it appeared to be in the interest of the infants and all concerned. *Re Smart Infants*, 12 P. R. 312.

The order was affirmed by a divisional court with one variation, viz., the habeas corpus to run concurrently with the petition and to be disposed of with it. *S. C., ib.* 435.

This order, 12 P. R. 435, was affirmed on appeal. Held, that the infant's father had waived his right to appeal from the order directing the filing of a petition by having complied with such order. Semble, but for the waiver of the appeal the father must have succeeded; for the power given by rule 474, O. J. A., is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular. *S. C., ib.* 435.

Illegitimate Child.]—Custody of illegitimate child. See BASTARD.

Married Minor.]—Where it appeared doubtful whether a minor was under or over sixteen, and she had been married by license with her own consent, the court refused to restore her to the custody of the applicant, with whom she had been living as an adopted child for some time previous to her marriage, but who was neither her parent nor guardian. Semble, that the English Marriage Act, 26 Geo. II. c. 33, is not in force here. *Regina v. Bell*, 15 U. C. R. 287.

Maternal Right — *Discretion.*] — The court has an absolute right in its discretion to give the custody of a child under twelve to the mother. *Re Davis*, 3 Ch. Ch. 277.

The court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding that the court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable, and the Judge is not prepared to say that he disbelieves such statement. *Ib.*

Mother—*Second Marriage.*]—The mother of a child six years of age, whose father was dead, having remarried, delivered up the child to a cousin for nurture and adoption. No written agreement was made and the parties differed as to the oral understanding—Held, that the court looking only to the best interests of the child, should refuse to direct its redelivery to the mother. The fact of the mother having remarried, and having children by both husbands, and that the child would be under the custody of a stepfather, was regarded as one ground for the non-interference of the court. *In re Scott*, 8 P. R. 58.

Paternal Right—*Discretion of Court.*]—Where a husband has done no wrong and is able and willing to support his wife and child, the court will not take away from him the custody of his infant child merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the court over the custody of infants, by R. S. O. 1897 c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit. In re Agar-Ellis, 10 Ch. D. 49, 71, and In re Newton, [1896] 1 Ch. 740, specially referred to. And where a wife, without any other reason than that she was tired of living in the country to which her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times. *Re Mathieu*, 29 O. R. 546.

——— *General Rule.*]—The court of chancery has not heretofore interfered, and courts of common law will not (subject to C. S. U. C. c. 74, s. 8), interfere to deprive the father of his exclusive common law right to the custody of the children, except in cases where it is essential to their welfare and well-being, either physically, intellectually, or morally, that they should so interfere. It is not sufficient for the mother, claiming children as against their father, to allege that he holds what she calls dangerous and fanatical religious views (in this case those of the Swedenborgians). Nor will a child, even though within the year of nurture, be delivered up to the mother under that Act, s. 8, unless she establishes such a case as would justify her in leaving her husband's home. *In re Carswell*, 6 P. R. 240.

Religious Faith of Father—*Testamentary Guardian.*]—Orphan children having been clandestinely taken from the custody of their uncle, the testamentary guardian under the will of their father, who had predeceased his wife, by their aunt, a Roman Catholic, claiming guardianship under an invalid instrument in her favour, signed by the mother of the children, and it appearing that their father, a Protestant, had desired the children to be brought up in his own faith, an order was made for their delivery to the custody of their uncle as testamentary guardian. *Re Chilman*, 25 O. R. 268.

Religious Training.]—It is the duty of the court to see that an infant is brought up in the faith of his or her father, but the mere fact that an infant was the child of parents belonging to the Presbyterian Church, and that she had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the master's ruling approving of her being placed and educated at a seminary, the proprietress of which was a member of the Church of England, it being shewn that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was the probability of a stricter personal supervision by the proprietress than at a public institution in another part of the country which was in connection with the Presbyterian Church in Canada. *MacNabb v. McInnes*, 25 Gr. 144.

Separation of Children.]—The provision of R. S. O. 1897 c. 168, s. 1, with regard to the custody of infants, recognizes the maternal as well as the paternal right, and requires equal regard to be paid to the wishes of the mother as to those of the father; and thus,

where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare of the children. And where the father was guilty of adultery with a servant in his house, and of making unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and at times cruel to her and them:—Held, upon habeas corpus proceedings taken by the father and petition for custody by the mother, that it was for the welfare at least of the children under five years that they should remain in their mother's custody, and, as it would be wrong to divide the custody, all the children, the eldest being fifteen, should remain in the custody of the mother. The difference between the law of England and that of this Province specially referred to. *Re Young*, 29 O. R. 665.

Separation of Parents.]—Where a wife had left her husband and gone to reside with her father, taking with her her infant child of about seven years old, and the husband obtained writs of habeas corpus to his wife's father to bring up her body, and to his wife to bring up the child, the court refused, on the return of the father and daughter to the respective writs that the husband had ill-treated his wife and child, to make any order that they should be delivered to him, but informed the wife that she was at liberty to go wherever she pleased, and to take the child with her. *Regina* v. *Baxter*, *Regina* v. *Snooks*, 2 U. C. R. 370.

Upon an application by the mother, under C. S. U. C. c. 74, s. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated:—Held, that the statute does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree, also to interest of the child. If, therefore, upon an application of this kind, it appear that the husband and wife are living apart, the court will inquire into the cause of their separation, in order to ascertain (1) whether the husband has forfeited, by breach of his marital duties, this prima facie right to the possession of his child, (2) and whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended to protect wives from the tyranny of their husbands who ill-use them. *In re Leigh*, 5 P. R. 402.

Where the father and mother of a female child under five years of age were living apart, the court refused, under the circumstances stated in the judgment, to take the child out of the custody of the mother, but allowed the father to have access to the child at stated times. *In re Murdoch*, 9 P. R. 132.

See sub-title III., *post*.

II. Estate.

1. *In General.*

Conversion.]—The principle of s. 56 of C. S. U. C. c. 12, relating to the conversion of infants' estate sold under that Act, is also applicable to all cases where it is necessary for collateral purposes to effect a conversion of an infant's estate from realty into personalty, the rule of the court in all such cases being, that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134.

Conveyance to Railway.]—Interest of infants in land, barred by a conveyance to a railway company by their mother who was part owner. See *Dunlop* v. *Canada Central R. W. Co.*, 45 U. C. R. 74.

Execution Sale.]—Where an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or is not competent to look after his own interests, or is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale as a prudent owner would. *In re Davis*, 17 Gr. 603.

Possession of Land.]—The possession of a mother will not be considered tortious as against the heir, being her own child, but will rather be treated as the possession of a guardian. *Doe d. Moak* v. *Empey*, 3 O. S. 488.

Quebec Law—*Donation in Favour of Children—Acceptance by Parent.*]—A substitution created by a donation inter vivos in favour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent; and the law of the Province of Quebec on the subject, as declared by the Civil Code, is the same as the old law of the Province in existence before the promulgation of the Civil Code of Lower Canada. Where an institute has accepted a donation creating a substitution in favour of his children, his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children thereafter born to him during marriage. Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of the vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing, and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under translatory title. (Leave to appeal to privy council refused.) *Melochc* v. *Simpson*, 20 S. C. R. 375.

Quieting Titles Act—*Barring Claim.*]—Quære, whether an order made by the referee of titles barring the claims of an infant heir-at-law would have the effect of divesting the estate of the infant. *Re Shaver*, 6 O. R. 312.

Vesting Order.]—Where the heirs are minors the court of chancery has jurisdiction on petition of the executor and executrix to make an order vesting the estate in the purchaser, or as they may direct. This course will enable a title to be made free from any doubt. *Donaldson* v. *Berry*, 2 Ch. Ch. 16.

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2. *Investment by the Court.*

Court's Duty.]—The court, on the administration of an estate, takes charge of the share going to infants, and invests the same

for their benefit, instead of the amount being left in the hands of a trustee. *Kingsmill* v. *Miller*, 15 Gr. 171.

Since the establishment of a government Dominion stock, the investment of infant's money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Ib.*

As a general rule, loans of money in court cannot be made on property on which there is any prior charge, however small, unless all parties interested consent. *Andrews* v. *Hempstead*, 1 Ch. Ch. 347.

Form of Application.]—An application to invest moneys of infants pursuant to an order of the court should be made by the infants, and not by the persons wishing to borrow. *Re Healey*, 1 Ch. Ch. 190.

Infant Resident in Foreign Country.]—In cases where, if money belonged to an infant residing in Upper Canada, the court would invest it for his benefit, the court will, where the infant is resident in a foreign country, direct an investment for his benefit in the securities of such country. *Sanborn* v. *Sanborn*, 11 Gr. 359.

Sanctioning Investment.]—A petition had been presented for sale of an infant's estate, fifty acres of land, which produced $8700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the court, on which it seemed to be intended the father of the infant—a farm labourer—was to reside with the infant, the referee refused to sanction the purchase. The circumstances under which such sanction would be given considered. *Re Mason*, 3 Ch. Ch. 426.

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3. *Payment of Money to which Infant is Entitled.*

Executor.]—Where infants are entitled to maintenance out of a fund in the hands of the executor of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into court. *Re Humphries*, *Mortimer* v. *Humphries*, 18 P. R. 289.

Foreign Guardian.]—Where one brought an action against an executor in this country to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a probate court of Minnesota, and it appeared that the duties and powers of guardians under the laws of Minnesota were not greater than those of testamentary guardians or guardians appointed by a surrogate court in this country:—Held, that the money must be paid into court, and not to the foreign guardian. Semble, that the rule might be modified if the sum were small, and the whole, or nearly the whole, were required for the infant's education and maintenance, or other immediate use. *Flanders* v. *D'Eveleyn*, 4 O. R. 704.

An order having been made under 47 Vict. c. 20, s. 12 (O.), for the appointment of a trustee to receive insurance moneys to which infants were entitled:—Held, that it would be contrary to the uniform practice of the court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties. *Re Thin*, 10 P. R. 490.

A foreigner was appointed trustee for infants under 47 Vict. c. 20 (O.), to receive insurance moneys, without being required to give security in this Province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a court in the state where he and the infants resided. The insurance company was discharged upon payment to the trustee of the moneys in their hands. *Re Andrews*, 11 P. R. 199.

An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a surrogate court, was refused, and the executors were ordered to pay the amount of the bequest into court. Re Andrews, 11 P. R. 199, distinguished. *Re Parr*, 11 P. R. 301.

An infant was entitled to share in certain insurance moneys accruing under a policy upon the life of her deceased father. The infant lived with her mother in a foreign state, and the mother had there been appointed by a surrogate court guardian of the infant, and had given security to the satisfaction of that court. The mother petitioned the high court to be appointed trustee under R. S. O. 1887 c. 136, s. 12, to receive the infant's share of the insurance moneys without security:—Held, that the security given by the petitioner in the foreign court would not attach to her appointment as trustee under the Act; and the court declined to appoint her unless she furnished the necessary security here. Re Thin, 10 P. R. 490, followed. Re Andrews, 11 P. R. 199, not followed. *Re Slosson*, 15 P. R. 156.

——— *Certificate of Foreign Court.*]—Where certain infants living with their mother in the Province of Nova Scotia were entitled to insurance moneys payable in Ontario, and their mother petitioned to be appointed trustee, without security, under R. S. O. 1887 c. 136, s. 12, as amended by 56 Vict. c. 32, s. 7, (O.), to receive such moneys, letters of guardianship having been issued to her by a probate court of the Province of Nova Scotia, a certificate of the Judge of that court shewing the facts necessary to bring the case within the proviso to the amending section, was received as evidence in support of the petition. *Re Daniel*, 16 P. R. 304.

Foreign Tutor.]—Held, that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there, which Province had also been the domicile of the father at his death, were entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors, money coming to the infant from said estate, which had been collected in Ontario. *Hanrahan* v. *Hanrahan*, 19 O. R. 396.

Foreign Tutrix.]—The provisions of ss. 155 and 157 of the Ontario Insurance Act, 60 Vict. c. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith. And therefore a tutrix of infants duly appointed in the Province of Quebec is

not entitled quâ tutrix to moneys of the infants paid into court under s. 157 of the Act; but she may, under s. 155, s.-s. 2, be appointed a trustee of the fund and receive it, upon giving proper security. *Re Berryman*, 17 P. R. 573.

Guardian — *Trusts under Will.*]—Where an infant had become entitled to a fund, the subject of an express trust in her favour under a will, and the fund was claimed in the infant's name by her guardian appointed by a surrogate court, but the infant, represented by the official guardian, opposed the claim:—Held, that it was not a case in which an order should be made under R. S. O. 1887 c. 110, s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but that the trustees should be allowed to transfer the fund into court. Huggins v. Law, 14 A. R. 383, distinguished. *Re Mathers*, 18 P. R. 33.

Money paid into court to the credit of infants will not be paid out to their guardian appointed by a surrogate court, upon his application, as a matter of right; though, in a proper case, an allowance for their maintenance and education may be made to him out of such moneys. Re Smith's Trusts, 18 O. R. 327, followed. Huggins v. Law, 14 A. R. 383, and Hanrahan v. Hanrahan, 19 O. R. 396, distinguished. *Re Harrison*, 18 P. R. 303.

Legacy.]—The testator by his will left money to his children, which was to be paid to them on their coming of age, and be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian:—Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though as against the surety the bill was dismissed, with costs. *Galbraith* v. *Duncombe*, 28 Gr. 27.

Moneys bequeathed directly to infant legatees and which had been invested by the defendants, the executors of the testatrix, were demanded of and received from them by one F., a solicitor who had obtained from the surrogate court his appointment as guardian of the infants. F. subsequently misapplied the moneys and absconded:—Held, reversing 11 O. R. 565, that the defendants were not liable. *Huggins* v. *Law*, 14 A. R. 383.

Life Insurance — *Executors.*]—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under ss. 11 and 12 of R. S. O. 1887 c. 136, be paid to the executors of the will of the insured, as provided by s. 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

——— *Mother.*]—The mother of an infant to whom insurance moneys were payable, having been appointed guardian and having given security, was appointed trustee under R. S. O. 1887 c. 136, s. 11. *Scott* v. *Scott*, 20 O. R. 313.

——— *Testamentary Guardian — Directions of Insured.*]—A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian. In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors:—Held, that the insurance moneys being made payable to the daughters were by 53 Vict. c. 39, s. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. 1887 c. 136. Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by s. 11, R. S. O. 1887 c. 136, might by s. 13, invest in manner authorized by the will; but while the insured could give directions as to the investment, she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the corpus for advancement. Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund. Held, also, that s. 12 of R. S. O. 1887 c. 136, does not justify an insurance company in paying the amount of a policy to a testamentary guardian; the guardian there named being one who has given security, and that the court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors. *Campbell* v. *Dunn*, 22 O. R. 98.

Life Tenant — *Lunatic—Foreign Guardian—Maintenance.*]—During the infancy of the defendant $2,000 was paid into court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign court, the mother applied for payment out of the whole fund, having given in the foreign court specific security for the amount:—Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given. Held, as to the other half, that, being actually in the hands of the court, it was subject to the jurisdiction of the court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the court—whatever sum should

be shewn to be necessary for maintenance being paid to the foreign guardian. *Re Thompson, Thompson* v. *Thompson*, 19 P. R. 304.

Money in Court — *Judicature Act.*]—Payment of money out of court to infants under order made prior to passage of O. J. Act. *See Re Cameron*, 9 P. R. 77.

——— *Administrator.*]—Money in court belonging at the time of her death to an intestate was paid out to her administrator notwithstanding that infants might be or might become entitled to it or a share of it. Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

——— *Administratrix.*]—The administratrix of a person who had died before the Devolution of Estates Act came into force was allowed to take out of court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payments of debts, &c. Hanrahan v. Hanrahan, 19 O. R. 336, followed. *Re Parsons, Jones* v. *Kelland*, 14 P. R. 344.

——— *Executor.*]—A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into court by McD.'s executors. The daughter by her will had disposed of the money which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid to the executor; —Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 334.

——— *Marriage—Foreign Law.*]—Where a female was entitled at majority to payment out of court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 229.

Small Amount.]—The rule is, that money belonging to infants is not ordered in equity to be paid to their guardian, whether appointed by the surrogate court or otherwise, but is secured for the benefit of the infants; but where the amount is small and is required for the immediate use of the infants, special circumstances may justify an exception. *Mitchell* v. *Ritchey*, 13 Gr. 445.

Summary Application to Compel Payment by Administrator.] — See *Re Coutts*, 15 P. R. 162, sub-title IV., *post*.

Trustee — *Discretion.*]—The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority—Held, that the defendant was a mere trustee for the plaintiff, without the discretion which she contended for; and a summary order (made before delivery of statement of claim in an action to recover the fund and for an injunction) requiring the defendant to pay the fund into court, and thereupon perpetually staying the action, was affirmed. Re Humphries, Mortimer v. Humphries, 18 P. R. 289, approved. *Whitewood* v. *Whitewood*, 19 P. R. 183.

See INSURANCE, V.

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4. Sale by the Court.

General Rule.]—An application to confirm a sale of an infant's estate was refused where it was not shewn, as required by C. S. U. C. c. 12, s. 50, that the sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or dilapidation or to depreciation from any other cause, the interests of the infant would be promoted by a sale, and where also it appeared that the proceeds of the sale would not produce as large a sum as the property could be rented for, if placed in a proper state of repair. *Re Phalen*, 6 P. R. 259.

Benefit of Parent.]—Application for sale under 12 Vict. c. 72, of the estate of infants. Sale refused under the circumstances, the application appearing to be more for the benefit of the father than of the children. *Re McDonald, Re Taylor*, 1 Gr. 90.

The statute R. S. O. 1887 c. 137, s. 3, cannot be used to sell an infant's estate for a parent's benefit. Origin of the enactment. *Re Hibbard*, 14 P. R. 177.

Claims of Father.]—The court may, under C. S. U. C. c. 12, s. 50, order a sale of infants' estate to satisfy claims of the deceased father of the infants, if it deems that course to be for the benefit of the infants. *Re Barker*, 6 P. R. 225.

Conduct of Sale.] — Where the person having the conduct of a sale under a decree of the court is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties to the suit object. The plaintiff had the conduct of a sale, and the next friend of the plaintiff was the highest bidder. The master certified that by reason of the next friend having bid the sale was abortive. The certificate was not filed or confirmed. A motion by the plaintiff to confirm the sale, notwithstanding the master's certificate, was refused, as the guardian of the infant defendants objected, and an order for a re-sale was refused, because until the master's certificate stood confirmed it was open to the parties to appeal from the certificate on the ground that the master ought to have reported that the next friend was the purchaser; and because if the master was right in finding the sale abortive, no order for a re-sale was necessary. *Crawford* v. *Boyd*, 6 P. R. 278.

Debts of Ancestor.]—The court will not direct a sale of the real estate of an infant, merely because the ancestor was indebted; it must be shewn that the estate will sustain

loss, or that the creditors are about to enforce payment of their demands by suit. *Re Boddy*, 4 Gr. 144.

Directions in Will.]—When property was devised by a testator to his widow for the maintenance of his family until the coming of age of his youngest child, and then to R., one of the sons, charged with certain payments at intervals to the widow and other children, with a provision for the substitution of another son in the event of R. dying under age or without issue:—Held, 1. That the court had no jurisdiction to order a sale or mortgage of such property, the court having no power under 12 Vict. c. 72, to dispose of the real estate of infants against the provisions of a will by which such estate was devised to such infants: 2. that such property was not the real estate of the infants within the meaning of the Act. *In re Callicott*, 1 Ch. Ch. 182.

A testator by his will devised his property to his wife for life, and after her death to be divided equally among his children. The will further provided that the division should not take place until the youngest child attained the age of twenty-one years. An application being made when the youngest child was only seven years old, for sale of a portion of the land in order to pay off a mortgage on the whole:—Held, that an order for sale would be against the provisions of the will, and therefore in violation of C. S. U. C. c. 12, s. 51. *Re Smith*, 6 P. R. 282.

A testator devised certain property, consisting of lands and houses, to an infant and her mother as tenants in common for life with cross remainders, and in the event of the infant's death without issue, and her mother's death or marriage, remainder over to a nephew and five grandchildren of the testator. An application by the infant to sell the property, on the ground that it was depreciating in value, owing to the extension of the city in a different direction, was refused, as a sale might prevent the devise over of the land in specie, and would therefore be against the provisions of the will. Quære, whether such a depreciation was within C. S. U. C. c. 12, ss. 50, 51. *Re Wilson*, 7 P. R. 244.

Dower of Mother.]—On a sale of the land of an infant under R. S. O. 1877 c. 40, ss. 75-83, an order was made under 44 Vict. c. 14, s. 5 (O.), barring the dower of the infant's mother, who was a lunatic and confined in an asylum. *Re Colthart*, 9 P. R. 356.

Estate Tail.]—On an application for a ruling as to whether the estate of an infant being an estate tail in possession could be sold under R. S. O. 1887 c. 137:—Held, that the Act applied to an estate tail. *In re Gray*, 26 O. R. 355.

Examination.]—On an application under C. S. U. C. c. 12, s. 50, for the sale of infants' estate, the examination of the infants by the master, under consolidated order 532, as to their consent must be annexed to the petition. A certificate of the master stating that the infants have been examined by him and that they consent is insufficient. *Re Axford*, 6 P. R. 192.

Upon a petition under R. S. O. 1887 c. 137, s. 3, for the sale of lands belonging to three infants, the examination of the eldest, a girl of sixteen, was dispensed with, notwithstanding the provisions of s. 4 of the Act and of con. rule 999, upon the ground that she was an imbecile. Re Lane, 9 P. R. 251, and Re Harding, 13 P. R. 112, followed. *Re Delanty*, 13 P. R. 143.

See Re Hornibrook, 12 P. R. 591.

An order was made under R. S. O. 1887 c. 137, s. 3, for a sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee and having given their consent, and the remaining infant, who was under fourteen, having been produced before the referee, who certified with regard to her in the manner directed by the rules, but the sale was not carried out. A subsequent offer for the lands at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to shew that it was in the interest of the infants; and their further examination was dispensed with, upon its being shewn that they were out of the Province, and that they were satisfied to accept the price offered. *Re Bennett*, 17 P. R. 498.

Exchange of Lands.]—The Settled Estates Acts do not authorize the court in sanctioning an exchange of the lands of an infant cestui que trust; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the court may order the same to be carried out under the provisions of s. 50 of C. S. U. C. c. 12. *Re Bishoprick*, 21 Gr. 589.

Execution of Conveyance.]—Where it had been referred to the master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein as the master shall direct," and the master did not in settling a conveyance direct that an infant whose lands had been sold should be made a party, but merely that her guardian should; and subsequently, after such infant had married, directed that she, being still an infant, and her husband should join in a new conveyance, which was done; it was held that this was within the master's powers, and was in effect as if the court had directed the execution of the conveyance under 12 Vict. c. 72, and that the deed was binding, and passed the estate. *Rae* v. *Geddes*, 3 Ch. Ch. 404.

Forum.]—All applications under 12 Vict. c. 72, for the sale of infants' estates must come on before the same Judge. *Re Hansell*, 1 Ch. Ch. 295.

Interested Party Applying.]—It is important that the next friend of an infant should be a disinterested person in proceedings taken to sell an estate in which the infant has an interest. Where, therefore, the mother, who had a claim against the estate, filed a bill as next friend asking for a sale of the property, the court refused to make the decree; but retained the bill in order that other parties to the cause, if so advised, might apply to make themselves plaintiffs and the infant a defendant. *Berry* v. *Berry*, 22 Gr. 202.

Master's Report.]—By an order in an infancy application under 12 Vict. c. 72 (C. S. U. C. c. 12), it was referred to the master to

take an account of the value of the crops grown on the premises during a given year, and of what had become thereof, and how much had been converted by one J. O. to his own use beyond one-third thereof: and it was ordered that said J. O. on service of the order and report should pay into court the amount found due by the master:—Held, that the order being final so far as J. O. was concerned, the report made in pursuance thereof did not require confirmation. *Re Yaggie*, 1 Ch. Ch. 168.

Mother's Life Interest.]—The mother applying for the sale of real estate settled upon infants, was required to join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement. *In re Kennedy*, 1 Ch. Ch. 97.

Objections to Sale.]—Certain infants' lands were sold under an order which appeared upon its face to have been prosecuted under the statutable jurisdiction of the court of chancery relating to the sale of infants' estates: 12 Vict. c. 72, R. S. O. 1877 c. 40, s. 76. The petition and order were intituled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the court, the order setting out that what was being done was being done because it was beneficial to the infants and the conveyance was executed by the referee for the infant. A subsequent purchaser objected that the order for sale did not disclose any jurisdiction:—Held, that as the court would never allow the infants to recede from what was so done for their benefit a subsequent purchaser could not raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appeared to have been followed. Calvert v. Godfrey, 6 Beav. 97, considered and distinguished. *Blean* v. *Blean*, 10 O. R. 633.

Renewal of Lease.]—Upon a petition for the sanction of the court to a renewal of a lease made by the infant's ancestor and containing a covenant for renewal:—Held, that none of the circumstances being alleged under which the court is empowered by the statute to act, the court had no authority to make any order. *Re Jackes*, 3 C. L. J. 69.

Semble, the court has authority under the Imperial Act 11 Geo. IV. and 1 Wm. IV. c. 65, s. 16, to sanction such a lease, but the lease must be produced to the court, in order that it may judge of the propriety of the terms. *Ib.*

Sale by Tender.]—It is the practice where the estate of infants is of small value, in order to save the expense of a sale by auction, to direct the advertisement to be inserted in a newspaper, asking tenders addressed to the registrar to be made for the property. *Re Hassell*, 1 Ch. Ch. 189.

Second Application.]—In proceedings under 12 Vict. c. 72, the mother was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered, which was accordingly effected, the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order: the whole of such proceeds, together with $5,321 in addition, were expended in support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The court refused the application, notwithstanding that the master reported the amount claimed was a proper sum to be allowed. *In re Hunter*, 14 Gr. 680.

Several Infants—*Consent of Majority.*]—Notwithstanding the provision of R. S. O. 1887 c. 137, s. 4, that an application for the sale of an infant's lands shall not be made without the consent of the infant if he is of the age of fourteen years, the consent of a majority of infant landowners may be sufficient; for by the Interpretation Act, R. S. O. 1887 c. 1, s. 8, s.-ss. 24 and 34, words importing the singular number shall include more persons than one, and females as well as males, and where an act or thing is required to be done by more than two persons, a majority of them may do it. And in this case, where there were three infants all over fourteen, and two of them consented to a sale of their lands, but the eldest had disappeared and could not be reached, an order was made dispensing with the consent of the one, the sale being evidently for the benefit of all the family. *Re Harding*, 13 P. R. 112.

Ultimate Benefit.]—In directing the sale of infants' real estate the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The court will order a sale of a portion of an infant's estate to save the rest for the benefit of the infant. *Re McDonald*, 1 Ch. Ch. 97.

III. Guardian.

Benefit of Child.]—There was a contest in the surrogate court between the stepfather and uncle for the guardianship of a child of ten or eleven years old; the child preferred her stepfather, and the surrogate court appointed him guardian; but the court of chancery, on appeal, being satisfied that it was for the real interest of the child that the uncle should be guardian, reversed the order below. *In re Irwin*, 16 Gr. 461.

Breach of Promise—*Rescission by Guardian.*]—To a count in assumpsit for a breach of promise of marriage, defendant pleaded a rescission before breach by the defendant and plaintiff's guardian, with the plaintiff's concurrence, plaintiff being then an infant:—Held, bad, for the contract could only be avoided by the act of the infant, and not of the guardian. *Parks* v. *Maybee*, 2 C. P. 257.

Compensation.]—Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as guardian of their infant children, and received the rents and profits of the real estate, all of which she duly accounted for. The master in taking the accounts allowed her a compensation on the receipt and application of such rents and profits, as well as the personal estate, amounting in all to $133. On further directions the court, regarding the case as an exceptional one, refused to interfere with such allowance. *Doan* v. *Davis*, 23 Gr. 207.

Jurisdiction of Court.]—22 Vict. c. 93 does not exclude the jurisdiction of the court of chancery, in respect to the appointment of guardians. *Re Stannard*, 1 Ch. Ch. 115.

Lease.] — The guardian of an infant tenant for life, without the sanction of the court executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrears, he was permitted to remove the buildings and erections put up by him on the property, (doing no damage to the realty,) but the court refused to allow him out of such rents for any improvements made by him upon the premises. *Townsley* v. *Neil*, 10 Gr. 72.

——— *Guardian in Socage.*] — Ejectment. The plaintiff claimed title through one G., who was the grantee of V. and his wife, and D. and his wife, the said wives having been the patentees of the Crown before marriage. Defendant claimed under a lease made by E., the father of the patentees, while they were under age and before marriage, as their guardian:—Held, that if the patentees' father was guardian in socage of the daughter under the age of 21 years (as contended by defendant), that guardianship ceased upon her attaining the age of fourteen, when the lease would be void. *Doran* v. *Reid*, 13 C. P. 393.

In replevin defendant avowed for rent, alleging that the plaintiff held the premises as tenant thereof to one L. as guardian of M., under a demise at a yearly rent of $350; that L., after making the lease, and about the 2nd April, 1877, died intestate, without appointing any guardian to M.; and defendant was, on the 21st May, 1877, appointed by the surrogate court guardian of M. in place of L.; and because $272 of the rent was due from plaintiff to defendant as such guardian, defendant took the goods as a distress therefor:—Held, on demurrer, that the plaintiff must succeed: for in this Province, a guardian, having no estate in the land, as in England, cannot lease his ward's land in his own name; and if he could his lease would determine on his death or on the ward attaining full age; that if the demise was by deed the personal representative of L. only could sue for the rent; and if not by deed the defendant might recover the rent in the name of the infant, but could not avow for it in his own right as guardian. *Collins* v. *Martin*, 41 U. C. R. 602.

The guardian of infants cannot give a lease of their estate. Such lease is void ab initio, unless the sanction of this court has been obtained thereto. *Switzer* v. *McMillan*, 23 Gr. 538.

A guardian of an infant appointed under R. S. O. 1887 c. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period. Switzer v. McMillan, 23 Gr. 538, not followed. During such minority the guardian is a trustee of the lands for the infant and cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him. Hickey v. Stover, 11 O. R. 106, followed. *Clarke* v. *Macdonell*, 20 O. R. 564.

Married Woman—*Jurisdiction of Court of Chancery.*]—The father of infants died intestate, and his widow obtained letters of administration, and by her will appointed her sister, a married woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the Judge of the surrogate court to be appointed their guardian, who, in opposition to objections made by the sister, did appoint him their guardian:—Held, on appeal, (1) that although this court has jurisdiction to appoint guardians to infants notwithstanding the enactment of the Surrogate Courts Act (22 Vict. c. 93) it will not do so on an appeal like this. (2) That the fact of the person named as guardian in the will of the deceased mother of the children being a married woman was itself sufficient to prevent the court appointing her. It is not the practice of the court to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend. Re Stannard, 1 Ch. Ch. 15, referred to and approved of. *Re McQueen*, *McQueen* v. *McMillan*, 23 Gr. 191.

New Guardian—*Past Maintenance.*]—It was provided in a will, (1) that the interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the court should appoint; and (2) that if the father applied to the court, the trustees were to allow the interest to accumulate and be invested till the infants became of age. The guardian named ceased to act, and after the lapse of two years (notice having been given to the father), it was ordered, (1) that the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, the testatrix, should be appointed guardian; (2) that the petitioner should be paid for the past maintenance of the infants. *Re Heywood*, 8 P. R. 202.

Payment — *Authority of Court.*] — The court will not make an order allowing payment of money by a guardian where the will gives him full power as executor to distribute the estate to the parties entitled, and the money is not in court. *Re Warmington*, 13 C. L. J. 225.

Summary Order for Custody.] — The court will, upon the petition of the guardian duly appointed by the court of probate or surrogate, interfere summarily, and order the person of the infant to be delivered to such guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending respecting the infant's estate. *Re Gillrie*, 3 Gr. 279.

Testamentary Direction.] — Although the court pays respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where a compliance therewith would clearly be prejudicial to the happiness and moral training of the infants. *Anonymous*, 6 Gr. 632.

A wife had obtained from the court an order giving to her the custody of her infant daughter until she had attained the age of twelve years:—Held, that this did not prevent the father of the infant appointing testamentary guardians of the infant. *Davis* v. *McCaffrey*, 21 Gr. 554.

Testamentary guardian appointed by father given custody of infant in preference to aunt, claiming under alleged appointment by mother. *Re Chilman*, 25 O. R. 268.

Tutor — *Purchase of Shares.*]—Where a father, acting generally in the interest of his minor child but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary. Such shares could not be sold or disposed of without complying with the requirements of articles 297, 298, and 299 of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares. The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to shew that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. Sweeny v. Bank of Montreal, 12 S. C. R. 661; 12 App. Cas. 617, referred to and followed. *Raphael* v. *McFarlane*, 18 S. C. R. 183.

——— *Borrowing Money—Quebec Law.*]—See *Davis* v. *Kerr*, 17 S. C. R. 235.

Wards in Court.]—It is irregular to give a reversionary guardianship of wards in court to the successors in office of any named person. *Murphy* v. *Lamphier*, 12 Gr. 241.

See *Re McQueen*, *McQueen* v. *McMillan*, 23 Gr. 191.

See also, sub-title I.

IV. MAINTENANCE.

Contingent Interest — *Life Insurance.*]—An order was made for payment, out of a fund in court to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled upon the death of the infant under full age. Re Arbuckle, 14 W. R. 585, followed. *Re Campbell*, 18 P. R. 400.

Corpus.]—Although the general rule is, that the court will not break in upon principal money for the maintenance and education of infant legatees, still in a proper case the court will so apply it, as well as to the advancement of the infants. *Ashbough* v. *Ashbough*, 10 Gr. 430.

Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until 21 years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of the death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both—the court held, that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees. *In re McDougall*, 14 Gr. 669.

In such a case the executors and trustees presented a petition under the statute 29 Vict. c. 28, s. 31; and it appearing that the parents of the legatees had abandoned them; that the legatees had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support; the court made an order approving of the application of part of the principal to supply the deficiency. *Ib.*

Trustees may be allowed payments made for maintenance and education out of capital. Under a general administration decree, the master may, without any special direction, take evidence as to such payments by executors, out of the infant's share of capital, and report the facts. *Stewart* v. *Fletcher*, 16 Gr. 235.

——— *Past Maintenance—Mode of Applying.*]—The court will sanction the use of the corpus of an infant's estate for his past as well as future maintenance, where the doing so is shewn to be for his benefit. And the court will also do so where it is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Vict. and the orders of this court, made to carry out the same, as the question of maintenance past as well as future can properly be dealt with, inasmuch as a great deal of the information required by the statute and orders referred to can be obtained in taking the accounts in such suit. But where such a suit was instituted by a party asking for maintenance out of the corpus of the estate, the court, as a check upon such suits, refused to make any direction as to maintenance. *Goodfellow* v. *Rannie*, 20 Gr. 425.

And see *Fenwick* v. *Fenwick*, 20 Gr. 381.

Funds in Hands of Administrator.]—Where an infant's fund is in court, or under the control of the court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion. But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate. And a summary application by the guardian of infants for payment to him or into court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator. Re Wilson, 14 P. R. 261, distinguished. Re Lofthouse, 29 Ch. D. 921, followed. *Re Coutts*, 15 P. R. 162.

Insurance Money.]—33 Vict. c. 21, s. 3 (O.), authorizes the application of only the interest on insurance moneys apportioned to infants under 29 Vict. c. 17, for the maintenance of the infants. The principal can, under these Acts, only be applied for advancement, but under the general jurisdiction of the court may be applied for maintenance. *Re Bazeley*, 12 L. J. 174.

Interest on Fund in Court.]—Where a legacy bequeathed to an infant had been paid into court, the interest thereon was ordered to be paid out as it accrued, for the education and maintenance of the infant, on its being shewn

that the money was required for these purposes. *Griffin* v. *McGill*, 2 Ch. Ch. 318.

Interest on Fund in Hands of Trustees.]—Under the will of their father two infants were entitled each to a vested legacy of $500, which trustees were directed to invest at interest until the infants should be of full age, and then pay to them:—Held, that a Judge in chambers had jurisdiction, upon a summary application, to make an order authorizing the trustees to apply the interest for the maintenance of the infants; but such an order should not be made except upon the clearest and most satisfactory evidence; as much evidence, at least, as is required upon an application for the sale of infants' lands for their maintenance should be required, and the like safeguards against deception and mistake should be insisted upon. *Re Wilson*, 14 P. R. 261.

Interest on Legacy.] — A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest:—Held, that the infant was entitled to maintenance out of the estate of the testator, during her minority, to the extent (if necessary) of the interest on the legacy; and an inquiry as to the ability of the widow to maintain the infant was refused. *Binkley* v. *Binkley*, 15 Gr. 649.

Investment of Fund.]—Investment and application of fund for maintenance and education. See *Griffin* v. *McGill*, 4 C. L. J. 227.

Past Maintenance — *Corpus.*]—It is in the discretion of the court whether to allow past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied. *Edwards* v. *Durgen*, 19 Gr. 101.

A farmer, by his will, gave to his widow his goods and chattels absolutely, also an annuity, and the use of his homestead and other real estate during her widowhood. She married again and claimed to be paid for the past maintenance of testator's children from the time of his death, out of the corpus of the estate devised to them at 21 and otherwise. The court refused to allow the claim. *Ib.*

——— *Misconduct.*]—A step-father's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct. *Fielder* v. *O'Hara*, 16 Gr. 610.

——— *Relative.*]—The court will not allow to a relative money expended by him in past maintenance of the infant, out of the proceeds of land of the infant sold in lieu of a partition under C. S. U. C. c. 86. *Kellar* v. *Tache*, 1 Ch. Ch. 388.

——— *Special Circumstances.*] — Applications for past maintenance of infants rest in the discretion of the court. Where the infants' brother-in-law, a farmer, had lodged and fed them, but expended nothing for their clothes or education, during a period of two years and a half previous to applying for maintenance, knowing all the time that they were entitled to money in court, and a Judge in chambers refused to allow anything for past maintenance, but made a more liberal allowance for the future than he would otherwise have done:—Held, that, dealing with the case on its special circumstances, and having regard to the discretion exercised, the Judge's order should not be disturbed. *Re Blair*, 14 P. R. 220.

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; and the court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor. Where the aggregate amount of principal of the estate of five infants was $11,250, the master allowed their mother $9,504 for five years' past maintenance, but, on appeal, the amount was reduced to $6,000. *Crane* v. *Craig*, 11 P. R. 236.

Where applications for past maintenance of infants are made, and especially where the only fund for the payment is the corpus of the estate, the applicant should come on petition before a Judge in chambers, shewing and proving the special circumstances relied on to overcome the general rule that arrears of past maintenance are not given, which rule applies whether the claimant is father, mother, or other relative, a step-parent or a stranger. And where it appeared that a person making a claim for the past maintenance of his infant step-children, against the proceeds of the sale of their father's farm realized in administration proceedings, had not maintained the infants on the basis of being compensated therefor, but that his claim was an after-thought, a Judge refused to confirm the master's recommendation of an allowance. *In re Renwick, Renwick* v. *Crooks*, 14 P. R. 361.

Reference to Master.]—In a suit for maintenance out of the property of infants, the master is usually directed to inquire and state what would be a proper sum to allow, but no authority is given for the payment until the report is brought before the court for its approval. *Murphy* v. *Lamphier*, 12 Gr. 241.

Statutory Allowance.] — Maintenance under the statute can only be ordered where the infant is under twelve, and is transferred by the court to the mother's custody. *In re Rees*, 15 Gr. 580.

Support—*Father's Liability.*] — Where a father whose children are maintained by another, and who could have obtained possession of their persons by habeas corpus, allows them to be so maintained, he is liable for their support and maintenance to the person in whose care such children are. *Hughes* v. *Rees*, 10 P. R. 301.

——— *Transfer of Right.*] — At common law there is no legal obligation on the part of a parent to maintain his children; the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance, and education of his children in consideration of his renouncing his rights thereto and of other considerations:—Held, that he could transfer his rights as a parent, and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children was inadmissible. *Wright* v. *McCabe*, 30 O. R. 390.

Vested Interest.]—By a deed of trust certain lands had been conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining 21:—Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance. *Stewart v. Glasgow*, 15 Gr. 653.

Wearing Apparel—*Father's Liability.*]—Liability of parent for wearing apparel furnished to his son. See *Hayman v. Heward*, 18 C. P. 353.

Widow Maintaining Children.]—The widow and administratrix of an intestate got in his personal estate, occupied the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds and profits of the real estate, come to her hands, must first be applied towards payment of debts, and then to reimburse her for the sums spent in the infants' maintenance. No allowance was made for her improvements, but she was not to be charged with any increase in rental caused thereby. *In re Brazill, Barry v. Brazill*, 11 Gr. 253.

Will—*"He who Seeks Equity must do Equity"—Receiver.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen v. Furness*, 20 A. R. 34.

See Harrison v. Patterson, 11 Gr. 105.

See, also, EXECUTION, III. 2.

V. RIGHTS AND LIABILITIES.

1. *In General.*

Administration.]—Administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian, were held to be invalid. *Re Jackson, Massey v. Crookshanks*, 12 P. R. 475.

See English v. English, 12 Gr. 441.

An infant may, by next friend, obtain an administration order. *Re Hill*, 10 C. L. T. Occ. N. 87.

See Re Wilson, Lloyd v. Tichborne, 9 P. R. 89.

Advancement—*Hotchpot.*]—A child who has been advanced is obliged to bring into hotchpot that wherewith he has been advanced, only when it has been so expressed in writing either by the parent or the child so advanced. *Filman v. Filman*, 15 Gr. 642.

The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction, or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. *Birdsell v. Johnson*, 24 Gr. 202.

A testator devised to his grandson A., an infant, 30 acres, part of his farm, and the remainder to his eldest son, A.'s father. By the evidence of the father it was shewn that on A. coming of age, by agreement between them, the father conveyed to A. 50 acres of equally valuable land in lieu of the 30 acres devised to A., the father at the time saying that he would charge A. with the difference in value as an advance; and that it being supposed that as the father was the heir-at-law of the testator all that was necessary was to destroy the will, this was done and no conveyance made by A. to his father. Up to the time of his death A. never made any claim to the 30 acres; on the contrary it was proved that on several occasions he had admitted the fact of the exchange:—Held, that sufficient appeared to shew that the conveyance to A. had been by way of an exchange of lands, and not as an advancement. *Ib.*

Difference between the law of England and our own as to advancements to children, commented on. Under our law an advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. *Re Hall*, 14 O. R. 557.

——— *Release by Son—Claim by Grandchildren.*] — A son, in consideration of his father conveying to him certain land, accepted it as an advancement, in lieu of and in full of all claims and demands against his father's estate either for wages or as one of his co-heirs or next of kin, and agreed that neither he nor his heirs would make any claim against the estate, nor attempt to set aside or invalidate any will or conveyance made by the father. On the death of the father intestate, the son's children, he having died in his father's lifetime intestate, claimed as co-heirs or next of kin of the grandfather to share in the estate of the latter:—Held, the children took, if at all, per stirpes, i. e., as representatives of their father, and as he would have been precluded by the agreement from taking anything, so were the children. Held, also, that the conveyance by the father to the son was an "advancement." *Re Lewis*, 29 O. R. 609.

Agreement for Infant's Benefit—*Undue Influence.*]—A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for his son eight or nine years old, and to whom it appeared she was much attached, in consideration of a certain sum, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration, however,

not being at all equal to the value of the property. The court in the absence of proof of any undue influence, oppression, persuasion, or fraud, refused to set aside the agreement as against the infant. *Gourley* v. *Riddell*, 12 Gr. 518.

Agreement to Devise Property to Infant — *Specific Performance.*] — See CONTRACT, IV. 1.

Apprenticeship — *Unreasonable Provision.*]—Articles of apprenticeship which require the apprentice during the term of four years of three hundred and ten working days of ten hours each, to give and devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for the time being, or as special exigencies of the business may require, are unreasonable and cannot be enforced against the infant, nor against a surety for him. *MacGregor* v. *Sully*, 31 O. R. 535.

Arrest.]—Infancy is no ground for discharging a person from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.

Assignment for Creditors — *Chattel Mortgage.*] — Execution of chattel mortgage and assignment for creditors by infant partner. See *Powell* v. *Calder*, 8 O. R. 505.

Award.]—An administratrix was sued by her brother for a debt alleged to have been due by her husband, the intestate, and judgment was recovered; subsequently a reference was made in respect of other moneys come to her hands for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to those trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys, and the debts of the estate, were to be considered and dealt with together, but the infants were not represented before the arbitrators:—Held, that the infants were not bound by the award. *Secord* v. *Costello*, 17 Gr. 328.

Breach of Promise of Marriage.]—A contract of promise of marriage to an infant can only be avoided by the act of the infant, and not by the act of her guardian. *Parks* v. *Maybee*, 2 C. P. 257.

Defence of infancy to action for breach of promise of marriage. See *Smith* v. *Jamieson*, 17 O. R. 626.

By-law against Sale to Minor.]—The municipality of Darlington passed a by-law enacting, among other things, that no innkeeper shall sell any intoxicating drink to any apprentice or minor without the permission of his legal protector:—Held, beyond the jurisdiction of the municipality to impose. *In re Barclay and Township of Darlington*, 12 U. C. R. 86. See also *Re Brodie and Town of Bowmanville*, 12 L. J. 143.

Compromise of Claims—*Enforcement by Infant.*]—One of the parties executing an agreement to submit to the provisions of a will, was, to the knowledge of all interested, under age at the time of the agreement:—Held, no answer to a bill by the infant after attaining twenty-one, against parties who had obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement. *Melville* v. *Stratherne*, 26 Gr. 52.

Contributory.] — Infant stock-holder repudiating liability as contributory. See *Re Central Bank and Hogg*, 19 O. R. 7.

Contributory Negligence.]—A woman went with her child two and a half years old to the defendants' shop to buy clothing for both. While there a mirror fixed in the wall, and in front of which the child was, fell and injured him:—Held, that it was a question for the jury whether the mirror fell without any active interference on the child's part; if so, that in itself was evidence of negligence; but if not, the question for the jury would be whether the defendants were negligent in having the mirror so insecurely placed that it could be overturned by a child; and if that question was answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury upon himself. Hughes v. Macfie, 2 H. & C. 744; Mangan v. Atherton, 4 H. & C. 388; and Bailey v. Neal, 5 Times L. R. 20, commented on and distinguished. Semble, that the doctrine of contributory negligence is not applicable to a child of tender years. Gardner v. Grace, 1 F. & F. 359, approved of. Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child. *Sangster* v. *Eaton*, 25 O. R. 78; 21 A. R. 264; 24 S. C. R. 708.

The doctrine of contributory negligence does not apply to an infant of tender age. Gardner v. Grace, 1 F. & F. 359, followed. *Merritt* v. *Hepenstal*, 25 S. C. R. 150.

Corporator.]—An infant cannot form one of the five persons requisite to incorporate a road company under R. S. O. 1877 c. 152. *Hamilton and Flamborough Road Co.* v. *Townsend*, 13 A. R. 534.

Costs — *Sale of Judgment.*]—The power given by rule 1129 to make an order in favour of a solicitor for a charge upon a judgment recovered by his exertions, is a discretionary one: the right given by the rule is ancillary to the solicitor's right to be paid on his retainer. And where an infant recovered judgment for damages for personal injuries, the solicitor retained by his father was allowed a charge upon the judgment, but only to the extent of the costs taxed against the defendant; and the court refused to direct a sale of the judgment to enforce the charge. *Nevills* v. *Ballard*, 18 P. R. 134.

——— *Infant Executor.*] — See *Merchants Bank* v. *Monteith*, 10 P. R. 334.

Death of Infant—*Parent's Pecuniary Interest to Maintain Action.*]—In an action by a parent for the death of his child through negligence it is not necessary to shew any pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit in the future capable of being estimated. Judgment

of Osler, J.A., in Blackley v. Toronto Street Railway Co., 27 A. R. at p. 44 note, followed. *Ricketts* v. *Village of Markdale*, 31 O. R. 610.

In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. *Rombough* v. *Balch, Green* v. *New York and Ottawa R. W. Co.*, 27 A. R. 32.

——— *Quantum of Damages Recoverable by Parent.*]—Held, that the mother of an infant injured by an accident could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him. *Wilson* v. *Boulter*, 26 A. R. 184.

Quantum of damages for death of a child discussed. *Huffman* v. *Township of Bayham, Tanner* v. *Township of Bayham*, 26 A. R. 514.

Devastavit.]—An infant whether executor or executor de son tort is not liable for a devastavit. *Young* v. *Purvis*, 11 O. R. 597.

Distress.]—Semble, that an infant may make a warrant of distress. *Owen* v. *Taylor*, 29 U. C. R. 358.

Executor — *Disclaimer — Possession of Land.*]—A son of the testator and one of the executors and trustees named in a will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the Statute of Limitations:—Held, affirming the judgment below, sub nom. Wright v. Bell, 18 A. R. 25, that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute. *Houghton* v. *Bell*, 23 S. C. R. 498.

A grant of probate to an infant executor along with an adult is not a nullity. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 582.

——— *See*, also, *S. C.*, 19 A. R. 447, 22 S. C. R. 246.

A grant of probate or of letters of administration to an infant is void. Sections 57 and 58 of the Surrogate Act, R. S. O. 1877 c. 46, protect persons bonâ fide making payments to an executor or administrator notwithstanding any invalidity in the letters probate or letters of administration, but they do not protect payments made to third persons by an infant assuming to act as administrator of the estate. *Merchants Bank* v. *Monteith*, 10 P. R. 334.

——— *See Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475.

Executor's Accounts.]—In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will, and had taken possession of the personal estate, and who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their share thereof might be charged upon the land in question before partition:—Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Gr. 247.

Expenditure by Trustee.]—The principle, that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant cestui que trust. *Bevis* v. *Boulton*, 7 Gr. 39.

Factories Act—*Child Labour.*]—The employment of a child under fourteen years of age in a factory at work other than of the kinds specified in s. 5 of the Factories Act, R. S. O. 1897 c. 256, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages, unless there be evidence to connect the violation of the Factories Act with the accident. *Roberts* v. *Taylor*, 31 O. R. 10.

Fraudulent and Voluntary Transactions between Parent and Child.]—See FRAUD AND MISREPRESENTATION, V. 4 (b).

Gifts between Parent and Child.]—See GIFT.

Grantee of Father.]—In August, 1861, J. B. being indebted jointly with W. B. to T. in the sum of £88, for which judgment had been recovered, and to one R. in the sum of £10, agreed with R. B., who was his son, and was not then of age, to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment, and of his making a lease for life to J. B., or J. B.'s wife, of 25 acres of the land, being the arable portion thereof. R. B. was then the holder of a due bill for £20, given to him in satisfaction of wages earned by him as a hired servant with an elder brother, and in pursuance of the said agreement transferred this to T., who received payment thereof, and also made a note jointly with J. B. and W B. for the balance of T.'s claim, which note remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not to J. B., for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861 and spring of 1862, J. B. became indebted to the plaintiffs, who afterwards recovered judgment, and filed a bill to set aside the transaction as fraudulent within the statute of Elizabeth:—Held, under the circumstances, that the conveyance to R. B. could not be deemed voluntary, but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs. *Delesdernier* v. *Burton*, 12 Gr. 569.

Hiring.]—Quære, whether if an infant hire himself for wages to his parent, the contract is binding on the latter. *Perlet* v. *Perlet*, 15 U. C. R. 165.

——— *Wages.*] — Where a minor enters into a contract of hiring, the wages he earns belong to him and not to his parents. *Delesdernier* v. *Burton*, 12 Gr. 569.

Implied Trust.]—Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother, who was fully cognizant where the money came from, and to whom it belonged: —Held, that he was liable to account to the children as their trustee. *Secord* v. *Costello*, 17 Gr. 328.

Lease.]—An infant cannot, during his minority, avoid, on the ground of infancy, a lease which is for his benefit. *Hartshorn* v. *Early*, 19 C. P. 139.

——— *Infant's Benefit — Costs.*]—An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose. Hartshorn v. Early, 19 C. P. 139, and Slator v. Brady, 14 Ir. C. L. R. 61, 342, followed. The discretion given by con. rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs. *Lipsett* v. *Perdue*, 18 O. R. 575.

Malpractice — *Medical Practitioner — Limitation of Actions.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill-effects of the treatment developed, but more than a year from the date when the professional services terminated:—Held, that the action was barred under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 40. Infancy does not prevent the running of the statute. *Miller* v. *Ryerson*, 22 O. R. 369.

Marriage.]—Section 2 of 26 Geo. III. c. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license without the consent of the parent or guardian was absolutely void, is not in force in this Province. *Lowless* v. *Chamberlain*, 18 O. R. 256.

See Regina v. *Secker*, 14 U. C. R. 404; *Regina* v. *Bell*, 15 U. C. R. 287; *Regina* v. *Roblin*, 21 U. C. R. 352.

See HUSBAND AND WIFE, IX.

Negligence—*Child Playing on Highway.*] —A municipality is liable for damages arising through its negligence to children playing upon the highway where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway, and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage. Judgment below, 31 O. R. 180, reversed. *Ricketts* v. *Village of Markdale*, 31 O. R. 610.

——— *Dangerous Article near Highway.*] —Plaintiff, a boy of twelve years of age, passing along the highway entered upon defendants' property, which adjoined it, and taking a fog signal out of a box on a hand car standing there, struck the fog signal with a stone when it exploded injuring him:—Held, that the defendants were not liable. *McShane* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 31 O. R. 185.

——— *Father's Liability.*] — The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf. The father of a lad of twenty living at home, was held not liable therefore for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horse and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. *File* v. *Unger*, 27 A. R. 468.

See NEGLIGENCE.

Penalty.]—Action for penalty under Election Act. See *Garrett* v. *Roberts*, 10 A. R. 650.

Promised Gift—*Change of Parent's Intention—Improvements.*]—When a child seeks to enforce an agreement that if he remains with a parent and works his farm and provides for his declining years the parent will bestow the farm on him, the agreement must be established by the clearest evidence and a certain and definite contract for a valuable consideration proved. In the absence of such evidence the parent will be entitled to change his views and the disposition of the property. In this case the son who had made certain improvements on the property was held not to be entitled to a lien for them. *Smith* v. *Smith*, 29 O. R. 309, 26 A. R. 397.

Purchase of Land—*Infant Heir.*]—Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to specific performance of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. There was a lapse of fourteen years after the vendor's conveyance before the bill for compensation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, the lapse of time was no bar to the suit. With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Forsyth* v. *Johnson*, 14 Gr. 639.

Railway — *Negligence—Exemption Agreement.*]—Declaration by the administrator of A., alleging his death caused by negligent management of defendants' train. Plea, setting up that A. was a newsboy in the employment of C. & Co., selling papers on defendants' trains, under an agreement between defendants and C. & Co., which exempted defendants from liability. Quære, if such a contract is to be considered as made with the person carried, and if so, as to the effect of his

being an infant. *Alexander* v. *Toronto and Nipissing R. W. Co.*, 33 U. C. R. 474, 35 U. C. R. 453.

Registration of Will.]—Infancy is not an inevitable difficulty within s. 15 of the Registry Act, so as to preclude the necessity of an infant devisee registering the will within six months of the death of the devisor, to avoid a conveyance by the heir-at-law. *McLeod* v. *Truax*, 5 O. S. 455.

See, also, *Mandeville* v. *Nicholl*, 16 U. C. R. 660.

Tenant in Common.]—The general rule in equity, that an infant is entitled to treat a person who takes possession of his estate as his bailiff or agent, applies to a case where the party in possession is a tenant in common with the infant, although there has not been any ouster or exclusion of the infant, or any denial of his title. *Cameron* v. *Cameron*, 26 Gr. 307. *See Re Taylor*, 8 P. R. 207; *Fullerton* v. *Keely*, 9 C. L. J. 54.

Tenant in Tail.]—A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting assurance of estates tail. The purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite 21 at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase without giving any notice of title or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. *Re Shaver*, 3 Ch. Ch. 379.

Transfer of Shares by Father—*Claim for Dividends.*]—Where a father took shares in an association formed to build a steamboat, in the name of his son, then an infant, and during the minority of the child directed two of the shares to be transferred to the defendant, which was done:—Held, that the infant could not, on attaining his majority, maintain assumpsit for money had and received, to recover dividends on these shares, received by defendant. *Hall* v. *Bidwell*, 3 O. S. 22.

Trespass.]—The mother in possession of the land belonging to the heir, a minor, may sue in trespass q. c. f. as the next friend of the minor. *Johnson* v. *McGillis*, 7 U. C. R. 309.

Will.]—In a so-called will, executed a few days before her death, G., L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age:—Held, that the will was invalid. C. S. U. C. c. 73, s. 16, (R. S. O. 1877 c. 106, s. 6), only removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685.

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2. *Deeds and Mortgages.*

Avoidance.]—The bringing an ejectment by an infant to regain possession of land conveyed to him, is so complete an avoidance of the deed that he cannot afterwards ratify it. *Doe d. Jackson* v. *Woodruffe*, 7 U. C. R. 332.

——— *Defending Action.*]—A mortgage by an infant may be avoided during infancy, and defending by guardian an ejectment brought by the mortgagee is a sufficient avoidance. *Gilchrist* v. *Ramsay*, 27 U. C. R. 500.

——— *Delay.*]—Where defendant, during nonage, conveyed land in fee to the grantor of the plaintiff; and, though fifteen years had elapsed since his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him for the land, a conveyance of which had in the interim, and after the conveyance to the plaintiff, been made to him (defendant) by the person entitled:—Held, that it might be assumed, under the power given to the court to draw inferences of fact, that the defendant had confirmed the deed, and that he could not now set up in this suit the defence of infancy. Grace v. Whitehead, 7 Gr. 591, remarked upon. *Featherston* v. *McDonell*, 15 C. P. 162.

Bond—*Mortgage.*]—Declaration on defendant's covenant to pay off a mortgage to one L., on land conveyed by him to the plaintiff, alleging non-payment, and a sale of the land under the mortgage to one M., who evicted the plaintiff. Plea, on equitable grounds, that before the mortgage fell due, defendant, at plaintiff's request, advanced to him the money required to pay it off, which the plaintiff promised and gave his bond to the defendant to do; that afterwards the plaintiff, owing defendant $400, gave him a mortgage therefor upon the same land; that when the mortgage to L. fell due, the plaintiff being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one-half of the land for more than her mortgage, and pay the plaintiff the surplus, and release to the plaintiff the other half; that L. accordingly sold half the land to M., and released the other half to the plaintiff by deed, in which defendant joined, which deed the plaintiff accepted, and L. also paid to the plaintiff the balance of the purchase money received for the other half, above L.'s mortgage. Replication, that the plaintiff, when all these transactions took place, was an infant, by reason whereof his alleged bond and mortgage were voidable, and he has avoided the same:—Held, that the replication was good, for that there was nothing alleged in the plea to which the plaintiff was prevented from setting up his infancy as an answer, and he might avoid the bond and mortgage whenever they were relied upon against him. *Gallagher* v. *Gallagher*, 30 U. C. R. 415.

Effect.]—A conveyance of land or mortgage made by an infant is not absolutely void, but voidable by him, either before or after he comes of age. *Doe d. Jackson* v. *Woodruffe*, 7 U. C. R. 332; *Mills* v. *Davis*, 9 C. P. 510; *Featherston* v. *McDonell*, 15 C. P. 162; *Gilchrist* v. *Ramsay*, 27 U. C. R. 500; *Miller* v. *Ostrander*, 12 Gr. 349; *Foley* v. *Canada Permanent L. & S. Co.*, 4 O. R. 38.

Estoppel.]—Quære, whether the deed of an infant, unless legally avoided, would operate by estoppel to pass the title to the land, as soon as the fee vested in him on obtaining his majority. *McCoppin* v. *McGuire*, 34 U. C. R. 157.

Exchange of Lands.]—An exchange of lands by an infant is not void, but voidable

only, and as such may be confirmed. Where, therefore, a party said to have been under age and intoxicated when he made the exchange, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered sufficient confirmation. *Miller* v. *Ostrander*, 12 Gr. 349.

Infant Married Woman.]—A deed executed by a man and his wife (she owning the estate) under C. S. U. C. c. 85, while the wife was under 21, was held good and valid, independently of the statute, to pass the husband's interest in the land, although not sufficient to bar the wife's. *Doran* v. *Reid*, 13 C. P. 393.

The effect of legislation now embodied in R. S. O. 1887 c. 127, s. 3, has been to give to the conveyance of an infant feme covert the same characteristics as are by law attributed to the conveyances of male infants, i. e., if such deeds are of benefit to the infant or operate to pass an estate or interest, they are voidable not void. *Wallis* v. *Learn*, 15 O. R. 481.

When a little more than two months after coming of age, a married woman sought to set aside conveyances for value made by her, while an infant feme covert, to the defendants, who were ignorant of her disability, and under which defendants had taken possession, it was:—Held, that she was entitled to such relief; but before the same could be granted, she must make complete restoration to the defendants of the specific or an equivalent value of that which she had received from them during her infancy. Mere acquiescence for about two and a-half months after attaining majority was considered insufficient to operate as a ratification of the conveyance. *Ib.*

Section 6 of R. S. O. 1887 c. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment. *Confederation Life Association* v. *Kinnear*, 23 A. R. 497.

Mortgage for Purchase Money—*Vendor's Lien.*]—Defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age defendant repudiated the mortgage, but adopted the purchase, by bringing an action to recover possession:—Held, that the mortgage being void, as the deed of an infant, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by assignment of the mortgage. *Grace* v. *Whitehead*, 7 Gr. 391.

Mortgage—*Covenant for Payment.*]—The defendant was one of several cestuis que trust who joined with their trustee in a mortgage for the purpose of discharging a lien upon the trust estate. It was recited in the mortgage deed that they had agreed to join therein in order to vest all their interests in the mortgage but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the master (who had directed the trustee to execute the mortgage) but not by the official guardian. It was stated, however, at the bar that the latter did approve on behalf of the infant, and that some pencil marks on the instrument signified his approval. No order was shewn requiring execution by the infant. Nearly two years after the defendant came of age she was served with the writ of summons in an action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside:—Held, that it was contrary to proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the master's attention had not been called to the fact of infancy. The covenant was void, as the infant had received no benefit from it and had been induced to enter into it per incuriam; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice. *Brown* v. *Grady*, 31 O. R. 73.

Ratification.]—The plaintiff being at the time an infant, on 20th February, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly applied in paying off prior incumbrances on the land. The plaintiff came of age on 19th April, 1880. After this date, and with full knowledge of his position, he, on 10th January, 1884, executed another mortgage, with the object of in part paying off the mortgage in question; and, moreover, by certain conversations with an agent of the defendants he admitted his liability under the latter mortgage, nor did he take any steps to disaffirm it until 7th September, 1882. On 30th September, 1882, this action was commenced:—Held, that the mortgage in question was not void, but only voidable, and that the plaintiff's conduct after he came of age amounted to a ratification of it. *Foley* v. *Canada Permanent Loan and Savings Co.*, 4 O. R. 38.

The rule is now well established, that the deed of an infant is not void ab initio, but voidable on his attaining majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmance of it. *Ib.*

Semble, that acts of less moment and significance than are required to avoid the conveyance of a minor, may be sufficient evidence of its ratification. *Ib.*

Semble, that it must be presumed that an adult who affirms a deed executed by him during infancy, does so with knowledge of his rights, and of his exemption from liability. *Ib.*

The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents, and as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed during minority should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority. *Ib.*

Re-acknowledgment.]—W. M. came of age on the 27th August, 1857. On the 1st July previous, he executed a deed of the premises in question to U., under whom defendant claimed, which was registered on the 26th August. This deed was re-acknowledged be-

tween the 28th and 30th August, and the re-acknowledgment registered on the 5th September in the same year. On the 28th August, a judgment was entered up against W. M. in favour of the plaintiff on a confession of judgment in assumpsit signed the same day, and the plaintiff claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on the 5th October, 1857:—Held, that there had been a sufficient re-acknowledgment of the deed by the infant, and that the confession of judgment was not per se an act done to avoid the deed. *McCoppin* v. *McGuire*, 34 U. C. R. 157.

Representation as to Age.]—A married woman, while yet under the age of twenty-one, but representing herself to be of full age, conveyed land to a bonâ fide purchaser for value, and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his vendee, on the same day, gave a mortgage thereon:—Held, that the married woman, notwithstanding her nonage, was bound by her representations as to her being of age; and that the other parties having acquired their interests with full knowledge of the existence of the deed by her to the purchaser, and after the registration thereof, took subject to all the rights of the purchaser; and the court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them; and, quære, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith. *Bennetto* v. *Holden*, 21 Gr. 222.

If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan. The owner of real estate, six months before attaining majority, applied to effect a loan on the security thereof, alleging, in answer to a question, that he was then of full age. A mortgage was accordingly executed and the money advanced. This the mortgagor expended in the purchase of other lands which, together with the lands so mortgaged, he, on the day after he attained twenty-one, conveyed to his mother for a nominal consideration:—Held, that the minority of the mortgagor could not be set up in answer to a bill to enforce payment of the mortgage, but the same remained a valid and subsisting charge upon the land held by his grantee. *Goyer* v. *Morrison*, 26 Gr. 69.

To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation. *Confederation Life Association* v. *Kinnear*, 23 A. R. 497.

Terms of Granting Relief.]—Application to set aside a conveyance made by plaintiff, a married woman, while under age.—Terms of granting relief.—Acquiescence after attaining majority. See *Whalls* v. *Learn*, 15 O. R. 481.

VI. Practice and Procedure in Actions against and by Infants.

1. *In General.*

Action without Next Friend—*Laches.*]—An infant was a part owner of a patent right and engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solicitors to take proceedings to stop the infringement of the patent, and the solicitors not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time with the result that the infringement ceased but it was subsequently dismissed with costs against the plaintiffs for want of prosecution. More than a year after he came of age, he moved to set aside all proceedings in the action:—Held, that, under the circumstances mentioned, he was not entitled to relief on the ground of infancy. *Millson* v. *Smale*, 25 O. R. 144.

Administration.]—An administration of an estate in which infants were interested, was made on the mere suggestion of their next friend that it would be for their benefit, without going into the merits of the case between the plaintiff and the defendant, the executor. *Re Wilson, Lloyd* v. *Tichborne*, 9 P. R. 89.

Appearance.]—An infant cannot appear by attorney, but by guardian. If the appearance is by attorney, all subsequent proceedings are irregular. An attorney who appears for an infant, knowing of his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside. *Macaulay* v. *Neville*, 5 P. R. 235.

An appearance entered by an attorney for an infant defendant (no prochein amy having been appointed,) is a nullity not an irregularity. *Fountain* v. *McSween*, 4 P. R. 240.

Interlocutory judgment cannot be signed until after prochein amy appointed. *Ib.*

Award.]—In order to bind an infant defendant, by an award, &c., the proper mode is, to obtain an order of reference to the master to ascertain whether the submission to arbitration is for the benefit of the infant. *Allan* v. *O'Neill*, 2 Ch. Ch. 22.

Costs.]—Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do. *McLaren* v. *Coombs*, 2 Ch. Ch. 124.

In such a case where they had appeared and contested, the guardian was allowed only an attending fee without brief. *Ib.*

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

Where in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties was necessarily referred to a master, the costs of such reference were ordered to be borne by the testator's estate. *Rodgers* v. *Rodgers*, 2 Ch. Ch. 241.

The general rule is, that in suits for specific performance against the infant heirs of vendors, the decree should be without costs. *Commander* v. *Gilric*, 6 Gr. 473.

The same rule as to the costs of a solicitor appointed by the court guardian ad litem to infant defendants in suits for specific performance seems applicable as in mortgage cases; but where the purchase money has not been paid, the court will direct the payment of the guardian's costs from it. *Ib.*

Where a cause was carried to a hearing in a defective state through an error common to all parties, diverse interests of infants being represented by one guardian and one counsel, no costs of that hearing were given to either party on the final disposition of the cause. *Munro* v. *Smart*, 26 Gr. 310.

In a case where infants were interested, and it was necessary to have the conveyance settled by the master, and one of the parties to the conveyance being out of the jurisdiction it also became necessary to obtain a vesting order, the referee allowed the purchaser the extra costs so incurred. *Re McMorris*, 3 Ch. Ch. 430.

See sub-heads, 3, 5, *post*.

Discovery—*Examination.*]—As a general rule, an infant, party to an action, may now be examined by the opposite party for discovery before the trial, under rule 487, in the same way as an adult. Mayor v. Collins, 24 Q. B. D. 361, distinguished. *Arnold* v. *Playter*, 14 P. R. 399.

Dower.]—An infant demandant may sue in dower, and if an infant tenant be sued the parol is not allowed to demur. *Phelan* v. *Phelan*, Dra. 386.

Where in dower, after declaration filed and notice to plead served on infant tenants, the latter neglect to plead, an order nisi may be made that, unless the infants plead within a given time, the demandant may assign John Doe for their guardian. *Robinson* v. *Blandshard*, 9 L. J. 23.

Where a married woman had signed a deed, which, however, contained no bar of dower, the secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred. Such relief would be properly the subject of a bill. *Thompson* v. *Thompson*, 2 Ch. Ch. 211.

Division Court.]—The 27th clause of 13 & 14 Vict. c. 53, does not restrict infants from suing in the division courts for any thing but wages, but was intended only to enable them to recover for their own labour contrary to the principles of the common law. *Ferris* v. *Fox*, 11 U. C. R. 612.

Execution of Conveyance.]—Where for the purposes of a suit it is necessary to obtain an order for the execution of a conveyance by infant representatives of a mortgagee, not parties to the cause, the proper mode of applying is by petition. *Owen* v. *Campbell*, *In re Mills*, 4 Gr. 630.

Noting pro Confesso.]—Where the defendant was shewn to have been an infant when the note pro confesso was entered, such noting and all subsequent proceedings were set aside; but as defendant was tardy in applying, and his conduct censurable, the order was made without costs, and he, being now of age, was ordered to answer in a fortnight. *Adams* v. *Guillott*, 2 Ch. Ch. 427.

Official Guardian—*Costs.*]—The official guardian's costs of defending the action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action. *Westgate* v. *Westgate*, 11 P. R. 62.

Costs of enforcing lease made by infant and costs of official guardian. See *Lipsett* v. *Perdue*, 18 O. R. 557.

———*Service.*]—The costs of serving an infant personally who is out of the jurisdiction, will not be allowed. The proper method is to obtain a præcipe order appointing a guardian ad litem, under G. O. Chy. 610, and serve him. The official guardian is now by O. J. Act, s. 66, such guardian. In this case an allowance was ordered to be made if the personal service on the infants had facilitated the official guardian in communicating with them or their relatives. *Rew* v. *Anthony*, 9 P. R. 545.

In a partition suit an order allowing substitutional service of the bill on the official guardian of an infant defendant, resident without the jurisdiction of the court, was granted on the ground that the share of the infant in the lands in question amounted to only $40, and substitutional service would be inexpensive. *Weatherhead* v. *Weatherhead*, 9 P. R. 96.

Held, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid. *Re Jackson*, *Massey* v. *Crookshanks*, 12 P. R. 475.

The provisions of the rules and general orders as to service in case of infancy apply whether the infant be a sole or joint defendant, and whether he be sued personally or in a representative capacity. *Ib.*

In a proceeding by petition under the Quieting Titles Act, service on the official guardian is good service upon infants who are required to be notified of the proceedings. *Re Murray*, 13 P. R. 367.

Plaintiff.]—The general rule is clear, that an infant plaintiff is, equally with an adult, bound by proceedings in a suit instituted by him. *McDougall* v. *Bell*, 10 Gr. 283.

The infant heirs of an intestate, who were resident in this Province, obtained the usual administration order against the administratrix, their mother, and in proceeding thereunder in the master's office, it appeared that the intestate was, at the time of his death, possessed of considerable real and personal estate in Ontario, and also of several bounty land warrants for lands in Manitoba, which had been duly assigned to him by the recipients thereof from the government of the Dominion, which were sold under the decree on further directions. On a special case being submitted for the opinion of the court:—Held, that this court, under the circumstances, had power to sell these warrants, and could order the parties interested in the estate to join in a conveyance thereof; or the court might, in

its discretion, grant the usual order vesting the same in the purchaser; the principle being that if a person selects a tribunal in which to sue for the enforcement of his rights, he cannot afterwards say that the judgment of that tribunal is not binding on him; and the general rule being also clear that infants, like adults, are bound by proceedings in a suit in which they are plaintiffs; and that, to any proceedings that might be taken in the courts of Manitoba, the decree and proceedings in this court would be an answer, and bind the parties and estop them from disturbing any title acquired under the sale. A vesting order operates on equitable as well as legal estates. *Re Robertson, Robertson* v. *Robertson*, 22 Gr. 449.

Proceedings after Majority.]—Proceedings which a defendant allows to be taken against him after he comes of age, are binding on him. There is no necessity for his being served with notice of the suit after his coming of age. A motion to set aside such proceedings as irregular and void was refused with costs, but the defendant was allowed to take an order giving him leave to falsify any of the items in the costs taxed and accounts allowed by the master, reserving the costs of reference. *Lawrason v. Buckley*, 2 Ch. Ch. 477.

Revivor.]—When it becomes necessary to revive by way of amendment against infant defendants, the proper course is, to amend simply in the first instance by making the infants parties. Then if the infants fail to have a guardian appointed, the plaintiff may apply, under order 13, to have a solicitor appointed guardian, and in either case the plaintiff may move that the suit do stand revived. *Kirkpatrick v. Pouquette*, 4 Gr. 549.

Where the plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives:—Held, that before an application to revive could be made, the decree must be drawn up, and a guardian ad litem appointed. *Beswick* v. *Pomeroy*, 1 Ch. Ch. 32.

Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches. *Burke* v. *Pyne*, 2 Ch. Ch. 193.

Service by Publication.]—Where an absent defendant is an infant the court has like powers as to granting an order for service by publication as in case of an adult; but semble, the notice published should not state that in default of answer the bill will be taken pro confesso. The court will also in the exercise of the discretion given to it by 28 Vict. c. 17, s. 12, call upon such defendant by the same order to shew cause why a solicitor of the court should not be appointed his guardian ad litem. *Duffy* v. *O'Connor*, 1 Ch. Ch. 393.

Specific Performance.]—In a suit for specific performance where there were infant defendants, the court held that the plaintiff's laches precluded him from obtaining relief, but directed an inquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it the plaintiff might excuse his laches, but, semble, all the parties beneficially interested must consent to the inquiry. *Chevallier* v. *Strong*, 8 Gr. 320.

Where, in a suit by the personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-plaintiff, the court refused to make a decree, although the bill had been taken pro confesso against the defendant the purchaser, and ordered the case to stand over, with a view to the plaintiffs amending their bill, by making the infant a party defendant, in order that the contract might be established against him. *Hamilton* v. *Walker*, 12 Gr. 172.

Trustee—*Day to Shew Cause.*]—In a decree against an infant defendant as trustee of real estate, it is not necessary to reserve a day for the defendant to shew cause after attaining twenty-one years of age. *Lake* v. *McIntosh*, 7 Gr. 532.

A suit to redeem a mortgage alleged to have been created by an absolute deed, was instituted against the infant heir of the mortgagee. The question raised by the pleadings was, whether the transaction was a mortgage or sale, which, at the hearing, was decided in favour of the plaintiff, and the infant was ordered to re-convey. On his attaining twenty-one, an application was made for leave to put in a further answer, and make a new defence, which was refused. *Ib.*

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

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2. *Ejectment Action.*

When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. *Doe d. Lemoine* v. *Vancott*, 5 O. S. 486.

An infant will be admitted to defend as landlord, by guardian. *Doe d. Sanderson* v. *Roe*, T. T. 3 & 4 Vict.

A guardian appointed by the vice-chancellor upon the petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should be by the infant. *Doe d. Marianne* v. *Alexander*, 1 U. C. R. 120.

A guardian appointed to an infant, under 8 Geo. IV. c. 6, s. 2, may bring ejectment to try the infant's title. Semble, it may also be brought in the name of the infant. *Doe d. Atkinson* v. *McLeod*, 8 U. C. R. 344.

C. S. U. C. c. 74, s. 5, does not vest the real estate of an infant in the guardian, and such guardian cannot, therefore, bring ejectment in his own name; he must proceed as guardian in the name of the ward. The last case distinguished. *Kinsey* v. *Newcombe*, 17 C. P. 99.

Plaintiff in ejectment, though an infant, sued in person. Defendant became aware of the infancy at the first trial, but took no objection until after the second trial, when a

verdict was given against him for non-appearance. He then moved to set aside the proceedings on this ground, and for want of proper notice of trial:—Held, that defendant was precluded by his delay, and the court refused to interfere. *Ham* v. *Egan*, 3 P. R. 16.

Held, that the guardian of an infant appointed under C. S. U. C. c. 74, can under s. 5 consent to the name of the infant being added as plaintiff in an action of ejectment which seems to be for the latter's benefit. Quære, whether such consent should be in writing. *Ogilvie* v. *McRory*, 15 C. P. 557.

An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered he cannot take any further step without having a next friend appointed, and any such further proceedings in the infant's own name will be set aside. *Campbell* v. *Mathewson*, 5 P. R. 91.

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3. *Guardian ad Litem.*

The subpœna and notice of motion for the appointment of a guardian had been served on the persons with whom infant defendants were residing; this was considered sufficient service. *Bowman* v. *Becktel*, 2 Gr. 556.

On a motion for the appointment of a guardian ad litem, under the 21st order of May, 1850, the court permitted an affidavit, shewing that defendants were infants, to be filed after the day named for the motion to be heard. *Freeland* v. *Jones*, 2 Gr. 581.

Form of jurat in affidavits of execution and justification of bonds from guardian and sureties in the court of chancery in the matter of an infant. *Re Auschrook*, 4 Gr. 109.

Where the mother of the infants is plaintiff, and the infants defendants, notice of motion to appoint a guardian ad litem must also be served upon them if of proper age. *Galbraith* v. *Galbraith*, 5 L. J. 41.

Notice of an application to appoint a guardian ad litem to an infant, who was a resident pupil at a college, served upon the principal of the college:—Held, sufficient under order XIII., s. 5. *Whitmarsh* v. *Ford*, 1 Ch. Ch. 357.

The court will appoint the testamentary guardian a guardian ad litem to infant defendants, without requiring all the infants to be produced in court, when it appears that the interest of the guardian is not opposed to that of the infants. *White* v. *Cummins*, 2 Gr. 487.

The court will not, even at the request of the infant defendants, in an amicable suit, appoint the plaintiff's solicitor their guardian ad litem. *James* v. *Robertson*, 1 Ch. Ch. 197.

When a father and his infant children are co-defendants, if it appears that the interest of the father conflicts with that of the children, the court will not appoint his solicitor guardian ad litem to the infants. *Atkins* v. *Blain*, 1 Ch. Ch. 249.

On motion to appoint a guardian, the master should not appoint the plaintiff's nominee, but should select one of the practitioners in the county town, the one who seems best fitted for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming some other solicitor. *Clements* v. *Arnold*, 3 Ch. Ch. 75.

A suit was brought for redemption of mortgaged property, and the mortgagee having died, his widow and infant heirs were the defendants. Upon an application for the appointment of a guardian ad litem to the infant defendants, a solicitor, nominated by the mother, was appointed guardian, it being considered that there could be no conflict of interest between the mother and her children. *Horkins* v. *Harty*, 6 P. R. 200.

A suit had been instituted by a creditor for the administration of the estate of a party deceased, and the agent of the plaintiff's solicitor was appointed guardian ad litem to the infant defendants. After a sale of the lands under the decree, at which the plaintiff, by leave of the court, had bid for a portion of the lands, a motion was made to change the name of the purchaser. The court refused the application, and directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside. *Fletcher* v. *Bosworth*, 5 Gr. 458.

Where the guardian for infant defendants, being notified, did not appear at the hearing, and their interests, which were not fully ascertained, were not represented, the court refused a decree in their absence, appointed another guardian, and directed the cause to be again brought on. *Sanborn* v. *Sanborn*, 11 Gr. 123.

Where a guardian ad litem dies, a new one may be appointed without notice. *Harper* v. *Harper*, 1 Ch. Ch. 217.

Where a guardian ad litem of infant defendants leaves the Province, another will be appointed on the ex parte application of the plaintiff. *Weldon* v. *Templeton*, 1 Ch. Ch. 360.

In a suit by a vendee of land brought against the representatives of the vendor for specific performance of the agreement, he was held not entitled to his costs. Some of the defendants being infants, the plaintiff applied for the appointment of a guardian ad litem, and one was appointed accordingly. The court, following the general rule, ordered the plaintiff to pay the costs of the guardian, and refused to give the plaintiff any remedy therefor against the estate of the vendor. *Mooney* v. *Provost*, 20 Gr. 418.

Where any of the defendants are infants, the court will not grant a summary reference under the 77th order, until a guardian to the infants has been appointed. *White* v. *Cummins*, 2 Gr. 397.

The court will exercise a supervision over solicitors appointed guardians ad litem, and expect at their hands a proper attention to the interests of the infants. *Duncan* v. *Ross*, 2 Ch. Ch. 443.

The guardian ad litem to an infant has no authority after the object of the suit has been

accomplished, to act for the infant in investing any funds for the infant. *Dix* v. *Jarman*, 1 Ch. Ch. 38.

A solicitor upon the plaintiff's application having been appointed guardian ad litem to infant defendants, and being unable to obtain his costs from the plaintiff or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund. *McKay* v. *Harper*, 9 C. L. J. 161.

It is no bar to the appointment of a guardian ad litem to an infant defendant, in an administration in chambers by motion, that the application for guardian is made before the return of the notice of motion for the usual administration order. *Barry* v. *Brazill*, 1 Ch. Ch. 237.

Where the mother and father of an infant defendant were living apart, and the infant had absconded and could not be served with notice of application for the appointment, the notice was directed to be served at the residence of the mother, that being the infant's last place of residence; service on the father being dispensed with. *Bigger* v. *Beaty*, 1 Ch. Ch. 236.

An order appointing a guardian ad litem was set aside for irregularity, where the notice of motion for the appointment did not allow the infant six weeks to appear and shew cause, but the guardian thus irregularly appointed was allowed his costs up to decree. *Hamilton* v. *Hamilton*, 2 Ch. Ch. 169.

An infant should be served with the bill before the return of the notice of application for the appointment of guardian, otherwise notice of the application will have to be reserved. *Robinson* v. *Dobson*, 1 Ch. Ch. 257.

When on a plaintiff's motion for appointing a guardian to an infant defendant, the person appointed is nominated by or at the instance of the infant, he is not entitled as of course to his costs against the plaintiff. *Clements* v. *Arnold*, 3 Ch. Ch. 75.

When a primâ facie case is made, shewing that no conflicting interests exist between the infants and the proposed guardian, or the party proposing him, the court will not go into the question of the fact or extent of interest. *Ferguson* v. *Langtry*, 2 Ch. Ch. 473.

On a petition for the appointment of a guardian to an infant, other than his father, who was living, it was held necessary that notice of the application should be served on the father. *Re Henricks*, 2 Ch. Ch. 418.

In a suit for the purpose (among other things) of having a guardian appointed, it is not the course of the court to direct a reference to the master to appoint a guardian, but only to approve of one, to be afterwards appointed by the court if it see fit. *Murphy* v. *Lamphier*, 12 Gr. 241.

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4. Mortgage Actions.

On an application by the executor of a mortgagee, for the infant heir of a mortgagor to convey after the executor has obtained a final order for foreclosure, the petition and affidavits should be intituled, not in the cause, but in the matter of the infant. *In re Hodges*, 1 Gr. 285.

When a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order and the mortgage debt equals or exceeds the value of the mortgaged premises, the infant heir is a person seised upon trust, within the meaning of the statute 11 Geo. IV. and 1 Wm. IV. c. 10, s. 6, and may be ordered on petition without suit, to convey the estate to the executor, or to a purchaser from him. *Ib.*

But the court will not make the order, unless it appears that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a reference as to this will be directed. *Ib.*

Form of decree upon a bill for foreclosure by a mortgagee against the infant heir of a mortgagor. *Saunderson* v. *Caston*, 1 Gr 349.

In foreclosure suits against infant defendants the court will make a decree for summary reference to the master under the 77th order of May, 1850; the decree, however, directing that in the proceedings before the master the plaintiff should be obliged in the first instance to prove the execution of the conveyance. *Creelman* v. *Clefford*, 2 Gr. 213.

Where a decree of foreclosure against an infant defendant did not reserve a day after his attaining twenty-one to shew cause, and upon his attaining his majority the infant applied upon affidavits to put in a new answer and raise a fresh defence:—Held, that the relief asked could not be obtained without a re-hearing of the cause. *Mair* v. *Kerr*, 2 Gr. 223.

Upon the re-hearing of a cause, where the decree of foreclosure did not reserve a day to the infant:—Held, that in decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one must be reserved to the defendants. *Ib.* Affirmed on appeal, 26th February, 1852.

Where, under such a decree, an application is made to put in a new answer for the purpose of raising a defence different from that set up by the guardian of the infant, the application must be founded on affidavits shewing that the new defence is a proper one to be permitted. Where, therefore, the ground of the application was, that the mortgagor was a mere trustee for others, and the affidavit in support of the motion did not state that the plaintiff had notice of such alleged trust, the motion was refused with costs. Held, in a suit revived against infant defendants, that the decree having been made in the life-time of their ancestor, it was not necessary to insert in the final order a day to the infants to shew cause. *Sutherland* v. *Dickson*, 2 Ch. Ch. 25.

The court, where it is considered beneficial to the interests of an infant defendant, will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale. *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; *Lawrason* v. *Fitzgerald*, 9 Gr. 371.

Where a mortgagor had conveyed his equity of redemption to the trustees of his marriage

settlement in trust for his wife for life, remainder to his children; and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties, the court granted a decree containing the usual reference to inquire whether a sale or foreclosure would be more beneficial to the infants; and gave liberty to the master to make the infants parties in his office. *Dickson* v. *Draper*, 11 Gr. 362.

Where a bill by a mortgagee against an infant heir of the mortgagor prays a foreclosure, and the court for the protection of the infant directs an inquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the master to make the executor of the mortgagor a party in his office, in case of the master's opinion being in favour of a sale. *Trust and Loan Co.* v. *McDonell*, 12 Gr. 196.

Where the heirs of the mortgagor are infants, and a foreclosure suit is instituted, the rule of the court is to grant a reference as of course, to inquire whether a foreclosure or sale is more for the benefit of the infants; but if affidavits are filed to satisfy the court as to the proper decree, or if the guardian consents, the reference may be dispensed with. *Dudley* v. *Berezy*, 13 Gr. 141.

On motion for decree in this cause, it was decided that infant defendants are not entitled, as a matter of course, to an inquiry whether a sale or foreclosure is most to their benefit, but that some grounds must be shewn. *Graham* v. *Davis*, 2 Ch. Ch. 24.

It must appear clearly that the master reports a sale to be beneficial for infants, before a final order for sale will be made. *Edwards* v. *Burling*, 2 Ch. Ch. 48.

Where in a foreclosure suit, the plaintiff's solicitor had taken proceedings after the plaintiff's decease, in ignorance of that event:—Held, on motion to confirm those proceedings, that no order could be made except by consent, and there being infant defendants, no binding consent could be given in this case. *Graham* v. *Davis*, 3 C. L. J. 206.

The holder of a mortgage on real estate, and of a judgment recovered against the mortgagor, agreed after the death of the mortgagor, with his widow and two of the heirs, for the release, on certain terms, of the equity of redemption in the mortgaged premises, and also for the conveyance to him of another portion of the real estate in discharge of the mortgage and judgment debts. On a bill filed to enforce this agreement, it appeared that the other children of the mortgagor, who were infants, were interested in the estate. The court refused the relief prayed, but directed a reference to the master, to inquire if it would be more for the advantage of the infants to adopt the agreement, or that a sale of the estate should be made under a decree of the court. *McDougall* v. *Barron*, 9 Gr. 450.

Where it appeared to be for the benefit of the infants interested, and the plaintiffs, who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants, without requiring the consent of the mortgagor. *Cayley* v. *Colbert*, 2 Ch. Ch. 431.

Liberty to plaintiff, who was mortgagee and trustee, to bid at sale of the mortgaged premises made under a decree. See *Ricker* v. *Ricker*, 27 Gr. 576; 7 A. R. 282.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the court will, under special circumstances, direct an immediate sale, even against the infant heirs of the mortgagor. *Swift* v. *Minter*, 27 Gr. 217.

Where there was no evidence to shew that infants had been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 8 P. R. 472.

A final order of foreclosure should reserve a day for infant defendants to shew cause. *London and Canadian Loan and Agency Co.* v. *Everett*, 8 P. R. 489.

In an action of ejectment by mortgagees, on the application of the infant defendants, an order for the immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts, but 880 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co.* v. *Dunn*, 9 P. R. 490, 587.

In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant, yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them. Rules 360 and 1005 considered. *Keen* v. *Codd*, 14 P. R. 182.

In a mortgage action, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession. *Sparks* v. *Purdy*, 15 P. R. 1.

Infants are bound by a judgment for possession against executors in a mortgage action. Keen v. Codd, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

See MORTGAGE.

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5. *Next Friend.*

In trover, where the plaintiff sued by his mother as his next friend, the court held that the latter, by allowing herself to be made guardian for bringing this suit, did not waive any right she might have had to the goods sued for, and that her consent to become prochein amy was no legal estoppel on her. *Barker* v. *Tabor*, 5 O. S. 570.

A party alleged that he was induced by the plaintiff's solicitor to allow his name to be used as next friend on the assurance that he would not be rendered liable to costs. The solicitor denied that. It was considered that

such a fact could not be established by ex parte affidavits. *Burgess* v. *Muma*, 2 Ch. Ch. 45.

Where infants were the only parties residing within the jurisdiction of the court—their next friend having died and no new guardian having been appointed—security for costs was ordered, but if the infants could find another next friend within the Province, application might be made to discharge the order. *Parks* v. *Brown*, 4 L. J. 232.

An infant out of the jurisdiction petitioning for relief will be required to give security for costs. *Stinson* v. *Martin*, 2 Ch. Ch. 86.

In the case of an infant plaintiff, the court will not require security for costs, or remove a next friend because he is not a person of substance. A motion to remove a next friend of an infant, on the ground that during the progress of the suit he had become insolvent, was refused with costs. *Re McConnell*, 3 Ch. Ch. 425.

Held, that the fact of the plaintiff, an infant, having sued by attorney and not by prochein amy was no ground for setting aside the process, for by the practice the prochein amy may be appointed at any time before declaration. Quære, however, whether as the writ, and not the declaration, is now the commencement of the action, the appointment should not more properly be made before suing out process. *O'Reilly* v. *Vanevery*, 2 P. R. 184.

The father of an infant plaintiff is in the first instance the proper person to act as next friend. Where, therefore, a brother aged twenty-two, who, as well as the infant, lived with the father, had been appointed, and there was conflicting evidence as to the brother's solvency, an order was made for security for costs. Semble, that in such a case the evidence of the father would be admissible even though prochein amy. *German* v. *Elliott*, 2 C. L. J. 207.

In the case of small estates, an administration suit can only be justified where every possible means of avoiding the suit has been exhausted before suit brought. Where a next friend filed a bill for a minor without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs. *McAndrew* v. *La Flamme*, 19 Gr. 193.

The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the surrogate court—and her husband, alleging certain acts of misconduct, which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiff to pay the costs of the defendants as between party and party. *Hutchinson* v. *Sargent*, 17 Gr. 8.

Where on a rehearing the decree was affirmed, but the court was of opinion that the guardian of the infant defendants, who reheard, was justified in raising the question for the determination of the full court, they directed his costs to be paid out of the fund after satisfaction of the plaintiff's claim. *Airey* v. *Mitchell*, 21 Gr. 510.

Where an infant appears and defends a suit by his guardian ad litem, or by his next friend institutes proceedings, he is bound by such proceedings just as if he had been an adult. *Ricker* v. *Ricker*, 27 Gr. 576.

Where the next friend of an infant went out of the jurisdiction pending the suit, but swore that she intended to return by a day named, the referee stayed proceedings until the appointment of a new next friend. On appeal the matter was directed to stand until after that day; and the next friend not having then returned, the appeal was dismissed with costs. *Davis* v. *Fenton*, 7 P. R. 261.

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the supreme court of Canada, where the appeal was advised by more than one counsel, and one of the Judges of the court of appeal had dissented from the rest. *Cottingham* v. *Cottingham*, 11 P. R. 13.

Where one commenced an action as next friend to an infant to restrain waste on the infant's property without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of:—Held, that the next friend should pay the costs. *Mill* v. *Mill*, 8 O. R. 370.

Upon application to the court therefor the next friend of an infant plaintiff may be allowed to withdraw, upon such terms as the circumstances of the case and the welfare of the infant may require. Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitor revoking the authority to use her name, to which they replied that proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors:—Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the court as to liability for costs theretofore incurred. As to costs:—Held, that the court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff as client has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant; but the next friend was entitled to be indemnified by the solicitors for costs incurred

after her letter. Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 449.

Infants having a bonâ fide cause of action are privileged suitors; and the same rule as to security for costs should not be applied as in the case of adults. If the next friend of the infant plaintiffs, being the natural guardian, is within the jurisdiction when the action is begun, and so continues pendente lite, the court will not too anxiously scrutinize the tenure of his residence. And where the infant plaintiffs and their natural guardian and next friend were foreigners, and came within the jurisdiction merely for the purpose of bringing the actions, but continued therein up to the time of an application for security for costs, and it appeared that they had a bonâ fide cause of action, an order staying proceedings until a new next friend within the jurisdiction should be found, was reversed. *Scott* v. *Niagara Navigation Co.*, 15 P. R. 409, 455.

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

See sub-heads 1, 3, *ante*.

See LIMITATION OF ACTIONS, II. 16, IV. 6 —PARTIES, II. 8—PAYMENT, II. 3—SPECIFIC PERFORMANCE, V. 11.

INFORMATION.

Breach of Liquor Act.]—The Crown is not obliged under the Act relating to the sale of liquors, 37 Vict. c. 32, s. 44 (O.), to prosecute before two magistrates, as a private individual would be, but may proceed in the Queen's bench by information. *Regina* v. *Taylor*, 36 U. C. R. 183.

Remarks as to the form of the information in this case. *Ib.*

Breach of Statutory Duty.]—An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the streets, &c.:—Held, that an information by the attorney-general to enforce the statutory restrictions was proper; and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the statute, the attorney-general was entitled to a decree for the removal of the rails as a nuisance; but that the municipal corporation was a necessary party to the information. *Attorney-General* v. *Toronto Street R. W. Co.*, 14 Gr. 673.

Civil Code.] — See *Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282; and *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S. C. R. 72.

Costs.]—On an information filed by the attorney-general for the Queen for goods smuggled, costs will not be allowed to the defendant against the Crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

Forfeiture of Land—*Leave to Defend—Delay.*]—Where an information was filed by a common informer, under 12 Geo. II. c. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was in possession, and had not been served with the information, to come in and defend. Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant. *Mewburn* v. *Street*, 21 U. C. R. 396.

An information to forfeit land sold by lottery, contrary to 12 Geo. II. c. 28, may be filed by a private individual, and need not be by the attorney-general or any public officer. *S. C., ib.* 498.

No writ or process is necessary, the information being the commencement of the proceeding; and at all events the want of it could not be objected to on demurrer, after defendant had appeared and pleaded. *Ib.*

The plaintiff in this case filed his information more than five years after the sale complained of:—Held, too late, for that the case came within 31 Eliz. c. 5, by which he was limited to one year. *Ib.*

Where it appears upon the record in a penal action that it is brought too late, the defendant may take advantage of the objection without having specially pleaded it. No precedent having been found of such an information, the court suggested that it might be necessary to consider in any future case whether it should not be shewn that the party exposing the land to sale by lottery had been properly convicted of the offence, whether the information must not be served on the party in possession of the land, whether all claiming title should not be called upon by proclamation or otherwise to come in and defend, and whether any other preliminary proceedings were requisite. *Ib.*

Interference with Navigation.] — Where relief would be given at the suit of an individual in respect of an injury to a private watercourse, an information will lie at the instance of the attorney-general for an injury to a navigable stream. *Attorney-General* v. *Harrison*, 12 Gr. 466.

Intrusion — *Order to Reconvey.*] — An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion. *The Queen* v. *Farwell*, 3 Ex. C. R. 271.

See, also, *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

Pleading.]—The proceedings in an ex officio information may be either at the suit of the Queen or the attorney-general, but the de-

fendant cannot be called upon to plead in vacation upon a rule to plead given in vacation, but is entitled to a regular rule to plead and an imparlance. *Regina* v. *Burnham*, 1 U. C. R. 413.

Postponing Trial.]—On putting off the trial of an information for penalties, on the application of the defendant, costs will be imposed in the same manner as in civil cases. *Rex* v. *Ives*, Dra. 440.

Use of Bridge.]—Information for excluding foot passengers from bridge, and for wrongful construction thereof—Demurrer for want of equity—Parties. See *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37.

See ATTORNEY-GENERAL — CERTIORARI — CRIMINAL LAW—CROWN, V.—DEFAMATION, V.—INTOXICATING LIQUORS, II. 3 (a), IV. 5 (a)—NUISANCE, IV.

INFRINGEMENT.

See COPYRIGHT—PATENT FOR INVENTION, IV. —TRADE MARK, II.

INJUNCTION.

I. IN GENERAL, 3193.

II. DAMAGES IN LIEU OF OR BECAUSE OF INJUNCTION, 3202.

III. INTERIM INJUNCTION, 3203.

IV. PRACTICE,

1. *In General*, 3206.

2. *Continuing and Dissolving*, 3209.

3. *Enforcing*, 3212.

V. TO RESTRAIN PROCEEDINGS AT LAW, 3217.

VI. UNDER THE COMMON LAW PROCEDURE ACT, 3218.

I. IN GENERAL.

General Rule.]—The rule of this court is never to interfere by injunction except where it can do so usefully and effectively. *Attorney-General* v. *International Bridge Co.*, 22 Gr. 208.

The principle upon which the court interferes by injunction is to preserve property in its actual condition until the legal title thereto can be established; and although under the present practice this court can determine legal rights, it will not do so upon interlocutory application. *Grand Trunk R. W. Co.* v. *Credit Valley R. W. Co.*, 26 Gr. 372.

Assignee for Creditors — *Interference with Assets.*]—V. and D., traders, made an assignment to plaintiffs on the 9th January, 1865, as insolvents, in pursuance of the Act of 1864. A judgment at law having been obtained against V., his interest in the partnership assets was sold for a nominal consideration to C., who had notice of the insolvency proceedings. C. having interfered with the partnership goods so as to hinder the plaintiffs from performing the duties of their office, an injunction was granted to restrain further interference. *Wilson* v. *Corby*, 11 Gr. 92.

Carrying on Business.] — The plaintiff purchased defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one C. and entered into a like agreement with him:—Held, that the plaintiff, after this sale, had not such an interest in the contract with defendant as entitled him to an injunction to restrain defendant from carrying on business at Kingston, and that his remedy, if any, was at law. *James* v. *Wooley*, 16 Gr. 106

See, also, *Mossop* v. *Mason*, 17 Gr. 360.

Chattels.]—This court will not grant an injunction at the suit of a mortgagee of chattels, against a judgment creditor of the mortgagor, to prevent a sale, the rule being universal that the court will protect the specific possession of chattels only in case they are of peculiar value. *Geddes* v. *Morley*, 1 O. S. 323.

Saw-logs cannot be intended primâ facie to be of "peculiar value," without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however must be applied for promptly. *Flint* v. *Corby*, 4 Gr. 45.

Where the court has possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject matter in dispute, deal with that also by injunction for the purpose of preserving the same in medio, without reference to the rule as to the court not interfering with chattels unless they are of special value, or form the subject of a trust. *Penman* v. *Somerville*, 22 Gr. 178.

——— *Sale.*]—A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale. *Bradley* v. *Barber*, 30 O. R. 443.

Contract — *Running Cars.*] — The court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the court cannot oversee the carrying out of the judgment if granted. Nor will the court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out in toto, as this would also involve the same minute supervision. Judgment below, 28 O. R. 399, affirmed. *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric R. W. Co.*, 25 A. R. 462.

Contravention of Unsigned Agreement.]—Several proprietors of salt wells entered into an undertaking to sell their products through trustees, and in no other way; and a written agreement to this effect was executed by all the parties, except one, who was

resident in England, and carried on his business here through an agent. The business was carried on under the agreement, notwithstanding his non-execution of the deed, and one of the other parties having subsequently attempted to act in contravention of the agreement, it was:—Held, that the delay of the absent party to sign the contract could not be set up as answer to a motion for an injunction restraining the contravention. *Ontario Salt Co.* v. *Merchants Salt Co.*, 18 Gr. 551.

Creditor—*Debtor's Chattels.*]—This court will not restrain a debtor from dealing with his chattel property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his claim against defendant. *Hepburn* v. *Patton*, 26 Gr. 597.

Cutting Timber.]—An injunction against cutting timber may be granted (since 20 Vict. c. 56, C. S. U. C. c. 12, s. 27,) without proof of spoil, trespass and injury to the extent or of the character which might be necessary in England. *Wightman* v. *Fields*, 19 Gr. 559.

——— *Delay.*]—One S. was locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The plaintiff's agent swore that some pine timber had been taken off these "lots in 1870-71, by some person getting out square timber:" and, further, that the defendant was the only person getting out square timber that season. After two years, the court considered this evidence too indefinite as to the locality of cutting, and as to quantity cut, and the act too old in date to warrant the court in granting an injunction to restrain further cutting. *Hughson* v. *Cook*, 20 Gr. 228

——— *Trivial Damage.*]—On an application to restrain the cutting of timber, the matter in dispute in this case being too insignificant to call for the interference of the court of chancery by injunction, the bill was dismissed with costs. *Bernard* v. *Gibson*, 21 Gr. 195.

The jurisdiction to restrain the cutting and removal of timber is not preventive only: the court will in a proper case interpose where the timber can be followed. The A. J. Act (1873, s. 32) it would appear, however, has removed any technical difficulty of this sort. *McLean* v. *Burton*, 24 Gr. 134.

Where timber is cut without any intentional wrong, and there is no evidence of mala fides or intentional wrong, the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land. *Ib.*

Defendants not Appearing.] — Where defendants did not appear upon a notice of motion for injunction, the court directed the writ to issue, although entertaining great doubt whether a sufficient foundation for the interposition of the court had been laid. *Dennison* v. *City of Toronto*, 6 Gr. 513.

Delay — *Crown.*]—On an application on behalf of the Crown for a special injunction, it appeared that the acts and threats complained of (obstructing the slides of the Chaudiere) occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in:—Held, too late. *Attorney-General* v. *McLaughlin*, 1 Gr. 34.

Delay—*Acquiescence.*]—The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin alongside a wharf at Washago. The defendants in extending their line of railway, constructed a bridge across the river, which completely obstructed the entrance, and caused, it was alleged, special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was in course of construction, by the plaintiff personally, and through his solicitor, with the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when a bill was filed, praying that it might be declared a nuisance, and that the defendants might be ordered to abate it:—Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the action of the defendants, and the bill was therefore dismissed with costs. *Sanson* v. *Northern R. W. Co.*, 29 Gr. 459.

Discretion—*Legal Right Established.*]—The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right, does not necessarily entitle him to an injunction. The exercise of this jurisdiction is discretionary, depending very much on the reality and irreparable nature of the injury complained of, and, when no mala fides exists, on the balance of inconvenience. Where, therefore, a railway company had constructed tanks, which were filled from a stream running through the plaintiff's land, for the use of their locomotives, in doing which they did not abstract more than 1-80th or 1-100th part of the water in the stream, the court refused to restrain the company from using the water of the stream, and dismissed a bill filed for that purpose with costs; notwithstanding that the plaintiff had, for the same act, recovered a verdict at law with 1s. damages. *Graham* v. *Northern R. W. Co.*, 10 Gr. 259.

Ejectment—*Cutting Timber and Hay.*] A writ of injunction will be granted in the first instance upon an ex parte application under C. L. P. Act, 1856, s. 286, in an action of ejectment, to restrain the defendant from cutting and carrying away timber and hay from off the land, which is the subject of the action. *Robins* v. *Porter*, 2 L. J. 230.

Enforcement of By-law.]—Where parties complaining of the illegality of a municipal by-law or resolution, permit a term of the courts of common law to pass without moving to quash it, the court will refuse an injunction to restrain the municipality from enforcing the by-law. *Carroll* v. *Perth*, 10 Gr. 64; *Grier* v. *St. Vincent*, 12 Gr. 330.

Establishing Legal Right.]—Since the general orders of 1853 it is not necessary for a party to establish his legal right by an action at law before applying for an injunction. *Radenhurst* v. *Coate*, 6 Gr. 139.

Executor.]—As a general rule, an assignment for the benefit of creditors will be taken as a declaration of insolvency and equivalent to bankruptcy in England. Where, therefore,

some of the legatees of a testator filed a bill against his executor and two of the legatees, charging maladministration, and alleging that the executor, subsequently to the death of the testator, had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and receiver before answer, under the circumstances, granted an interim injunction and receiver, notwithstanding the executor denied any maladministration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Gr. 443.

Joint Interest — *Sale by One.*] — The plaintiff and L. were tenants in common of an oil well. They filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to the plaintiff and 800 to L., and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L. without authority contracted for the sale of all the oil in the tank at $1.25 a barrel:—Held, on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil, and that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction; and that his only remedy was an action at law. *Mason* v. *Norris*, 18 Gr. 500.

Legal Title Doubtful—*Preservation of Fund.*]—Where the evidence adduced leaves it doubtful as to the person to whom a trading concern belongs the court will not at the instance of a party claiming an interest in the funds invested therein, restrain the carrying on of the business, but will direct an account of the dealings thereof to be kept. J. W. S. was killed by a railway disaster in the State of Ohio and the defendant, his widow, while residing in the State of New York, took out administration to his estate there, and instituted proceedings in the courts of the State of New York against the railway company, which was incorporated in both States, to recover damages. This action was compromised by the company paying to the widow in New York $4,000. Part of that money she brought to this country, a portion of which, it was alleged, she invested in business, another portion being deposited in a bank. Under these circumstances J. W. S. having died childless, the father of the deceased claimed to be entitled to one-half of the sum received from the railway company, and filed a bill seeking to restrain the withdrawal of the money from the bank, and the further carrying on of the business, which, however, the widow denied being hers. The evidence of experts—lawyers practising in the States of Ohio and New York respectively—as to what was the proper distribution of the fund was contradictory, as was also the evidence as to the ownership of the business. Under these circumstances the court refused to restrain the carrying on of the business, but directed defendant to keep an account of the dealings thereof, and continued an interim injunction obtained ex parte, restraining the withdrawal of the money from the bank. *Smith* v. *Smith*, 25 Gr. 317.

Letters — *Stenographer — Implied Contract.*] — Documents consisting of notes or drafts of private letters dictated by a member of a firm of solicitors to a stenographer in the course of business in the office were surreptitiously taken by him and given to another person who, knowing how they had been obtained, proposed to publish them and to use them as evidence in a criminal prosecution or parliamentary inquiry he alleged he intended to bring about, although they contained nothing which could have been used as evidence against anyone:—Held, that the property in the documents was in the plaintiffs and their possession having been obtained by a breach of contract the plaintiffs were entitled to a perpetual injunction restraining their publication. *Laidlaw* v. *Lear*, 30 O. R. 26.

Mortgage Sale.] — Pending an appeal from this court a mortgagee was restrained from proceeding to a sale of the mortgaged premises under the power of sale. *Commercial Bank* v. *Bank of Upper Canada*, 1 Ch. Ch. 64.

Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify against incumbrances, and the purchaser gave a mortgage on the land for part of the purchase money. He afterwards learned that before his purchase, these and other premises had been mortgaged to another person for a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee being about to sell under his mortgage the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor, and the vendor, claiming a right to apply the amount due by him in discharge of the first mortgage, and for an injunction to restrain any action for such amount, until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due, and the vendor had become insolvent. Under these circumstances, an interim injunction was granted upon payment of the amount due into court. *Heap* v. *Crawford*, 10 Gr. 442.

Nuisance.] — A railway company being about to construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, and rendered greatly less eligible from the inconvenience and danger occasioned by the cars running immediately in front thereof, and the present traffic be diverted from that part of the road:—Held, that the injury as alleged did not amount to a private nuisance, and therefore the complainant was not entitled to an injunction; and, Held, also, that as the injury was not irreparable, the court would not, if otherwise in favour of the plaintiff, have granted the application. *Magee* v. *London and Port Stanley R. W. Co.*, 6 Gr. 170.

Where the evidence, as to the injury done to a highway in the manner a railway was constructed, was conflicting, the court refused an injunction, leaving the parties to their legal remedy. *Municipality of Fredericksburg* v. *Grand Trunk R. W. Co.*, 6 Gr. 555.

Penalty.]—To restrain defendant from doing acts contrary to his agreement, though

the performance was secured by a penalty. See *Toronto Dairy Co.* v. *Gowans*, 26 Gr. 290.

Proceedings in Quebec Court.]—Injunctions granted to restrain proceedings in a Montreal court against a bank in process of being wound up in Ontario, under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding-up for things done in their official capacity, and from attacking the validity of their appointment. *Re Central Bank, Baxter* v. *Central Bank*, 20 O. R. 214.

Recount.]—A Judge of the high court has no jurisdiction to restrain by injunction a county court Judge and returning officer from holding a recount of the ballots cast at an election for the House of Commons. In re Centre Wellington, 44 U. C. R. 132; Re North Perth, Hessin v. Lloyd, 21 O. R. 558, considered. *McLeod* v. *Noble*, 24 A. R. 459.

Remedy at Law.]—Where a bill prayed specific performance of an agreement, and for an injunction against waste, and an account of waste committed, and the court was of opinion that the plaintiff's remedy, except as to the injunction, was at law, the decree was made without costs; the objection to the jurisdiction appearing by the bill, and not being raised until the hearing of the cause. *Raven* v. *Loveless*, 11 Gr. 435.

Removal of Building.]—A mortgagee filed his bill for foreclosure and to restrain the vendee of the mortgagor from removing a building. The building having been actually removed, the court thought it a proper case for a mandatory injunction, but as it had been removed piecemeal, and there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 15 Gr. 646.

Removal from Office.]—An injunction granted to restrain trustees of a university founded by royal charter from removing a professor thereof. *Weir* v. *Mathieson*, 11 Gr. 383.

Restraining Waste.]—A general charge in a bill, that defendant, an executrix and trustee, is committing waste on testator's property without specifying any act of waste, is not sufficient to sustain an injunction or a receiver. *Sanders* v. *Christie*, 1 Gr. 137.

Where an injunction to stay waste was continued at the hearing, and it appeared that the waste committed did not exceed $20, the court refused to direct any account, and left the amount of the waste to be dealt with in any action for mesne profits which the plaintiffs might bring. *Raven* v. *Loveless*, 11 Gr. 435.

A person who has an interest in remainder, subject to an estate for life, cannot maintain a bill in respect of merely permissive waste by whomsoever committed. *Zimmerman* v. *O'Reilly*, 14 Gr. 646.

Such proof of possession as would maintain a suit at law against a wrong-doer, is sufficient primâ facie proof of title to enable a party to obtain a decree for an injunction to restrain waste. *Walker* v. *Frid*, 16 Gr. 105.

Right—*Plaintiff not Bound to Incur Expense.*]—Defendant had built a drain from his premises to a lot of which the plaintiff became lessee. Being desirous of building on this lot, he requested defendant to stop up or remove this drain, which defendant at first refused, and afterwards neglected, to do. It was alleged by defendant that the cost of diverting the drain would have been $14 only:—Held, that the plaintiff was not obliged to divert the drain, and sue defendant for the expense; and as the plaintiff's building could not be safely proceeded with until the drain was stopped up or diverted, an injunction was granted, requiring the same to be done. *Macaulay* v. *Roberts*, 13 Gr. 565.

Running of Street Cars on Sunday.]—See *Attorney-General* v. *Niagara Falls, Wesley Park and Clifton Tramway Co.*, 18 A. R. 453.

Sale of Medical Practice — *Implied Negative Stipulation — Damages.*] — By an agreement under seal the defendant sold to the plaintiff a house and the goodwill of his medical practice for $2,100, and the defendant "(bound) himself in the sum of $400, to be paid to the (plaintiff) in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village:"—Held, that there was an implied agreement by the vendor not to resume practice; that the sum of $400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both. Judgment below, 31 O. R. 91, varied. *Snider* v. *McKelvey*, 27 A. R. 339.

Specific Performance.]—In a suit for the specific performance of an agreement for the sale of lands, or to set aside a conveyance for fraud, the plaintiff is not of right entitled to an injunction to restrain alienation, unless it is alleged by the bill and proved that the holder of the land threatens and intends to convey the lands. *Kerr* v. *Hillman*, 8 Gr. 285.

Statutory Remedy—*Balance of Convenience.*]—On a motion by a road company for an injunction to restrain the defendant from passing through their toll gates without paying tolls when demanded, it was contended that because there was a statutory remedy by the recovery of a penalty for each offence under s. 129, R. S. O. 1877 c. 152, the court would not interfere by way of injunction:—Held, that as the plaintiffs had established a primâ facie case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial, and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. Letton v. Goodden, L. R. 2 Eq. 130, and Cory v. Yarmouth, &c., R. W. Co., 3 Ha. 593, considered and followed. *Hamilton and Milton Road Co.* v. *Raspberry*, 13 O. R. 466.

Street Railways — *Contract — Specific Performance.*]—The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. c. 91 (O.):—Held,

that the agreement was one of which the court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come. Bickford v. Town of Chatham, 16 S. C. R. 235, followed. Fortescue v. Lostwithiel and Fowey R. W. Co., [1894] 3 Ch. 621, not followed. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form. Davis v. Foreman, [1894] 3 Ch. 654, followed. *City of Kingston* v. *Kingston Portsmouth and Cataraqui Electric R. W. Co.*, 28 O. R. 389, 25 A. R. 462.

Tenant in Common.]—One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Gr. 614.

Title Doubtful.]—There are many cases in which the court will interfere by injunction to maintain things in statu quo pendente lite, not only where plaintiff's title to relief is unquestioned, but even where it is doubtful; provided there is a substantial question to be settled. *Attorney-General* v. *McLaughlin*, 1 Gr. 34.

But the court does not interfere by special injunction against a party in possession claiming adversely to plaintiff; nor, on the other hand, will the court, as a general rule, so interfere in favour of a party in possession to restrain a casual trespass. *Ib.*

Trustee.]—The court will grant an injunction to restrain a trustee from interfering with the trust estate where fraud is charged, and by the same order appoint a receiver. *Vernon* v. *Kinzie*, 2 O. S. 40.

Use of Bridge—*Completed Work.*]—A company was incorporated to construct a bridge across the Niagara river, which bridge was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains;" and the company completed such bridge so far as to permit of the running of railway trains across it. The time limited for the completion of the structure for the passage of ordinary carriages had not elapsed, when the bridge company leased such bridge to a railway company, who were daily running trains across it; but no commencement was made with that portion of the bridge intended for the purpose of ordinary traffic, &c. An information was filed seeking to restrain the lessees from using the structure for railway traffic, until it was put in a condition to be used for ordinary passenger traffic, but a demurrer thereto for want of equity was allowed. *Attorney-General* v. *International Bridge Co.*, 22 Gr. 298.

Quære if even the time allowed for the completion, of the bridge for ordinary traffic had elapsed, whether the court would have interfered by injunction, the work which had been done, having been done by authority of law, and the relief prayed being such as would, in the event of the order of the court being disobeyed, have necessitated the destruction of that portion of the work already completed. *Ib.*

Water Rights.] — Under the circumstances set out in this case, an injunction was refused restraining the defendant, who owned a mill on the river Ottawa, from interference with the slides in the Chaudiere rapids by throwing in rubbish, &c. *Attorney-General* v. *McLaughlin*, 1 Gr. 34.

——— *Small Damage.*]—The owner of land through which a stream flowed into land on which a former proprietor had erected a milldam, which forced back the water and overflowed about two acres of the adjoining land, damaging it to the extent of about £2 per annum, brought trespass against the former owner of the mill for the value of the land so damaged, in which he established his legal right, and now applied for a perpetual injunction:—Held, that the small amount of damages occasioned was not a sufficient reason for withholding the aid of the court, and that the plaintiff, having established a clear right both at law and in chancery, was entitled to a perpetual injunction to stay further trespass. *Wright* v. *Turner*, 10 Gr. 67.

II. Damages in Lieu of or Because of Injunction.

Damages and Injunction.]—See *Snider* v. *McKelvey*, 27 A. R. 339.

Discontinuance of Act Complained of—*Costs.*]—Where a plaintiff filed a bill for an injunction and payment of damages, and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit:—Held, that the court had not jurisdiction to make a decree for the damages. Defendant having neglected to inform plaintiff of the discontinuance, though applied to respecting it, before suit, the bill was dismissed without costs. *Brockington* v. *Palmer*, 18 Gr. 488.

Diverting Watercourse.]—The plaintiff having failed to prove actual damage for the diversion of a watercourse, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. c. 29, s. 90, s-s. h (D.). *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Mode of Computing.] — The mode of computing damages to be allowed in lieu of an injunction considered. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89.

Prima Facie Case.]—Where a registered shareholder of a company finding the annual reports of the company misleading applies for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiffs' affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. *Montreal Street R. W. Co.* v. *Ritchie*, 16 S. C. R. 622.

Reference—*Discretion.*]—Where a plaintiff on obtaining an injunction enters into the usual undertaking to abide by such order as the court may make as to damages, it is in the discretion of the court to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for the defendant, the court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained. *Hessin* v. *Coppin*, 21 Gr. 253.

Sale—*Increased Price.*]—On obtaining an ex parte injunction restraining the sale of property, the plaintiff entered into the usual undertaking as to damages, and subsequently dismissed his bill; whereupon the defendant moved for a reference to the master to inquire as to damages sustained by him, when, in answer to the application, it was shewn that, since the dismissal of the bill, an increased price had already been offered, and that it was probable a still greater advance in price would be obtained on a sale. The court, under the circumstances, refused the application, but without costs, and reserved to the defendant liberty to renew his application, on which he should be at liberty to use depositions and affidavits read on the present motion. *Featherstone* v. *Smith*, 20 Gr. 474.

Undertaking—*Reference as to Damages.*]—The jurisdiction to award an inquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judiciously and not capriciously. Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the divisional court, under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal inquiry, refused to award a reference as to damages. *Gault* v. *Murray*, 21 O. R. 458.

III. Interim Injunction.

Adverse Decision in Other Cases.]—An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action in statu quo long enough to enable him to obtain the decision of an appellate court on points already decided in other cases, against his contention, in courts of first instance. *Wyld* v. *McMaster*, 4 O. R. 717.

Appeal.]—See *McLeod* v. *Noble*, 24 A. R. 459.

Balance of Convenience.]—The plaintiff, who claimed the exclusive user of certain streams flowing through his lands, which right the defendants denied, obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby:—Held, that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour. Remarks as to the general principles on which interlocutory injunctions should be granted or refused. *McLaren* v. *Caldwell*, 5 A. R. 363.

A by-law of a municipal corporation, passed under s. 283 of the Consolidated Municipal Act, for the purpose of regulating procedure, requiring work exceeding $200 in value to be done by contract after tenders had been called for, was, on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms. In pursuance of this stipulation, the contractors entered into other contracts with the corporation, and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:—Held, that as the applicant's legal right was not clear, and as serious loss and public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted. Validity of proceedings not taken in accordance with the provisions of a by-law for regulating the proceedings of the council or committee thereof, considered. Re Wilson and Ingersoll, 25 O. R. 439, referred to. *Dwyre* v. *Ottawa*, 25 A. R. 121.

See Taylor v. *Hall*, 29 Gr. 101; sub-title IV. 2, *post*.

Cutting Timber—*Title in Dispute.*]—Where a strip of land was vested in the plaintiff, (according to the report of commissioners appointed to run the line between two townships), but defendant claimed it, and had applied to the court of Queen's bench to quash the report, pending the application defendant commenced to fell the timber, alleged to be valuable, growing on the strip. The court restrained such felling until a decision of the motion pending before the Queen's bench. *Christie* v. *Long*, 3 Gr. 630.

Legal Right Doubtful—*Delay.*]—Plaintiff claimed to be entitled under a lease to certain water rights, but his title was disputed, and the injury of which he complained had been going on for three years, and was not any greater at the time the plaintiff moved for an interlocutory injunction than it had been for three years before. The court refused the motion. *Rich* v. *Brantford*, 14 Gr. 83.

Mandatory Injunction.]—The court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed. *Toronto Brewing and Malting Co.* v. *Blake*, 12 O. R. 175.

See Mearns v. *Town of Petrolia*, 28 Gr. 98, *Hathaway* v. *Doig*, 6 A. R. 264.

No Active Interference.]—The office of an interlocutory injunction is simply to retain matters in statu quo. Where, therefore, the railway track of the Niagara Falls Suspension Bridge had been declared to be a public highway, and that an agreement that the same should be used by one railway exclusively was ultra vires the charter of the bridge company, the E. & N. R. W. company moved to restrain the G. W. R. W. company, with whom such illegal agreement had been made, from preventing the E. & N. R. W. company from crossing the lands of the G. W. R. W. company in order to obtain access to the bridge; and it was shewn that the latter company were not actively interfering to prevent the approach being obtained, but were simply passive, the court, on interlocutory motion, refused the injunction, although of opinion that, at the hearing, the relief should be granted. *Erie and Niagara R. W. Co.* v. *Great Western R. W. Co.*, 21 Gr. 171.

Nuisance—*Delay.*]—A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the complainant. The court refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing. *Radenhurst* v. *Coate*, 6 Gr. 139.

Possession—*Legal Title Doubtful.*]—Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of the plaintiff must be considered, and the court will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O. R. 175.

Prior Undertaking.]—An interim injunction was granted, without going into the case, in terms of an undertaking given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking:—Held, that though the undertaking might have been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, however, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction. *Hendrie* v. *Beatty*, 29 Gr. 423.

Second Application.] — Although the court had refused an ex parte injunction to restrain the removal of chattels claimed by plaintiff, and directed notice of motion to be given, an interim injunction was subsequently granted, on an affidavit that defendants were removing the property, notwithstanding the notice had been served. *Wilmot* v. *Maitland*, 2 Gr. 556.

See sub-title, I.

IV. Practice.

1. *In General.*

Adding Parties.]—After decree a party defendant may be added for the purposes of an injunction on motion merely. See *Young* v. *Huber*, 29 Gr. 49; *Peterkin* v. *Macfarlane*, *ib.* 53, *note*.

See Hathaway v. *Doig*, 6 A. R. 264.

On a motion for injunction an objection was taken that certain necessary parties were not before the court; but counsel appearing for the absent parties, and consenting to their being made parties, to be bound by the proceedings, and treated as if actually defendants on record:—Held, that this cured the defect for the purposes of the motion. *Attorney-General* v. *County of Grey*, 7 Gr. 592.

Amendment.] — Where the time for amending the bill as of course has not elapsed, an order to amend without prejudice to an injunction, is as of course, and obtainable on præcipe. *Evans* v. *Root*, 1 Ch. Ch. 357.

Material amendments will not be allowed without prejudice to a pending motion for injunction. *Davy* v. *Davy*, 2 Ch. Ch. 81.

A motion to amend without prejudice to an injunction will not be granted ex parte. If the amendments are such as could be made without a special application the order can be obtained on præcipe; if not, notice must be given to the parties affected. *McGregor* v. *Maud*, 2 Ch. Ch. 387.

After service of an injunction the plaintiff amended his bill and added a new defendant, who was a mere trustee for the plaintiff, without however altering the frame of the bill or prayer. Subsequently to the amendment the defendants committed a breach of the injunction, and the plaintiff moved to commit the defendants:—Held, that the amendment was not a waiver of the injunction. *McDonell* v. *McKay*, 12 Gr. 414.

Where after serving a notice of motion for injunction, and before the motion is made, the plaintiff amends his bill, such amendment is an answer to the motion. *McDonell* v. *Street*, 13 Gr. 168.

Appeal.]—See *McLeod* v. *Noble*, 24 A. R. 459.

Bill Necessary.]—A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents and for a receiver. It appeared that the defendant was a stranger whose right to be in possession was denied:—Held, that no relief could be had against him without bill filed. *Young* v. *Wright*, 8 P. R. 198.

Change of Parties.] — Where a motion for injunction stood over, and before it was again brought on, the plaintiff amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought

thereby, and in the absence of whom such relief would not have been granted, and again brought on the motion without giving a fresh notice, the court refused to hear the motion on this objection being taken. *Westacott* v. *Cockerline*, 13 Gr. 159.

Costs.]—Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of defendant, against whom an injunction had been ordered, the court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing. *Fire Extinguisher Co.* v. *North Western (Babcock) Fire Extinguisher Co.*, 20 Gr. 625.

Where an ex parte injunction is dissolved on the ground of concealment of the true state of facts, it is proper to dissolve it with costs; and "with costs" in such case means "with costs payable forthwith." *Walton* v. *Henry*, 13 P. R. 290.

See Skldzsky v. *Cranston*, 22 O. R. 590.

County Court.]—Under the Judicature Act, R. S. O. 1897 c. 51, s. 57, s.-s. 4, and the County Courts Act, R. S. O. 1897 c. 55, s. 23, s.-s. 11, when a cause of action is within the jurisdiction of a county court, an injunction may in a proper case be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not in as full and ample a manner as in a case in the high court. *Bradley* v. *Barber*, 30 O. R. 443.

County Court Jurisdiction.] — The county court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the county court on its equity side. *Rae* v. *Trim*, 8 P. R. 405.

Defect in Form.]—An injunction may be granted in a proper case, though the bill is defective in respect of parties and form. *Dumble* v. *Peterborough and Lake Chemung R. W. Co.*, 12 Gr. 74.

Defendant's Motion.] — An injunction may be granted against a plaintiff at the instance of defendant, before decree. *Stewart* v. *Kingsmill*, 13 Gr. 347.

If an injunction may be granted to a defendant before the hearing, (as to which quære,) the answer must pray therefor specifically. *Brandon* v. *Elliott*, 14 Gr. 109.

Evidence.]—On motion for an injunction against one defendant, the cross-examination of another defendant on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant against whom the plaintiff moved had no notice of the cross-examination, or of the plaintiff's intention to read the depositions on the motion. *Curtis* v. *Dales*, 12 Gr. 244.

There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered. *Treadwell* v. *Morris*, 15 Gr. 165.

On a motion for injunction to stay the wrongful selling of property by the legal owner, the plaintiff's affidavits alleged that the principal defendant had sold, or pretended to sell, to his son, who was also a defendant, but by mistake no injunction was asked against him. No threat of any further sale was alleged. Defendant filed no affidavit in answer: — Held, that the allegations were sufficient, and an injunction was granted. *Boardman* v. *Wronghton*, 16 Gr. 384.

Ex parte Application.]—Where an injunction is being applied for ex parte counsel who desire to appear in opposition to the application should be heard. *McLeod* v. *Noble*, 24 A. R. 459.

Leave to File Further Affidavits.]—On granting an interim injunction leave was reserved to plaintiff to file an affidavit of B. An application to continue the injunction was enlarged in consequence of the other business of the court, and it was then agreed that no further affidavit should be filed, but the affidavit of B. was then in the plaintiff's hands ready to be used if the motion had not been adjourned, and was in fact filed and served the same afternoon:—Held, that plaintiff was entitled to read this affidavit. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274; 2 Ch. Ch. 319.

Local Judge.]—When the solicitors for both parties reside in the same county the local Judge has jurisdiction to grant an injunction until the trial. Kohles v. Costello, 16 C. L. T. Occ. N. 84, declared to be no longer law owing to changes in the arrangement of the rules. *Dougall* v. *Hutton*, 19 C. L. T. Occ. N. 190.

Notice to Proceed.]—See *Baby* v. *Langlois*, 1 C. L. J. 209.

Order before Service of Bill.]—Where an ex parte injunction is granted before the bill is served, an office copy of the bill should be served with the injunction, or as soon as possible afterwards. *Heron* v. *Swisher*, 13 Gr. 438.

Prayer.]—Injunction being prayed for in the prayer for process is sufficient. *Clarke* v. *Manners*, 2 O. S. 1.

An injunction was refused, the allegation and prayer of the bill having been framed with a view to relief on other grounds than those upon which the application was founded, although the affidavits in support of it would warrant the injunction. *Ely* v. *Wilson*, 7 Gr. 103.

Special Return Day.]—Where an injunction is granted to a particular day, which is not a motion day, and the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omit to mention that such notice is given by leave of the court. *Johnson* v. *Cass*, 11 Gr. 117.

Stay of Proceedings — *Security for Costs.*]—An order for security for costs made pursuant to rule 1199, and issued according to form 95, has the effect of staying all further proceedings until security is given; and while such order stands, it is not competent

for the plaintiff to proceed with a pending motion for an injunction against the defendant who had obtained the stay, but such motion should be enlarged till the security is perfected. *Weekes* v. *Underfeed Stoker Co. of America*, 19 P. R. 260.

Undertaking for Damages — *Foreign Plaintiff.*]—Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction. *Delap* v. *Robinson*, 18 P. R. 251.

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2. Continuing and Dissolving.

Amendment.]—Where a defendant, upon filing his answer, obtains and serves an order nisi to dissolve a common injunction, and the plaintiff thereupon, at any time before the actual dissolution, amends his bill, the defendant before proceeding with the application to dissolve must answer the amendments, or be prepared to contend that even admitting them to be true the injunction ought to be dissolved. If he choose not to proceed with the application, the plaintiff must pay the costs incurred before the amendments. *Fisher* v. *Wilson*, 1 Gr. 218.

Costs of Former Motion.]—A motion by the plaintiff to continue an ex parte injunction was refused, with costs, but at the same time leave was given to amend the bill and another interlocutory injunction was granted ex parte. On the return of the motion to continue the latter, it was objected that the costs of the former motion which had not been taxed were not paid:—Held, that the non-payment was no objection to the motion being proceeded with. *Taylor* v. *Hall*, 29 Gr. 101.

County Court Action.]—A plaintiff in an injunction suit, instituted in the county court, desiring to extend the injunction, must have the pleadings and papers in the cause transmitted to the court of chancery before the motion is heard. *Stevenson* v. *Huffman*, 4 Gr. 318.

A defendant on moving to dissolve an injunction from a county court, is not bound to have the proceedings returned from the county court office. *Abraham* v. *Shepherd*, 4 Gr. 260.

Delay.]—Where an ex parte injunction was served on 24th December, and the bill was not served up to the 13th May following, the injunction was dissolved. *Heron* v. *Swisher*, 13 Gr. 438.

Dismissal of Bill.]—A bill filed to restrain proceedings at law to enforce a judgment having been dismissed, the court continued the interim injunction obtained during the progress of the cause until the decision of the court of appeal, upon paying into court the amount of the judgment, or giving security to the satisfaction of the defendants. *Cotton* v. *Corby*, 7 Gr. 50.

Effluxion of Time.]—Where an interim injunction has been granted until a day certain, and a motion to continue it must be made if it is desired to extend it beyond such day, no motion to dissolve is necessary, except where it is sought to get rid of it in the meantime. *McCuaig* v. *Conmee*, 19 P. R. 45.

Exceptions to Answer.]—Exceptions to an answer cannot be shewn as cause against dissolving a special injunction: for if the answer be insufficient, it may still be used as an affidavit. *Harrison* v. *Baby*, 1 Gr. 247.

Extending Scope of Order.]—An ex parte injunction had been granted to restrain defendants, until further order, from interfering with certain saw logs in the Salmon river, which the plaintiff claimed as his. Defendants having, notwithstanding, obtained possession of the logs, a motion to extend the injunction so that, in effect, the plaintiff might receive possession of the logs from the defendants was retained until after trial of issues as to the plaintiff's property in the logs, this being disputed by defendants. *Farwell* v. *Wallbridge*, 2 Gr. 332.

New Facts.]—On a motion to continue an injunction the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may shew suppression of facts by the plaintiff as a ground for dissolving it, and may thereupon move to dissolve it. *Hynes* v. *Fisher*, 4 O. R. 60.

Order pro Confesso.]—An injunction had been obtained against a defendant, and after the time limited for putting in his answer had expired, an order pro confesso was taken out against him. He then gave notice of motion to dissolve the injunction:—Held, that the statements of the bill having been confessed by his allowing the order pro confesso to stand, precluded him from moving. *Manley* v. *Williams*, 5 L. J. 163.

Praecipe Decree.]—Where in a foreclosure suit an interim injunction has been granted to restrain cutting timber, the registrar has no power to grant a decree on præcipe, with a provision for continuing the injunction. For this purpose the cause must be brought on for hearing. *King* v. *Freeman*, 1 Ch. Ch. 350.

Receiver.]—A defendant may move to dissolve an injunction without moving at the same time to discharge a receiver of the funds to which the injunction related. *Sanders* v. *Christie*, 1 Gr. 137.

Substantial Question to be Tried—*Amendments.*]—The proposed amendments of the bill were set out substantially in the order for the injunction, which was served:—Held, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail. Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit in medio, an injunction restraining the defendant from dealing with it was continued to the hearing. *Taylor* v. *Hall*, 29 Gr. 101.

Suppression of Facts.]—The affidavits on which an ex parte injunction is applied for must (to guard against abuse of that process) present a candid statement of the whole case, and must set forth not only the facts which the plaintiff thinks to be, but such as are in

truth material to the determination of the application. An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits. *Ley* v. *McDonald*, 2 Gr. 398.

Title after Action.]—Two railway companies were in actual possession of a strip of ordnance land 100 feet in width, along which their tracks were laid, and a third railway company proceeded to lay their track on the same strip, when an injunction was obtained at the instance of one of the first named companies restraining such third company from further proceeding with their works, whereupon they applied for and obtained from the government of the Dominion a license of occupation of the same strip for the purpose of running their track thereon, the order in council authorizing such license stating that it was not to "operate to imply any covenant or agreement on the part of the Crown to give possession to the licensees, but that such license shall be accepted by them subject to any legal rights which either the Grand Trunk or the Northern Railway (the two railways so in possession) may hereafter establish in respect of the one hundred feet or any part thereof." A motion made to dissolve the injunction was refused, with costs. Although the rule is, that on a motion to dissolve an injunction the plaintiff cannot support the writ on grounds not set forth in his bill, still where a defendant moves to dissolve because he has acquired a title subsequent to the filing of the bill, the plaintiff may resist such application by any means in his power, whether stated in the bill or not. *Grand Trunk R. W. Co.* v. *Credit Valley R. W. Co.*, 26 Gr. 572.

Water Rights.]—C. being seised in fee of certain lands on both sides of the river Humber, erected grist and saw mills on the east bank of the river; and on the west bank a woollen mill or factory, situate some distance further down the stream; and having leased the latter together with the water power, water privileges, &c., to certain persons who assigned to the plaintiff, subsequently thereto leased the grist and saw mills to certain parties who had since assigned the lease to the defendant. At the time the lease of the woollen mills was made, a dam had been erected across the river by C., about a quarter of mile up the stream, for the purpose of carrying the waters thereof to the grist mill and saw mill, but which it was said still permitted sufficient water to escape for driving the machinery of the woollen mill, and which had been built by C., for the purpose of consuming the waste water flowing from the said dam. After the defendant entered into possession of the grist and saw mills, he erected a new grist mill, and threw a new dam across the river lower down the stream than the old one, and of more perfect construction, in consequence of which in the dry season the bed of the river had become almost dry, and the plaintiff was unable to work his woollen mill. Thereupon he filed a bill, and obtained a special injunction restraining the defendant from making or continuing, &c., any dam, &c., whereby the natural flow of the river might be prevented, &c., so as to injure, &c., the water power of the woollen mill, and at any time heretofore, used, &c., which the defendant moved upon affidavit to have dissolved:—Held, that the court would not dissolve the injunction, but retain the same until the hearing or a trial had been had at law. *Gamble* v. *Howland*, 1 O. S. 161. See *S. C.*, 3 Gr. 281.

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3. *Enforcing.*

Amendment after Order.]—After service of an injunction the plaintiff amended his bill, and added a new defendant, who was a mere trustee for the plaintiff, without, however, altering the frame of the bill, or the prayer. Afterwards defendants committed a breach of the injunction, and the plaintiff moved to commit them:—Held, that the amendment was not a waiver of the injunction. *McDonald* v. *McKay*, 12 Gr. 414.

Appeal.]—Section 27 of the Court of Appeal Act, R. S. O. 1877 c. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause. *McLaren* v. *Caldwell*, 29 Gr. 438.

Where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. 1877 c. 38, s. 26, pending an appeal to the court of appeal, all proceedings to enforce the injunction are, by virtue of s. 27 of that Act, thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction. Dundas v. Hamilton and Milton Road Co., 19 Gr. 455, followed, and preferred to McLaren v. Caldwell, 29 Gr. 438. *McGarvey* v. *Town of Strathroy*, 6 O. R. 138.

Held, that the operation of an injunction awarded by a judgment of the court below was stayed pending an appeal to the court of appeal, after the perfecting of the security on appeal, by virtue of R. S. O. 1877 c. 38, s. 27. *City of Toronto* v. *Toronto Street R. W. Co.*, 12 P. R. 361.

See McLeod v. *Noble*, 24 A. R. 459.

Attempted Settlement—*Delay.*]—In 1845, the plaintiff obtained an injunction restraining defendant from continuing any dam whereby the natural flow of the river, on which they both had mills, should be interfered with, to the injury of plaintiff's rights. To this bill no answer was ever filed, but a motion to dissolve the injunction was made and refused; and in the same year the plaintiff recovered a verdict against defendant at law, in respect of the same matters. An arrangement was then made between them that the dam should remain, and that each party should have the exclusive use of the water for a certain portion of every day, and this was acted upon for nearly seven years. Defendant then began to make a limited use of the water all day, and contended that owing to improvements in the machinery of his mill this would not interfere with plaintiff's rights. The plaintiff denied this, and moved to commit for contempt:—Held, that the delay was no answer to the motion; that the defendant having abandoned the agreement, the plaintiff had a right to fall back on his injunction; that on this application the propriety of granting the injunction originally was not a proper subject of consideration; and the court

being of opinion that the continuance of defendant's dam was a breach of the injunction, ordered defendant to stand committed in two weeks, unless in the meantime he obeyed the injunction. *Gamble* v. *Howland*, 3 Gr. 281.

Defendant appealed from an order directing his committal for breach of an injunction, and moved the court to stay proceedings under the order pending the appeal, which was refused. *Ib.*

Change in Law.] — An injunction was obtained restraining the sale, under a writ of ven. ex., of a married woman's inchoate right of dower, subsequently to which an Act was passed rendering such estates saleable at law, and the plaintiffs in the action, without procuring a discharge of the injunction, sued out an alias fi. fa., and were proceeding to a sale of the widow's dower, the husband having, after the injunction had been granted, died. The court granted a sequestration to enforce the injunction; although, upon an application for that purpose, defendants might have been entitled to be relieved from the injunction. *Allen* v. *Edinburgh Life Ass. Co.*, 26 Gr. 192.

Committal—*Costs.*]—The defendant was committed for breach of an injunction, but was discharged on an application explaining and apologizing for his contempt. It appeared that he was unable to pay costs, and therefore, though costs of both motions were imposed, payment thereof was not made a condition of such discharge. *Donnelly* v. *Donnelly*, 9 O. R. 673.

Compliance Shewn—*Costs.*]—The court refused to commit for breach of an injunction, where defendant made an affidavit of compliance with the writ, even though the affidavit was contradictory to a statement previously made by him; but defendant was ordered to pay the costs of the motion, as his conduct had caused it. *Campbell* v. *Gorham*, 2 Gr. 403.

Contempt—*Effluxion of Time.*]—Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie. *McLeod* v. *Noble*, 24 A. R. 459.

Delay in Proceeding.] — An injunction while it stands should be obeyed; and where, after twelve weeks had elapsed from service of it, without the bill being served, defendant treated the injunction as gone, the court, while refusing a motion to commit for breach of it, refused defendant his costs of resisting the application. *Heron* v. *Swisher*, 13 Gr. 458.

Evasion.]—Defendant and his agents, &c., were restrained by injunction "from preventing the plaintiff, his counsel, &c., from having, and from in any way interfering with their having free access at all times to the books and papers of the co-partnership, and from removing such books from the usual place of business of said co-partnership, and from retaining or keeping any of said books, &c., in any other place. Upon the plaintiff, who had been a partner of defendant, applying to the brother and clerk of defendant for access to the books, which had usually been kept locked up in a desk in the place of business of the co-partnership, where such application was made, such clerk answered to the effect, either that he had "instructions not to suffer," or that he had "not instructions to suffer" the plaintiff to see the books, when at the same time he was aware that the books and papers had been removed from their accustomed place to defendant's private residence by defendant, assisted by his said clerk, and subsequently removed by defendant to Toronto:—Held, that the clerk was guilty of a contempt of the court, and he was ordered to pay the costs of the motion to commit. *Prentiss* v. *Brennan*, 1 Gr. 428, 497.

Quære, whether a party whose committal had been ordered for breach of an injunction, and against whom a sequestration has been granted for the same contempt, can move against the writ before clearing his contempt. *Ib.*

Improper Order.] — A party disobeying an injunction was refused his costs of resisting a motion to commit for contempt, although at the same time the injunction was dissolved upon his application, as granted improperly. A defendant served with a writ must obey it as long as it exists. *Notter* v. *Smith*, 1 Ch. Ch. 21.

Ineffective Order—*Subsequent Acts.*]—An injunction was issued restraining defendant from removing logs from a specified lot of land; before this he had removed logs from the lot to the adjoining road allowance, and after being served with the injunction, he took these away to his mill. The court refused to commit him for breach of the injunction. *Ball* v. *Sherlock*, 16 Gr. 658.

Invalid By-law — *New By-law.*] — A municipal corporation having been enjoined from purchasing a property for municipal purposes under a by-law which was invalid, repealed such by-law and proceeded to purchase the same property under a new by-law valid on its face:—Held, that in purchasing under the new by-law the corporation was not guilty of a breach of the injunction, and a motion for a writ of sequestration was dismissed. *Young* v. *Town of Ridgetown*, 18 O. R. 140. See, also, *Waldie* v. *Burlington*, 7 O. R. 192; 13 A. R. 104; *McGarvey* v. *Town of Strathroy*, 6 O. R. 138.

Liberal Construction of Order.] — Injunctions must be obeyed according to the spirit as well as letter. *Bickford* v. *Welland R. W. Co.*, 17 Gr. 484.

Where defendants were enjoined against removing from their premises certain iron rails claimed by the plaintiff, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States:—Held, that they committed a breach of the injunction. *Ib.*

Notice—*Service.*]—On application for an attachment against defendant for disobeying an injunction in an action of detinue:—Held, that no order could be made without previous notice. *Melling* v. *Ellis*, 7 L. J. 18.

Where the injunction operates strictly by way of restraint, the proper course is to move that defendant be committed for breach of the injunction, unless he shew cause at a future day to the contrary; and in the latter case the motion must be made on personal service of a notice of motion on defendant. *Ib.*

Notice of Acts Objected to—*Service of Judgment—Revivor.*]—On a motion to commit a defendant for non-compliance with a decree which contained this clause: "And this court doth further order and decree that an injunction be awarded to the plaintiff perpetually restraining the defendant, his servants, workmen, and agents, from trespassing upon the lands of the plaintiff in the pleadings mentioned," the trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was objected: 1. That the suit was revived while pending in the court of appeal by an order issued from the division of the high court of justice appealed from. 2. That no certificate of the supreme court (which had in substance affirmed the decree) had been served; and 3. That the notice of motion did not specify the acts of disobedience. It was:—Held, that the suit was properly revived: that it was not necessary to serve the certificate of the supreme court when the decree was not materially altered, and when the defendant well knew that the decree would be enforced; and that when (as in this case) a correspondence had shewn the defendant what acts were complained of, it was not necessary to repeat them in the notice of motion; and the objections were overruled. Held, also, that under the form of decree, the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month the order must go. *Grascll* v. *Carter*, 6 O. R. 584.

Notice of Motion.]—On moving for a writ of sequestration for breach of injunction two clear days' notice of motion is sufficient. *Cook* v. *Credit Valley R. W. Co.*, 8 P. R. 167.

Nuisance—*Second Complaint.*]—In 1873 an injunction was granted restraining the Toronto Street Railway Company, on the ground of nuisance, from using their railway, unless by a day named the defendants should put the same in a good and sufficient state of repair, to the satisfaction of an engineer named, who on the day appointed reported the railway in such a state of repair as the decree in the cause required. Two years afterwards the said railway, as also other lines laid in the meantime by the same company, had, as was alleged, been allowed to go into such a state of disrepair as to become again a nuisance to the public, whereupon a petition was filed by the relators, alleging these facts, and claiming the benefit of the decree:—Held, that as the decree had already been complied with, a new information must be filed to obtain the relief now asked. *Attorney-General* v. *Keely*, 22 Gr. 458.

Parties Liable.]—Pending the injunction in this case (see 4 O. R. 601), one P., who was not a party to the action, but was a member of the plaintiffs' association, on behalf of the association hired one H. to work for him. M. and J., members of the defendants' association, but not parties to the action, hearing of this went to H. and induced him to refuse to work for P. and to leave Toronto. The court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative capacity, but the plaintiffs' affidavits stated that the plaintiffs represented their association and the defendants, theirs. On motion to commit M. and J. for contempt of process of the court:—Held, that the master plasterers' association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association and P.: that though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail. *Hynes* v. *Fisher, McCord and Jenkins' Case*, 4 O. R. 78.

Proof of Order—*Substitutional Service.*]—On a motion to commit for breach of an injunction, the affidavits need not state that the writ was under the seal of the court. *Farnell* v. *Wallbridge*, 3 Gr. 628.

Where, after a breach of an injunction, defendant left the jurisdiction, substitutional service of the notice of motion to commit was ordered to be made on his solicitor. *Ib.*

Servant.]—A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ. And after leaving his master's service he continues bound by an injunction issued while he was a servant against the master and his servants to restrain waste. *Brown* v. *Sage*, 12 Gr. 25.

Service of Order.]—The defendant, in a suit on the equity side of the county court, had, before being served with an injunction restraining the removal of a building, removed the same by direction of the city inspector as being a nuisance, having been erected partly on the public street. Notwithstanding this, an order was made by the judge of the county court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to the court of chancery. In allowing the appeal, and directing defendant's discharge, the court did not give him the costs of the application. *Murphy* v. *Morrison*, 14 Gr. 203.

——— *Conflict of Evidence.*]—A defendant is bound to obey an injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service. Where a breach of an injunction was sworn to by a single deponent, and was denied by defendant, and there was no corroborative evidence, the court refused to commit. *Stewart* v. *Richardson*, 17 Gr. 150.

Service on Solicitor.]—Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the court will commit for contempt. *Andrews* v. *Maulson*, 8 L. J. 74.

Settlement of Action.]—On the same day that an injunction restraining the felling of timber had been served, the plaintiff and the principal defendant in the cause entered into a written agreement, by which the latter agreed to give up possession of the premises on a particular day, and to refrain from

cutting or removing any timber cut in the meantime; and the plaintiff thereby agreed "that I, the said T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," &c. Defendant still continued to cut down and remove the timber, and a motion was made to commit him for breach of the injunction:—Held, that the suit was still pending, the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit. *Mulholland* v. *Bowness*, 14 Gr. 106.

Stay —"*Final Disposition of the Action.*"] —Where an injunction is granted "until the trial or other final disposition of the action, or until further order," or an undertaking is given to that effect, it remains in force until the action is finally disposed of or until some some other order is made with regard to the injunction or undertaking. The action is not finally disposed of until final judgment is entered, because until then it cannot be certain what the final judgment will be. And where an interim injunction was obtained by the plaintiffs, restraining the defendants from doing certain acts until the trial or other final disposition of the action or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a divisional court:—Held, that the effect of the stay was to leave the whole matter in statu quo until the defendants should become entitled to enter judgment, and by so doing put an end to the injunction in accordance with its terms. *Carroll* v. *Provincial Natural Gas Co.*, 16 P. R. 518.

Trivial Damage.]—Where an injunction forbids cutting down trees, it is no answer to a motion to commit, that the trees cut down in contravention of the writ were of little value. *Brown* v. *Sage*, 12 Gr. 25.

V. To Restrain Proceedings at Law.

See Pomeroy v. *Boswell*, 7 Gr. 163; *Morrison* v. *McLean*, 7 Gr. 167; *Boulton* v. *Cameron*, 9 Gr. 297; *Bletcher* v. *Burns*, 9 Gr. 425; *Keating* v. *McKee*, 14 Gr. 608; *Hewitt* v. *Brown*, 16 Gr. 670; *Campbell* v. *Royal Canadian Bank*, 19 Gr. 477; *Brown* v. *McNab*, 20 Gr. 179; *Cunningham* v. *Buchanan*, 20 Gr. 523; *Leitch* v. *Leitch*, 11 Gr. 81; *Bush* v. *Bush*, 15 Gr. 431; *Arnold* v. *Allinor*, 16 Gr. 215; 15 Gr. 375; *National Life Assurance Co.* v. *Ecclo*, 20 Gr. 429; *Walker* v. *City of Toronto*, 1 Gr. 592; *Neil* v. *Bank of Upper Canada*, 2 Gr. 386; *Smith* v. *Wootten*, 12 Gr. 280; *Paton* v. *Ontario Bank*, 13 Gr. 107, 556; *Rice* v. *Beckett*, 2 Gr. 650; *Heward* v. *Harris*, 5 Gr. 226; *Canada Permanent Building Society* v. *Bank of Upper Canada*, 20 Gr. 203; *Hudson* v. *Cook*, 20 Gr. 238; *Treadwell* v. *Morris*, 15 Gr. 185; *Kennedy* v. *Rose*, 21 Gr. 95; *Craig* v. *Milne*, 25 Gr. 259; *French* v. *Taylor*, 23 Gr. 436; *Georgian Bay Transportation Co.* v. *Fisher*, 27 Gr. 346; *Town of Dundas* v. *Desjardins Canal Co.*, 17 Gr. 27; *Webb* v. *McArthur*, 4 Ch. Ch. 63; *Beckhard* v. *McCappin*, 17 Gr. 572; *Van-Warmer* v. *Harding*, 2 Ch. Ch. 199; *Fisher* v. *Glass*, 5 Gr. 46; *Clarke* v. *Manners*, 2 O. S. 4; *Harrison* v. *Baby*, 1 Gr. 247; *Gartshore* v. *Gore Bank*, 13 Gr. 187; *Carruthers* v. *Armour*, 7 Gr. 34.

VI. Under The Common Law Procedure Act.

See Walsh v. *Brown*, 4 L. J. 68; *Arkland* v. *Hall*, 2 P. R. 388; *S. C.*, 4 L. J. 282; *Richey* v. *Toronto Roads Co.*, 23 U. C. R. 62; *Cunningham* v. *Cook*, 2 C. L. J. 46; *McNab* v. *Taylor*, 34 U. C. R. 524.

See Ejectment, VII. 3—Municipal Corporations, XII. 9—Nuisance, V.—Partnership, XI. 2 (b)—Specific Performance, IX.—Way, V. 3 (b), VIII. 4 (b).

INNKEEPER.

I. In General, 3218.

II. Lien, 3219.

I. In General.

Excluding Guest.]—Where a traveller is shewn to have come to an inn as a guest, and to have stayed there six weeks, paying for his board by the week, two days in advance:—Held, that if dismissed abruptly without cause, he has a right of action against the landlord on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term. *Whiting* v. *Mills*, 7 U. C. R. 450.

Where the declaration avers that defendant came as a guest and was so received, the intendment after verdict will be that the relation thus begun continued until it was interrupted by the wrongful act of defendant. *Ib.*

Fire — *Damages.*] — Held, that an innkeeper is not responsible for neglecting to warn his guest of the breaking out of a fire in the building so as to enable him to escape, and therefore is not liable in an action by the guest's personal representative for damages in consequence of the death resulting from such fire. *Hare* v. *Henderson*, 43 U. C. R. 571.

Insolvent Act.]—An innkeeper is not a trader within the meaning of the Insolvent Act of 1869. *Harman* v. *Clarkson*, 22 C. P. 291.

License in Nominee.]—A man may be an innkeeper, though he take out a license in the name of another. *McKay* v. *Brown*, 5 L. J. 91.

Loss of Box left at Inn.]—The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, &c. The plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost; there was no other evidence of any negligence in the matter:—Held, that the plaintiff could not recover. *Palin* v. *Reid*, 10 A. R. 63.

Loss of Luggage.]—The plaintiff arrived in Toronto from Ireland, and drove from the railroad station to the defendant's hotel, having a portmanteau, carpet bag, &c., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, and after occupying it for an hour went to his friend, with whom he remained. He was furnished with a key for the door but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. The plaintiff said he intended to return that night, but he said nothing of his intention to defendant:—Held, that the plaintiff was not there as a guest after he had dressed and left the inn; and that defendant therefore was not liable as an innkeeper, the portmanteau having been lost after the plaintiff left. Quære, if defendant had been so liable, whether the plaintiff was not guilty of contributory negligence. *Lynar* v. *Mossop*, 36 U. C. R. 230.

Negligence.]—The plaintiff lent or hired his horse to S., who while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall:—Held, that the plaintiff might maintain an action for damages. *Walker* v. *Sharpe*, 31 U. C. R. 340.

Sale of Liquor to Inebriate.]—See *McCurdy* v. *Swift*, 17 C. P. 126; *Bobier* v. *Clay*, 27 U. C. R. 458; *Gleason* v. *Williams*, 27 C. P. 93; *Trice* v. *Robinson*, 16 O. R. 433; *Austin* v. *Davis*, 7 A. R. 478; *Northcote* v. *Brunker*, 14 A. R. 364; *Thornley* v. *Reilly*, 17 A. R. 294; *Crane* v. *Hunt*, 26 O. R. 641.

Sale of Intoxicating Liquors.] — See INTOXICATING LIQUORS.

Selecting Room—*Changing Room.*]—An innkeeper has the sole right to select the apartment for a guest, and if he find it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change. *Doyle* v. *Walker*, 26 U. C. R. 502.

A guest who has been received loses the right to be entertained if he neglect or refuse to pay upon reasonable demand. *Ib.*

II. LIEN.

Agreement.]—One W. left his horses at plaintiff's inn, agreeing that he should retain them as security for their keep. He was a teamster, not living at the plaintiff's, and it appeared that he and the plaintiff both used the horses as they wished. W. had had them away for three days, and had brought them back into plaintiff's yard, when they were seized under a division court execution against W. In an action brought by the plaintiff for this seizure, the jury having found for the plaintiff, and the question whether the goods had before the seizure been actually returned into the plaintiff's possession not having been submitted to them:—Held, that it could not be assumed that they had found this to have been the case, and a new trial was granted without costs. *Crabtree* v. *Griffith*, 22 U. C. R. 573.

Boarder — *Special Agreement.*]—In sci. fa. upon a bond to the Crown, it appeared that A., the obligor, had lived at an hotel with his family for some time, using his own furniture, and that when the landlord objected to the removal of the furniture until payment of his bill, he had consented that a large portion of it should remain as security:—Held, that although the landlord could have no lien as an innkeeper, A. being in his house as boarder upon a special understanding, yet that he was clearly entitled to it by the agreement with A., and that A.'s administrator was justified, therefore, in paying him as against the Crown. *Regina* v. *Askin*, 20 U. C. R. 626.

Inn-keeper or Boarding House Keeper—*Piano not Owned by Guest.*]—J. and his wife took rooms in premises kept by defendant R. A., called the "Shandon House," partly furnishing them and agreeing to pay $50 per month for rooms and board. Subsequently they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff:—Held, that the relation between the defendant R. A. and J. was not that of innkeeper and guest, but of boarding house keeper and boarder:—Held, also, that as the piano was not the property of J. and his wife, defendant had no lien on it for board and lodging under R. S. O. 1877 c. 147. *Newcombe* v. *Anderson*, 11 O. R. 695.

Quære, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. 1877 c. 147, s. 1. *Ib.* See, also, *Rees* v. *McKeown*, 7 A. R. 521.

Stabling Horses.] — The plaintiffs owning a line of stages, entered into a special agreement with defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and defendant refused to let the plaintiffs remove the horses. The plaintiffs then brought trover:—Held, that defendant had no right of lien, as the plaintiffs employed defendant as a livery stable keeper, and under a special agreement which gave him no continuing right of possession. Held, also, that a conversion was sufficiently proved. *Dixon* v. *Dalby*, 11 U. C. R. 79.

Defendant kept an inn and livery stable. F., the plaintiff's hired man, boarded there for some months, and kept there the plaintiff's horses, with which he went out to work every morning on a gravel road, returning at night. Defendant charged a fixed sum per week for F.'s board and the horses' keep:—Held, that defendant had no lien on the horses for their keep; for neither the plaintiff nor F. was a guest, within the common law meaning of that term; F. did not live in the inn, and there was no continuing possession or right to it. *Neale* v. *Crocker*, 8 C. P. 224.

——— *Revival of Lien.*]—An innkeeper, claiming to act under R. S. O. 1887 c. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at the inn, to enforce a lien thereon for the keep and accommodation thereof:—Held, that the lien existed and the sale was authorized. After the lien accrued the plaintiff removed the stallion and subsequently brought it back to the inn:—Held, that the lien revived on the return of the stallion. *Huffman* v. *Walterhouse*, 19 O. R. 186.

See INTOXICATING LIQUORS, VI. 2—MUNICIPAL CORPORATIONS, XVIII. 4 (b)—SPECIFIC PERFORMANCE, IX.

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See DEFAMATION.

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See BANKRUPTCY AND INSOLVENCY, V., VI.

INSOLVENT DEBTORS' RELIEF.

See BANKRUPTCY AND INSOLVENCY, IV.

INSPECTION ACT.

Negligence — *Pleading.*]—In an action against a government inspector of raw hides for fraudulently grading and branding incorrect weights and qualities on hides:—Held, that "anything done under this Act," in R. S. C. c. 99, s. 20, has the same meaning throughout the section, and means "anything intended to be done under this Act;" and the defendant not appearing to have acted malâ fide, or to have intended not to perform his duty under the Act, was entitled to the protection of this section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under the Act. Semble, that full effect may be given to ss. 96 and 104 of R. S. C. c. 99, by holding that up to five per cent. of any deficiency or excess in the weight of certain kinds of leather the inspector is protected against any action, and as to any excess he is entitled to any defence open to him under the Act or otherwise. *Grant* v. *Calbard*, 19 O. R. 20.

Sureties.]—Liability of inspector's sureties for deputy's default. See *Verratt* v. *McAulay*, 5 O. R. 313.

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I. In General.

Administration of Deposit—*Costs.*]—The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders; and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders. *In re Ætna Ins. Co. of Dublin*, 17 Gr. 109.

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts and paid proportionately, and are not to be paid in priority to the debts. *Ib.*

See Calvin v. *Provincial Ins. Co.*, 20 C. P. 267.

Defendants were licensed under 31 Vict. c. 48 (D.), to transact fire and inland marine insurance, while their original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine:—Held, affirming 26 Gr. 354, that the holders of ocean marine policies, though resident in Canada, were not, on the insolvency of the defendants, entitled to rank as creditors on the fund deposited with the government of Canada. Under that Act, companies confining themselves to ocean marine insurance were not bound to make a deposit or obtain a license. Held, also, that under 38 Vict. c. 20 (D.), it was the duty of the assignee to determine the right of the policy holders to rank upon the deposit; and not merely to report the claims proved. *Greene* v. *Provincial Ins. Co.*, 4 A. R. 521.

J. M. and F. M., his wife, were jointly insured in the defendant company, whose deposit was being administered under R. S. O. 1877 c. 160, ss. 21, 22. On 4th February J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on 27th February, sent J. M. and the other policy holders a circular notifying them of an agreement for re-insurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before 15th March. On 24th February the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. was bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke* v. *Union Fire Ins. Co., McPhee's Claim*, 6 O. R. 635.

Pending administration of the deposit of the Union Insurance Company under R. S. O. 1877 c. 160, ss. 21, 22, and after the completion of the receiver's schedule prescribed by the Act, a re-insurance was effected with the Agricultural Insurance Company of all the Union company's risks, in consideration of which the Union company gave the Agricultural company its note. This note not being paid at maturity, the Agricultural company sought to be placed on the dividend sheet of the Union company for dividends accrued or to accrue:—Held, that it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the Agricultural company, made with the assent of persons entitled to rebates, the liability of the Union company in respect to rebates was greatly reduced, and to that extent the Agricultural company should be taken to be subrogated to the position of the policy holders of the Union company. *Clarke v. Union Fire Ins. Co., Claim of the Agricultural Fire Ins. Co. of Watertown, New York*, 6 O. R. 640.

Canadian policy holders petitioned for distribution of the deposit made by the company, a foreign corporation, with the minister of finance under 31 Vict. c. 48 (D.), and 34 Vict. c. 9 (D.), the company being insolvent:—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. The above Acts are not ultra vires of the Dominion Parliament. For any balance of their claims not covered by the deposit, Canadian policy holders would be entitled to rank upon the general assets of the company. *Re Briton Medical and General Life Assn. (Limited)* (2), 12 O. R. 441.

The definition of "Canadian policy" and "policies in Canada" in 34 Vict. c. 9, s. 1 (D.), is not to be interpreted to mean that the deposit is only for the security of policy holders whose policies were issued after the deposit was made and license to transact business in Canada obtained. *Ib.*

Agent—*Acting for Rival Company—Dismissal.*]—*See Eastmure* v. *Canada Accident Ins. Co.*, 25 S. C. R. 691.

——— *Altering Policy.*]—*See Pigott* v. *Employers Liability Assurance Association*, 31 O. R. 666.

——— *Libel.*]—The plaintiff had been the agent of defendants, an insurance company, and had obtained about 1,000 policies for them. Having left them, he entered the service of another company, and canvassed actively for that company among defendants' customers, asking those whose policies were about to expire whether they wished to be insured or to insure again.. Defendants gave evidence that he asked several of them to renew their policies, not telling them that he was acting for another company, and that these persons believed he was acting for defendants. Defendants' officers were repeatedly informed of all this, and that the plaintiff was representing himself as their agent. Under these circumstances they published in a newspaper an advertisement headed "Caution," and stating that notwithstanding plaintiff's false statements to the contrary, he was no longer their agent. The plaintiff sued for this alleged libel. There was no proof of malice in fact. It was objected that the communication was privileged, but the objection was overruled, and this question was left to be dealt with by the court upon the evidence, upon the leave which was reserved to move for a nonsuit—neither side requiring any question to be left to the jury:—Held, that the occasion was privileged and that neither the expression, "false statements," nor the mode of publication afforded sufficient evidence of malice. A verdict for the plaintiff was therefore set aside and a nonsuit entered. Semble, that the learned Judge at the trial might properly have ruled that there was a privilege,

and no evidence of malice to go to the jury. *Holliday* v. *Ontario Farmers Mutual Insurance Co.*, 38 U. C. R. 76.

——— *Negligence — Trover — Exercise.*] — B., wishing to insure his vessel, the C. U. Chandler, went to a firm of insurance brokers, who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at $2,500, and the rate of premium was fixed at 11 per cent. K. refused to forward the application unless the valuation was raised to $3,000, or 12 per cent. premium was paid. This was not acceded to by the brokers, but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost, and four days after K. received a telegram from the attorney of the company at the head office, as follows: "Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and returned at once; he did not shew it to the brokers or to B., nor inform them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for a conversion of the policy:—Held, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at $3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence. Held, further, that as the property in the policy prepared at the head office and sent to K. never passed out of the company, and was at the most no more than an escrow in the hands of K., the agent, trover would not lie against K. for its conversion. *Buck* v. *Knowlton*, 21 S. C. R. 371.

Agent's Powers.]—See sub-titles II.—III., 1, 3, 4—V.—VI., 1.

Agreement to Refer.]—See *Calvin* v. *Davidson*, 31 U. C. R. 396.

Assessment of Insurance Companies.]—See ASSESSMENT AND TAXES, II.

Attachment of Insurance Loss.]—See *Lee* v. *Gorrie*, 1 C. L. J. 76; *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 26, 308; *Simpson* v. *Chase*, 14 P. R. 280.

Calls—*Suspension of License.*]—In these cases which were actions for calls on stock, an objection was taken that there was no power to sue, because the company's license under 42 Vict. c. 25 (O.), had been revoked, but it was shewn that one B. had been appointed receiver, and was specially required by order of the chancery division to prosecute all members in arrears for calls; and that he had adopted these actions, and was prosecuting them as receiver:—Held, that the objection was not tenable. *Union Fire Insurance Co.* v. *Fitzsimmons*, *Union Fire Insurance Co.* v. *Shields*, 32 C. P. 602.

Statement: Call on stock. Defence: That by an order of the Lieutenant-Governor of Ontario in council, issued under 42 Vict. c. 25, the plaintiffs' license had been and still was suspended, whereby it became unlawful for the plaintiffs to do any further business in Ontario; and that the calls sued for were made for the purpose of enabling the plaintiffs to carry on their business in Ontario:—Held, on demurrer, that the defence should have alleged notice in the Gazette of the suspension of the license, pursuant to R. S. O. 1877 c. 160, s. 34, and 42 Vict. c. 25, s. 3, s.-s. 7; but an amendment was allowed, this point not having been taken, and:—Held, also, a good defence for that bringing an action for calls was transacting business of insurance within the meaning of the above Acts. *Union Fire Insurance Co.* v. *Lyman*, 46 U. C. R. 741

Debentures—*Pledge of Assets.*]—By the Act of Ontario (31 Vict. c. 52), the Toronto Mutual Fire Insurance Company (which afterwards became united with the Beaver Insurance Company), was empowered to issue debentures in favour of any person, firm, &c, for the loan of money, and in pursuance thereof debentures of the company were issued to the amount of $83,808, all of which remained outstanding and unpaid. One of these debentures for $5,800 had been issued to the plaintiffs for money loaned to the company; and the defendants the Federal Bank held debentures to the amount of $18,000, for securing the payment of which premium notes to the amount of $33,915, were by resolution of the directors of the company pledged to the bank, and the bank had obtained possession of the notes and collected large sums thereon, which they claimed the right of applying in liquidation of the debentures held by them. To a bill filed by other debenture holders seeking to have their priority declared, a demurrer by the bank for want of equity was overruled with costs, giving the bank liberty to answer in two weeks, the court holding that under C. S. U. C. c. 52, and 31 Vict. c. 52 (O.), and 32 & 33 Vict. c. 70 (D.), the pledge to the Federal Bank was not authorized. *Bank of Toronto* v. *Beaver and Toronto Fire Insurance Co.*, 26 Gr. 102.

Delivery of Policy.]—See *McFarlane* v. *Andes Ins. Co.*, 20 Gr. 486; *Confederation Life Association* v. *O'Donnell*, 10 S. C. R. 92.

Discovery in Actions against Insurance Companies.]—See EVIDENCE, VII. XII.

Estoppel and Waiver in Contracts of Insurance.]—See *Quinlan* v. *Union Fire Insurance Co.*, 31 C. P. 618; 8 A. R. 376; *Wright* v. *London Life Assurance Co.*, 5 A. R. 218, 5 S. C. R. 466; *McIntyre* v. *National Insurance Co.*, 5 A. R. 580; *Omnium Securities Co.* v. *Canada Fire Mutual Insurance Co.*, 1 O. R. 494; *Phillips* v. *Grand River Farmers Mutual Insurance Co.*, 46 U. C. R. 334; *Fire Insurance Association (Limited)* v. *Canada Fire and Marine Insurance Co.*, 2 O. R. 481; *Russell* v. *Canada Life Assurance Co.*, 8 A. R. 716; *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, 11 S. C. R. 212; *Royal Insurance Co.* v. *Byers*, 9 O. R. 120; *National Fire Insurance Co.* v. *McLaren*, 12 O. R. 682; *Graham* v. *Ontario Mutual Insurance Co.*, 14 O. R. 358; *City of London Fire Insurance Co.* v. *Smith*, 15 S. C. R. 69; *Cousineau* v. *City of London Fire Insurance Co.*, 15 O. R. 329; *Horton* v. *Provincial Provident Institution*, 16 O. R. 382; 17 O. R. 361; *Wyman* v. *Imperial Insurance Co.*, 16 S. C. R. 715; *McIntyre* v. *East Williams Mutual Fire Insurance Co.*, 18 O. R. 79; *Wells* v. *Supreme Court of the*

Independent Order of Foresters, 17 O. R. 317; *Cockburn* v. *British America Assurance Co.*, 19 O. R. 245; *Hatton* v. *Provincial Ins. Co.*, 7 C. P. 555; *Campbell* v. *National Life Ins. Co.*, 24 C. P. 133; *Supreme Tent Knights of the Maccabees* v. *Hilliker*, 29 S. C. R. 397; *McGeachie* v. *North American Life Ass. Co.*, 20 A. R. 187, 23 S. C. R. 148; *Niagara District Mutual Fire Ins. Co.* v. *Lewis*, 12 C. P. 123; *Scott* v. *Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 119; *Mulcey* v. *Gore District Mutual Fire Ass. Co.*, 25 U. C. R. 424; *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 69; *Shannon* v. *Hastings Mutual Ins. Co.*, 26 C. P. 289, 2 A. R. 81; *Morrow* v. *Lancashire Ins. Co.*, 29 O. R. 377, 26 A. R. 173; *Bull* v. *North British Canadian Investment Co.*, 14 O. R. 322, 15 A. R. 421, 18 S. C. R. 697; *Hopkins* v. *Manufacturers and Merchants Mutual Fire Ins. Co.*, 43 U. C. R. 254; *Law* v. *Hand-in-Hand Ins. Co.*, 29 C. P. 1; *Smith* v. *Mutual Ins. Co. of Clinton*, 27 C. P. 441; *Lyons* v. *Globe Mutual Fire Ins. Co.*, 27 C. P. 567, 28 C. P. 62; *Parsons* v. *Victoria Mutual Fire Ins. Co.*, 29 C. P. 22; *Merritt* v. *Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529; *Mason* v. *Andes Ins. Co.*, 23 C. P. 37; *Stuckney* v. *Niagara District Mutual Fire Ins. Co.*, 23 C. P. 372; *Canada Landed Credit Co.* v. *Canada Agricultural Ins. Co.*, 17 Gr. 418; *Hartney* v. *North British Fire Ins. Co.*, 13 O. R. 581; *Lambkin* v. *Ontario Marine and Fire Ins. Co.*, 12 U. C. R. 578; *Robins* v. *Victoria Mutual Fire Ins. Co.*, 6 A. R. 427; *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537; *Commercial Union Ass. Co.* v. *Margeson*, 29 S. C. R. 601; *Davis* v. *Canada Farmers Mutual Ins. Co.*, 39 U. C. R. 452; *Hendrickson* v. *Queen Ins. Co.*, 30 U. C. R. 108, 31 U. C. R. 547; *Abrahams* v. *Agricultural Mutual Assurance Association*, 40 U. C. R. 175; *Jacobs* v. *Equitable Ins. Co.*, 17 U. C. R. 35; *Dominion Grange Mutual Fire Ass. Association* v. *Bradt*, 25 S. C. R. 154; *Reason* v. *Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *McGuigan* v. *Manufacturers and Merchants Mutual Fire Ins. Co.*, 29 C. P. 494; *Lambkin* v. *Western Ass. Co.*, 13 U. C. R. 237.

Foreign Company—*Service of Process.*]—See ATTACHMENT OF DEBTS, I.—PRACTICE.

Foreign Company — *Foreign Winding-up.*]—See *Douglas* v. *Atlantic Mutual Life Ins. Co.*, 25 Gr. 379.

Government Deposit—*Insolvency.*]—An insurance company in order to deposit $50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank, and forwarded the deposit receipt to the minister. The money in the bank drew interest, which by arrangement was received by the company. The bank having failed, the government claimed payment in full for this money as money deposited by the Crown:—Held, that it was not the money of the Crown, but was held by the Finance Minister in trust for the company. It was not therefore subject to the prerogative of payment in full in priority to other creditors. *Liquidators of Maritime Bank* v. *The Queen*, 17 S. C. R. 657.

Holding Real Estate.]—An insurance company was, by its charter, authorized to hold real estate for the immediate accommodation of the company, "or such as shall have been bonâ fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts;" and having sold and conveyed a vessel, took from their vendee mortgages on real estate for securing the purchase money:—Held, a transaction within the charter, the price of the vessel being a debt existing previously to the execution of the mortgage; and, semble, that under these words it was not, as with banks, necessary to the validity of such a mortgage that any previous indebtedness should exist. *Western Assurance Co.* v. *Taylor*, 9 Gr. 471.

Insurance Corporations Act, 1892—*Interim Receiver*—*Security.*]—A master of the high court has no authority under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, s.-ss. 5 and 7, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt. *Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416.

——— *Powers of Master*—*Creditors' Schedules*—*Contributaries' Schedules.*]—The Ontario Legislature has power to confer upon the master the powers given by the Insurance Corporations Act, 1892. The master has power under that Act to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a company for services to ascertain whether they shall appear as creditors in the schedules; but he cannot adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors. He has also power to settle schedules of contributories, but cannot adjudicate upon the question whether officials of the company have been guilty of such a breach of duty as to make them liable for any loss by reason thereof. Such matters can only be determined by action. *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

Interpleader by Insurance Company.]—See INTERPLEADER, I.

License—*Fraternal Society.*]—The defendant with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in this Province induced a number of persons to make application for membership therein, and to pay a joining fee of $5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid; but, if accepted, the payer was constituted a member, &c., entitled to the

full benefits of all social, &c., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—Held, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor contrary to s. 49 of the Insurance Act, R. S. C. c. 124; and that no protection was afforded by s. 43, relating to fraternal, &c., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction therefor of the defendant for carrying on such business was therefore affirmed. *Regina* v. *Stapleton*, 21 O. R. 679.

Name.]—Held, that the Act abolishing districts (12 Vict. c. 78) did not take away from defendants the name given to them by their charter. *Hughes* v. *Mutual Fire Insurance Co. of the District of Newcastle*, 9 U. C. R. 387.

Perjury.]—32 & 33 Vict. c. 23, s. 8, (D.), applies to all cases of perjury, not merely to "perjuries in insurance cases," which is the heading under which ss. 4 to 12 are placed in the Act. *Regina* v. *Currie*, 31 U. C. R. 582.

Petitions.]—It is irregular to file a petition before it is heard. The proper proceeding, in order to bring it before the court, is to serve a copy with a notice of a day for hearing indorsed; and this practice is applicable to petitions under the Insurance Companies' Act, 31 Vict. c. 48 (D.). *Re Western Insurance Co.*, 6 P. R. 86.

Policy not under Seal.]—*London Life Ins. Co.* v. *Wright*, 5 S. C. R. 466, sub-head V., 1, *post*.

Provincial Company—*Locality of Operations.*]—A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction, creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. *Clarke* v. *Union Fire Insurance Co.*, 10 P. R. 313. See *S. C.*, 6 O. R. 223.

See Duff v. *Canadian Mutual Fire Insurance Co.*, 9 P. R. 292.

Unfair Defences.]—Remarks upon the impropriety of insurance companies setting up defences of the kind indicated, instead of any bona fide reason that may exist for resisting claims made against them. *Brady* v. *Western Insurance Co.*, 17 C. P. 597. See also *Shannon* v. *Hastings Mutual Fire Insurance Co.*, 26 C. P. 580.

Varying Policy by Parol Evidence.] See Evidence, XIII.

Winding up Company.] See *McNeil* v. *Reliance Mutual Insurance Co.*, 26 Gr. 567. See Company, X.

II. Accident Insurance.

Alteration of Policy—*Agent.*]—A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes, which had been refused to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agent, nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration:—Held, that the company could not be held to have authorized the alteration and were not bound by the contract as altered. *Pigott* v. *Employers' Liability Assurance Corporation*, 31 O. R. 666.

See, also, sub-titles III., 1, 3, 4, V., VI., 1.

Condition—*Defence of Actions.*]—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor:"—Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counterclaim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendants' solicitors, a sufficient compliance with the condition. *Wythe* v. *Manufacturers' Accident Insurance Co.*, 26 O. R. 153.

The implication from a condition in an employer's liability accident policy that "the employer shall at the cost of the company (insurers) render them every assistance in his power in carrying on any suit they shall undertake" is that the employer shall not assist the opposite side, and when the evidence shewed that the employer did so the court refused to interfere to assist him. *Talbot* v. *London Guarantee and Accident Co.*, 17 C. L. T. Occ. N. 216.

——— *Indemnity.*]—The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received when acting as conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on

the insurance company a third party notice claiming indemnity:—Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged. An order was therefore made in chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

Construction of Policy — *Immediately Disable.*] — The defendants insured the plaintiff against accident by a policy containing a clause providing that if "accidental injuries . . . shall immediately, continuously, and wholly disable and prevent the assured from pursuing his usual business or occupation," &c., they would pay a certain weekly allowance during a limited period. The plaintiff was injured accidentally within the meaning of the policy, but did not become wholly disabled until three months afterwards, when he notified the company:—Held, that the word "immediately" in the clause had relation to causation and not to time, and that the plaintiff was entitled to recover. Williams v. Preferred Mutual Accident Ass'n., 91 Ga. 698, and Merrill v. Travellers Insurance Co., 91 Wis. 329, distinguished. *Shera* v. *Ocean Accident and Guarantee Corporation*, 32 O. R. 411.

Exposure to Danger — *Disappearance—Onus.*] — The deceased was found dead in a cattle-guard on a railway, having been run over by a passing train. The cattle-guard was at the side of a street and near the end of a railway station platform, which extended to and adjoined the street. There was no express evidence as to how deceased got into the cattle-guard. The defendants set up that, contrary to the terms of the accident policies sued on, the death was occasioned by suicide or exposure to obvious and unnecessary dangers, by the deceased attempting to cross over the street by walking on the track and then falling into the cattle-guard. The jury both at this and a former trial having found against the defence of suicide, the court, not being dissatisfied with the finding, refused to set aside the verdict, though the circumstances, stated in the report, were very peculiar and tended naturally to excite suspicion. The proof of such a defence rests upon the defendants, and the evidence of it should be clear and convincing. Held, also, that there was no evidence of any such exposure, for that it was equally consistent with the evidence that the deceased accidentally fell into the cattle-guard from the platform while walking along the platform; and, at all events, that the using of a track to cross a street was not the mode of walking thereon against which prohibitions are levelled. *Wright* v. *Sun Mutual Life Ins. Co.*, 29 C. P. 221.

The policy also provided that the insurance was not to extend to mysterious disappearances, nor to any case of death, the nature, cause or manner of which was unknown, or incapable of direct and positive proof:—Held, that this did not apply to cases where, as here, the immediate cause of death was indisputable, and evidenced by outward violence, but, as its context shewed, to mysterious disappearances, &c. *Ib.*

In an accident policy, it was provided that the insurance should not extend to any bodily injury where the death or injury might have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, &c., or while engaged in, or in consequence of any unlawful act; that the insured should use all due diligence for personal safety and protection, &c.; and that standing or walking on a railroad track was a hazard not contemplated or covered by the contract. The insured was killed by being run over by an engine while, contrary to the rules of the Northern Railway Company, and the statute 42 Vict. c. 9, s. 16, s.-ss. 5, 6 (D.), driving a horse and buggy on the private grounds of the railway company at a place where there was a network of tracks, and where it was most dangerous to be:—Held, that there could be no recovery, and a nonsuit was entered. *Neill* v. *Travellers' Ins. Co.*, 31 C. P. 394.

An appeal from this decision was dismissed with costs, the court being equally divided. 7 A. R. 570. Affirmed in the supreme court, 12 S. C. R. 55.

The insured, who was a baggageman at a railway station, received the injuries which caused his death while in the act of coupling cars, which was not part of his duty as baggageman. The evidence shewed that he had coupled cars on other occasions, and that on this occasion he understood the brakesman to request him to make the coupling. In his application for an accident insurance policy he was described as a baggageman, and in the policy there was the following clause, which was also contained in the application: "1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." By clause 4 it was provided that the contract should not cover death resulting from voluntary exposure to unnecessary danger:—Held, that the words "occupation or exposure" did not apply to the insured's casual act of coupling, nor was there "voluntary exposure to unnecessary danger." *McNevin v. Canadian Railway Accident Ins. Co.*, 32 O. R. 284.

Intoxication—*Improper Treatment inducing Apoplexy.*]—See *Bobier* v. *Clay*, 27 U. C. R. 458.

Notice of Death—*Waiver—External Injuries Producing Erysipelas — Proximate or Sole Cause of Death.*]—An accident policy issued by the appellants, was payable in case, inter alia, "the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, &c., nor to any bodily injury happening directly or indirectly in consequence of disease, or to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death." The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the in-

sured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under the policy. On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st May. The manager of the company acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. At the trial there was conflicting evidence as to whether the erysipelas resulted solely from the wound but the court found on the facts that the erysipelas followed as a direct result from the external injury:—Held, that the company had not received sufficient notice of the death to satisfy the requirements of the policy and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard. Held, also, that the external injury was the proximate or sole cause of death within the meaning of the policy. *Accident Ins. Co. of North America* v. *Young*, 20 S. C. R. 280.

——— *Condition Precedent.*]—A condition in a policy of insurance against accidents required that in the event of an accident thereunder, written notice, containing the full name and address of the insured, with full particulars of the accident, should be given within thirty days of its occurrence to the manager for the United States or the local agent:—Held, that the giving of such notice was a condition precedent to the right to bring an action on the policy. *Employers' Liability Assurance Corporation* v. *Taylor*, 29 S. C. R. 104.

The policy contained a clause providing that written notice must be immediately given to the company at the office in Montreal . . . and "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation:"—Held, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy. *Shera* v. *Ocean Accident and Guarantee Corporation*, 32 O. R. 411.

Partnership—*Insurance of Partners in Firm—Registered Declaration of Partnership.*]—*See Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263.

Payment of Premium—*Promissory Note—Agent's Authority.*]—A policy issued by the Manufacturers' Accident Insurance Company in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that the renewal receipt to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident, payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shewn that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company:—Held, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia. Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to shew that such receipt had been obtained and were not taken by surprise. *Manufacturers Accident Insurance Co.* v. *Pudsey*, 27 S. C. R. 374.

See Pigott v. *Employers' Liability Assurance Corporation*, 31 O. R. 666, and sub-titles, III., 1—V., 8—VI., 1.

III. Fire Insurance.

1. *Agent's Authority and Duty.*

Agreement to Refer to Arbitration.]—*See Calvin* v. *Provincial Ins. Co.*, 20 C. P. 267.

Approval of Company.]—An agent employed to receive applications, received from the plaintiff the usual premium, and gave to him a receipt therefor, "subject to approval by the board of directors, money and note to be returned in case application is rejected." It was alleged that this was orally understood between the agent and the assured to be a final agreement for the policy and an acceptance of the risk. The directors having refused to effect the proposed insurance, and returned the premium note given to the agent:—Held, not liable to make good a loss. *Henry* v. *Agricultural Mutual Ass. Co.*, 11 Gr. 125.

Held, also, that the agent's authority did not extend to the making of final agreements for insurance, or to the insuring temporarily of property, not of the classes specified in printed circulars of the company, or such as they were accustomed to insure. *Ib.*

Assenting to Assignments.]—See *Hendrickson* v. *Queen Ins. Co.*, 31 U. C. R. 547; *McQueen* v. *Phœnix Mutual Ins. Co.*, 29 C. P. 511; 4 A. R. 289; 4 S. C. R. 699.

Demanding Proof of Loss.]—See *Faweett* v. *Liverpool and London and Globe Ins. Co.*, 27 U. C. R. 225.

Filling up Application.]—See *Sowden* v. *Standard Fire Ins. Co.*, 5 A. R. 290; *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376; *Graham* v. *Ontario Mutual Ins. Co.*, 14 O. R. 358.

Foreign Agent—*Ontario Policy — Delivery of Policy before Receipt of Premium.*]—See *Clarke* v. *Union Fire Ins. Co., Re Export Lumber Co.*, 10 P. R. 31, 6 O. R. 223.

Foreign Company.] — See *Campbell* v. *National Life Ins. Co.*, 24 C. P. 133.

Further Insurance — *Waiver.*]—One of the conditions of an insurance policy provided, that if the insured had at the time of the policy, or should have afterwards, any other insurance without the consent of defendants written on the policy, the policy should be void. The plaintiff relied upon a waiver of this condition by defendants' inspector, whose duty was described as being "to examine into the circumstances, to adjust the loss, and to settle or report to the office." A nonsuit having been ordered upon the ground that the condition could not be waived by the inspector, or in any way except in writing:—Held, that the nonsuit was right upon the evidence; and the court refused to set it aside. Quære, whether, if the case had been left to the jury, and they had found that the agent had authority to waive the condition, the verdict could have been allowed to stand. *Mason* v. *Hartford Fire Ins. Co.*, 37 U. C. R. 437.

Insurance beyond Limit.]—The agent of an insurance company effected an insurance upon wheat in the name of himself and partner for £3,000, there being already an insurance with the company on the mill in which it was stored of £750; the rule of the company being that not more than £3,000 should be taken on any one building and its contents. The usual proposal was transmitted by the agent to the head office on the 23rd, and on the 27th the premises and wheat were burned, no action in the meantime having been taken by the company upon the proposal. Such agent, in making the proposal, had refrained from drawing the attention of the company to the previous insurance on the building; and the then secretary of the company swore that had he been aware of it, the second application would have been immediately rejected. After the loss the company paid the £750 (insured on the building), £2,250 (on the wheat), together making the sum of £3,000 allowed by the rules to be on one building and its contents. A bill filed by the agent and his partner to compel payment of the additional £750 was dismissed with costs. *Tucker* v. *Provincial Ins. Co.*, 7 Gr. 122.

Insuring his own Property.] — The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. And the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company. *White* v. *Lancashire Ins. Co.*, 27 Gr. 61.

Interim Receipts.]—See *Penley* v. *Beacon Assurance Co.*, 7 Gr. 130; *Henry* v. *Agricultural Mutual Ass. Co.*, 11 Gr. 125; *Patterson* v. *Royal Ins. Co.*, 14 Gr. 169; *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

Knowledge of Nature of Business.]—See *Davis* v. *Scottish Provincial Ins. Co.*, 16 C.P. 176; *Crawford* v. *Western Ass. Co.*, 23 C. P. 365.

Knowledge of Premises.]—See *Benson* v. *Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121; *Gowinlock* v. *Manufacturers' and Merchants' Mutual Ins. Co. of Canada*, 43 U. C. R. 563; *Shannon* v. *Hastings Mutual Ins. Co.*, 25 C. P. 470; 26 C. P. 380; 2 A. R. 81; 2 S. C. R. 394; *Lyon* v. *Stadacona Ins. Co.*, 44 U. C. R. 472; *Sowden* v. *Standard Ins. Co.*, 44 U. C. R. 95; *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 37 U. C. R. 380.

See sub-head 4 (b).

Knowledge of Title.]—See *Chatillon* v. *Canadian Mutual Ins. Co.*, 27 C. P. 450; *Sinclair* v. *Canadian Mutual Fire Ins. Co.*, 40 U. C. R. 206; *Dear* v. *Western Ass. Co.*, 41 U. C. R. 553; *Lyon* v. *Stadacona Ins. Co.*, 44 U. C. R. 472; *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121.

See sub-head 4 (c).

Neglect to Forward Application.]—A. applied to an agent of the Royal Insurance Company to effect an insurance, and paid the premium. The agent gave the usual receipt, following a form supplied by the company, which declared that a policy would be issued by the company in sixty days if approved of by the manager at Toronto; that otherwise the receipt would be cancelled and the amount of unearned premium refunded; and that the receipt would be void should camphene oil be used on the premises. The agent did not report the transaction to the company, and after the expiration of sixty days a fire occurred:—Held, 1. That this receipt contained a valid contract for interim insurance. 2. That the company, and not the insured, should sustain any damage occasioned by the agent's neglect, and that the company was

liable for the loss by fire. *Patterson* v. *Royal Ins. Co.*, 14 Gr. 169.

Notice of Vacancy.]—See *Williams* v. *Canada Farmers' Mutual Ins. Co.*, 27 C. P. 319.

Oral Contracts.]—See *Parsons* v. *Queen Ins. Co.*, 29 C. P. 188.

Premium—*Credit—Course of Dealing.*]—The defendants executed policies, acknowledging the receipt of the premiums for re-insurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiffs alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved, and it was shewn that their agents had no authority to reinsure, except upon payment of the premium:—Held, affirming 26 Gr. 661, that the defendants were not liable. Held, also, that even if such a custom had been proved to exist, it would not be binding on the company, unless authorized by it. Held, also, that the defendants were not bound by their admission on the policy of the receipt of the premium. Xenos v. Wickham, L. R. 2 H. L. 296, distinguished. *Western Assurance Co.* v. *Provincial Ins. Co.*, 5 A. R. 180.

——— *Note.*]—A person made a proposal for insurance, but did not pay the amount of the premium, on the ground that the agent of the company agreed to take his note for the amount. The loss occurred a few days afterwards, and a bill was filed to enforce the contract:—Held, that there was no contract, and that the agent was not authorized to bind the company as alleged. *Walker* v. *Provincial Ins. Co.*, 5 L. J. 162; 8 Gr. 217.

For the premium payable on an interim insurance on a stock of goods, instead of a cash payment, the agent received the note of the insured payable on the first of the next month. It was proved that the agent was authorized to receive notes for farm risks, for which the company had a printed form, and the note in question was filled in on one of these forms. There was nothing to shew that the agent was limited only to accept cash premiums in these cases, and that in accepting the note he had violated any express instructions, or exceeded the limits of his authority. He said his taking the note was a matter of business between the plaintiff and himself, and that he had no instructions from the company further than that they expected all premiums to be remitted on the 1st of each month. A nonsuit, therefore, which had been entered on the ground that the premium had not been paid in cash, was set aside, and a new trial granted. *Johnson* v. *Provincial Ins. Co.*, 26 C. P. 113.

For the premium payable on an interim insurance on a stock of goods, instead of a cash payment, the agent received the note of the insured, payable on the 1st of the next month, giving him a receipt as for cash. It was proved that, except in the case of farm risks, where notes might be received, for which there was a printed form on which this one was filled in, the agent had no authority to receive payment otherwise than in cash. Semble, that the company were not bound by the agent's act in accepting payment otherwise than as authorized. By a memorandum on the note, the insurance became avoided if the note were not paid at maturity. The note, made on the 7th October, was payable on the 1st November. The plaintiff paid $25.36 on account on the 27th October, the note being for $40. The fire took place on that night. It appeared that the agent on the receipt of the notice from the company that they had cancelled the risk, wrote to the plaintiff, after the fire, but before the maturity of the note, returning him the note and the sum paid thereon, which the plaintiff retained, and did not afterwards pay or offer to pay the note:—Held, that the insurance was avoided, the premium never having been paid. *Johnson* v. *Provincial Ins. Co.*, 27 C. P. 464.

See Manufacturers Accident Ins. Co. v. *Pudsey*, 27 S. C. R. 374.

——— *Setting off Agent's Debt.* — An agent instructed to receive payment for his principal, cannot, as a general rule, accept anything but money:—Held, therefore, on this principle, and also in view of R. S. O. 1877 c. 161, s. 34, and of the fact that the renewal receipt in question in this case cobtained a notice that it would not be valid unless dated and countersigned by the agent on the day on which the money was paid, that, where in consideration merely of a setting off of debts as between the agent of a company and a policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed. *Frazer* v. *Gore District Mutual Fire Ins. Co.*, 2 O. R. 416.

Sub-Agent.]—In an action brought on an interim receipt, signed by one S., an agent for the respondent company at L., one of the pleas was that S. was not respondents' duly authorized agent, as alleged. The general managers of the company for Ontario had appointed by a letter signed by them both, one W., as general agent for the city of L. S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. In his evidence S. said he was authorized by W. to sign interim receipts, and the jury so found. He also stated that Z., one of the joint general managers, was informed that he (S.) issued interim receipts, and that the former said he was to be considered as W.'s agent. There was no evidence that the other general manager knew what capacity S. was acting in:—Held, that W. had no power to delegate his functions; and that S. had no authority to bind the respondent company. Per Strong, J.: The general agents, being joint agents, could only bind the respondent company by their joint concurrent acts, the appointment of S. as agent by Z. without the concurrence of the other general manager would have been insufficient. *Summers* v. *Commercial Union Ins. Co.*, 6 S. C. R. 19.

Waiving Conditions.]—See *Lampkin* v. *Western Ass. Co.*, 13 U. C. R. 237; *Johnstone* v. *Niagara District Mutual Ins. Co.*, 13 C. P. 331; *Scott* v. *Niagara District Mutual Ins.*

Co., 25 U. C. R. 119; *Krentz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131; *Brady* v. *Western Ins. Co.*, 17 C. P. 597; *Lyndsay* v. *Niagara District Mutual Fire Ins. Co.*, 28 U. C. R. 326; *Crawford* v. *Western Ass. Co.*, 23 C. P. 395; *Mason* v. *Hartford Fire Ins. Co.*, 37 U. C. R. 437; *Western Assurance Co* v. *Doull*, 12 S. C. R. 446; *Peck* v. *Agricultural Ins. Co.*, 19 O. R. 494; *Parsons* v. *Queen Ins. Co.* 2 O. R. 45; *Smith* v. *Commercial Union Ass. Co.*, 33 U. C. R. 69; *Campbell* v. *National Life Ass. Co.*, 24 C. P. 133; *Logan* v. *Commercial Union Ins. Co.*, 13 S. C. R. 270; *Atlas Ass. Co* v. *Brownell*, 29 S. C. R. 537; *Commercial Union Ass. Co.* v. *Margeson*, 29 S. C. R. 691.

See sub-titles II.—V.

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2. *Cancellation or Surrender of Policy.*

Assignee of Policy.]—The plaintiffs effected an insurance with defendants, "loss, if any, payable to H." as security for any balance of account that might be due H:—Held, affirming 43 U. C. R. 556, that H., in the absence of authority from the plaintiffs, had no power to surrender the policy for cancellation before any loss had happened, and that on the evidence no such authority was shewn. *Marvin* v. *Stadacona Ins. Co.*, 4 A. R. 330.

Evidence.]—Semble, that the evidence, set out in the report, sustained the finding of the arbitrator herein, that at the time of the loss the insurance in defendant company had been cancelled, and a new and valid insurance effected in another company. *Walker* v. *Beaver and Toronto Mutual Ins. Co.*, 30 C. P. 211.

Joint Tenants—*Application by One to Cancel—Subsequent Loss.*]—*See Clarke* v. *Union Fire Ins. Co.*, *McPhee's Claim*, 6 O. R. 635.

Notice.]—A condition indorsed on a policy provided that, if for any cause the company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the company should refund a ratable proportion of the premium:—Held, not essential that the notice should precede the termination of the insurance, but that they might be contemporaneous, and that the company could terminate the risk, by giving notice that they did so, and refunding the unearned premium:—Held, also, that in this case, on the facts set out, there was evidence to shew a termination of the risk under the condition. *Cain* v. *Lancashire Ins. Co.*, 27 U. C. R. 453. *See*, also, *S. C., ib.*, 217.

A notice by an insurance company to terminate a fire policy under statutory condition No. 19 of the Ontario Insurance Act, R. S. O. 1887 c. 167, s. 114, should be wholly in writing, and should inform the assured that the policy will be terminated at the expiration of the prescribed statutory period after the service of the notice; and when on the cash plan a ratable proportion of the premium returned should be calculated from the termination of the notice. Where, therefore, a company gave a notice which was in effect an immediate cancellation with a return of the unearned premium from the date of the notice:—Held, that the policy had not been cancelled. *Bank of Commerce* v. *British America Assurance Co.*, 18 O. R. 234.

Substitution of Policy.]—Declaration on a fire policy averring an assignment of the policy, with the assent of the defendants, to A. B., and that the action was brought as well on behalf of A. B. as on plaintiffs' behalf. Plea, on equitable grounds, that A. B. was never interested in the insured property, and that before the loss the policy was cancelled by an agreement between plaintiffs and defendants, by which a policy on other goods was substituted and the unearned part of the premium credited by defendants to plaintiffs on account of the new policy:—Held, on demurrer, a good answer in equity, and semble, also, a good legal defence. *Miall* v. *Western Insurance Co.*, 19 C. P. 270.

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3. *Conditions.*

(a) *In General.*

Agent's Representation—*Keeping Powder.*]—The plaintiff applied for insurance upon his stock-in-trade with the defendant company. Pending the negotiations the company's agent told the plaintiff he thought the company's condition was to allow twenty-five pounds of powder to be kept, and the plaintiff said he did not keep more than ten pounds. The insurance was then effected by an interim receipt, and on the same night the premises were burned. The plaintiff had more than ten pounds, but less than twenty-five pounds, of powder in stock when the fire occurred. The statutory condition prohibited more than twenty-five pounds being kept in stock without permission, and the company's variation of their condition relieved them from liability if more than ten pounds were "deposited on the premises, unless the same be specially allowed in the body of the policy and suitable extra premium paid." The case having been dealt with on other grounds, on an appeal to the privy council was remitted to the high court to try whether the variation of the condition was a just and reasonable one:—Held, that inasmuch as the company's agent had represented that twenty-five pounds of gunpowder were allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one to be set up by the company, or one which they could have inserted in the policy, and was therefore void, and that the plaintiff should recover. *Parsons* v. *Queen Insurance Co.*, 2 O. R. 45.

Arbitration.]—Where a condition in a policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim:—Held, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy. *Guerin* v. *Manchester Assurance Co.*, 29 S. C. R. 139.

See, also, *McInnes* v. *Western Assurance Co.*, 5 P. R. 242, 30 U. C. R. 580.

Certificate of Magistrate.]—The condition as to proof of loss required a certificate from the magistrate most contiguous to the

place of fire:—Held, that the condition was unjust and unreasonable, and therefore void, under s. 33 of 36 Vict. c. 44 (O.) *Shannon* v. *Hastings Mutual Insurance Co.*, 26 C. P. 380, 2 A. R. 81.

Co-insurance.]—A provision in a fire insurance policy that "the assured shall maintain insurance on the property covered by this policy of not less than 75 per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any loss," is a condition and not a mere direction as to the mode of ascertaining the amount of the loss, and it is void if not printed in accordance with the provisions of the Act. *Wanless* v. *Lancashire Insurance Co.*, 23 A. R. 224.

The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for $15,000, "subject to 75 per cent. co-insurance"—these words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink, among the variations of the statutory conditions, as follows:—"The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of 75 per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of $12,120.17, the cash value of the property insured being $115,000, and the whole amount of insurance upon it, including the $15,000 named in the defendants' policy, $70,000. The defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than the latter, but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy:—Held, following Wanless v. Lancashire Insurance Co., 23 A. R. 224, that the "co-insurance" clause was a condition and a variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of s. 171 of the Ontario Insurance Act, R. S. O. 1897 c. 203, it was binding on the insured. *Eckhardt* v. *Lancashire Insurance Co.*, 29 O. R. 695.

Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R. S. O. 1897 c. 203, s. 169, of the condition commonly known as the "co-insurance condition," that condition is primâ facie valid and should not be held to be "not just and reasonable" within the meaning of s. 171 of the Act, without evidence to that effect. Judgment below, 29 O. R. 695, affirmed. *Eckardt* v. *Lancashire Insurance Co.*, 27 A. R. 373.

Constitutionality of Insurance Act.]—Held, that 39 Vict. c. 24 (O.), R. S. O. 1887 c. 162 was not ultra vires; that under the B. N. A. Act the local Legislature has the power to prescribe the terms upon which insurance companies, either foreign or domestic, or incorporated by the Imperial Parliament, shall carry on business within the limits of the Province. The power to legislate upon the subject of insurance is not vested in the Dominion Parliament by virtue of its power to pass laws for the regulation of "Trade and Commerce" under s. 91 of the B. N. A. Act, but belongs to the local Legislature. *Ulrich* v. *National Insurance Co.*, 42 U. C. R. 141; *Parsons* v. *Queen Insurance Co.*, 4 A. R. 103, affirming *S. C.*, 43 U. C. R. 271; *Parsons* v. *Citizens Insurance Co.*, 4 A. R. 96; *Johnston* v. *Western Assurance Co.*, 4 A. R. 281.

See *Dear* v. *Western Ass. Co.*, 41 U. C. R. 553.

Dominion Act of Incorporation.]—The defendants, a mutual insurance company, were incorporated by an Act of the Dominion Parliament, 41 Vict. c. 40, by s. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void:"—Held, on demurrer, that the matters provided for by the above section were subject matters of the Fire Insurance Policy Act of Ontario, over which the Province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act, per se, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained. Citizens' Ins. Co. v. Parsons, and Queen Ins. Co. v. Parsons, 7 App. Cas. 96, commented upon. *Goring* v. *London Mutual Fire Ins. Co.*, 11 O. R. 82.

Failure to Indicate Variations.]—Action on a fire policy, upon which the statutory conditions were not indorsed, but which was on its face declared to be subject to the company's conditions indorsed, the eleventh of which was that the insured should do all in his power to save and protect the insured property, and prevent injury thereto. By the seventeenth condition the non-fulfilment of these conditions entailed the forfeiture of the policy. The jury found specially, amongst other things, that the plaintiff wilfully neglected to save, and prevented others from saving, the insured property, whereby his goods were prevented from being saved, but they disagreed as to the defence of fraudulent over-valuation:—Held, that under the decision of the Privy Council in Parsons v. Citizens' Ins. Co., 7 App. Cas. 96, the policy must be taken to be a policy with the statutory conditions only; and a new trial was granted that the case might proceed as upon such a policy. *Devlin* v. *Queen Ins. Co.*, 46 U. C. R. 611.

Foreign Policy.]—Held, that a policy of insurance issued by a company whose head office was in Montreal, and signed by their president there, and countersigned by the local agent in Ontario, where the property insured

was situated, was within R. S. O. 1877 c. 162, s. 3. *McIntyre* v. *National Ins. Co. of Montreal*, 44 U. C. R. 501.

Gunpowder.]—By a policy on a "general stock of iron and hardware" it was provided that if gunpowder was kept on the premises without written consent, the policy should be void. To a plea setting up a breach of this condition, the plaintiff replied that it was well understood by the parties that the words "general stock of iron and hardware" included gunpowder in tins and canisters to the extent of 25 lbs., which was the gunpowder mentioned in the plea:—Held, replication bad; for the condition, which wholly excluded gunpowder, could not be thus qualified by parol evidence. *Mason* v. *Hartford Fire Ins. Co.*, 29 U. C. R. 585.

Interim Receipt.]—The plaintiff, a hardware merchant, as also a large wool buyer, discounted paper with his banks for wool purchases on the security of warehouse receipts therefor, and at the same time he signed and delivered to the defendants' local agent, who was also the bank agent, applications for insurance on the wool, to be held by the bank as further security. The agent either charged the plaintiff with the amount of the premiums in his bank account or received it in cash, but did not then fill in defendants' printed form of interim receipt, or sign a written receipt or contract of any kind professing to bind the company, stating that he was too busy to do so. He informed the head office of the insurances, but not of the mode of effecting them, and after the loss remitted the amount of the premiums and wrote out and signed receipts, copying an old printed form. There was no evidence of any express authority to the agent to enter into verbal contracts, while the applications stated that the insurances were on the usual terms and conditions of the company. One of the conditions of defendants' policy was, that no receipt or acknowledgment of insurance should be binding unless made by and on one of defendants' printed forms, and signed by their authorized agent. In an action on equitable grounds, setting up insurances by interim receipts:—Held, that the causes of action were not proved. Held, also, that even if the policy should be deemed to be without conditions, the conditions indorsed not being in accordance with the statute, still these conditions might be looked at with reference to the agent's authority, as being a public declaration of defendants' proposed mode of dealing with the public. *Parsons* v. *Queen Ins. Co.*, 29 C. P. 188.

The action was brought on an interim receipt for insurance against fire issued by the defendants after the passing of R. S. O. 1877 c. 162, which stated that the plaintiff was insured subject to all the covenants and conditions of the company. No conditions were on the interim receipt:—Held, affirming 43 U. C. R. 271, that whether the receipt was to be treated as a contract in fieri forming the equitable foundation for the issue of a policy, or as a concluded contract, R. S. O. 1877 c. 162 applied, and that the plaintiffs could not therefore resort to their own special conditions for the purpose of defeating the claim, or to the statutory conditions. *Parsons* v. *Queen Ins. Co.*, 4 A. R. 103. See *S. C.*, 4 S. C. R. 215, 7 App. Cas. 96. See *McQueen* v. *Phœnix Ins. Co.*, 29 C. P. 511.

Invalid Condition — *Agreement.*] — One of the conditions indorsed on a policy, being No. 3, provided that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium:—Held, that even if this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, and denied that the insurance ever came into existence. *Geraldi* v. *Provincial Ins. Co.*, 29 C. P. 321.

In a declaration on a fire policy the policy was alleged to be subject to the conditions indorsed on the policy—not being the statutory conditions—which were set out in full, amongst which were No. 3, as above. The defendants pleaded on equitable grounds a second plea, that in and by said policy (and the conditions indorsed thereon and set out in the declaration) setting up the above provision, and alleging non-payment, the insurance was avoided, upon which issued was joined. The learned Judge at the trial struck out the conditions from the declaration, as also the part between the brackets from the second plea, and upon this being done was of opinion that the declaration must be read as setting up a policy under seal which acknowledged the payment of the premium, and contained an unconditional covenant for the payment of the amount insured, and that the issue joined on the second plea must be found for the plaintiff, for whom he entered a verdict. The court directed the record to be restored to its former state, or so far as was necessary to enable the issue which had been joined between the parties as to the non-payment of the premium to be tried as joined. *Ib.* On appeal this decision was reversed, and a new trial ordered.

Keeping Water.]—Where by a policy the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default:—Held, that nevertheless he could not recover. *Garrett* v. *Provincial Ins. Co.*, 20 U. C. R. 200.

Limitation of Amount Recoverable—*Abatement Based on Subsequent Insurance.*] —The fourth variation was, that in no case should the insured be entitled to recover more than two-thirds the actual value of any building or contents or other property insured; nor in case of further insurance by the insured or other party more than the ratable proportion of two-thirds of the actual value without reference to the date of the different policies; that any general policy on different properties shall be treated as a special policy on each property for the whole amount thereby insured. The insurance was $100 on barn and stables valued at $1,200, and $900 on contents valued at $3,000:—Held, that as to the latter part of the condition referring to further insurance by the insured or other party, it was unjust and unreasonable; but as to the former part thereof, as to the payment of not more than two-thirds of the value of the property insured—which meant at the time of loss—it was just and reasonable. *Graham* v. *Ontario Mutual Ins. Co.*, 14 O. R. 358.

Making Agent of Company Agent of Insured.]—A clause in the application, stat-

ing that the agent of the company filling up the application should be regarded as the agent of the applicant was not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the Judge as to whether it was just and reasonable; and if it were it was not unreasonable. *Sowden* v. *Standard Fire Ins. Co.*, 5 A. R. 280.

Misrepresentation — *Materiality—Reasonableness.*]—A condition was added by the company that if the assured should make any misrepresentation or concealment, or omit to make known any fact material to the risk, or make any untrue statement as to ownership or title, the policy should be void—without providing, as in the statutory condition, that such misrepresentation must be material to the risk, and should void the insurance only as to the property affected by it. Per Patterson, J., agreeing with 26 Gr. 341, such condition was unreasonable, and was in effect declared to be so by the statute *Butler* v. *Standard Fire Ins. Co.*, 4 A. R. 391.

Mutual Companies.]—The Act does not apply to mutual insurance companies. *Baldock* v. *Royal Mutual Ins. Co.*, 5 A. R. 87; *Frey* v. *Wellington Mutual Ins. Co.*, 5 S. C. R. 82.

Necessity for Legislation.] — Remarks as to the conduct of business by insurance companies, and the necessity of legislative interference to prevent the multiplication of unreasonable conditions, and protect the public. *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 69.

Payment of Premium.] — A premium note, dated the 24th May, 1880, given on effecting an insurance with the defendant company, stated that the insured for value received on policy No. 1,405, dated the 6th May, 1880, promised to pay the company $14.50 on the 24th December, 1880, with interest at seven per cent., and contained an agreement that if the note were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy should be null and void so long as the note remained unpaid. Upon the policy, which was dated the 14th May, 1880, and took effect from the 24th May, 1880, was indorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given for it; and in that case it was a condition of the contract "that if such premium be not paid—— 18——, the whole amount of premium shall then be considered as earned, and the policy shall be null and void, so long as any part thereof remains unpaid." The application, which was made a part of the policy, stated that the premium was due on the 24th December, 1880:—Held, that the omission to fill up the blank in the condition, did not prevent its operating, for the condition would be perfect without the figures "18," which might be rejected as surplusage; but that the condition could be reformed by inserting the words and figures evidently intended—namely, the 24th December, 1880; or might have been filled up by the parties:—Held, also, that the condition was not unreasonable, being in effect the same as that provided for in the case of mutual insurance companies by R. S. O. 1877 c. 161. *Sears* v. *Agricultural Ins. Co.*, 32 C. P. 585.

Payment of Premium—*Test of Reasonableness.*]—Under the statutory conditions indorsed on a mutual fire insurance policy the words, prescribed by s. 4 of R. S. O. 1877 c. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type, and after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour, "In case any promissory note for a cash premium or for any premium note . . given to the company, or to any officer or agent thereof, be not paid when due, the policy . . shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for $12, the first payment on the premium undertaking, which was for $17.62, fell due on the 15th April, 1878, and the loss, exceeding the amount insured, $500, occurred on the 23rd March. This note was not paid, the plaintiff alleging that he omitted to pay it assuming that the defendants would deduct it in settling the loss, which had not been adjusted:—Held, that the Uniform Conditions' Act, R. S. O. 1877 c. 162 (excepting s. 2), does not apply to mutual insurance companies; but that if it did the condition would have been clearly void for non-compliance with s. 4 of that Act. Held, also, reversing 44 U. C. R. 70, that the condition was not just or reasonable, as it was required to be by the express contract and by s. 35 of the Mutual Insurance Act, R. S. O. 1877 c. 161; and that the plaintiff was entitled to recover. The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But quære, per Moss, C.J.A., whether in the abstract such a condition could be regarded as reasonable, and per Patterson, J.A., it could not. Per Patterson, J.A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, s. 48 of the Mutual Act. Quære, whether this was a note which the company had power to take, or one within the condition. *Ballagh* v. *Royal Mutual Fire Ins. Co.*, 5 A. R. 87.

Plaintiff Referring to Conditions in Pleading.]—A policy of insurance, issued after 39 Vict. c. 24 (O.), did not contain the conditions made necessary by that statute:—Held, that the fact of the declaration having stated that the policy was subject to conditions, which it set out, did not preclude the plaintiff from contending there were no conditions upon the policy, for an amendment would be allowed in order to state the contract proved according to its legal effect. *Parsons* v. *Citizens' Ins. Co.*, 43 U. C. R. 261.

Action on a policy of insurance for $600, on a wooden building, alleging a total loss by fire. The policy contained the statutory conditions, and also what purported to be variations thereof, by which the insured was stated to warrant the truth of the statements as to the age and value of the building. The variations had not the notices required by the statute to be prefixed thereto, but all the conditions and variations were set out in the declaration as part of the contract. The plaintiff in his application and proof papers stated that the building was worth $900, and its age ten years, while the jury found such

value and age to be $300 and nineteen years, respectively, but that the misrepresentations were not wilfully made. Defendants set up the breach of warranty and also fraudulent misrepresentations as to such value and age; and also that by one of the statutory conditions the value must be ascertained by arbitration:—Held, that the question of warranty did not arise, for no effect could be given to the variations, as they did not comply with the statute; and that the plaintiff should not be deprived of his objection thereto taken at nisi prius and in term, even though their appearance in the record was his own fault. Quære, whether the conditions making the questions of value and age the subjects of warranty were not unreasonable. The court set the verdict aside, with liberty to defendants to have a new trial if they desired to try the question of fraudulent misrepresentation with a view of avoiding the contract; but if they abandoned all defences but that of value, then there was to be an order of reference, as required by the conditions. *Sly* v. *Ottawa Agricultural Ins. Co.*, 29 C. P. 28. See *S. C.*, 29 C. P. 557.

Policy before the Act.]—The policy was issued on the 2nd May, 1876, being before the coming into force of the Fire Policy Act of 1876:—Held, that the policy did not come within the Act so as to make the statutory conditions applicable; and even if the Lieutenant-Governor's proclamation, provided for by the Act of 1872, was issued before 1876, of which there was no evidence, the court under such Act would only be enabled to say what conditions were just and reasonable. *O'Neill* v. *Ottawa Agricultural Ins. Co.*, 30 C. P. 151.

Policy Issued in Quebec.]—Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties? *Guerin* v. *Manchester Assurance Co.*, 29 S. C. R. 139.

Property out of Ontario.]—The Fire Insurance Policy Act, R. S. O. 1877 c. 162, does not apply to property outside of Ontario. *Cameron* v. *Canada Fire and Marine Ins. Co.*, 6 O. R. 392.

Reference to Arbitration.]—No. 15 of the statutory conditions does not make the reference to arbitration a condition precedent to an action; and the provision in this policy for payment, "after the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy," if not nugatory as an attempt to vary the statutory condition, was held not a reasonable condition. Under that condition the Judge at the trial might try the question of liability, and refer the amount to be ascertained in the manner there provided. *Ulrich* v. *National Ins. Co.*, 42 U. C. R. 141.

Re-insurance.]—See *Fire Insurance Association* v. *Canada Fire and Marine Ins. Co.*, 2 O. R. 481, 495.

Seizure under Process.]—By a condition in a policy of insurance additional to the statutory condition, it was provided that "when property insured . . or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company:"—Held, that such condition was not just or reasonable, and that it was not binding. Quære, whether the additional condition in this case was so printed as to comply with the statute. See 26 Gr. 115. *Sands* v. *Standard Ins. Co.*, 27 Gr. 167.

A special condition of a policy of insurance effected by one K. on certain goods, provided that if the insured property should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding in law or equity, the policy should cease to be binding on the insured. The goods, prior to the insurance being effected and up to the time of the loss, were mortgaged by K. to the plaintiff, to whom the loss was made payable. After the making of the policy, an execution at the suit of one D. against K. issued against his goods, under which the goods, which were in K.'s possession, were seized, but on a bond being given for their re-delivery upon request to the sheriff, the seizure was withdrawn, and the goods were left in K.'s possession:—Held, that there was a valid seizure, for the goods being in K.'s possession, the sheriff, so long as he was not forbidden doing so by the mortgagee, might properly seize them in corpore, and, if need be, take them out of K.'s possession, and that what occurred subsequently could make no difference. Held, also, that that part of the condition which referred to the levy or taking possession of the goods under legal process, was, on the particular facts of this case, just and reasonable, for although the condition in its generality might be unjust and unreasonable as applying to all seizures, legal or otherwise, yet that it was divisible so as to be just and reasonable when applicable, as here, to a legal seizure. The policy was therefore held to be avoided. Per Wilson, C.J., the other part of the condition, referring to the title being disputed, &c., was not just and reasonable. *May* v. *Standard Fire Ins. Co.*, 30 C. P. 51.

But, held on appeal, reversing this judgment, that the plaintiff was entitled to recover. Per Burton, Patterson, and Morrison, JJ.A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession. Per Armour, J., that the condition was not binding on the insured, as it was not printed in compliance with R. S. O. 1877 c. 162, s. 4. Wilson v. Standard Fire Ins. Co., 29 C. P. 308, followed and approved of. Semble, that the condition was void, as being unjust and unreasonable. Remarks as to the principle and considerations upon which the validity of a variation of or addition to the statutory conditions should be tested and determined. *May* v. *Standard Fire Ins. Co.*, 5 A. R. 605.

Ship Insured "While Running"—*Variation from Statutory Conditions.*]—A policy issued in 1895 insured against fire the hull of the ss. Baltic, including engines, &c., "whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building." The Baltic was laid up in 1893 and was never afterwards sent to sea. In 1896 she

was destroyed by fire:—Held, reversing 25 A. R. 386, that the policy never attached; that the steamship was only insured while employed on inland waters during the navigation season or laid up in safety during the winter months. Held, also, that the above stipulation was not a condition but rather a description of the subject matter of the insurance, and did not come within s. 115 of the Ontario Insurance Act relating to variations from statutory conditions. *London Assurance Corporation* v. *Great Northern Transit Co.*, 29 S. C. R. 577.

Statutory Conditions Omitted—*Misrepresentation*.]—The policy sued on, which was issued by defendants, who were incorporated since the passing of R. S. O. 1877 c. 162, by the Dominion Parliament, had not indorsed upon it the statutory conditions referred to in the schedule to that Act, but had conditions of its own, which were not printed as variations in the mode indicated by the Act:—Held, affirming 43 U. C. R. 261, that the defendants could not resort to their own conditions avoiding the policy for non-disclosure of a previous insurance, nor to the statutory conditions, as they were not printed on the policy. *Parsons* v. *Citizens' Ins. Co.*, 4 A. R. 96.

A person insured under such a policy is entitled to avail himself of any condition indorsed on the policy in his favour, or of any statutory condition, notwithstanding that it is not printed upon the policy, but the assurers are only entitled to avail themselves of such conditions when they have them printed upon their policy. *Ib.*

Apart from conditions, an insurance company may defend on the ground of misrepresentation or concealment, which would vitiate the contract. *Ib.*

Held, following Parsons, v. Queen Ins. Co., 4 A. R. 96, 105, that the conditions of the policy not being, in accordance with the statute, headed either "Statutory Conditions," or "Variations," the policy was one without conditions, and the condition as to arbitration could therefore form no defence. *McIntyre* v. *National Ins. Co. of Montreal*, 44 U. C. R. 501.

Held, that according to the true construction of the Act, 39 Vict. c. 24 (O.), whatever may be the conditions sought to be imposed by insurance companies, no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act. The penalty for not observing that manner is that the policy becomes subject to the statutory conditions, whether printed or not. *Citizens' Ins. Co. of Canada* v. *Parsons; Queen Ins. Co.* v. *Parsons*, 7 App. Cas. 96.

Where a company has printed its own conditions and failed to print the statutory ones it is not the case that the policy must be deemed to be without any conditions at all. *Ib.*

Storing of Oil.]—A condition of the policy was, that the company should not be liable for any loss occurring while petroleum, rock, earth, or coal oil, burning fluid, naphtha, or any liquid product thereof or any of their constituent parts were stored or kept on the property insured:—Held, affirming 12 O. R. 706, that the fact of there being a small quantity—about a gallon in two small cans—of lubricating oil, used for the purpose of lubricating the engine, was not such a storing of oil, &c., as was contemplated by the condition. *Mitchell* v. *City of London Ass. Co.*, 15 A. R. 262.

Test of Reasonableness.]—Held, following Parsons v. Queen Ins. Co., 2 O. R. 45, any variation of the statutory condition is prima facie unjust and unreasonable. *Smith* v. *City of London Ins. Co.*, 11 O. R. 38.

Value.]—The first and second conditions indorsed on a policy declared that it was issued on the faith of the statements in the application, and on the plan shewing the situation of the property, and of all buildings or combustible materials within 100 feet of it, being in all respects accurate and true, and containing all the information required to enable the company to judge of the nature and extent of the risk, and of the interest of the insured in the property; and that if in such application or plan, or in any written notice to the company respecting any change in the nature of the risk, there should be any untrue or inaccurate statement, whether intentional or not, the policy should be void. The sixteenth condition, after providing that payment of losses should be made in sixty days, and that any difference touching any loss should, if the company should so require, be settled by arbitration, and that the company should have the option of replacing any property burned, proceeded, "In case of loss, if the property insured be found by arbitration or otherwise to have been overvalued in the survey and description on which this policy is founded, the company shall be held liable only, although there may have been no fraud, for such proportion of the actual value as the amount insured bears to the value given in the application for the insurance effected by this policy:"—Held, that the sixteenth condition was not a qualification of the second, but that each was separate—the second causing a forfeiture of the policy for an over-valuation in the application, and the sixteenth providing for a case in which on an amicable settlement or arrangement by arbitration it should turn out that the property had been over-valued, and giving to the company the option of waiving such forfeiture, and in such case making payment on the terms stated. *Williamson* v. *Commercial Union Ass. Co.*, 25 C. P. 453. But on appeal this decision was reversed. See 26 C. P. 591.

Variations—*Representations in Application—Apprehension of Incendiarism.*]—Where a fire insurance policy does not contain the statutory conditions, but contains other conditions not printed as variations, it must be read as containing the statutory conditions and no others. Citizens' Ins. Co. v. Parsons, 7 App. Cas. 96, followed. And the law in this respect has not been altered by 55 Vict. c. 39, s. 33 (O.). Where the policy is based upon an application containing statements or representations relating to matters as to which the insurers have required information, the first of the statutory conditions in s. 114 of R. S. O. 1887 c. 167, must be taken to refer to such statements and representations, whether the risk they relate to is physical or moral. Reddick v. Saugeen Mutual Fire Ins. Co., 15 A. R. 363, followed. And where, in the application, the insured was asked whether any in-

cendiary danger to the property was threatened or apprehended, and untruly answered "No."—Held, that the policy was avoided. *Findley* v. *Fire Insurance Company of North America*, 25 O. R. 515.

Waiver of Conditions.]—See *Watts* v. *Atlantic Mutual Life Ins. Co.*, 31 C. P. 53; *Phillips* v. *Grand River Farmers' Mutual Fire Ins. Co.*, 46 U. C. R. 334; *Fire Ins. Association* v. *Canada Fire and Marine Ins. Co.*, 2 O. R. 481; *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234; *Smith* v. *City of London Ins. Co.*, 11 O. R. 38, 14 A. R. 528, 15 S. C. R. 69; *Millcdle Mutual Marine and Fire Ins. Co.* v. *Driscoll*, 11 S. C. R. 183; *Hartney* v. *North British Fire Ins. Co.*, 13 O. R. 581; *Bull* v. *North British Canadian Investment Co.*, 15 A. R. 421; *Cousineau* v. *City of London Fire Ins. Co.*, 15 O. R. 329; *Logan* v. *Commercial Union Ins. Co.*, 13 S. C. R. 270; *McIntyre* v. *East Williams Mutual Fire Ins. Co.*, 18 O. R. 79; *Allen* v. *Merchants' Marine Ins. Co.*, 15 S. C. R. 488.

See, also, sub-heads, 4, 9.

(b) *Alienating or Incumbering the Property or the Policy.*

Addition to Statutory Condition.]—By a condition in a policy of insurance additional to the statutory conditions, it was provided, that "when property insured . . or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured, shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company:"—Held, affirming 26 Gr. 115, that such condition was not just or reasonable, and that it was not binding. *Sands* v. *Standard Ins. Co.*, 27 Gr. 167.

Agreement to Sell.]—The fact that the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession. *Ardill* v. *Citizens' Ins. Co.*, *Ardill* v. *Ætna Ins. Co.*, 22 O. R. 529; 20 A. R. 605.

Arson by Assignor.]—Declaration, on a policy to plaintiff on premises subsequently mortgaged for $2,000 to one S., alleging an assignment of the policy by plaintiff, with defendants' assent, to S.: that S. continued interested to $2,000 until the loss, and plaintiff, during all the time last aforesaid, and at the time of the loss, was interested therein to said amount so insured, as also as trustee for S. Then, after setting out the loss, it proceeded, whereby said S., and plaintiff, as trustee for him, and in his own right, suffered damage, &c. Plea, arson, by plaintiff. Replication, on equitable grounds, that before the loss the policy was, with defendants' assent, duly assigned to S., and the action was brought by plaintiff, as trustee, and for benefit of S.:—Held, on demurrer replication bad. *Chisholm* v. *Provincial Ins. Co.*, 20 C. P. 11.

Assignment after Loss—*Foreign Law.*]—To an action on a judgment recovered in the supreme court of the state of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B. not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do:—Held, a good replication, for defendants by their Acts of incorporation being evidently designed to carry on the business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in New York the law there would govern. The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which that law must govern. *Waydell* v. *Provincial Ins. Co.*, 21 U. C. R. 612.

An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers; but the safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss be partial only, and less than the sum insured. *Kerr* v. *Hastings Mutual Fire Ins. Co.*, 41 U. C. R. 217.

The conditions which must be complied with on the assignment of a policy of insurance only apply to the case of assignment prior to loss. *Wattes* v. *Canada Farmers' Ins. Co.*, 13 C. L. J. 198.

The interest of the insured in a policy of insurance upon chattels may, before loss, be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels. *McPhillips* v. *London Mutual Fire Ins. Co.*, 23 A. R. 524.

Assignment of Part of Insured Property.]—Where a policy of insurance in one sum covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers in breach of the fourth statutory condition, the policy is avoided in toto and does not remain in force as to the chattels. Distinction between the breach of that condition and the first condition pointed out. Gore District Mutual Fire Ins. Co. v. Samo, 2 S. C. R. 411, applied. *Dunlop* v. *Usborne and Hibbert Farmers Mutual Fire Ins. Co.*, 22 A. R. 364.

Chattel Mortgage.]—Where a policy of insurance against loss or damage by fire contained the following provision: "If the property insured is assigned without the written consent of the company at the head office indorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease:"—Held, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition. *Sovereign Fire Ins. Co.* v. *Peters*, 12 S. C. R. 33.

A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; that the policy should not be assignable without the consent of the company indorsed thereon; and that all incumbrances effected by the assured must be notified within fifteen days therefrom:—Held, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. Sovereign Ins. Co. v. Peters, 12 S. C. R. 33, distinguished. Held, further, that it was an incumbrance even if the condition meant an incumbrance on the policy. *Citizens' Ins. Co.* v. *Salterio*, 23 S. C. R. 155.

———*Waiver.*]—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed:—Held, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition. Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop* v. *Imperial Fire Ins. Co.*, 26 S. C. R. 585.

Construction of Policy.] — One of the conditions of a mutual policy provided that, in case of real estate insured and a mortgage given by the insured, the mortgagee might continue his interest by giving notice, &c., and that "whenever any one hereafter insured shall alienate conditionally by mortgage, his policy shall be void," unless written notice thereof be given to the board of directors stating the amount and to whom mortgaged, who should have power to assent or cancel the policy:—Held, looking at the constitution and working of mutual insurance companies, that the alienation referred to was of the land on which the premises insured were situate. *Russ* v. *Mutual Fire Ins. Co. of Clinton*, 29 U. C. R. 73.

Quære, as to the meaning of the words "hereafter insured." *Ib.*

Covenant to Insure.] — The usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages, operates as an equitable assignment of the insurance when effected. *Greet* v. *Citizens' Ins. Co.*, *Greet* v. *Royal Ins. Co.*, 5 A. R. 586; 27 Gr. 121.

Evidence of Assent.]—Action upon a policy by A., the person insured, averring an assignment to B. & C., notified to defendants and indorsed on the policy, and an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. & C. of the goods insured was proved. An assignment was indorsed on the policy, purporting to be made by A. to B. & C., but signed by D., the agent of A., in his own name, and witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office at Montreal; that the secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that afterwards B. & C. paid an additional premium to M. to cover an increase of the risk:—Held, that this evidence was sufficient to sustain the issue for the plaintiffs. Held, also, that the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants. *Ross* v. *Commercial Union Ass. Co.*, 26 U. C. R. 559.

In an action on a fire policy, issued to plaintiff, the declaration alleged an assignment of the policy and of the property insured to one M., and by M. to B. & P. with the assent of defendants, before the loss, and that the plaintiff sued as trustee for B. & P. The second plea denied the assignment to B. & P., and defendants' assent thereto. As to the second plea, it appeared that the assignment to M. had been assented to by A., a sub-agent, at Oil Springs, of P., the defendants' agent at Sarnia, (defendants' head office being at Montreal); and a memorandum was also indorsed by P. that the loss, if any, should be paid to M. only. A. had effected the insurance with plaintiff, and he swore that he was aware of the intended assignment by M. to B. & P., and drew it out, after speaking of it to C., defendants' inspector, who told him to use the same form as in the assignment to M.; that B. & P. purchased the property, which was then kept by the plaintiff as a temperance house, it being part of the bargain that the policy should be assigned, though the assignment was not completed for some months after the conveyance of the property. B. & P. opened a bar, for which an extra premium was charged by the company, and paid through A. to P. and by P. to the head office:—Held, that there was evidence of assent by the defendants to the assignment to B. & P., so as to sustain a verdict for the plaintiff on this plea. *Hendrickson* v. *Queen Ins. Co.*, 30 U. C. R. 108. See *S. C.*, in appeal, 31 U. C. R. 547.

Defendants pleaded that a certain incumbrance (being a mortgage for a loan obtained by the plaintiff from a company) was created by the plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent who took the plaintiff's application for insurance, also obtained the loan for him; that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing; and that after the fire defendants were told by the company that they had a claim only to the $100 insured on the buildings, which they sent to them by letter:—Held, that defendants sending the money by letter was a written consent to the incumbrance: and that their assent to the

assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment. *Hazzard* v. *Canada Agricultural Ins. Co.*, 39 U. C. R. 419.

Fraud by Assignor.]—The assignee of a policy cannot recover on it if fraud is established against his assignor. *North British and Mercantile Ins. Co.* v. *Tourville*, 25 S. C. R. 177.

Husband's Mortgage of Wife's Land—*Goods and Lands.*]—The plaintiff had insured a house and furniture in separate sums. The land on which the house stood had been devised to his wife; and a mortgage in fee was proved, of which no notice had been given, executed by himself, his wife joining to bar dower, after the insurance. It was not proved when she was married or acquired the property, so as to shew whether the Married Woman's Act would apply:—Held, that the policy was void; for unless that Act applied, his conveyance would pass a freehold interest in the land, and as against him it would be presumed primâ facie that he had power to mortgage as he assumed to do. Held, also, that the policy was avoided as to the furniture, as well as the house. *Russ* v. *Mutual Fire Ins. Co. of Clinton*, 29 U. C. R. 73.

Incumbrance by Assignee.]—Declaration, on a policy of insurance made to plaintiffs. Second plea, setting out, among other conditions, that if after insurance effected the applicant incumbered his property by mortgage, such incumbrance should avoid the policy, unless notice thereof were given. Averment, that after the insurance, and after assignment of the insured premises and the policy, and before the fire, the assignee incumbered the said premises by mortgage, and that no notice of the same was given to defendants:—Held, plea bad: because the condition set out applied only to incumbrances created by the applicant, not by his assignee. *Richardson* v. *Canada West Farmers' Mutual and Stock Ins. Co.*, 16 C. P. 430.

Infirmity of Assignor's Title.]—Cases in which an infirmity of claim or title of the assignor will or will not attach to the assignee of a policy considered. *Kreutz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131.

Interim Receipt—*Duty of Holder to Give Notice.*]—See *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

Lease.]—Semble, that a demise of the house insured for one year is not "an alienation" within the Act. *Hobson* v. *Wellington District Mutual Fire Ins. Co.*, 6 U. C. R. 536.

Mortgage.]—Held, affirming 26 Gr. 113, that the fourth statutory condition did not apply to an alienation by way of mortgage, but only to an absolute transfer. *Sands* v. *Standard Ins. Co.*, 27 Gr. 167.

The eleventh plea set up a condition of the policy, that if the insured's interest in the property should be changed in any manner, whether by act of the parties or by operation of law, the policy should be void, and alleged that after the issuing of the policy the insured mortgaged the property, whereby his interest became changed and the policy avoided:—Held, that this plea, which was proved, constituted a good defence, and avoided the policy. *O'Neill* v. *Ottawa Agricultural Ins. Co.*, 30 C. P. 151.

——— *Agreement for Sale.*]—The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided:—Held, affirming 14 O. R. 322, that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition. Sands v. Standard Ins. Co., 26 Gr. 131, 27 Gr. 167, approved. Held, also, that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the condition. *Bull* v. *North British Canadian Investment Co.*, 15 A. R. 421.

Mortgage after Assignment.]—One G. insured two houses with defendants, a mutual insurance company, and then mortgaged them to the plaintiff, to whom he assigned the policy, with defendants' assent. Afterwards G., in violation of one of the conditions of the policy, executed another mortgage to other persons, of which no notice was given to defendants. The assignment to the plaintiff was upon the express condition that the plaintiff should be bound by all the conditions of the policy, and that the policy should continue to be voidable as though the assignment had not been made:—Held, that the policy was avoided by G.'s act as against the plaintiff, who could recover upon it only in right of G. *Smith* v. *Niagara District Mutual Ins. Co.*, 38 U. C. R. 570.

Burton v. Gore District Mutual Ins. Co., 12 Gr. 156; 14 U. C. R. 342, commented upon and distinguished, upon the grounds of the change since made in the law as to assignment of choses in action by 35 Vict. c. 12 (O.), and of the express condition in the assignment, and the provisions of 36 Vict. c. 44, s. 39 (O.), relating to insurance companies. *Ib.*

Mortgage of Policy.]—A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with or in any way incumbered, the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S., the insured under said policy, assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy:—Held, that the mortgage of the policy by S., without such consent, made it void and he could not recover the amount insured in case of loss. *Salterio* v. *City of London Fire Ins. Co.*, 23 S. C. R. 32.

Oral Notice.]—A by-law of the company (No. 16), declared that certain circumstances would vitiate the policy unless notice were given, the consent of the board obtained and indorsed on the policy, and signed by the president and secretary. One of the circumstances which the by-law declared would viti-

ate the policy, unless notified in writing to the secretary, consented to by the board, and indorsed, was that "of alienating by mortgage or otherwise, or any change in the title or ownership of the property insured." A few days after obtaining the first interim receipt, the plaintiff mortgaged the property, which he notified verbally to the agent, who was otherwise well aware of the transaction, but no notice in writing was given to the secretary:—Held, that such want of notice in writing to the secretary vitiated the policy; but quære, what the conclusion should be if notice, though not in writing, were traced home to the company. *Hacke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

Partnership Turned into Company.]—Where the business of a partnership is taken over by a limited liability company formed for that purpose there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company. *Peachey* v. *City Mutual Fire Ins. Co.*, 18 A. R. 446.

Payments by Assignor.]—Declaration—First count: On a fire policy, dated 22nd September, 1869, made by defendants to one B., for one year, with condition for renewal; alleging that B. renewed to 22nd September, 1873; that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss was solely interested; that the premises were destroyed by fire on the 13th March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants: breach, non-payment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B. and renewals by him, and loss by fire on the 14th March, 1873, whereby B. became solely interested; and that after the fire and before suit, namely, on the 5th November, 1872, B. by writing assigned to plaintiff, as assignee in insolvency, all his interest in said insurance, &c. Sixth plea: averring B.'s insolvency, and assignment to plaintiff on the 25th January, 1872, and that the current year expired in September, 1873, and that the plaintiff did not renew by paying the premiums, &c., and so that the policy was at an end. Equitable replication: that the defendants should not be allowed to so aver, because B., under whom plaintiff claims, duly paid renewal premiums to defendants, who accepted, and gave their receipts therefor, declaring policy renewed, &c., which receipts B. delivered to plaintiff, who adopted his act:—Held, replication good, for B.'s payment in renewal, and taking the receipts in his own name, would enure to the benefit of the estate. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

Partnership—*Change after Mortgage—Notice of Incumbrances—Subrogation.*]—On 21st February, 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated 19th March, 1879, expiring 1st March, 1880. On 10th March, 1879, A. left the firm. On 1st March, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and that the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mortgage debt, and obtain an assignment of the mortgage. There was no written application for the U. Policy. The R. policy was handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting the insurance. On 14th March, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on the mortgage, of which they took an assignment. The evidence shewed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiffs now, suing on the U. policy, claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage:—Held, that the non-communication of A.'s retirement from the firm was not a breach of statutory condition No. 1, because A., though he had retired, retained an insurable interest, both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; and, moreover, even if A. had no interest at all, the surviving partners could recover according to the extent of their interest. Semble, that even if notice of the change had been of moment, yet, since the evidence shewed that the matter of the policy, as between the mortgagees and the U. company, was left to the under-clerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. company of the change in question, a jury might properly find that notice of the change was communicated to the U. company. *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234.

Held, further, that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages. Samo v. Gore District Mutual Ins. Co., 1 A. R. 545, followed. *Ib.*

Held, further, that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence shewed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the

duty of the U. company to have properly issued their policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued. *Ib.*

Held, further, that the letter of 14th March, 1881, contained representations which the mortgagees were bound to make good, especially as the U. company acted as agents for the plaintiffs in effecting the policy. *Ib.*

Held, further, that the claim of the U. company to foreclose could not be entertained, for the U. company could not take advantage of their own default, in not making the formal entry of assent to the prior insurances on their policy, to bring into play the subrogation clause for their own advantage. Springfield Fire Ins. Co. v. Allen, 43 N. Y. 387, distinguished. *Ib.*

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed, and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating their respective liabilities as between themselves. *Ib.*

Quære, whether upon the facts stated in the report the plaintiffs were not entitled to recover on the ground of the compromise made between the parties. *Ib.*

Second Mortgage — *Right of Action.*]— M. having insured with a mutual company, assigned all his interest in the policy and premises insured to the plaintiffs by way of mortgage to secure a debt, and the policy was duly ratified to them in accordance with 6 Wm. IV. c. 18, s. 18. A loss having occurred, the plaintiffs sued in their own names as assignees, setting out the mortgage in the declaration. Defendants pleaded:—3. That the debt due the plaintiffs was less than the sum insured; that the assignment was to secure the debt; and, as to any surplus, plaintiffs held as trustees for the mortgagor; that before the loss, M. insured in another office for £500, which defendants had no notice of, and never consented to or approved of. 4. That before the mortgage to plaintiffs, M. had mortgaged the premises insured to one R. in fee, who afterwards effected an insurance with another company without the knowledge and consent of defendants. Lastly, that before M.'s mortgage to plaintiffs he had mortgaged the premises insured to R. in fee, which mortgage is still in force and unsatisfied:—Held, on demurrer, third and last pleas good, fourth plea bad: for although the mortgage to R. mentioned in it would form a good defence of itself, yet it was not relied on for that purpose, but stated only as incident to another and insufficient defence, viz., the second insurance by R., and therefore it could not be acted on as admitted by the demurrer. Per Robinson, C.J.—The 19th clause of the Act applies only to absolute alienations, and the plaintiffs in this case, as mortgagees, were not entitled to sue in their own names. Per McLean, J., and Burns, J.—They were so entitled. Per Robinson, C.J.—A mortgage by the insured in a mutual insurance company, without consent, will avoid the policy. *Burton* v. *Gore District Mutual Ins. Co.*, 14 U. C. R. 342.

Trust for Creditors — *Knowledge of Agent—Parties.*]—On the 19th November, 1877, an interim receipt on a stock of goods was made to plaintiff, subject to the conditions of the defendants' printed form of policy then in use, being the statutory conditions, one of which was that "if the property insured is assigned without the written permission indorsed thereon of the agent of the company duly authorized for such purpose, the policy shall hereby become void." On the 28th November the plaintiff assigned the insured property to one McK., in trust to sell the same and pay plaintiff's creditors, among whom were McK. and McM. & Co., the amounts due them, and the residue, if any, to the plaintiff. By the policy, which was dated 12th December, but which was not delivered to the plaintiff until after the fire, which occurred on the 15th January, 1878, the loss, if any, was to be paid to McK. and McM. & Co., and others as creditors, as their interest might appear. When the assignment was made the defendants' agent, who issued the receipt, was expressly notified thereof, and assented thereto, and stated that no notice to the company was necessary, as the policy was payable to the assignees. The plaintiff sued on the policy, setting it out, together with the assignment, and alleged that after satisfying the creditors' claims there would be a surplus coming to him, and that he sued as trustee for the creditors, and in his own interest:—Held, that the policy must be deemed, in the absence of evidence to the contrary, to be the form of policy in use when the receipt was given, it having been accepted by the plaintiff and the action brought thereon. Held, also, that under the condition there should have been a consent in writing to the assignment even if indorsement thereof on the receipt was not essential; but that the agent who issued the receipt had the power to dispense with such written consent and that he had done so. Held, also, that the creditors should have been made parties with the plaintiff, but that this might be dispensed with by obtaining releases of their claims; and a verdict was directed for the plaintiff for the whole amount insured, on the production of such releases to the master. *McQueen* v. *Phœnix Mutual Fire Ins. Co.*, 29 C. P. 511.

On appeal it was—Held, reversing the above judgment, that the plaintiff was not entitled to recover, as the notice of assignment, even if given to the company, would only have been notice that the property had been alienated, which, under the above section, rendered the insurance void. *S. C.*, 4 A. R. 289.

On appeal to the supreme court, the judgment was reversed and it was held that the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and to have executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition on the policy. 2. That the words "loss payable, if any, to G. McK.," etc., operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant were made, the action for a breach of that covenant was properly brought by him. *S. C.*, 4 S. C. R. 660.

See, also, sub-heads 4 (c), 5, 7, 9 (c).

(c) *Change in Risk.*

Additions — *Furnaces.*] — Defendants pleaded, (1) that the conditions provided that

in the assurance of buildings containing any furnace, &c., the construction of the same must be particularly described when effecting the insurance, or if subsequently introduced due notice given to the company and the same sanctioned; that if after insurance the risk should be increased by any means within the control of the assured or the premises occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addition should be allowed by indorsement on the policy, the assurance should be void. And defendants alleged that after effecting the insurance the plaintiff made divers alterations and additions to the building, and in such additions introduced two furnaces, of which said furnaces being introduced defendants had no notice or knowledge:—Held, plea bad, for the condition provided only against furnaces introduced into the building assured, not into additions made to it. The second plea was, that after the policy divers erections, which were within the plaintiff's control, were added to the buildings insured, whereby the risk was increased, without the defendants' knowledge or consent. The plaintiff replied that by a condition of the policy, in case the risk should be increased by the erection of buildings, &c., it should be optional with the company to terminate the assurance; that the increase of risk was so occasioned as alleged in the plea, and defendants did not terminate the assurance, as provided for in the condition; and that said policy is valid and subsisting:—Held, replication clearly bad, it being admitted, as stated in the plea, that defendants had no knowledge of the buildings being erected. *Lomas* v. *British America Assurance Co.*, 22 U. C. R. 310.

The plaintiff also took issue on the above and other pleas. At the trial it was proved that an addition had been made, in which a boiler was placed, and steam carried thence into the main building from which certain furnaces were then removed. The jury gave a verdict for the plaintiff on the second plea, and found that the external risk was increased, the internal risk diminished, and on the whole the risk diminished by the alterations:—Held, that the plea was proved, and defendants entitled to have a verdict entered for them upon it, on leave reserved. *Ib.*

3. Defendants pleaded that by another condition all assurances, original or renewed, should be considered as made under the original representation, so far as it might not be varied by any new representation in writing, which in all cases it should be incumbent on the assured to make when the risk had been changed either within itself or by the surrounding or adjacent buildings; and defendants averred that although after the original representation new buildings were erected adjacent to and around the buildings insured, and although the risk was changed thereby, yet the plaintiffs did not make to defendants any new representation in writing of such new buildings, or of the change of risk, whereby the policy became void. Per McLean, C.J.—The plea shewed a good defence. Per Hagarty, J.—Not, for the change here occurred before the time for renewing the policy, and the condition did not bind the plaintiff to make a new representation until then. Sillem v. Thornton, 3 E. & B. 868, distinguished, as the alterations there seemed to have been in progress when the policy was effected. *Ib.*

See, also, *Heneker* v. *British America Assurance Co.*, 13 C. P. 99, decided in the same term,—an action on another policy on the same property, in which the pleadings and decision were substantially the same. The third plea was held no defence.

A new action having been brought on this policy, the judgment as given in the former case was adhered to. The defendants further pleaded that the British American land company, of which company the plaintiff is commissioner, had, before the policy, leased the property to one L., who had covenanted to insure and keep insured, and that L., as lessee, made additions to the buildings which increased the risk, and that such increased risk was within the control of the land company as lessors, whereby the policy was avoided according to one of the conditions:—Held, that these conditions, made by a lessee, were not within the control of the lessors. Held, also, that the provision in the lease, that the lessee should not make alterations "in the arrangement of the mill or machinery," was not a prohibition from the putting up of additional buildings; but if it were, the defendants had no right to resist payment because the landlord might have a right of entry for a forfeiture by the tenant. *Heneker* v. *British America Assurance Co.*, 14 C. P. 57.

A policy provided that it should be avoided by any addition made to the building insured, unless written notice thereof was given to the secretary, and the consent of the board of directors thereto indorsed on the policy, signed by the president and secretary. Defendants in their plea stated an addition without notice or consent, by which they alleged that the premises became materially altered, so as to increase the risk. The plaintiff took issue:—Held, that the latter averment being surplusage, need not be proved, and that defendants were entitled to succeed on shewing the addition without notice, although the jury found the risk not increased by it. *Lyndsay* v. *Niagara District Mutual Fire Insurance Co.*, 28 U. C. R. 326.

There was also an equitable replication of parol waiver by an agent duly authorized but his authority was not proved; and semble, that such waiver could be no answer. *Ib.*

Amendment.] The answer of the company relied upon the premises being vacant without notice to them. At the hearing this proved to be incorrect, when an application was made to supplement their answer by relying on a change in the occupation and an increase in the number of tenants; but as it was not shewn that the change in occupation had increased the risk, or that the loss was occasioned by it, the court, in the exercise of the discretion given to it under the A. J. Act, refused to allow the amendment. *Guggisberg* v. *Waterloo Mutual Fire Insurance Co.*, 24 Gr. 350.

Breach before Assignment.]—Declaration on a policy assigned to plaintiff by one S., the original assured, stating the assignment thereof with the consent in writing of the defendants, and on security given by plaintiff for the portion of the premium note remaining unpaid, the subsequent ratification by defendants, signified by their indorsement on said policy, thus entitling plaintiff to all the rights of S. in and upon the same. Plea, setting up a change in the occupancy of the premises, after the issue of the policy, from a tavern to

that of a store, by one D., contrary to a condition of the policy, whereby the policy became void. Replication, on equitable grounds, in substance, that the alleged change took place before the assignment of policy to plaintiff; that defendants were, but plaintiff was not, aware of said change; that after said assignment and before the loss, plaintiff was intending to visit the premises to ascertain whether all conditions of the policy had been complied with, and plaintiff upon such representation refrained from ascertaining the alleged facts in the plea contained, and was afterwards induced by defendants to pay further premiums in respect of such insurance, which defendants with full knowledge of all the facts accepted from plaintiff, who was then and continued to be ignorant thereof till after the fire occurred:—Held, on demurrer, replication good; that defendants must be held to have waived the alleged cause of forfeiture and their statutable ratification of the assignment be considered binding upon them, notwithstanding the prior breach of condition by the original assured, and that the said breach was still continuing at the assignment of the policy to plaintiff. *Kreutz* v. *Niagara District Mutual Fire Insurance Co.*, 16 C. P. 131.

Cases in which the original infirmity of claim or title of the assignor will and will not attach to the assignee of the policy. *Ib.*

Construction of the expression "change of occupancy." Quære, whether plea good. *Ib.*

Business Expressly Prohibited—*Dangerous Articles.*]—Plaintiff insured with defendant for £2,000, the property insured being described in the application as his stock of dry goods, contained in the first and second floors of a three-story building occupied by him as a dry goods store, the third story being occupied by another person as a dwelling and architect's office. By the policy the insured covenanted that the representations in the application were true, otherwise the policy should be void; and it was agreed that if the building should be used for any trade or business denominated hazardous, extra hazardous, or specially hazardous in the memorandum annexed to the policy, or for the purpose of keeping or selling any of the goods so denominated, unless agreed to in writing by the company, the policy should be void. There was also a condition of the policy that the application should specify the construction of the building containing the property to be insured, and by whom occupied; that it should be stated whether goods insured were or were not of the descriptions denominated hazardous, extra-hazardous, or included in the memorandum of special rates; that if after the insurance the risk should be increased by any means within the control of the assured, or if such building should be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance should be void. In the memorandum referred to, hat-finishers and sulphur were included among the trades and goods deemed hazardous, which it was stipulated should subject the building and all its contents to an additional charge; hat-bleaching was in the class called extra hazardous, and hat manufacturers in that of specially hazardous (each with a stipulation as to extra charge), and at the end of the last class was added, "and generally all trades requiring the use of fire-heat not before enumerated." It appeared that the goods kept by the plaintiff consisted in part of millinery, which in the defendants' printed instructions to their agents was classed as extra hazardous, and ordered to be charged at a higher rate, but it was not mentioned in the policy or conditions; also, that the business of bleaching straw bonnets was carried on in the third story (described in the application as occupied for an architect's office) and a stove introduced into the cellar for the purpose of this process, in which sulphur was also made use of. No notice was given to defendants of any of these changes. A fire having occurred:—Held, that the policy was avoided; that bleaching bonnets was included in the trade of "hat bleaching" mentioned in the class "extra hazardous;" and that the plaintiff having carried on that business without notice to defendants, no question as to the increase of risk thereby was left to the jury, but the policy by the express terms of it was at an end. Held, also, that the other conditions were broken; for the occupation of the building was altered, and the risk increased by means within the control of the assured. The keeping millinery would not have been fatal, for plaintiff could not be supposed to be aware of defendants' instructions to their agents; nor would the use of sulphur, for the memorandum referred to it only when kept as stock. *Merrick* v. *Provincial Insurance Co.*, 14 U. C. R. 439.

Changes in Arrangement.]—One of the conditions was, "if the risk shall be increased by any means whatever, or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void." After the insurance, certain alterations were made in the premises insured, consisting of the removal from one room to another adjoining it of a couple of dye-kettles, a different disposition of the flues and pipes connected therewith, and the erection of a new chimney, thereby to a slight extent increasing, (if considered as an isolated act) but to a great extent diminishing the risk. The jury found that, though the erection of the chimney did per se increase the risk, yet that, diminishing it in one place and increasing it in another, the risk on the whole was not increased; and they rendered a verdict for the plaintiff, which was upheld, and Henecker v. British America Assurance Co., 13 C. P. 99, distinguished. *Date* v. *Gore District Mutual Insurance Co.*, 15 C. P. 175.

Change of Occupant.] — Semble that a mere change in the occupant of a house insured against fire, without notice, &c., is not such a change of occupation as would avoid a policy effected under 6 Wm. IV. c. 18, and the by-law set out in this case. *Hobson* v. *Wellington District Mutual Fire Ins. Co.*, 6 U. C. R. 536.

"Increased or Changed."]—Where the words in a condition in a policy are, "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonym of "increase," than as a word of different signification. Ottawa Co. v. Liverpool Insurance Co., 28 U. C. R. 522, approved. *Gill* v. *Canada Fire and Marine Insurance Co.*, 1 O. R. 341.

Keeping a Watchman.]—The plaintiff, who resided at a distance from a mill on which he held a mechanic's lien, applied to the agents of the defendants to effect an insurance

thereon. One of the questions put to the applicant was, "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at night?" His answer was, "The building is never left alone, there being always a watchman left in the building when not running." At the foot of the application was a condition that the foregoing was a full and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property, so far as was known to the applicant and material to the risk. The policy which issued thereon mentioned the application in these terms, "Special reference being made to the insured's application, which is his warranty and a part hereof." One of the conditions of the policy provided that any changes material to the risk and within the control or knowledge of the insured should avoid the policy unless notified to the company. When the application was made, a watchman was kept on the premises, but after the issue of the policy, and without the knowledge of the assured, he was discontinued.—Held, affirming 25 Gr. 282, that the answer was not a warranty that a watchman would be kept during the existence of the policy, but merely a representation as to an existing state of things at the date of the application. Held, also, that even if the withdrawal of the watchman was a change material to the risk, the assured was not responsible, as it was not within his control or knowledge. *Worswick* v. *Canada Fire and Marine Ins. Co.*, 3 A. R. 487.

In July, 1876, S., of whom the plaintiff was assignee, applied to the agent of the Royal Insurance Company at Woodstock for an insurance of $4,000 on certain mill property, stating in the application that a watchman was kept on the premises at night, &c.; and by a memorandum at the foot of the application he covenanted for its truth, and agreed that it should be held to be a part and condition of the contract. This application was forwarded to the general agents of the Royal at Montreal, who desiring to assume only $2,000 of the risk applied to defendants there, shewing them the application, and the defendants, without any direct application to themselves, but on the faith of the representations in this application, accepted the risk for $2,000 and issued a policy therefor. The general agent of the Royal wrote to their agent at Woodstock, stating that they had only taken $2,000, and given the difference to the defendants, whose receipt for the premium he inclosed. The agent read the letter to S., who paid the two premiums, and in due course received a policy from the defendants. It was proved that when the insurance was effected there was a watchman, but that he had been discontinued some weeks before the fire by which the mill was wholly destroyed, though it probably would have been saved had he been there:—Held, that defendants' policy must be deemed to be based on the application given to the Royal; that the keeping of a watchman was a matter material to the risk, and the statement as to it constituted a continuing warranty, the breach whereof avoided the policy. After the first insurance, S. applied to defendants' agent at Woodstock for a further insurance of $2,000 on the same property, shewing to him the former policy, of which the agent then heard for the first time; and the agent, instead of taking from S. a special application used for this kind of risk, drew up himself an informal one, not signed by S., in which, in a column headed "Diagram shewing the risk to be insured as well as all neighbouring buildings, their construction, roofing, occupation, and distance from each other," he inserted the words "Same as policy No. 1,705,106," the number of defendants' previous policy:—Held, that there was not enough to warrant the conclusion that the second policy was issued on the faith of the representation as to keeping a watchman contained in the first application. But under the circumstances a new trial was granted, to enable the defendants to furnish further evidence on the point, with leave to add a plea setting up the materiality to the knowledge of S. of the information as to a watchman, and the omission of S. to tell the defendants that he had been discontinued. *Whitlaw* v. *Phœnix Ins. Co.*, 28 C. P. 53.

Mortgage — *Subsequent Changes.*]—One S., being the owner of a frame building, used as an hotel, and two barns, insured with defendants, $700 on the hotel and $150 on each of the barns. Subsequently S. mortgaged the land and premises in fee to plaintiff, but still continued in possession. The policy was ratified to plaintiff by defendants. After this, one D., tenant to S., carried on, in addition to the hotel, the business of storekeeping in the hotel, and S. while in possession and before the fire, without plaintiff's knowledge, made an addition to the hotel itself, which had the effect of placing the hotel nearer to barn No. 1, and removed barn No. 1 so as to make it near barn No. 2. A fire afterwards occurred, which originated in the addition made to the hotel, and destroyed it as well as the two barns. Plaintiff thereupon in his own name sued defendants for the total amount of the loss, $1,000. Defendants pleaded that the policy was subject to conditions that any change in occupancy, or any alteration or addition to the building insured, not notified to the company for approval, should avoid the policy, with averments that the occupancy was changed in this, that while the frame building, at the time of insurance, was occupied as a tavern only, yet before the fire a large portion thereof was occupied by one J. H. as a store, of which no notice was given to the company, and that before the fire the buildings were altered, without defendants' knowledge, in the manner above described:—Held, 1. That the right of plaintiff, the mortgagee of S., to maintain the action in his own name on the policy did not properly arise upon the pleadings; but semble, plaintiff had the right so to do. 2. That the change of occupancy was such as to avoid the policy, though plaintiff had no knowledge of it. 3. That the alterations and additions were such as to avoid the policy, though plaintiff had no knowledge of them, and were such as to avoid the whole policy, though in other respects divisible. *Kuntz* v. *Niagara District Fire Ins. Co.*, 16 C. P. 573. See, also, *S. C.*, sub. nom. *Kreutz* v. *Niagara District Fire Ins. Co.*, *ib.* 131.

New Hazardous Occupation — *No Increase in Risk.*]—A policy on a building described in the application for insurance as a spool factory contained the following conditions: "That in case the above described premises shall at any time during the continu-

ance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or extra hazardous unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing or added to or indorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the assured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent:"—Held, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured. *Sovereign Fire Ins. Co.* v. *Moir*, 14 S. C. R. 612.

Notice of Change.]—The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were relet to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. B., the defendants' local agent, was notified of this change, and went on the premises and saw the tenant at work making a desk. He wrote to the head office at plaintiff's request, notifying them of this, and they answered that if the policy were sent, with a letter of explanation, they would consent in writing on it, adding, "Is there woodwork done on the premises?" The matter was then allowed to drop. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured, shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may cancel the policy." The jury were asked whether the change was material, and whether it was fairly communicated to the defendant; and they found for the plaintiff:—Held, that the verdict should not be disturbed. Semble, that the transmission of the policy for indorsement was not essential. *Peck* v. *Phœnix Mutual Ins. Co.*, 45 U. C. R. 620.

Occupancy.]—Quære, as to the distinction between change "in the occupation" and in the "nature of the occupation" of a building. *Ottawa and Rideau Forwarding Co.* v. *Liverpool and London and Globe Ins. Co.*, 28 U. C. R. 518.

Defendants insured two buildings, each for different sums, by a policy providing that in case any alteration or addition should be made in or to any risk, whether by the erection of apparatus for producing heat, by the introduction of articles more hazardous than allowed, or change in the nature of the occupation, or in any other manner whatsoever by which the degree of risk was increased, and an additional premium would be required, without notice and allowance thereof, the policy should be void. A plea setting up a defence under this as to one building, alleged that an alteration was made in the risk, within the meaning of the condition, by the plaintiffs having suffered a change in the occupation of the building, and by the introduction therein of painters who worked therein and thereon at their trade; and that another alteration was made in said risk by plaintiffs having permitted a change in the occupation of the other building insured, which adjoined building No. 1, and by the introduction therein of carpenters, who worked therein at their trade—whereby, and by means of such alterations, the risk on the said building No. 1 was increased, &c.:—Held, pleas good; that the means by which the risk was increased could not be rejected as surplusage, as defendants contended, but that what was alleged as to the change of occupation might have increased it, and whether it did so or not was for the jury. A mere temporary introduction of painters and carpenters, for repairs, &c., would not avoid the policy. Quære, therefore, whether in this respect the plea was sufficient. Semble, that it was, because the court could not judicially know whether what was alleged on that point could increase the risk; but it was suggested that the plaintiffs should reply specially the circumstances under which the painters and carpenters were introduced. *Ib.*

——— *Knowledge.*]—Plea, that by one of the conditions defendants were to be notified of all changes of occupation, or of vacancy; that at the time of insurance the premises were vacant, and afterwards they were occupied by B., in part as a dwelling-house, and in part as an Orange lodge; and defendants were not notified. Equitable replication, that when the policy was made, defendants knew that the building was in course of construction, and that B. intended to occupy it as a dwelling; and that afterwards, with such knowledge, B. occupied as in the plea alleged; and defendants with knowledge thereof received the renewal premiums down to the time of the loss without objection:—Held, replication good, and that it sufficiently shewed notice to defendants of the occupation as a lodge. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

Oven—*No Increase of Risk.*]—A condition provided that if during the continuance of the policy the premises should be used for carrying on any trade or business whereby the risk was increased the policy should be void. After effecting the insurance, the insured built an oven on the premises, but it was safely built, and was only in use for a short time, and there was evidence to shew that it did not increase the risk. It also appeared that according to the agent's instructions he had power, when the risk became more hazardous, to cancel the policy, and though aware of the oven, did not do so:—Held, that this did not avoid the policy. *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121.

Pleading—*Secondary Evidence.*]—To an action on a policy of insurance, averring a total loss by fire, defendants by their second plea set up an avoidance of the policy by reason of the mis-statement in the application of a material fact, namely, in stating that the buildings were occupied as a dry goods and grocery store, whereas they were occupied as a dry goods and grocery store, a butcher's shop, and a waggon-maker's shop. A third

plea alleged that, contrary to a condition of the policy, the premises were altered, appropriated, and used, without the company's consent, for the purpose of carrying on other trades than when the policy was issued, which, according to the by-laws and conditions, or class of hazards, increased the risk, whereby the policy was avoided. The policy had been destroyed, and no copy kept, but a form was produced proved to be the form then in use, and filled up from the application:—Held, good secondary evidence of the policy, as regarded the conditions, &c., but not as regarded the description of the property, which differed from that in the application. The application described the premises as being used "as dry goods, groceries:"—Held, that the second plea was not proved, for it must be assumed that the description in the policy was the same as in the application, which differed from that alleged in the plea. Held, also, that both pleas were bad in omitting to state that the matters complained of increased the risk—which in fact they did not do, for it was proved that the defendants had charged the plaintiff a much higher rate than the highest rate mentioned in the table of rates for the trades objected to; and on this ground the alteration in the occupation was held not to be material. *Johnston* v. *Canada Farmers' Mutual Fire Ins. Co.*, 28 C. P. 211.

Risk not Increased.]—It was a condition, that in the event of any alteration, &c., whereby the risk should be increased, and a consequent additional premium required, the policy should be void, unless notified to defendants and allowed by them, and consequent additional premium paid. It appeared that when the policy was effected by A., he was told by defendants' agent that if an elevator was erected on the premises without informing defendants his policy would be avoided, as in that case he would have to pay an additional premium; but this was not inserted in the policy. A. erected an elevator, and did not give notice to defendants:—Held, on a plea setting out the condition, and alleging the erection of the elevator, that the risk was thereby increased, and that a consequent additional premium would have thereby been required; that the jury not having found any increase of risk, the facts afforded no defence. *Todd* v. *Liverpool and London and Globe Ins. Co.*, 18 C. P. 192.

Sale of Liquor.]—In a policy of insurance effected by the plaintiff for a year in a mutual company, the premises insured were described as a two story brick building, &c., occupied as a tenement dwelling. By a memorandum afterwards indorsed on the policy the building was allowed to be "occupied as a refreshment room, no liquor sold." Afterwards the policy was renewed by a renewal receipt issued under s. 32 of the Mutual Insurance Act, 36 Vict. c. 44 (O.). The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the knowledge or consent of the insured. The defendants set up in their pleas a condition of the policy, that if the hazard was increased by any means within the knowledge of the assured without the defendants' consent, the policy should be void; and alleged that liquor was sold to the knowledge of the insured, and without the company's consent, whereby the hazard was increased. The conditions indorsed on the policy did not comply with the Act respecting statutory conditions, which was in force when the policy was renewed:—Held, that although under s. 36 of the Mutual Act, which required policies to be under the corporate seal, the indorsement when made, being after the execution of the policy, might not then be deemed a part thereof, it became so on the renewal authorized by s. 32 of the Act, so as to cause the policy to be avoided for the unauthorized sale of liquor on the premises. *Gauthier* v. *Canadian Mutual Ins. Co.*, 29 C. P. 593.

Steam Engine.] — The plaintiff insured with defendants on a stone building £400, and on furniture and other goods therein £200, all at the rate of eight per cent.; on a frame building £100, and on goods and tools therein £50; all at the rate of twelve per cent. It was a condition of the policy "that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void." It was proved that after insuring the plaintiff put up a steam engine in the frame building, and, in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken the risk would not be increased, but many swore that it would, and it was proved that the plaintiff was told by the agent of the company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect an insurance at other offices, but was refused, the risk being considered too hazardous; and that he had acknowledged that he knew the policy was void because he had made no arrangement with defendants in consequence of the additional risk. The frame building was destroyed by fire, which began in the upper part of it, and a portion of the goods in it were destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed:—Held, that under the facts proved the policy was clearly avoided. *Reid* v. *Gore District Mutual Insurance Co.*, 11 U. C. R. 345.

Stock of Grocer—*Liquors.*]—The plaintiff, describing himself in the application as a grocer, and his store as being used as a grocery, insured with defendants his stock of groceries, &c., therein, and without the knowledge or assent of the defendants habitually retailed liquor there; but the jury found that the risk was not thereby increased:—Held, that there was no misrepresentation or concealment of a material fact; that in insuring a "grocery" defendants knew that liquor might be sold there; and that the plaintiff was entitled to recover. *Nicholson* v. *Phœnix Insurance Co.*, 45 U. C. R. 359.

Store—*Printing Office.*] — The premises were, when insured, used as a store, and were after insurance used as a printing office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to condition indorsed thereon:—Held, that the policy was vitiated. *Hervey* v. *Mutual Fire Insurance Co. of Prescott*, 11 C. P. 394.

Survey—*Effect of Payment to Mortgagees.*] —The plaintiff having created a mortgage in

favour of a loan company, whereby he covenanted to insure the buildings on the property, failed to insure, but assented to an insurance effected by the company in their own name, and repaid them the premium. The premises insured were described as a "two-story house, shingle-roofed building . . . owned and occupied . . . as a steam bending factory." The property having been destroyed by fire the insurance company paid to the loan company the amount due to them, and took an assignment of their mortgage, whereupon the plaintiffs instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due on the mortgage after crediting the amount of insurance. It was shewn that the premises, instead of being used as a steam bending factory, had been converted into a door and sash factory, of which change no notice had been given to the insurance company:—Held, reversing 2 O. R. 89, that the special survey set out in the report in which the intention to use the premises as a factory was mentioned, did not form part of the application or policy and could not be construed as an assent by the defendants to such occupation; that the statutory condition as to change of occupation or use of the building without notice to the insurance company had therefore been broken, thus invalidating the policy; and that the plaintiff was not entitled to any benefit thereunder. Held, also, that the insurance company were at liberty to set up this defence, though between them and the mortgagees the policy was, by a subrogation clause therein, made unconditional. *Howes* v. *Dominion Fire and Marine Insurance Co.*, 8 A. R. 644.

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

Time—*Alteration before Delivery of Policy.*]—Plaintiff, in March, 1861, made a written application to defendants for insurance on certain premises. The risk was accepted conditionally on certain alterations being made, until the making of which it was not to be considered as taken. After these alterations no steps were taken towards completing the insurance until January, 1862, when a policy, dated in May, 1861, was issued and delivered to the plaintiff. Among other conditions of the policy were these: 1. that the policy should not be binding on the company until actual payment of the premium; 2. that applications for insurance should specify the construction of the building to be insured, and that after the effecting of the insurance any increase to the risk by any means whatever within the control of the insured should avoid the policy; 3. that if the property to be insured were leasehold, or other interest not absolute, it should be represented to the company, and expressed in the policy in writing. The premium was not paid in full till January, 1862, on the day of the issue and delivery of the policy to plaintiff. Between March, 1861, and January, 1862, a funnel for conducting shavings from an upper to a lower story, in front of a furnace, was placed in the insured building; which addition or alteration, it was proved, increased the risk. There was also a mortgage on the premises, which was mentioned in the application for insurance:—Held, 1. that the insurance was not effected until January, 1862, and that the policy not having then a retroactive relation to its date for any other purpose than for the computation of the period at which it should expire, the risk by the erection of the funnel was not increased after but before the making of the policy. *Fourdrinier* v. *Hartford Fire Ins. Co.*, 15 C. P. 403.

Time for Notice.]—A condition provided that in case the premises became vacant or unoccupied, unless notice thereof was given, and the company consented to retain the risk, the policy should be void:—Held, that the insured had a reasonable time to give notice: that three days was not too long a delay, the property being at Owen Sound and the office of the company at Hamilton; and a fire having occurred on the third day, that the company was bound to pay the policy. *Canada Landed Credit Co.* v. *Canada Farmers' Mutual Stock Ins. Co.*, erroneously reported as *Canada Agricultural Ins. Co.*, 17 Gr. 418.

Uncompleted Building.]—At the time the insurance was effected the house was not completely finished, so that some lumber remained on the premises, and carpenters were employed, of which the agent was fully aware, but there was no proof that the risk was thereby increased:—Held, that this did not avoid the policy. *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121.

Using House as Hotel.]—Where a condition in a policy of insurance against fire provided that any change material to the risk within the control or knowledge of the insured should avoid the policy, unless notice was given to the company:—Held, that changing the occupation of the insured premises from a dwelling to a hotel was a change material to the risk within the meaning of this condition. *Guerin* v. *Manchester Assurance Co.*, 29 S. C. R. 139.

Vacancy.]—The policy provided that in case of any alteration or addition, &c., or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk was increased and a consequent additional premium would be required, the insurance should be void in default of notice and allowance thereof:—Held, that a mere ceasing to occupy was not within the condition. *Gould* v. *British America Ass. Co.*, 27 U. C. R. 473.

——— *Agent's Knowledge.*]—A condition of a policy of insurance provided, that in the event of a failure to notify the company of the premises becoming vacant, or to obtain their consent thereto, the policy should become void. In this case, T., the insured, on the premises becoming vacant, notified the local agent, L., who, it appeared, was also aware of the fact. T. then assigned the policy to the plaintiff, who also, previously to the

assignment, had notified the agent, and was informed that it was all right. On the plaintiff obtaining the assignment he took the policy to the agent, paid the transfer fee, and obtained the agent's receipt therefor. The agent then sent the policy to the head office, by whom it was returned with their consent indorsed thereon, and a receipt for the money paid. The agent admitted his knowledge of the vacancy; and did not deny the receipt of the notice; but it did not clearly appear whether the notice had been received by the company itself, and the secretary stated that it had not, and that the agent had no authority to receive it:—Held, however, that under the circumstances of this case, the company could not avail themselves of the condition, for they had recognized L. as their agent in the whole dealing, so as to warrant the plaintiff in assuming that notice of the vacancy to him was sufficient. *Williams* v. *Canada Farmers' Mutual Fire Ins. Co.*, 27 C. P. 119.

——— *Waiver.*]—A fire policy, granted to the plaintiff on a dwelling house in a town, contained the following condition: "Unoccupied dwelling houses, with the exceptions undermentioned, are not insured by this association, nor shall it be answerable for any loss by fire which may happen to, in, or from any dwelling house left without an occupant or person actually residing therein. The temporary absence of a member or his family, however, none of the household effects being removed, is not to be construed into non-occupancy. And this condition is not construed to apply to the temporary non-occupation of small dwellings for the accommodation of hired help on a farm, the main dwelling on the same continuing to be occupied. But the main dwelling house must not be unoccupied for longer than forty-eight hours at any one time." The plaintiff lived several miles from the house, which was leased to a monthly tenant, who had removed his goods within forty-eight hours before the fire, and no one had resided in the house for ten days before. The fire took place on the 10th September, and the tenant's month was up on the 24th. He was in arrear for rent, for which his goods had been distrained, but the plaintiff, who had a person ready to take possession, did not suppose that the tenant would leave until his month was up:—Held, that the exception as to forty-eight hours applied only to dwellings on a farm; that the condition, which required an actual residence of the occupant, was broken; and that the plaintiff could not recover. *Abrahams* v. *Agricultural Mutual Assurance Association*, 40 U. C. R. 175.

Held, also, that a demand of the claim papers and proof of loss, without reference to a condition requiring the premises to be occupied, could not be construed as a waiver of the breach of such condition. Canada Landed Credit Co. v. Canada Agricultural Ins. Co., 17 Gr. 418, dissented from on this point. No such waiver having been set up at the trial, which took place without a jury, quære, as to the propriety of allowing it to be urged in term. *Ib.*

The fact that a dwelling house is unoccupied is not per se a "change material to the risk," within statutory condition 3 in a fire policy on household furniture therein. *Broadman* v. *North Waterloo Ins. Co.*, 31 O. R. 525.

——— *Oral Statements—Evidence of Other Transactions.*] — The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff. The application, signed by the plaintiff, stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date and for six months previously the house had been unoccupied. One of the special conditions indorsed upon the policy, was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application, he asked the plaintiff if there was any one in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application, the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants, should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice shewing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies:—Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed. The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of shewing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one:—Held, that this evidence was properly rejected. *Peck* v. *Agricultural Ins. Co.*, 19 O. R. 494.

——— *Subrogation.*]—The defendants insured seven houses belonging to the plaintiff, which had been mortgaged by him to a loan company and were described in the policy as "a two-story frame, roughcast, felt-roofed block. . . . containing seven dwellings, six of which are occupied by tenants, and one by assured." In the application, filled up by defendants' agent, the question as to how many tenants, was answered "six tenants and applicant," the agent informing defendants that "the largest house of the lot the applicant will occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied, . . . this policy shall cease and be void unless the company shall by indorsement . . . allow the insurance to be continued." A fire occurred by which the houses were destroyed, and defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to have the

mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify defendants. In an action by plaintiff upon the policy:—Held, that the actual facts as to occupancy being before them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant or unoccupied houses. Held, also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods, was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued. Smith v. City of London Ins. Co., 14 A. R. 328, and Ballagh v. Royal Mutual Fire Ins. Co., 5 A. R. 87, specially referred to. Held, however, that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block. Held, also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered. Reddick v. Saugeen Mutual Fire Ins. Co., 14 O. R. 506, followed. Held, lastly, that although defendants had paid the mortgagees and taken an assignment of the mortgage, they could not hold it against the plaintiff. Imperial Fire Ins. Co. v. Bull, 18 S. C. R. 697, followed. *McKay* v. *Norwich Union Ins. Co.*, 27 O. R. 251.

——— "*Untenanted.*"] — A variation of statutory condition 3 in a policy of fire insurance providing that "if the premises insured become untenanted or vacant and so remain for more than ten days without notifying the company," &c., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied." Where, therefore, the occupant of a house ceased to reside in it for several weeks, but left furniture and clothing therein, while a person went there for domestic purposes, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition. *Spahr* v. *North Waterloo Ins. Co.*, 31 O. R. 525.

Waiver — *Subsequent Assessment.*]—To a declaration on a policy of insurance in a mutual company defendants pleaded that the plaintiff induced them to enter into a contract by representing and warranting to them certain facts relative to the insured premises, material to be made known to defendants and to the risk, which were false and fraudulent, whereby the policy was avoided. A further plea, after setting up the representation and warranty as in the former plea, averred that the plaintiff promised and agreed that the premises should continue as represented and warranted, and that in the belief that he would perform the same the defendants made the policy, but that, after the making thereof, the plaintiff ceased to keep the premises in the condition represented and warranted, thereby increasing the risk, whereby, &c. To each of these pleas the plaintiff replied by way of estoppel, that after such representation and warranty, and after the loss, and after defendants had acquired full knowledge of the breach and falseness of said representation and warranty, defendants levied an assessment on the premium note given by plaintiff to cover losses by defendants to a date named, before which day the plaintiff had sustained said loss; and notified him that unless such assessment should be paid within thirty days his insurance would be void; and that within said thirty days he paid and defendants received said assessment:—Held, on demurrer, replications good, as shewing that defendants, with full knowledge of the breaches of warranty, had elected, as they might, to treat the insurance as existing. *Hopkins* v. *Manufacturers and Merchants Mutual Fire Ins. Co.*, 43 U. C. R. 254.

——— *Subsequent Acceptance of Premiums.*]—In an action against defendants, a mutual insurance company, on a policy against fire, averring a total loss, defendants set up that the plaintiff, without the defendants' knowledge or consent, had erected a steam engine on the insured premises, thereby increasing the risk, and rendering the insurance void under 36 Vict. c. 44 (O.). It appeared that when the engine was erected the plaintiff notified defendants thereof, and applied for additional insurance, but on being informed that he must pay an increased premium he refused to do so; that he never received any notice of his policy being cancelled, or of his requiring to have a new policy at the increased rate, but nothing further was done nor any objections made until a month after the fire, when the objections now relied upon were raised; that after such erection, when, by the terms of the policy, the renewal premium became due, the plaintiff received notice thereof from the defendants' agent, to whom the renewal receipt had been sent from the head office, requesting the plaintiff to pay the same, which he did, and was given the receipt, and there was the same notice and payment of the next renewal premium. Defendants alleged that these notices were sent and the renewal premiums received by mistake:—Held, that under the circumstances, defendants could not set up that the policy had been avoided. *Law* v. *Hand-in-Hand Mutual Ins. Co.*, 29 C. P. 1.

(d) *Prior or Subsequent Insurance.*

Acts of Assignor—*Mortgage.*]—The assignee of a policy of insurance, who is not interested in the property insured, does not by such assignment and the assent of the insurers thereto become the insured under the policy, and the policy still remains liable to be defeated by a breach of the conditions by the assignor. A policy of insurance was issued by the defendants on the cash system, containing the usual conditions against subsequent insurance and alienation of the property insured, and was assigned by the insured to E. M., with the consent of the defendants. E. M. after the loss occurred assigned to the plaintiff. The assignor subsequently mortgaged the property insured, effected a further insurance upon it, and then conveyed his equity of redemption. The defendants pleaded these facts as constituting respectively defences to the policy. The plaintiff replied that

they all occurred after the assignment of the policy to E. M. and the defendants' assent thereto:—Held, that inasmuch as the plaintiff was not interested in the property insured, the acts of the assignor avoided the policy. Defendants pleaded also that by alienation of the property insured by way of mortgage the policy was avoided under R. S. O. 1877 c. 161, s. 41:—Held, that a transfer by way of mortgage came within the Act, and avoided the policy in the hands of the plaintiff as assignee. The defendants further pleaded, on equitable grounds, that the policy had been assigned to E. M. by way of collateral security to a mortgage on the insured property made to him by R. & F.: that R. & F. subsequently assigned their equity of redemption and their interest in the property subject to the mortgage to R. & M., who became the insured under the policy subject to the mortgage: that R. & M. subsequently effected further insurances without consent of, or notice to defendants, and that after the loss the mortgage to E. M. was paid by R. & M., the owners of the equity of redemption: that the policy was thereupon assigned to the plaintiff, who sued as trustee for R. & M., and that as to R. & M. and the plaintiff, who sued as their trustee, the policy had been avoided by their acts. Held, a good defence. *Kanady* v. *Gore District Mutual Fire Ins. Co.*, 44 U. C. R. 261.

Agent's Authority—*Termination of Contract—Conditions.*]—The plaintiff had for some years insured his mill and machinery therein with the defendants the policy having been effected through one of their local agents, there being also another insurance with another company. The plaintiff, desiring additional insurance thereon, signed an application therefor, for a portion thereof through the same agent, on which was an indorsement, of which he was unaware, and to which his attention was not called, that where steam was used for propelling purposes the proposal was required to be submitted to the defendants before the interim receipt was issued. The agent issued the interim receipt to the plaintiff at the time of the proposal, as was his practice, recognized by the defendants. The application, which contained a statement, without the names of the companies, of the amount of additional insurances effected elsewhere and also the amount of the prior insurance, was sent by the agent to the defendants, but was mislaid by them after they had made from it certain extensions on the policy, which had also been forwarded to them for that purpose. About two months after the date of the interim receipt the defendants wrote their agent declining to continue the risk on the interim receipt, retaining, however, the portion of the premium earned, at the same time reinsuring half the risk. Of this the plaintiff was not informed, nor was any portion of the premium repaid him:—Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed primâ facie to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it. *Cockburn* v. *British America Assurance Co.*, 19 O. R. 245.

Under the eighth statutory condition the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company, and their assent did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent:—Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and would be compellable to make their assent appear in or to have it indorsed on their policy if such policy were issued. Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it. *Ib.*

Semble, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy. *Ib.*

Agent's Omission—*Oral Notice.*]—The plaintiff applied to effect an insurance in the defendant company through one S., their local agent at Dundas, on certain machinery, for two months. In answer to the inquiry in the application respecting other insurances, he mentioned two existing policies, and informed S. that there was another policy in the Gore Mutual, covering the building and machinery, but that he could not remember the amount which was on the machinery, and requested him to wait until he found the policy, as he was most anxious to have the correct amount stated in the application. S., however, through whom this policy had been effected as agent for the Gore Mutual, promised to ascertain the amount and fill it in before sending the application to the head office, whereupon the plaintiff signed it, and received an interim receipt which declared that unless followed by a policy within thirty days the insurance should cease, and contained a foot note to the effect that any existing insurances must be notified at the issuing of the receipt, or the contract would be void. S. forwarded the application, without having filled in the omitted particulars, to the board of directors at Toronto, by whom it was accepted; and in accordance with their practice where the risk only extended over a short period, instead of a formal policy they issued a certificate which stated that the plaintiff was insured subject to all the conditions of defendants' policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. S. had authority to receive applications, accept premiums, and issue interim receipts. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, indorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and indorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was

not indorsed on the policy:—Held, reversing 24 Gr. 269, that oral notice to the agent was inoperative to bind the company; and that the plaintiff therefore was not entitled to have the policy reformed by the indorsement of the Gore Mutual policy thereon, and could not recover. Held, also, that oral notice to the agent of existing insurances was sufficient so far as the interim receipt was concerned. Semble, the plaintiff should not be permitted to sue upon a policy as a perfect and complete instrument entitling him to certain rights, and in the same action to say that it does not contain the real contract which he has made. *Billington* v. *Provincial Ins. Co.*, 2 A. R. 158.

On appeal to the supreme court this judgment was affirmed, and—Held, that the application in writing did not contain a full and truthful statement of previous insurances; the oral notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the indorsement of the Gore Mutual policy thereon, and could not recover. *S. C.*, 3 S. C. R. 182.

Assent.]—One condition was, that the insured should at once give notice in writing to the head office of any additional insurance, and should have the consent of the directors thereto, if given, indorsed on the policy, otherwise the policy to be void; and this notwithstanding anything contained in another condition as to giving notice with reasonable diligence:—Held, that the assured ran the risk, in effecting a second insurance, of getting defendants' assent, which he had not done, and that the question of reasonable time or diligence in giving notice and getting such assent, which was urged as a defence, could not arise. *Weinaugh* v. *Provincial Ins. Co.*, 20 C. P. 405.

Held, also, that the happening of the fire did not absolve the assured from performance of the condition. *Ib.*

The proposal for subsequent insurance spoke of the existing insurance with defendants, and plaintiff in his proofs of loss swore to the fact, and no evidence was offered in any way meeting this, while the plaintiff, in the second count of his declaration, admitted the property insured to be the same. Notwithstanding this, the question of identity of property covered by the different policies was submitted to the jury:—Held, that this was wrong, as the question on the evidence was not open. *Ib.*

Assignee for Creditors—*Ignorance of Prior Insurance.*]—Declaration—First count: on a fire policy, dated 22nd September, 1869, made by defendants to one B. for one year, with condition for renewal; alleging that B. renewed to 22nd September, 1873; that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss was solely interested: that the premises were destroyed by fire on the 13th March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants. Breach, nonpayment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B., and renewals by him and loss by fire on the 14th March, 1873, whereby B. became solely interested; and that after the fire, and before suit, namely, on the 5th November, 1872, B. by writing assigned to plaintiff, as assignee in insolvency, all his interest in said insurance, &c. Second plea: that by one of the conditions the renewal policies became avoided if insured or his assigns should effect any further insurance, and should not with reasonable diligence notify the company, and have it indorsed: that the plaintiff became assignee before the fire of B.'s estate and effects, including this property and policy, and then effected a further insurance in the Western Assurance Co.; and that neither he nor B. gave notice, &c., whereby the policy was avoided:—Held, plea good, for the plaintiff was B.'s assignee within the policy, and as such became possessed of B.'s policy for the benefit of the estate, and in such interest effected the second insurance. An equitable replication to this plea alleged that when the plaintiff effected the further insurance, he was ignorant of this insurance by B.: that as soon as he became aware thereof, he, with all reasonable diligence, notified defendants, and by their default it has not been indorsed:—Held, bad, for the assignee's ignorance could not deprive defendants of the benefit of their express stipulation. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

A further replication alleged that defendants with full notice of B.'s insolvency, and plaintiff becoming assignee, accepted from B. the renewal premium, and renewed the policy to him and for his benefit, from September, 1872, to September, 1873; that the subsequent insurance was for the plaintiff's benefit as assignee, and that B. had an insurable interest in the property greater than the sum insured with defendants, as they knew:—Held, bad, for it shewed no new contract released from the stipulation relied on in the plea. *Ib.*

Condition.]—The following condition "Insurance subsisting or effected with other companies must be notified to the board, and if approved of, to be indorsed on the policy and signed by the secretary:"—Held, a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide. *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451.

Further Insurance after Assignment.]—The plaintiffs sued as assignees of a policy effected by defendants with one B. for $3,000, alleging that after it was executed B. mortgaged to them the property insured for $2,000, and assigned the policy to them as collateral security therefor. A loss by fire was then averred and the full amount of the policy claimed. Defendants pleaded that the assignment was consented to by them on condition that the plaintiff should be bound by the conditions of the policy as B. was, and that it should continue voidable as though the assignment had not been executed; and then alleged another insurance effected by B. without defendants' consent, contrary to a condition of the policy that no other insurance should subsist upon the insured premises without such consent. The plaintiffs replied that the alleged insurance was not of the same interest as that insured by the plaintiffs, and was not effected by or with the plaintiffs' knowledge or authority:—Held, no answer to the plea, and that the policy was avoided by B.'s act, following Smith v. Niagara District Mutual Ins. Co., 38 U. C. R. 570. *Mechanics' Building and Savings Society* v. *Gore District Mutual Fire Ins. Co.*, 40 U. C. R. 220, 3 A. R. 157.

In another replication the plaintiffs alleged that the assignment was not on the terms that they should be bound by any conditions which would avoid the policy by B.'s acts, but that they became entitled to all the rights under and subject to all the conditions of the policy to which B. had been entitled and subject before the assignment, and that the insurance alleged was not effected or authorized by them:—Held, on demurrer, that the replication was bad; for the plaintiffs in their declaration had asserted a right to the whole policy as under an absolute assignment, when it was clear that B. was still interested, and that as to him the policy was void; and the plaintiffs should have traversed the consent alleged. *Ib.*

Further Insurance on Part.]—A policy of insurance on a "grist mill" covers not only the building, but also the fixed and movable machinery in it. The plaintiff effected an insurance in defendants' company on a grist mill. He stated in his application that there were no other insurances on the property, although there was an existing insurance on the fixed and movable machinery in the mill:—Held, that the policy was void, as there was a double insurance on part of the property insured by the defendants; and that they were not estopped from setting up such further insurance by their agent's knowledge of it. Judgment below, 40 U. C. R. 188, reversed. *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 2 A. R. 396.

One of the conditions of a mutual policy was, "that in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by, or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company shall be void, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary." It appeared by the pleadings that three separate sums were insured—on a building, on the machinery, and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery:—Held, that by the condition, and by the statute under which these companies are incorporated, the policy was altogether avoided, and not merely as to the property so doubly insured. Held, also, that it was immaterial that such second insurance was with a foreign company, and therefore not capable of being enforced here, for the condition intends an insurance in fact. Quære, whether it would make any difference if the properties were wholly unconnected, so that a fire in one could not possibly endanger the others. *Ramsay Woollen Cloth Manufacturing Co.* v. *Mutual Fire Co. of the District of Johnstown*, 11 U. C. R. 516.

A plea merely alleging that the property was insured in another office, is bad; the particulars of the alleged insurance must be stated. *Ib.*

Goods—*Agreement.*]—Section 29 of C. S. U. C. c. 52, applies to insurance on goods as well as on buildings. The notice of additional insurance there referred to cannot be given after the destruction of the goods by fire or a loss upon them to the amount insured, so that the policy has ceased to cover a continuing risk. Where the declaration alleged such a loss:—Held, that the defendants, in pleading an additional insurance without notice, might assume the loss to be as alleged, although the plaintiff under the allegation might recover for a partial loss; and if it was in fact only partial, so that the notice might be given after it, the plaintiffs should have replied this. The effect of the statute is not to avoid a condition made by the policy that such notice shall be given forthwith, for, notwithstanding the statute, the parties themselves may make any stipulation on the subject not opposed to it. *Butler* v. *Waterloo County Mutual Fire Ins. Co.*, 29 U. C. R. 553.

Identity.]—The plaintiff having effected an insurance with defendants on his "stock manufactured and in process, used for the manufacture of agricultural machinery," afterwards insured with another company his "agricultural machinery in process of construction finished, and unfinished:"—Quære, whether the defendants' policy extended to finished machines, or only to parts finished, or unfinished of machines yet in process of construction; but—Held, that the second policy covered at all events a part of the property included in the first, and that there was therefore a double insurance. Held, also, that the construction of the policy, under the circumstances, was for the court, not the jury. Held, also, that there was clearly no notice of or consent to the second insurance, as required by 36 Vict. c. 44, ss. 37, 38, the notice being verbal, and given to an agent who had no authority to receive it. *Billington* v. *Canadian Mutual Fire Ins. Co.*, 39 U. C. R. 433.

Implied Assent.]—To an action on a fire policy in a mutual insurance company, the defendants set up as a defence the eighth statutory condition, that the company were not to be liable for any loss "if any subsequent insurance be effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent." By 44 Vict. c. 20, s. 28 (O.), the Fire Insurance Policy Act is made applicable to mutual fire companies, except where the provisions of the Mutual Act are inconsistent with, or supplementary, or in addition thereto. Section 39 of the Mutual Act enacts in substance, that if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent indorsed on the policy, signed by the secretary, &c., or otherwise acknowledged in writing; and s. 40, that whenever the company, receives notification in writing of an additional sum being assessed on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing. The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for $1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied, informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff did not, within a reasonable time after effecting the further insurance,

notify the defendants; but that the notice was reasonably sufficient as far as he knew:—Held, that under s. 39, the insurance was void; and that under the circumstances, there could be no implied assent under s. 40; and further, that the notice was not sufficient. *Graham* v. *London Mutual Fire Insurance Co.*, 13 O. R. 132.

Inability to Give Notice.]—By a condition in a policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance made, or which might afterwards be made, on the same property and have a memorandum thereof indorsed on the policy, otherwise the policy would be void; provided that if such notice should be given after it issued the company had the option to continue or cancel it:—Held, that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss. *Commercial Union Assurance Co* v. *Temple*, 29 S. C. R. 206.

Information Indirectly Given.]—In an action on an interim receipt for insurance against fire, it appeared that the application represented that there were four further insurances, but had not correctly stated the amount insured in the different companies; but annexed to the application, and delivered to the company's agent at the same time, was a memorandum giving them accurately:—Held, that the memorandum was part and parcel of the application, and the agent having received and accepted the premium, must be taken to have assented to it, and his act, under the circumstances, be held, so far as the interim receipt and the right of the plaintiff thereunder were concerned, to be the act and assent of defendants. *Parsons* v. *Queen Ins. Co.*, 43 U. C. R. 271.

The interim receipt stated that the plaintiff was insured subject to all the usual terms and conditions of the company:—Held, that, treating the receipt as subject to the statutory conditions, the eighth condition, as to the assent of the company appearing in or being indorsed on the policy, had been sufficiently complied with. *Ib.*

Insurance afterwards Ceasing — *Waiver.*]—To a plea of an insurance by the plaintiff with another company, without notice to defendants, or indorsement thereof on their policy, contrary to one of the conditions, the plaintiff replied, on equitable grounds, that he effected the insurance with defendants through N., their agent, residing at E.: that when he effected the second insurance complained of he had not received defendants' policy and had no notice or knowledge of said condition: that as soon as he became aware of it he gave notice to said N. that he had effected the insurance mentioned in the plea, and another insurance with the B. A. Co.; and that as the insurance mentioned in the plea had then been cancelled, the said N. promised to have the insurance with the B. A. Co. indorsed on defendants' policy, and told plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them: that after said notice, defendants noted on their policy the insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting; and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of defendants and not of the plaintiff; that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co.; and by reason of the premises defendants waived the indorsement of the insurance mentioned in the plea. It appeared that the policy was made at the head office in Montreal, on the 5th June, and sent to N. about ten days before the fire, which took place on the 7th July, but it remained with him, not being called for by the plaintiff. On the 16th the plaintiff obtained the policy pleaded, but it was cancelled on the 30th. N. was agent also for the B. A. Co., and granted to the plaintiff a policy with that company about the same time as the defendants. On the 4th July both those policies were sent to the respective head offices to have each marked on the other, and defendants' consent was noted on the 9th July, and the policy returned. The agent knew of the policy pleaded before the fire, but not until after it had been cancelled:—Held, that the replication was not proved, for the omission to note the policy was not owing to the negligence of defendants; they were not aware of it while it existed, and it would have been useless to note it after it ceased. Held, also, that the agent could not have waived the forfeiture. Held, also, that the application should not have been admitted, and might be struck out under the C. L. P. A. Act, s. 290. *Jacobs* v. *Equitable Ins. Co.*, 17 U. C. R. 35.

See Smith v. *Commercial Union Ins. Co.*, 35 U. C. R. 63, disapproving of this case on the question of waiver.

The jury, in the former case, having a second time found for the plaintiff, a new trial was granted without costs. The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable time must be allowed to give notice of it to plaintiffs and procure the indorsement, and that this was a question for the jury; but, held, the question was not properly presented by the pleadings, and the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise. It was contended also that the second insurance was void, owing to an omission by the plaintiff to comply with its conditions, but held that it was nevertheless an insurance within the condition in defendants' policy. *Jacobs* v. *Equitable Ins. Co.*, 19 U. C. R. 250.

On a third trial a verdict was found for defendants, the learned Judge having charged that the defendants had proved their plea, and not left it to the jury to say whether the plaintiff had given notice to them of the further insurance within a reasonable time. The court held the direction right. *S. C.*, 19 U. C. R. 257.

Insurance by Another.]—The plea alleged that the plaintiff had effected another insurance. The evidence shewed that this policy was effected by one S., (whose interest in the property did not appear), in his own name, and assigned by him to B., to whom the plaintiff's interest in the property had been assigned:—Held, that the plea was not proved, for the insurance complained of was not shewn to be by or for the plaintiff, or of

his interest, which would be necessary to avoid plaintiff's policy. *Park* v. *Phœnix Ins. Co.*, 19 U. C. R. 110.

Insurance by Mortgagee.]—A subsequent insurance effected by a mortgagee, under a mortgage containing a covenant to insure according to the Short Forms Act, without the plaintiff's knowledge or consent, was—Held, not to avoid the policy under the eighth statutory condition. *Sawrey* v. *Isolated Risk and Farmers' Fire Ins. Co.*, 44 U. C. R. 527.

Insurance in Different Interest.] — Section 28 of C. S. U. C. c. 52, makes a policy voidable "if insurance on any house or building subsists in the company and in any other office, or by any other person at the same time," without the consent of the company; and it was a condition of the policy that a further insurance by the plaintiff, or any other person, should render the policy void:—Held, that the further insurance must be by the same person who has before insured, or in the same interest. *Gilchrist* v. *Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 15.

Interim Insurance.] — The condition was, that if there should be any insurance at any other office, notice should be given, and the same indorsed on or stated in the policy, otherwise the first insurance should be void:—Held, that an insurance effected in another office by an interim receipt, was within the condition. *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

Interim Insurance by Another—*Benefit Accepted by Insured.*] — The plaintiff's policy contained a condition avoiding the same if any double insurance should subsist without defendants' consent. The plaintiff's father, without plaintiff's directions, paid the premium of an insurance on part of the same premises with another company, but no policy was issued until after a fire had consumed the premises, and the plaintiff received the insurance money on the second policy:—Held, 1. that an insurance had in fact been effected with the second company within the terms of the condition; 2. that the plaintiff having taken the benefit of such insurance, had thereby avoided defendants' policy. *Dafoe* v. *Johnstown District Mutual Ins. Co.*, 7 C. P. 55.

Interim Insurance in Dispute.]—It was a condition that if the insured should make any other insurance on the same property, and should not notify defendants, the policy should cease. It appeared that shortly before the fire the insured made an application to the Provincial Ins. Co. for a further insurance of $1,000, and obtained an interim receipt therefor. The validity of this receipt was disputed, but the plaintiff had taken proceedings in chancery to compel the company to issue a policy; and had, in his proofs of loss, sworn to this additional insurance:—Held, an insurance of which notice was required. *Mason* v. *Andes Ins. Co.*, 23 C. P. 37.

Materiality—*Fraud.*] — The omission to communicate the fact of an existing insurance with another company is not per se such a wrongful concealment as to sustain a plea of fraud: and where, as in this case, the plea is not rested on any ground of breach of warranty, but on a misrepresentation of facts material to the risk, the materiality is a matter depending on evidence; and there being no evidence on that point here, the court refused to interfere. *Parsons* v. *Citizens' Ins. Co.*, 43 U. C. R. 261.

Mistake as to Existence of Insurance.]—Contrary to the statutory condition in a policy issued to him by defendants, the plaintiff, who was illiterate, being told and induced to believe by the agent of the M. company that plaintiff's policy had expired, effected another insurance on the same property with the M. Co., and received from the agent the usual interim receipt for thirty days, acknowledging payment of the premium, for which the plaintiff gave his note instead of money. After the fire, which happened within the thirty days, the agent with whom plaintiff had effected the further insurance, discovering that the policy issued by defendants had not in fact expired, withdrew plaintiff's application for the insurance with them, and got back the interim receipt from him:—Held, that the condition was nevertheless broken, and that plaintiff could not recover: that the question whether there had been in fact any subsequent insurance at all, by reason of the premium having been, contrary to the rules of the company, paid by note instead of money, could not be determined in this suit, particularly as the company had admitted their liability by paying an insurance effected at the same time on plaintiff's furniture, the premium on which had been covered by the same note. *Gauthier* v. *Waterloo Ins. Co.*, 44 U. C. R. 490.

Mistake in Notice.]—In an action on a policy of insurance, the defendants alleged that an additional insurance had been effected in another company without their being notified within a reasonable time, and in a proper manner, and without such notice being acknowledged by them, there being conditions indorsed upon their policy in accordance with these objections. It appeared that the notice of further insurance stated the amount to be larger than it really was, and gave the name of the company in which it was effected wrongly:—Held, that inasmuch as defendants were neither prejudiced nor misled by the mistake, and no fraud appeared or was alleged in so giving the notice, the policy was not thereby vitiated. *Osser* v. *Provincial Ins. Co.*, 12 C. P. 133.

Mistake in Name—*Substitution of Insurance.*]—Where an applicant for insurance in answer to the question, "What other insurance, if any, is there upon the property, and in what office?" replied, shewing four existing insurances of $2,000 each, but by mistake mentioned the name of the Canada Fire and Marine Insurance Company as one of them, instead of the Provincial:—Held, reversing 43 U. C. R. 603, that under the 8th statutory condition the policy was void. *Parsons* v. *Standard Insurance Co.*, 4 A. R. 326.

After the issue of the policy, the insured allowed one of the above policies to drop, and substituted another for a similar amount in a different company:—Held, that the policy was also avoided by the non-communication of this new insurance. *Ib.* Reversed in the supreme court, 5 S. C. R. 233.

Non-Disclosure.]—Held, upon the evidence set out in these cases, that the policies

were avoided by the non-disclosure of a previous insurance. *Greet* v. *Citizens Insurance Co.*, *Greet* v. *Royal Insurance Co.*, 5 A. R. 596.

Notice after the Loss.]—In an action on a cash premium policy in the defendants' company, it appeared that the insured, after insuring with the defendants, effected insurances in other companies without notifying the defendants in writing, as required by 38 Vict. c. 41, s. 37, and by the by-laws indorsed on the policy. After the fire the insured, on the 19th January, 1875, furnished the company's local agent with proof papers of the loss, which contained a certificate of the further insurances, and the defendants objected to their sufficiency, saying nothing, however, as to the further assurances. On the 30th, on receiving a reply from the agent, they again wrote to him that in consequence of the failure of the assured to send the proper proof, as also to notify the company of the further insurance, the policy was forfeited:—Held, that 36 Vict. c. 44, ss. 37, 38 (O.), applied to all policies issued by mutual companies, cash premium as well as mutual. Held, also, that under this Act and the by-laws, the notice of the further insurances must be before the loss occurs, and that the notification here given was clearly insufficient. Held, also, that 38 Vict. c. 65, s. 1 (O.), would not deprive the defendants of their right to insist on the forfeiture for this cause, for their objection was not to the proofs of loss. *Fair* v. *Niagara District Mutual Fire Ins. Co.*, 26 C. P. 398.

Besides the provision of C. S. U. C. c. 52, s. 28, the policy provided that in case of insurance with other companies, notice must be given to defendants, and their approval indorsed on the policy; and the passing of a resolution avoiding the policy, and mailing a copy addressed to the assured, should avoid the same. After the issue of the policy in question, the plaintiff obtained from another company an interim receipt, by which they considered themselves bound until they should repudiate the risk. No notice was given to defendants of this further assurance until they received from plaintiff his statement and affidavit after the fire, when he swore to the existence of it, and on the second day after this defendants mailed to him a copy of their resolution avoiding his policy. It appeared, also, that the plaintiff had claimed under the policy against the other company:—Held, that the plaintiff having effected an insurance with another company, which from all that appeared was binding upon them, and having failed to notify defendants thereof, defendants were not liable under their policy, which they had the right to avoid even after the fire. *Bruce* v. *Gore District Mutual Ins. Co.*, 20 C. P. 207.

A policy avoided under s. 37 of 36 Vict. c. 44 (O.), for want of the assent of the company to an additional insurance in the manner prescribed, is revived under s. 38, and the company are deemed to have assented to the additional insurance, if, after notice of such insurance, the two weeks allowed by that section for the company to signify their dissent are allowed to elapse without such dissent; but during the two weeks the insured remains in the same position as at the time of effecting the additional insurance, and should a loss occur during such interval, he cannot recover:—Held, that in computing the two weeks, the day of the receipt of the notice is excluded, so that where a notice was given on the 5th July, and the fire occurred on the 19th, the time had not expired; and semble, the notice must be received by the company, and not by their local agent, and must be actually received by the company, and the date of its delivery at the post-office does not govern. *McCrea* v. *Waterloo County Mutual Fire Ins. Co.*, 26 C. P. 431.

In this case R., who had insured on the 20th April, 1875, in defendant company, on the 1st May effected an additional insurance in the Stadacona company, and on the 5th July posted a notice to defendants' local agent, informing him of the fact, which was received by the local agent on the 8th, and on the same day forwarded to the head office, where it was received on the 10th; and on the 20th, and after notice of the loss, they notified the insured that they dissented to the additional insurance and had cancelled their policy:—Held, that the notice was within the time allowed, and that the policy was forfeited. *Ib.*

The notice also notified defendants of the intention of the insured to effect an additional insurance in the Beaver and Toronto Mutual Insurance Co., and the insured, before the expiration of the fourteen days, and without any further notice to defendants, effected such insurance:—Held, that this also voided the policy. *Ib.*

Quære, as to the effect of a notice of the intention to effect a further insurance. *Ib.*

Held, affirming 26 C. P. 431, that the notice was within the two weeks allowed to the company to dissent from an additional insurance under 36 Vict. c. 44, s. 38 (O.), and that the policy was avoided. Semble, that the notice must be received by the company, and not by their local agent. *McCrea* v. *Waterloo County Mutual Fire Ins. Co.*, 1 A. R. 218.

Notice in Writing — *Non-Receipt of Letter.*]—To an action on a fire policy, defendant set up a condition indorsed on the policy, that any subsequent mortgage of the property insured "must be notified to the secretary in writing forthwith otherwise the policy shall be void." The plaintiff mortgaged part of the property insured to one McC., who mailed a letter to defendants' secretary, notifying him, as required by the condition, but the letter did not reach him:—Held, that the mere posting, without shewing that it reached the secretary, was not a compliance with the condition. *McCann* v. *Waterloo County Mutual Fire Insurance Co.*, 34 U. C. R. 376.

——— *Estoppel.*]—The plaintiff who was insured against fire with the defendants for $1,000, effected a change of mortgages on the insured property. The new mortgagees refused to accept the defendants' policy, and insured the property for the same amount with another company, notifying the plaintiff of the fact by letter. The plaintiff shewed the letter to the defendants' secretary-treasurer, asking him to bring the matter before the board, and was then informed by him that it would be all right and that there was nothing further to do. Subsequently the plaintiff paid an assessment on defendants' policy, which accrued after the notification of the double insurance, which was received by defendants and entered in their books. It did not appear that this payment was on account of losses incurred by defendants previous to the double

insurance. The plaintiff's property was destroyed by fire the day the Ontario Insurance Act, 1887, came into force:—Held, that R. S. O. 1877 c. 161, in force at the time the insurance was effected, applied to the policy. Held, also, that the shewing of the letter to the secretary-treasurer was not a notification in writing as required by R. S. O. 1877 c. 161, s. 40; but held, that the policy being voidable at the defendants' option, the receipt and entry in their books of the assessment after the secretary-treasurer was aware of the double insurance, operated as an estoppel upon them. *McIntyre* v. *East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.

Omission to State.]—The not communicating at the time of the proposal for an insurance, the fact that there was an insurance already effected with another company:—Held, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy. *McDonell* v. *Beacon Fire and Life Assurance Co.*, 7 C. P. 308.

Oral Notice.]—One of the conditions of an insurance policy was: "Persons who have insured property with this company shall give notice of any other insurance already made, or which shall be afterwards made on the same property, so that a memorandum of such other insurance may be indorsed on the policy or policies effected with this company," &c. After the policy had been assigned, the assignees effected another insurance, of which the only notice given, if any, was an oral one to P., the agent of the company in Sarnia, their head office being in Montreal, and not indorsed on the policy, which was not produced at the time:—Held, that such notice was insufficient. *Hendrickson* v. *Queen Insurance Co.*, 31 U. C. R. 547; 30 U. C. R. 108.

——— *Waiver.*]—A policy of insurance against loss by fire contained the following conditions: "In case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not), notice thereof must be given in writing at once, and such subsequent assurance indorsed on the policy granted by the company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." The insured effected subsequent insurance and orally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment made in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he nor the agent made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy, the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition, and contended that by the act of the agent and inspector the company were estopped from setting it up:—Held, that the insured not having complied with the condition, the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms. *Western Assurance Co.* v. *Doull*, 12 S. C. R. 446.

Oral Statement.]—The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendant company, through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. S. failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head office at T., making no mention of the insurance in the Gore Mutual. The company accepted the risk, and in accordance with their practice, where the risk extended only over a short period, instead of a formal policy they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, indorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and indorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not indorsed on the policy:—Held, affirming 2 A. R. 158, which reversed 24 Gr. 299, that as the application in writing did not contain a full and truthful statement of previous insurances, the oral notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the indorsement of the Gore Mutual policy thereon, and could not recover. *Billington* v. *Provincial Insurance Co. of Canada*, 3 S. C. R. 182.

Receipt of Notice.]—It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, which the jury found they had received, and that they had not within two weeks thereafter notified the insured of their dissent:—Held, that the notice must be presumed to have reached the company as there was no evidence of its non-receipt; and that under 36 Vict. c. 44, s. 38 (O.), they must be deemed to have assented to it, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course. In re Imperial Land Co. of Marseilles, L. R. 7 Ch. 592, and McCann v. Waterloo County Mutual Fire Ins. Co., 34 U. C. R. 381, distinguished. *Shannon* v. *Hastings Mutual Ins. Co.*, 26 C. P. 380; 2 A. R. 81.

Under 36 Vict. c. 44, s. 38 (O.), it is enacted that whenever a notification in writing shall have been received by a company from a person already insured of his having insured an additional sum on the same property in some other company, the said additional insurance shall be deemed to be assented to, unless the company so notified shall within two weeks after the receipt of such notice signify to the party in writing their dissent:—Held, that under this section the insured must prove not only the sending of the notice, but its actual receipt by the company; and that on the evidence, set out in the report, there was no

sufficient proof of either the sending of such notice or its receipt. *Lyons* v. *Manufacturers and Merchants' Mutual Ins. Co.*, 28 C. P. 13.

Renewal of Policy.]—Where, at the time of effecting an insurance against fire, there was a prior insurance in force, as to which no statement was made, either in the application or policy issued thereon, the renewal of such policy without any such statement being then made, the prior insurance having then expired, does not validate the policy, the renewal being merely a continuation of the policy, and not a new insurance. *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Insurance Co.*, 32 O. R. 369.

Second Mortgage—(*assignment.*]—Where an assignment had been made of the policy to a mortgagee of the property with concurrence of the company, after which the mortgagor effected another insurance without the consent required by the policy:—Held, on the premises being burnt down, that the policy was not void in equity as respected the mortgagee. Held, also, that on paying the amount of the debt the company was entitled to an assignment of the mortgage. *Burton* v. *Gore District Mutual Fire Ins. Co.*, 12 Gr. 156.

Special Insurance.]—The policy sued upon was effected on large quantities of wool purchased during the wool season, and kept separate from the plaintiff's general stock in a warehouse called the wool house. A prior insurance in another company was on a general stock of goods, which included wool pickings, being small quantities purchased out of the wool season and kept in the general storehouse:—Held, that this should not be deemed to cover wool purchased during the wool season. *Parsons* v. *Queen Insurance Co.*, 29 C. P. 188.

Substitution of Insurance.]—The appellant sued upon a policy of insurance made by the respondents on the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, $8,000," and the policy had indorsed upon it the following condition, being statutory condition No. 8, R. S. O. 1877 c. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances which formed a portion of the "further insurance" for $8,000 mentioned in the policy, was one for $2,000 in the Western Assurance Company, which appellant allowed to expire, substituting a policy for the same amount in the Queen Insurance Company, without having obtained the consent of or notified the respondents:—Held, reversing 4 A. R. 326, which reversed 43 U. C. R. 603, that the condition as to subsequent insurance must be construed to point to further insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the $2,000 insurance in the Queen Insurance Company. *Parsons* v. *Standard Fire Insurance Co.*, 5 S. C. R. 233.

Held, following Parsons v. Standard Insurance Company, 5 S. C. R. 233, that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy. *Lowson* v. *Canada Farmers Mutual Fire Insurance Co.*, 6 A. R. 512.

The plaintiff being the owner of a quantity of railway ties and lumber, effected insurance thereon with three companies to the amount of $4,000, and subsequently, with the knowledge and through the agency of H., the person acting on behalf of the several companies, effected an additional insurance of $1,200 on the same property in the Fire Insurance Association. H. acted as agent for that company also, and he made the necessary entries thereof on the three first policies. In consequence of the Fire Association having ceased to take risks on that kind of property, H. asked the plaintiff for the interim receipt of that company which he gave up accordingly, and H. substituted one in the Gore District Company for it, he being agent for that company also, but omitted to give any notice or make any entry as to the substitution of the Gore insurance for that of the Fire Association:—Held, that this was not such an omission on the part of the plaintiff as invalidated the policies, in this following Parsons v. Standard Insurance Company, 43 U. C. R. 603; 4 A. R. 326; 5 S. C. R. 233. *Moore* v. *Citizens Fire Insurance Co.*, 14 A. R. 582.

The plaintiff, who was insured with defendants, a mutual insurance company, for $2,000, and in other companies with their assent for $8,000, in all for $10,000, on 4th July wrote to defendants notifying them of changes he had made in his policies with other companies, with a list of the companies he was then insured in, to which defendants' secretary on the 7th July replied that no such notice was necessary so long as the total amount of the insurance was not increased. In June or July defendants' inspector notified the plaintiff that defendants intended reducing his insurance with them by $1,000, to which the plaintiff assented, informing them that he would replace the amount in some other company. On 16th July the insurance was reduced and the unearned premium returned by the local agent, S., with whom the plaintiff effected an insurance for the $1,000 in the Quebec Insurance Company, of which company S. was also agent:—Held, that under these circumstances defendants could not set up that this was a further insurance without notice to them. *Parsons* v. *Victoria Mutual Fire Ins. Co.*, 29 C. P. 22.

See Lyons v. *Globe Mutual Fire Insurance Co.*, 27 C. P. 567; *S. C.*, 28 C. P. 62.

Voidable Insurance.]—The plaintiff, who was insured in the defendant company under a policy containing a condition that the "company is not liable . . . if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent," effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendants not having expired as a matter of fact, though the plaintiff was led by the agent of the other company to believe it had:—Held, affirming 44 U. C. R. 490, that the plaintiff could not recover, for the insurance in the Mercantile

Company, being not void, but only voidable, was a subsequent insurance within the meaning of the condition. *Gauthier* v. *Waterloo Mutual Insurance Co.*, 6 A. R. 231.

Waiver]—Where there was some evidence of a waiver of the notice of another insurance required, which the plaintiff could not take advantage of under his replication, the court, instead of a nonsuit, granted a new trial with leave to amend. *Hatton* v. *Beacon Insurance Co.*, 16 U. C. R. 516.

To a declaration against a mutual insurance company, defendants pleaded, 1, an insurance with another company, before the granting of another policy sued on, without defendants' consent; 2, a similar insurance after defendants' policy was granted. The plaintiff replied, on equitable grounds, to the first plea, that the insurance had been effected with the A. Co., which had failed, and the plaintiff notified defendants thereof, and that said policy would not be renewed, to which defendants made no objection, but afterwards granted the policy sued on, and received from the plaintiff the calls on his premium note. And to the second plea, that the plaintiff notified defendants' agent of the insurance, so that he might indorse defendants' consent thereto on their policy, or notify the plaintiff if defendants refused to do so, but that they did neither, and afterwards made the plaintiff pay calls on his note:—Held, on demurrer, replication bad, for 6 Wm. IV. c. 18, s. 22, avoids the policy under the facts pleaded, and the condition could not be waived by defendants' conduct. *Merritt* v. *Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529.

See the next sub-head, and also sub-head 9, *post*.

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4. *Errors and Misstatements.*

(a) *In General.*

General Rule.]—Any fraud, concealment, or misrepresentation, by a party effecting a policy of insurance, of a matter material to be known by the insurer, will avoid the policy. *McFaul* v. *Montreal Inland Ins. Co.*, 2 U. C. R. 59.

In effecting insurances the applicant is bound to make true answers to the questions put by the company; if he does not, and misrepresents the risk in any way, it will invalidate the policy. *Greet* v. *Citizens' Ins. Co.*, 27 Gr. 121.

Answer Filled in by Agent.]—At the foot of the paper containing the answers to the several queries propounded by an insurance company, a memorandum was inserted stating that their agents were the agents of the applicants, so far as related to the making of applications, &c., and that the company would not be bound by any statement made to the agent not contained in the application:—Held, that the applicant was bound by a false statement contained in the application, even if the agent had, as was alleged, filled in the answer to the question without putting the question to the applicant. *Bleakley* v. *Niagara District Mutual Ins. Co.*, 16 Gr. 198.

Clause not Noticed.]—In the application for insurance prepared by the company there was inserted, in very small type, a notice that the estimated value of personal property and of each building to be insured "must be stated separately," &c., which had escaped the notice of the applicant, and such separate valuations, &c., were not given. The court being of opinion that although this provision might not have been framed in order to elude observation, it was certainly calculated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favour. *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121.

See S. C., 5 A. R. 596.

Construction of Questions.]—One of the questions contained in the printed form of application for insurance on a steamboat during the winter, which was that used in insuring buildings, was whether the stoves, funnels, flues, &c., employed for heating or using fire were properly secured, to which the answer was "None." The application was filled up by the defendants' agent, and on the back was written, "No fire is used on the steamer;" while to the question specially addressed to himself, "Are there any other circumstances connected with danger of fire to the property proposed for insurance?" his answer was, "No," and that he confidently recommended the risk. In his evidence at the trial he stated that the plaintiff told him there was a stove on board, but that there would be no fire lighted until he was fitting up in the spring; that he turned to his book of instructions, and when plaintiff asked him if he could light a fire then, he said certainly, and his doing so would not affect the policy. The book of instructions provided that the risk was to include ordinary refitting in spring, and the policy was to specify the kind of fuel to be burned:—Held, that the word "None," written after the question must mean, in the words of the questions, that there were no stoves, funnels, flues, and other apparatus employed for heating or using fire, and not that there was no stove on the vessel used or unused. Held, also, that defendants must be held liable on the explanation given by their agent to plaintiff as to his right to use the stove for refitting purposes, which the risk must therefore be considered to have included *Lyon* v. *Stadacona Ins. Co.*, 44 U. C. R. 472.

Danger of Incendiarism.]—To a question asked of the plaintiff, on his application for insurance, whether there was any incendiary danger either threatened or apprehended, the answer was in the negative, but the evidence shewed the contrary in both respects. The contract of insurance made the answer a warranty:—Held, that he could not recover. *Herbert* v. *Mercantile Fire Ins. Co.*, 43 U. C. R. 384.

——— *Application Filled in by Agent*]—An application for insurance on the contents of a barn contained the question "Is there any incendiary danger threatened or apprehended?" to which the answer was "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—

Held, that the plaintiff was bound by his untrue answer to the question, it being material to the risk, for the reasonable inference was that the apprehension of incendiary danger as a fact existed. Graham v. Ontario Mutual Ins. Co., 14 O. R. 318; Chatillon v. Canadian Mutual Fire Ins. Co., 27 C. P. 450, considered and commented on. Quære, whether the inquiry raised by the question was not as to the apprehension of the applicant of incendiary danger, and not whether, as a fact, any incendiary danger was to be apprehended. *Knisely* v. *British America Ass. Co.*, 32 O. R. 376.

——— *Insured's Unfounded Belief in there being Danger.*]—Action on a fire policy, dated 21st May, 1879, on the ordinary contents of a barn, which was at the time of the insurance empty, and on a reaping and threshing machine. This barn was on the east half of the lot, the plaintiff's homestead and home buildings being on the west half, some distance across the road. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No" to the question, "Is there reason to fear incendiarism, or has any threat been made?" On the same day the plaintiff had obtained another policy from defendants on his dwelling-house and home buildings, the same question and answer being contained in his application therefor; and the thresher and reaper in question were then in the home buildings. The fire occurred on the 28th October, 1879. At the trial it appeared that one M., the plaintiff's hired man, about the 8th May, had threatened to beat the plaintiff, and the latter, who was a nervous, timid man, being alarmed, had had the premises insured; that he had sat up and watched for a night, and that he believed the premises had been set on fire. He denied having any reason for fear, except as to his home buildings. At the time of the fire the barn contained some grain and hay, and the threshing and reaping machines, for the loss of which this action was brought. One of the conditions on the policy was, that if the assured misrepresented or omitted to communicate any circumstances material to be made known to the company, in order to enable them to judge of the risk, the policy would be avoided:—Held, that the plaintiff could not recover, for the plaintiff having admitted his own belief in the danger and acted upon it, his answer to the above question was untrue. *Campbell* v. *Victoria Mutual Fire Ins. Co.*, 45 U. C. R. 412.

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiarism?" and by another, "Have you any reason to suppose that your property is in danger from incendiarism?" the applicant, B., replied to each in the negative. It appeared that the mill had been burnt some months previously, and that the origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter:—Held, reversing 27 Gr. 121, that the answers were such a misrepresentation as avoided the policy. *Greet* v. *Citizens' Ins. Co.*, *Greet* v. *Royal Ins. Co.*, 5 A. R. 596.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which B answered in the negative:—Held, affirming 27 Gr. 121, a misrepresentation, which avoided the policy. *Greet* v. *Mercantile Ins. Co.*, 5 A. R. 596.

Fire Occurring to other Properties.]—In a form of application for fire insurance, the questions were asked: "Have you ever had any property destroyed or damaged by fire? If so, when and where?" also, "Has this risk been refused by any other company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No;" and signed a memorandum at the foot of the application form, whereby he covenanted and agreed with the company that the foregoing was a just, true, and full exposition of all the facts and circumstances in regard to the situation, condition, value, and risk of the property to be insured, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract. As a matter of fact, the insured had had other properties, but unconnected with the property now in question, destroyed by fire:—Held, however, that the answer to the first of the above questions was immaterial to the risk. Held, also, that the answer to the second question was clearly a warranty, having reference as it had to the property to be insured, and the only point for the jury's decision was as to its truth. *Stott* v. *London and Lancashire Fire Ins. Co.*, 21 O. R. 312.

Fraudulent Statement — *Proof of Fraud.*]—Where an insurance policy is to be forfeited if the claim is in any respect fraudulent it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or by circumstantial evidence. The assignee of the policy cannot recover on it if fraud is established against his assignor. *North British and Mercantile Insurance Co.* v. *Tourville*, 25 S. C. R. 177.

Misrepresentation Inducing Acceptance of Lower Premium.]—See *Canada Fire and Marine Ins. Co.* v. *Northern Ins. Co. of Aberdeen and London*, 2 A. R. 373; *Greet* v. *Citizens' Ins. Co.*, 27 Gr. 121.

Omission in Good Faith—*No Condition Imposed.*]—At the foot of a series of questions in the form of an application, the following note was printed: "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract:"—Held, that the request to give full answers could not be construed as a notice that such answers were indispensable to the validity of the contract, or to the authority of an agent to bind the company by an intermediate insurance, there being no pretence of the omission to give full answers having been fraudulent. When such is the intention of the company, distinct notice to that effect should be given. *Rowe* v. *London and Lancashire Fire Ins. Co.*, 12 Gr. 311.

(b) *As to Description of Premises or Nature of Business.*

Added Premises — *Rectification of Policy.*]—On the 9th August, 1871, the plaintiffs applied to the defendants through their agent, H., at Hamilton, for an insurance on goods to the amount of $6,000, contained in a store on the south side of King street, described in the application as No. 272, in defendants' special tariff book, and marked No. 1 on a diagram indorsed on the application, and received from H. a letter and receipt for the premium, $37.50, being at the rate of 62½c. on the $100. On the following day the plaintiffs notified H. that they had added to their premises two flats in the adjoining building (which would be No. 273 in defendants' special tariff book,) and had placed part of their goods there. A few days after, H. inspected the building, and said an extra rate would be required. On the 29th H. notified the defendants of the opening into the adjoining building, and asked as to the rate to be charged. The secretary at Montreal, on receiving the letter, pencilled on the application the fact of the opening, and he had previously drawn on the application a sketch of the premises taken from a former policy, when the plaintiffs only occupied 272. An increased premium, making in all 1 per cent., was fixed and paid by 23rd September, and the policy issued immediately thereafter dated as of the 9th August, describing the premises substantially as in the application, and referring to the sketch and pencilled opening, through which it was said there was a communication with the adjoining house (No. 273). The policy was handed to the plaintiffs in September, 1871, and the premises were burned in March, 1872:—Held, that the alteration in the premises having been made before the policy issued, the description therein did not extend to or cover the goods which were in the adjoining flats added when the extra premium was paid and the policy issued, and that the plaintiffs suing upon the policy were bound by the description contained in it. Semble, however, that the policy was not in accordance with the intention of the parties, the notice to and knowledge of H. as to the storing goods in 273, being notice to and knowledge of the defendants; and that in equity the policy might be reformed. *Wydd* v. *London and Liverpool and Globe Insurance Co.*, 33 U. C. R. 284.

On application to reform the policy, it was held, that by what had taken place, these flats had become for insurance purposes part of No. 272, and that the plaintiffs not having been guilty of any fraudulent conduct whatever, and not having concealed any fact from the company, were entitled to have the policy so rectified as to enable them to recover the full amount of their loss to the extent covered by the policy. *S. C.*, 21 Gr. 458; 23 Gr. 442.

Agent's Knowledge — *Intention to Mislead.*]—Declaration on a policy of insurance against fire of the plaintiff's grist mill. Fourth plea, that by the policy it was agreed that the plaintiff's application, on which the policy was granted, and the survey and diagram of the premises, and all things therein contained, should be taken as part of the policy, and if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, the policy should be void. And the defendants alleged that there was a wooden building 58 feet from the insured premises, which was a fact material to the risk, and to be known to defendants, yet the plaintiff in said application and diagram erroneously represented that said building was 100 feet from said insured premises, whereby said policy was void. In the fifth plea, after setting out the same condition, defendants alleged that there was a wooden building not shewn on the plan or diagram near the insured premises, which was material to the risk, but that the plaintiff erroneously omitted it. The ninth plea alleged that the plaintiff erroneously and falsely represented the cash value of the insured premises to be $9,000, which was a material fact, yet that they were worth much less, as the plaintiff well knew. The plaintiff replied to the fourth plea, that the insurance was effected through one M., as an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums; that said agent personally inspected the property, and was fully aware of its position, and of the distance therefrom of the wooden buildings mentioned; and said application and diagram were made with the knowledge and approbation of said agent, and transmitted by him to defendants, and neither he nor they objected to the said buildings, or notified the plaintiff that his policy was affected thereby; and further, that there was no fraud or fraudulent representation by the plaintiff in reference to the distance of said wooden building from the property. There was a similar replication in substance, to the other two pleas:—Held, that the replications were bad, for that on the admitted facts the plaintiff knowingly concurred with defendants' agent in a misrepresentation to defendants of material facts, which was a fraud upon defendants; and the denial of fraud was therefore immaterial. *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 37 U. C. R. 380.

The power of the agent to bind the company by accepting an application false to his own and the applicant's knowledge could not be assumed from his powers as specified in the plea, though they might afford evidence from which a jury might infer such power. *Ib.*

Concealment—*Materiality.*]—A policy on four dwelling houses provided that all statements contained in the application, which must be in writing and signed by the applicant or by his authority, would be taken to be warranted by the assured, and "if any misrepresentation or concealment of facts has been made in the application, or if he (the applicant) shall in any manner make any attempt to defraud this company, the policy shall be void." The defendants in their plea, after setting out this condition, alleged that the insured concealed from them the fact that the insured premises were near to and immediately opposite to a blacksmith shop, which fact was one material for the consideration of the risk attending the application; and that by reason of such concealment the policy became void. At the foot of the application it was agreed that the survey and diagram should form a part of the contract, and that if the agent of the company filled up the application he should in that case be the agent of the applicant, and not of the company. It appeared that in answer to this question in the application—"External exposures. What

is the distance, occupation, and materials of all buildings within one hundred feet?"—the distance of certain buildings from those insured was stated, and a sketch was given on the back shewing their position. The insurance was effected through the defendants' agent, who with the husband of the insured measured the distance from the other buildings, and told him that it was unnecessary to put in a blacksmith's shop on the other side of the street, eighty-six feet distant:—Held, that the plea was not proved, for the defence was not put upon the ground of warranty, but on the concealment of a material fact: and according to the evidence there was no concealment, nor was the blacksmith's shop material to the risk. *Benson* v. *Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282.

Construction of Answer—*Knowledge of Agent.*]—To a question contained in an application for insurance, "For what purposes are the premises occupied?" the answer was "Dwelling, &," which the learned Judge found to mean "&c.:"—Held, that this meant dwelling, et cetera; and that on the evidence as to what passed between the applicant and the agent, notice was given that the premises were occupied for another purpose also—a drinking saloon, as it appeared. *Gouinlock* v. *Manufacturers and Merchants Mutual Insurance Company of Canada*, 43 U. C. R. 563.

It appeared that the company's agent had the fullest knowledge of the existence of the saloon, and that it had been the subject of discussion between such agent and the applicant, and further, that the chief agent had certified on the back of the application that he had personally inspected the premises and recommended the risk:—Held, that there was no breach of the first statutory condition (R. S. O. 1877 c. 162), and that the plaintiff was entitled to recover. *Ib.*

Diagram—*Omission of Building—Agent's Knowledge.*]—The first statutory condition indorsed on a policy provided that if the insured misdescribed his buildings or goods to the prejudice of the company, or misrepresented, or omitted to communicate any material circumstance, the insurance relating thereto should be void. The second statutory condition provided that the policy was intended to be in accordance with the application unless the company should point out the difference relied on, with a variation added thereto, that such application or any survey, plan or description of the property to be insured should be considered a part of the policy and every part of it a warranty by the insured, but that the company would not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The twentieth statutory condition as varied, provided that in case any agent of the company took part in the preparation of the application, he should, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the insured in person, but through the agent of the company, the insured was required to make known the existence of all buildings within 100 feet of the insured premises; and it appeared that the insured had omitted to make known the existence of a small building used for storing coal oil, and material to be made known, within such distance, but of the existence of which the applicant was not at the time aware. A diagram was made and filled in by the agent and signed by him in his own name as well as that of the applicant, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection and the knowledge thereby acquired, as also an intimate knowledge of the property, which he passed three times each day; and the agent at the foot of the application stated that he had made a personal survey of the risk:—Held, reversing 31 C. P. 618, that under the conditions and circumstances above set forth the insured was relieved from the effect of his omission to make known the existence of such coal oil shed; that the inspection by the agent need not be one made for the purpose of such insurance, provided a personal inspection did take place; and that under the facts and circumstances appearing in the case the company could not dispute the correctness of the answers given by the insured, whether his answers upon the application for insurance were to be treated as warranties or representations only. *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 576.

Misdescription as to Walls—*Agent of Company.*]—It was provided by one of the conditions in the policy sued on that if any one should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void. The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings, and told defendants' agent to make his own measurements and description. The agent filled up the application from an examination and diagram which he had made on a previous occasion, and in answer to the question, "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted?" replied, "No, it is a first-class building in every respect; although one roof covers all, there is a solid brick fire-wall between each store." The application contained an agreement that if the agent of the company filled up the application, he should, in that case, be the agent of the applicant, and not of the company. There was not a solid brick wall between the stores, and the jury found that this was a misdescription of a fact material to the risk:—Held, affirming 44 U. C. R. 95, that the plaintiff could not recover. *Sowden* v. *Standard Fire Ins. Co.*, 5 A. R. 290.

Mistake of Agent—*Delay in Objecting.*]—The agent of an insurance company filled in an application for insurance on a building built with boards, and fixed the premium at the rate demanded on brick buildings, there being no tariff value for board buildings. The word "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application, which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. In this case it was in black. At the head office the word intended for boards was read "brick," and the policy issued as on a brick building. A loss having occurred the

company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance:—Held, affirming 11 O. R. 38, 14 A. R. 728, that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were ad idem, and the contract was complete; and even if it were otherwise, the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy. *City of London Fire Ins. Co.* v. *Smith*, 15 S. C. R. 69.

Misstatement as to Chimney—*Repayment of Premium.*]—In his application the plaintiff untruly represented the building as furnished with a brick chimney:—Held, that on this ground the policy never attached, and that the plaintiff, therefore, might recover back his premium. *Mulvey* v. *Gore Mutual Fire Ins. Co.*, 25 U. C. R. 424.

Misstatement of Number of Stoves.]—One of the pleas set up that the insured stated in the application that there was only one stove on the premises, whereas there were two:—Held, that this was an untrue statement which avoided the policy. *O'Neill* v. *Ottawa Agricultural Ins. Co.*, 30 C. P. 151.

Nature of Business—*Previous Statements—Waiver.*]—A policy issued by defendants provided, "This insurance shall at all times and under all circumstances be subject to such conditions as are contained in the printed proposals issued by said company, a copy of which conditions is printed on the back hereof." One of these conditions was, that persons desirous of making insurance were to "deliver in" to the office or its agent the following particulars, viz., a statement as to the construction, &c., of the building, and whether any "hazardous trade" was carried on, or any "hazardous" goods were deposited in the premises containing the goods to be insured. There was, also, a condition that certain specified machinery and heating apparatus should, if used upon the premises, be particularly described. Plaintiff, by his agent, applied to defendants' agent for an insurance on his stock-in-trade, utensils, and shop furniture. At the time of the application certain goods of the class denominated "hazardous," and certain machinery, &c., of the kind provided against, were in use on the premises in question. Defendants' agent presented to applicant a printed blank form, which made no allusion to hazardous goods or trade, or to machinery, &c., and on the same being signed, defendants' agent accepted it and received the premium. Defendants' agent, however, when taking a risk a year previously on the same property and in the same premises, had inquired and was told by plaintiff's agent the full particulars respecting plaintiff's business and the premises in which it was carried on, and was also informed about the machinery, &c., upon the same; having been, moreover, referred to another company, by whom a risk on the said property had been taken, for all requisite information on the subject. It also appeared that the nature of plaintiff's business was well-known by advertisement in the local newspapers, and otherwise:—Held, that the expression, "deliver in," meant deliver in writing, and that the plaintiff did furnish in writing all the information he was required to do, the defendants or their agent not having requested to be furnished with more, but having accepted it as sufficient by issuing the policy; and, in addition to this, that the evidence shewed that defendants, by their agent, did in fact know and had the means of knowing the nature of plaintiff's business, and the processes by which it was carried on. Held, also, that defendants were at liberty, if they pleased, to waive the presentment of their printed proposals containing the conditions of insurance; and that their agent having accepted the representation of plaintiff as to the proposed risk, defendants were, in the absence of any fraud or concealment on his part, liable to plaintiff for the loss sustained by him. *Davis* v. *Scottish Provincial Ins. Co.*, 16 C. P. 176.

Occupation—*Substituted Policy—Agent's Knowledge.*]—On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling-house, thereby contracting with the defendants that it was so occupied; whereas, in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance, the risk never attached. On the pleadings and at the trial, this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and the application for the substituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked for, and had told him that the building was then unoccupied:—Held, that under the circumstances, the knowledge of their general manager was the knowledge of the company; that the misdescription was immaterial, and that the defendants could not be permitted at that stage of the cause to shift their ground, and set it up as a warranty or part of the contract. *Reddick* v. *Saugeen Mutual Fire Ins. Co.*, 15 A. R. 363.

Omission of Buildings—*Slight Error in Distance.*]—The application herein contained the following memorandum: "Annex diagram shewing size and distance of all buildings within 500 feet" of the insured premises; and the application concluded: "I hereby make application for insurance as above specified, and I declare that the answers to the above questions and the description in the annexed diagram are true and complete in all particulars." The back of the application was headed "Diagram," with directions as to filling it up. In the policy it was stated that the application and survey were thereby referred to as forming part of the policy. There were two buildings, one 18 x 20, and another smaller one, within 500 feet, omitted from the diagram:—Semble, that the diagram was a part of the application, within the meaning of the condition making the statements in the application warranties; and that the omission of the two buildings, at all events the larger one, would avoid the policy; but that the statement in the diagram of a building being 190 feet instead of 178 feet was so slight a

difference as to be immaterial; and the jury having found in plaintiff's favour thereon, the court would not interfere. *O'Neill* v. *Ottawa Agricultural Ins. Co.*, 30 C. P. 151.

Omission of Immaterial Fact.]—One of the conditions of the policy provided that the misrepresentation or concealment of facts in the application, or attempt to defraud the company, should avoid the policy. To the question in the application whether there was any building within one hundred feet of the assured premises, it was answered that there was none:—Held, that the existence of a small building used as a water-closet within forty-six feet of the insured premises, which had nothing to do with the fire, and in no way increased the risk, did not invalidate the policy, as the condition contemplated a fraudulent concealment only, which was not alleged, and before accepting the risk the agent, as his instructions required him, had inspected and made a survey of the premises. *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121.

Omission in Good Faith.]—A person, on applying to insure, omitted unintentionally from his description of the property some particulars as to which he had not been questioned, but the company's agent swore he would not have insured the property if he had known these particulars:—Held, that there being no fraudulent concealment, the omission did not avoid the policy. *Laidlaw* v. *Liverpool and London Ins. Co.*, 13 Gr. 377.

Reference to Plan—*Canvasser.*] — An insurance policy described the goods insured as stock, consisting of dry goods, &c., while contained in that one and a half story frame building occupied as a store house, said building shewn on plan on back of application as "feed house" situate attached to wood-shed of assured's dwelling-house. The plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked "feed house," did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation "feed house." The goods insured were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the said premises, as well as misdescription of the building containing the goods insured. In an action on the policy it appeared that a barrel of oil was in the building marked "feed house" at the time of the fire:—Held, that it was evident that the building in which the goods were stored was that intended to be described in the policy; that the building marked "feed house," being detached from that in which the goods were, was a suitable place for storing oil, which, therefore, was not a breach of the condition; that the case was a proper one for the application of the maxim falsa demonstratio non nocet, but if not, the matter was one for the jury who had pronounced upon it. Held, further, that the canvasser who secured the application could not be regarded as agent of the assured, but was agent of the company which was bound by his acts. *Guardian Ins. Co.* v. *Connely*, 20 S. C. R. 208.

Second Policy.]—Declaration, on a policy on a woollen mill and machinery. Plea, in substance, that contrary to the conditions of the policy the premises were used not only for a woollen mill but also for the manufacturing and storage of shingles, and that there was misrepresentation and concealment and breach of warranty, the application stating and warranting that the premises were only used as a woollen mill, and that there was no special risk within 150 feet thereof; whereas they were used as a shingle manufactory, and there were special risks within 150 feet. Replication, on equitable grounds, by way of estoppel: that the plaintiff had by a former policy insured the mill with defendants, and before this policy was executed the defendants' agent inspected the premises, was informed of and saw the shingle mill, and on account of it made the plaintiff pay one half per cent. more than he had previously paid the defendants on the same premises, and in consideration thereof the defendants executed the policy:—Held, on demurrer, replication bad; for it did not aver that there was any fraud or even mistake in preparing the policy, but merely that one of its clearly expressed terms ought not to be insisted on by the defendants, by reason of an equity arising not since, but prior to the execution of the policy. Semble, that the plaintiff's remedy was in equity. *Crawford* v. *Western Ass. Co.*, 23 C. P. 365.

Survey—*Agent's Default.*]—The plaintiff, upon an application for insurance being read over to him, objected to the distance, stated in the diagram, which was indorsed on the application, of the contiguous buildings. The defendants' agent, C. M., who had prepared the diagram after a personal survey of the premises, promised to measure the distance and make the necessary alterations before sending it to the head office. The plaintiff thereupon signed the application, but the agent forwarded it without having made the corrections. By one of the conditions of the policy it was provided that if an agent should fill up an application, he should be deemed to be the agent for that purpose of the insured and not of the company "but the company will be responsible for all surveys made by their agent personally:"—Held, affirming 26 C. P. 380, that the diagram was a survey within the meaning of the above proviso, and that the company, therefore, and not the plaintiff, were responsible for its inaccuracy. *Shannon* v. *Hastings Mutual Ins. Co.*, 2 A. R. 81; 2 S. C. R. 394.

See S. C., as to pleading: 25 C. P. 470.

Warranty—*Materiality.*] — To an action on a policy of insurance against fire on a stock of goods, defendants pleaded, setting up a condition of the policy, that the application, survey, and diagram, and all things therein contained, should be taken and considered as part of the policy, and that if the applicant should make any erroneous or untrue representation or statement therein, or omit to make known any fact material to the risk, the policy should be null and void; and averred a breach of warranty in stating that there were no buildings or premises within one hundred feet of that containing the insured property other than those mentioned in the application, survey, and diagram, whereas there were other buildings, describing them. The application contained twelve questions, none of which referred to the existence of buildings within one hundred feet, which the applicant was required to answer and

sign. Below the questions was a square space headed Diagram, with a note on the north and west sides thereof, as follows. On the north: "Agents must write the word risk in red on the property proposed for insurance," &c. And on the west: "Use red ink for brick," &c. "Give all exposures within one hundred feet, and mark distances between buildings." Below this space, and at the foot of the application, was the following: "It is hereby expressly agreed, declared, and warranted, that each and every of the answers as above made is true, and that the same and this application and survey, and the diagram of the premises herewith, shall be part of the insurance contract and the policy hereby applied for," and the basis of the company's liabilities; and then, after providing that in case the agent should fill in the application he should for that purpose be the applicant's and not the company's agent, and for the case of the use of stoves, &c., it concluded, "And that the foregoing is a full, just, and true exposition of all facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are material to the risk. Survey in all cases to be signed by applicant," and not by agent:—Held, that there was no such warranty as was set up, for that the application shewed that the only warranty was as to the answers to the questions submitted, none of which referred to the distance of buildings within one hundred feet; and that the applicant was only required to make known such buildings as were material to the risk, and it was proved that the buildings omitted were not of such a character. *Wilson* v. *Standard Fire Ins. Co.*, 29 C. P. 308.

(c) As to Title or Incumbrances.

Agreement to Pay Off—*Agent's Acquiescence.*]—An application for insurance filled in by the company's agent had, at the foot thereof, a notice requesting the applicant to answer the questions fully, and that if the agent should fill up the application he would be the agent of the applicant and not of the company, but it did not state that the company would not be bound by any statement made to the agent and not contained in the application. By the application the agent was asked to state his opinion of the risk, and whether he recommended the company to accept it, his answer to which was "very good." When the application was made, the lot on which the insured premises were situate was one of eleven lots mortgaged for $1,000, but there was an arrangement with the mortgagee to release any lot on payment of $100 thereon. Before the insurance was effected the insured had paid $300 on the mortgage, and intended having this lot released; and the agent who solicited the insurance and filled up the application, being informed by him of all the facts, said the mortgage was not worth mentioning in the application, and accordingly answered to the question as to incumbrances that there were none:—Held, that the company could not set up that there were any misrepresentations as to incumbrances. *Naughter* v. *Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121.

Agreement to Purchase.]—The application contained the following questions and answers: Q.: "Occupied by applicant or tenant? A. "Tenant." Q. "Title by deed or how?" A. "Deed." Q. "Incumbered or not; if not, say no?" A. "No." The plaintiff afterwards made affidavit "that he is the bonâ fide owner of the said property and of the said policy; that the said property is not and was not in any way incumbered by mortgage or otherwise." It appeared that he was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price; and that there was a mortgage from M. to one H. including the property insured:—Held, that (irrespective of the mortgage) the plaintiff had misrepresented his title, and could not recover. *Walroth* v. *St. Lawrence County Mutual Ins. Co.*, 10 U. C. R. 525.

In an action on a policy of insurance against fire on a frame building, the defendants pleaded that by a condition of the policy the application was made a part and condition of the insurance contract, and that by said application the plaintiff covenanted that the same was a just, full, and true exposition of all the facts and circumstances, so far as known to the applicant and material to the risk, and that the plaintiff falsely and fraudulently represented that he was the owner of the land on which the insured property was situate, and that no other person had any interest therein, whereas he was not such owner, which were facts material to be known to the defendants and to the risk, whereby the insurance was not in force. The defence was based on the answers to the questions: 1. "State the nature of your title, whether fee simple," &c. "If others are interested, give name, interest, and value," Answer. "Owner." 2. "What incumbrance, if any, is now on said property?" Answer. "$60 balance of payment, to be paid in four years." It appeared that the applicant purchased the land from a minor for $90, to be paid for, and the deed to be given, in four years, when the minor became of age; and that the house was so built as to be capable of removal; and it was admitted that all these facts were known to the defendants' agent when he took the application. There was no condition in the policy making the application a part and condition of the insurance contract, but it was urged that because by the terms of the application it was expressly so made, the condition therein contained, as alleged in the plea, could be so set up:—Held, that the plea was not so pleaded as to enable defendants to take advantage of the condition relied upon. Held, also, that the plea was in fact disproved, for that the plaintiff's title and interest, as also the incumbrance, were communicated according to the truth, in that the plaintiff was the owner of the house, and in a sense also of the land under the agreement for the purchase thereof, and that there was an incumbrance of $60. *Brogan* v. *Manufacturers and Merchants Mutual Fire Ins. Co.*, 29 C. P. 414.

Buildings on Leased Land.]—One condition of a policy was that the application, with the survey and diagram of the premises, should form part of the insurance contract; and there was a proviso, in the shape of a covenant on the part of the assured, that the representation given in the application contained a just, full and true exposition of all facts, &c., and the interest of the insured therein, so far as same were known to the assured, and that if any material fact should not be fairly represented, the policy should

be void. In the application plaintiff described the subject of insurance as "all the property of the assured," and to an inquiry therein whether he was owner, mortgagee, or lessee, he replied "owner." The property consisted of two buildings belonging to plaintiff, though the land on which they stood was leasehold. Defendants pleaded that plaintiff in his application had misrepresented the facts, especially as regarded his title, having described himself as owner, whereas he was merely lessee. At the trial plaintiff tendered the evidence of the owner of an adjoining building, to shew that he (witness) had told defendants' agent how the buildings were situated, and that the agent knew the position of all to be the same; but this was rejected as contradicting plaintiff's own written statement, and the jury were directed to find for defendants on the plea, the learned Judge refusing to leave to them the question of misrepresentation on plaintiff's part:—Held, that this direction was wrong; that the word "owner" having no definite meaning in law, but being applicable to various interests in buildings, the plaintiff if he used it in good faith ought not to suffer, and the question whether he fairly represented the facts regarding the risk should have been left to the jury. Held, also, that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land; and that, to establish the bona fides of plaintiff's answer, he might shew that defendants' agent, who drew up his statement, had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title. *Hopkins* v. *Provincial Ins. Co.*, 18 C. P. 74.

Different Parcels—*Mortgage on One.*]—The defendants' travelling agent obtained from the plaintiff his application, and in filling up the answers the question as to the existence of incumbrances was answered in the negative, when in fact the land on which one of the houses insured stood was mortgaged:—Held, that this vitiated the policy, not only as to that house, but also as to another building standing on land not in the mortgage, although separate sums were named in respect of each building. *Bleakley* v. *Niagara District Mutual Ins. Co.*, 16 Gr. 198.

Dispute as to Existence of Mortgage.]—Defendants pleaded a false representation by plaintiff on obtaining a policy, that the land on which the building insured stood was unincumbered, whereas in truth it was mortgaged to one S. for £94. The plaintiff called S., who proved that at the time of effecting the policy about $100 was due on the mortgage:—Held, that the policy was void under C. S. U. C. c. 52, s. 27; and that evidence as to the value of the land was properly rejected. *Muma* v. *Niagara District Mutual Ins. Co.*, 22 U. C. R. 214.

In an action against a mutual insurance company, defendants pleaded a false representation by plaintiff in obtaining the policy, that the land on which the building stood was unincumbered, whereas it was mortgaged to one S. for £94. The plaintiff replied, on equitable grounds, in substance, that he acted as agent for S. on the agreement that any moneys due to him for services should be credited on account of this mortgage: that before applying for the policy, he delivered to S. a claim against a certain person, which S. accepted: that these moneys together then equalled the mortgage debt, and the same was then cancelled and paid, and S. ready to release the mortgage; that before applying the defendants delivered to plaintiff a printed form of application, and thereby required him to state that the land was unincumbered, and to make the statements in his application in the replication set forth, wherefore the plaintiff made such statements in his application, and by the procurement of defendants, and therefore the statement was not false or fraudulent:—Semble, that the replication was clearly bad; but as the evidence disproved it, no formal judgment was given on the demurrer to it. *Ib.*

Disputed Title.]—The plaintiff had lived with his father for about thirty-seven years, on land belonging to the Crown. A barn had been built on it, resting upon abutments of loose stones, which the plaintiff, in October, 1867, insured with defendants. In December, 1867, a patent issued to one F., and in June, 1869, T., claiming through the patentee, recovered judgment in ejectment against the plaintiff and his father, and placed a hab. fac. in the sheriff's hands. A few days after, and before it had been executed, the barn was burned. Proceedings in chancery were then pending by the plaintiff contesting the claim of T. The policy required that the plaintiff in his account of the loss should shew the true nature of his title at the time of the fire; and the plaintiff in such account stated that he was bonâ fide owner, and that his title was by possession for thirty years by himself and his father:—Held, that the account did not give a true statement of plaintiff's title: that the barn was part of the freehold: and that he could not recover. *Sherbonneau* v. *Beaver Mutual Fire Ins. Association*, 30 U. C. R. 472; 33 U. C. R. 1.

Divisible Risk.]—The plaintiffs effected an insurance in the defendant company on a manufactory and the stock contained therein. Their application was for an insurance of $1,000 on the building, and $2,000 on the stock, at 5 per cent. on each sum; and it stated that there were no incumbrances on the property, although there were several mortgages on the building. The risk was accepted at 6½ per cent., and a policy covering both risks was issued by the company, which acknowledged the payment of a premium of $195. The policy was made subject to 36 Vict. c. 44 (O.). The proviso (since repealed by 39 Vict. c. 7) to s. 36 declared: "That the concealment of any incumbrance on the insured property, or on the land on which it may be situate, . . shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit in their discretion to waive the defect":—Held, reversing 20 C. P. 405, that the policy was divisible, the contract of insurance being distinct and separate as to each risk; and therefore that the plaintiffs were entitled to recover the insurance on the stock, although the policy was void as to the building. The judgment was affirmed as to the insurance on the building being void. *Samo* v. *Gore District Mutual Fire Ins. Co.*, 1 A. R. 545.

There was a covenant in the application, which formed part of the policy, that it contained a full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, material to the risk

and material to be known to the company. Per Patterson, J.A., the failure to disclose the incumbrance was not a breach of this covenant. *Ib.*

One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk:—Semble, that the omission to state the incumbrances was not necessarily the omission of any fact material to the risk. *Ib.*

On appeal to the supreme court from the above judgment:—Held, that the contract of insurance on the building and on the stock was entire and indivisible; and that the misrepresentations as to incumbrances, by the conditions of the policy as well as by s. 36 of 36 Vict. c. 44 (O.), rendered the policy wholly void. *Gore District Mutual Fire Ins. Co.* v. *Samo*, 2 S. C. R. 411.

When a policy covers two or more distinct properties, each of which is insured thereby for a specific sum and at a fixed rate respectively, such policy must be considered as divisible; and therefore the fact of one of the said properties having at the date of the policy been under mortgage, whereby the assured had an estate therein less than a fee simple, or said property was incumbered, does not affect the right of the assured to recover in respect of the other properties mentioned in the policy, though no notice had been given to the insurance company at the time of application of one of such properties being under mortgage, and though no notice was by plaintiff procured to be made of such mortgage in such policy as required by c. 52, C. S. U. C., ss. 27, 67. *Date* v. *Gore District Mutual Fire Ins. Co.*, 14 C. P. 548. See, also, as to the policy being divisible; *Ramsay Woollen Cloth Manufacturing Co.* v. *Mutual Ins. Co. of the District of Johnstown*, 11 U. C. R. 516; *Kuntz* v. *Niagara District Fire Ins. Co.*, 16 C. P. 573; *Ross* v. *Mutual Fire Ins. Co. of Clinton*, 29 U. C. R. 73.

Error — *Agent's Knowledge.*] — Where a person in answer to a question indorsed on the printed form of application, stated that he was the owner of the estate subject to a mortgage in favour of a building society for $1,500, the facts being, that he only held a contract of purchase: that a portion of the purchase money remained unpaid; and that a mortgage for the amount mentioned had been agreed for, but not executed; of which facts the company, through their agent, was aware:—Held, that the insurance was not avoided, it not being shewn that such misstatement was intentional or material. *Laidlaw* v. *Liverpool and London Ins. Co.*, 13 Gr. 377.

Goods on Incumbered Land.]—To an action on a policy on chattel property, defendants pleaded that plaintiff, in his application, falsely, &c., stated that he held the property in which the goods insured were, by deed and unincumbered, whereas said property was largely mortgaged. The evidence shewed that to a question contained in a printed form of application, wholly inapplicable in many of the questions to insurance on chattel property alone, whether the property was incumbered, defendants' agent, at plaintiff's dictation, filled in the answer that there was no incumbrance, and that the plaintiff was about to explain that the land was mortgaged, when the agent stopped him, stating that that was of no importance, as the proposition was merely for insurance of goods, and that question related only to realty; whereupon, the goods not being incumbered, the agent wrote the answer accordingly:—Held, that the question must be considered as relating to the goods insured, and not to the real property, and that the plea was therefore not proved. *Ashford* v. *Victoria Mutual Ass. Co.*, 20 C. P. 434.

House on Highway.] — A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation, and occupancy of the property, or any omission to make known a fact material to the risk, would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway:—Held, that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition. *Norwich Union Fire Insurance Co.* v. *LeBell*, 29 S. C. R. 470.

Illiterate Applicant — *Agent's Act.*] — In an action on a mutual policy of insurance, it appeared that to enable defendants' local agent to fill in the application, which formed part of the policy, the insured, who was a French Canadian and unable to read or write, truly stated to the agent all the facts material to the risk, including those relative to title and incumbrances; and the agent then filled in the application, as also the plaintiff's name, and he signed as a marksman; but in so filling it in, the agent, without the authority or knowledge of the insured, misstated the facts as to the title and incumbrances:—Held, that defendants, under the circumstances, must be restrained in equity from setting up, under the terms of the statute, 36 Vict. c. 44, s. 36 (O.), or of the conditions on the policy, the act of their own agent as an avoidance of the policy. A second policy in which, as before, the application was filled in by the agent, but the plaintiff had the benefit of the services of his son, who was able to read and write, and who acted as his agent in procuring the insurance, and signed his name to the application, was on that ground distinguished from the above, and the policy held void. *Chatillon* v. *Canadian Mutual Fire Ins. Co.*, 27 C. P. 450.

Incorrect Statement of Title.] — A condition was, that any fraud or attempt at fraud, or false swearing on the part of the assured, should cause a forfeiture of all claims under the policy. After the loss plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas under the conveyance to him and his wife he was only jointly interested with her therein:—Held, that he was not guilty of false swearing within the meaning of the condition: for that the word "false," as used there, meant wilfully and

fraudulently false (of which defendants had themselves at the trial acquitted the plaintiff), whereas it was merely an incorrect description of his title with which he could be charged. *Mason* v. *Agricultural Ass. Association of Canada*, 18 C. P. 19, 16 C. P. 493.

Incumbrance not Due—*Agent's Knowledge.*]—In the application for a policy of insurance against fire, it was stated that there was no incumbrance. The application was filled in by the company's agent. The insured informed him of the existence of a mortgage on the property when the agent told plaintiff that if there was nothing overdue thereon it was not an incumbrance, and, under this belief, there being nothing overdue, the statement was made. A policy was afterwards issued with conditions and variations. The fourteenth variation was, that if any agent, &c., of the company shall have written or filled up any part of the application, he shall for that purpose be deemed the agent of the insurer and not of the company; and no statement written or verbal, made to such agent, &c., as to any matter to which the inquiries in the application extend, should bind the company or affect the company with notice thereof unless stated in the application. The fifteenth variation was, that any fraudulent misrepresentation contained in the application, or any false statement therein respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon or other change in the title or ownership of the insured property rendered the policy void:—Held, that the defendants were estopped from setting up the avoidance of the policy. Chatillon v. Canadian Mutual Fire Ins. Co., 27 C. P. 450, and Hastings Mutual Fire Ins. Co. v. Shannon, 2 S. C. R. 394, followed. *Graham* v. *Ontario Mutual Ins. Co.*, 14 O. R. 358.

Incumbrance Understated—*Divisible Condition.*]—A fire policy contained a condition, in addition to the statutory conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were incumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered "$7,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company, on which $6,100 were due. After the policy a mortgage was given to secure indorsements and was discharged, and another was given by the plaintiff to his partners who retired from the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, but not made fraudulently, and a verdict was entered for the defendants:—Held, that the representation as to incumbrances was a violation of the condition, and that the verdict was right. Per Hagarty, C.J. Though that part of the condition as to levying might be unreasonable (5 A. R. 605), the remainder was not, and the condition was divisible. *Wilby* v. *Standard Ins. Co.*, 3 O. R. 115.

Indirect Assent.]—See *Hazzard* v. *Canada Agricultural Ins. Co.*, 39 U. C. R. 419, under sub-head 5 *post*.

Information Indirectly Given—*Applicant's Ignorance.*]—The application contained a question, "If incumbered, state to what amount," to which no answer was made, but on the face of the application was written, "Loss, if any, payable to Joseph Watson, $1,000; H. G. Bernard, $400, or as their interest may appear." The agent who took the application said he knew from this that the property was incumbered. There was also a mortgage given by a former owner on this and other property to one Whitney, of which, however, the plaintiff knew nothing:—Held, that there was no misrepresentation or concealment in either case. *Dean* v. *Western Assurance Co.*, 41 U. C. R. 553.

Insured's Agent Making Misstatement—*Goods and Land.*]—The plaintiffs employed one R., an insurance broker, in no way connected with the defendants, to effect an insurance on their building and stock, informing him of there being incumbrances to a large amount on the building; and they signed a form of application in blank and handed it to R., who filled in the application, except as to incumbrances, which he left blank. R. then applied to one G., who also acted as a broker, and was in no way connected with the defendants; and G. submitted the application to defendants' local agent, who accepted the risk and received the premium. The agent then forwarded the application to the head office for approval, and it was returned to him for information as to the incumbrances. The agent then applied to G., who referred to R. R. having tried but failed to find the plaintiffs stated to G. that there were no incumbrances, and G. then tore up the application and filled in another one, stating that there were no incumbrances, and signed the plaintiffs' name to it. This he handed to the agent, and on it the policy issued. It was also proved that after the issuing of the policy the plaintiffs effected a further incumbrance on the land, but did not notify defendants. The plaintiffs having sued defendants on the policy, which provided that if the assured was not the sole and unconditional owner of the property insured, unless the true title was expressed therein, the policy should be void:—Held, that they could not recover. Held, also, that the policy was not divisible as to the real and personal property, but was altogether avoided. *Samo* v. *Gore District Mutual Fire Ins. Co.*, 26 C. P. 405.

Leasehold—*Right to Remove Building.*]—The plaintiff in his application stated that he held the house in fee, when in fact he had a leasehold only:—Held, a fatal objection, and that his having a right to remove the building could make no difference. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

The plaintiff applied as if the property were his own, stating that it was occupied by himself and unincumbered, and he obtained a policy for two-thirds of the actual value. He was only a lessee for years of the land on which the buildings were erected:—Held, that the policy was void. *Shaw* v. *St. Lawrence County Mutual Ins. Co.*, 11 U. C. R. 73.

In answer to the questions—"(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner—" a person seeking to effect an insurance against fire answered: (1) Tenant—as boarding-house.

(2) Applicant." And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land;" and he answered $900. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building the subject of insurance:—Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions in the policy. *Compton* v. *Mercantile Ins. Co.*, 27 Gr. 334.

Limited Title — *House on Another's Land.*]—The plaintiff and his brother, being joint owners of land which their father had conveyed to them, subject to a mortgage to C., gave a mortgage to the father to secure the balance of purchase money, the father covenanting to pay C.'s mortgage. Under an agreement with his father and brother, the plaintiff, who was a carpenter, at his own expense built a dwelling-house for his own use on a quarter of an acre of the land, the agreement being that, if the brothers should not be able to pay for the land, the plaintiff should have the house as his own. The house was placed on blocks of wood, and was held by its own weight on them. The plaintiff, in his application for insurance on the house and contents, in answer to the question—"Title, held in fee, or how?" answered, "In fee:" and to the question—"Incumbered or not? If yea, to what amount—how much land does incumbrance cover, and for what purpose created?" he answered, "None." But he stated to the agent that there was on the land a mortgage, but nothing against the house, which he held in fee unincumbered. There was a condition in the policy that the incumbrance should be disclosed and that the failure to do so would avoid the policy:—Held, that the house was not insured as a chattel, but as realty; and that the failure to disclose the incumbrance was fatal. The directors passed a resolution to pay the loss, in ignorance of the fact that the incumbrance existed, and made an assessment to meet it, but on discovery rescinded this resolution:—Held, that the defendants had not by the resolution waived their right to set up the defence. *Phillips* v. *Grand River Farmers' Mutual Fire Ins. Co.*, 46 U. C. R. 334.

Mortgagee Insuring as Owner.]—The plaintiffs represented themselves as owners of an unincumbered estate in fee simple when they were only mortgagees in fee, and for a less sum than that insured for:—Held, that they could not recover on the policy. *Brown* v. *Gore District Mutual Ins. Co.*, 10 U. C. R. 353.

See Howes v. *Dominion Fire and Marine Ins. Co.*, 2 O. R. 89, 8 A. R. 644.

Omission of Annuity — *Materiality* — *Reasonableness.*]—The defendants, in the prescribed manner, indorsed upon the plaintiff's policy as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement respecting the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for $1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favour of his father. The omission was not explained, but it was not attributed to any fraudulent intent. The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition, or the above addition thereto. The jury found that the existence of the annuity was not material to be made known to the defendants:—Held, affirming 4 O. R. 506; (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the added condition. (2) That the added condition was not a just and reasonable one because it was not limited to such facts or matters as were material to be made known to the company. (3) That the divisional court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial. *Reddick* v. *Saugeen Mutual Fire Ins. Co.*, 15 A. R. 363.

Semble, the first statutory condition applies to matters of title or incumbrance, or relating to the "moral" as well as the "physical" risk where the policy is based upon an application in which the insured is interrogated as to such matters. Klein v. Union Fire Ins. Co., 3 O. R. 234, approved and distinguished. *Ib.*

Omission in Good Faith]—The plaintiff in his application for insurance with defendants, a mutual insurance company, answered "Yes" to the question, "Does the property to be insured belong exclusively to you?" and to the question, "If incumbered, state to what amount," he made no answer. The defendants' agent who took the application, said the plaintiff told him there was a mortgage for $100 on the building, which he was about to have discharged, and that he, the agent, therefore thought it unnecessary to insert it in the application, and gave no notice of it to the company. The plaintiff said the agent filled up the application, which he signed without reading, and that he told the agent of the mortgage, but did not say he was going to remove it:—Held, that there was no false statement as to title; and that there was no concealment as to the incumbrance, for the omission to mention it was sufficiently explained; and that the defendants, after the issue of the policy on the application, and after the fire, could not take advantage of the omission as avoiding the policy under 36 Vict. c. 43, s. 36 (O.). Quære, whether the "false statement" or "concealment" mentioned in that section must not be fraudulent in order to avoid the policy. *Sinclair* v. *Canadian Mutual Fire Insurance Co.*, 40 U. C. R. 206.

Omission of Incumbrance.]—It was a condition of the policy that persons sustaining loss should declare on oath whether any and what other insurance or incumbrance had been made on the insured property. The notice given said nothing about incumbrance, and a mortgage was proved, made by the plaintiff about a month before the policy:—Held, that though this mortgage was not within the condition, yet the plaintiff could not recover, for he had not complied with the condition, which required him to declare whether there was or

was not any incumbrance, and he had not declared that there was not. *Markle* v. *Niagara District Mutual Fire Insurance Co.*, 28 U. C. R. 525.

Partial Interest Outstanding.]—One of the questions contained in an application for insurance on a steam vessel was "State fully the applicant's interest in the property, whether owner, mortgagee, &c.," to which the answer was "Owner." It appeared that the assured, on the purchase of the vessel, arranged with the vendor that he should retain a sixteenth interest, in order that the assured might obtain the benefit of a contract made with the vendor by one P. not to put an opposition boat on the route, and sixty shares only were therefore transferred to the assured. It further appeared that the true state of the title was fully disclosed to the defendants' agent at the time of insurance and discussed between him and assured:—Held, that in the answer to the question there was involved no misrepresentation or non-communication of any material fact; that in the absence of fraud or bad faith, neither of which was imputed, it was true in letter and in spirit; and the plaintiff was therefore entitled to recover. *Lyon* v. *Stadacona Insurance Co.*, 44 U. C. R. 472.

See Kerr v. *Hastings Mutual Fire Ins. Co.*, 41 U. C. R. 217, under the next sub-head.

Partnership Property — *Title not in Question.*]—In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence in that a threshing machine insured as plaintiff's own property, was partnership property; and also to set up the fifteenth condition, in that there was fraud and false statement, for the like reason, in the proofs of loss:—Held, that the application must be refused, the first condition having no reference to title, and as to the fifteenth, the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property, was not material, no question as to title having been in the application for insurance asked. As the terms of the policy limited the right of the plaintiff to recover to the extent of his own interest only, the damage was reduced to the extent of that interest. The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn." The machine was in No. 2 barn, though the horse power was outside. The plaintiff applied to the company and an indorsement was made on the policy, stating that the machine should be covered "while in any one of the outbuildings insured." Barn No. 2 was insured, though not by the defendants' company:—Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it. An objection was also made that a reaper, destroyed by the fire, was not covered by the policy:—Held, on the evidence, that the objection was not tenable. *Stillman* v. *Agricultural Insurance Co.*, 16 O. R. 145.

Pleading.]—The declaration alleged that the plaintiff, at the time of the insurance and loss, was owner of the premises insured. Plea, that the premises were incumbered by a mortgage, and that the plaintiff did not truly state his title in his application. Replication, that the title was not incumbered by the mortgage:—Held, on demurrer, replication good; for the statement that plaintiff did not state his title truly was either useless, or the plea was in effect only an assertion that the plaintiff's title being incumbered by the mortgage, he did not state it truly; which was fully answered. *Williamson* v. *Niagara District Mutual Fire Insurance Co.*, 14 C. P. 15.

To an action on a mutual fire policy, defendants pleaded that the plaintiff in his application represented that he held the premises in fee simple, whereas "the plaintiff had not a title in fee simple, and the true title was not nor is expressed in said policy, or in the application," but not alleging that the plaintiff made any statement as to incumbrances or outstanding equities:—Held, that on this issue the plaintiff was entitled to recover, the deed to him being absolute though he was in fact only mortgagee. *White* v. *Agricultural Mutual Assurance Co.*, 22 C. P. 98.

One G. having effected an insurance on a house, conveyed the premises in fee to the plaintiff, who, on the same day, mortgaged them back to G. for a large portion of the purchase money. G. subsequently assigned the policy to the plaintiff, and obtained defendants' consent thereto, but without notifying them of the incumbrance. The premises having been destroyed by fire, and plaintiffs having sued defendants on the policy, they pleaded, setting up a condition requiring incumbrances affecting the property at the time of insurance to be mentioned in the application, and any subsequent incumbrance to be notified to the secretary in writing and his consent obtained thereto, otherwise the policy to be void; and averring that after the granting of the policy to G., and at the time of the transfer to plaintiff, the property was incumbered by plaintiff's mortgage to G., whereby the policy became void:—Held, that the plea sufficiently raised the defence as to the incumbrance, and that the defendants must succeed, though it might have been better to plead that the plaintiff fraudulently procured defendants' consent to the assignment to him, without communicating the existence of the mortgage. *Parker* v. *Agricultural Mutual Insurance Co.*, 28 C. P. 80.

Property Subject to Charge — *Materiality.*]—The plaintiff effected an insurance on buildings and the chattels therein, specific amounts being placed on each. By the application, in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unincumbered; and at the end thereof there was a provision that where property was heavily incumbered, or the value of buildings compared with the amount insured on ordinary contents was small, the manager, &c., was authorized to insert the two-thirds clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unincumbered. It was also so stated in the proofs of loss. By the first statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, &c. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to the charge to support the father and a brother and to other charges.

and on default the plaintiff was to stand seised to the use of the father of the land, which should immediately revest in him as before:—Held, that under the first statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide; and that the misrepresentation only applied to the buildings and not to the chattels. Held, also, that the fifteenth statutory condition which provides that "all fraud or false swearing in relation to any of the above particulars, shall vitiate the claim," did not apply to the statements as to title or incumbrances, for it referred to the particulars contained in the thirteenth statutory condition items (a) to (e), which had no relation whatever to such statements. The Judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed. *Goring* v. *London Mutual Fire Insurance Co.*, 10 O. R. 236.

See S. C., 11 O. R. 82.

Purchase Money Unpaid—*Unfair Defence.*]—To an action on a policy of insurance against fire, the sixth plea set up a condition of the policy that the statements contained in the application were to be taken and deemed to be warranted by the insured, and alleged that the plaintiff stated that he owned in fee simple in his own right the land on which the insured premises were, whereas he did not. It appeared that he had a deed in fee simple, but had not paid the price:—Held, that there was no untrue representation. *O'Neill* v. *Ottawa Agricultural Insurance Co.*, 30 C. P. 151.

The eighth plea set up a condition of the policy, that if the insured's interest in the property was other than the entire unconditional and sole ownership thereof for his own use and benefit, it must be so represented in the application, otherwise the policy would be void, and alleged that the insured had failed to declare therein that other persons were jointly interested in the property whereby the policy was void. By the application the insured agreed to be bound by the conditions of the policy issued in accordance therewith, but in the application he was not asked to state the above facts:—Held, that to permit this defence to be set up would be a fraud on the insured, and he was allowed to reply such fraud, unless the defendants consented to the plea being struck out from the record. *Ib.*

Recovery back of Loss Paid.] — The defendant insured his dwelling-house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire the defendant swore to the same facts in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid to him under false pretences, and for perjury; and defendant, to avoid the arrest and prosecution, gave the plaintiffs a note for the $700:—Held, that the plaintiffs could not recover on the note, for in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration appeared but that of avoiding the arrest and prosecution. Held, also, that for the same reason the plaintiffs could not recover on the common counts, as for money paid under a mistake or misrepresentation of facts; but a new trial was granted to enable plaintiffs to shew the facts more fully. *Canada Farmers Mutual Insurance Co.* v. *Watson*, 25 C. P. 1.

Second Application.] — Declaration against a mutual company. Pleas, 1, that before insurance the plaintiff had mortgaged the premises, which fact he wrongfully and fraudulently concealed; 2, that at the time of insurance the plaintiff's title was incumbered as in the first plea mentioned, and in his application he did not express the true title, nor the incumbrance, according to the conditions and the statute, but stated the premises were freehold property. Replication to first plea on equitable grounds, that G., an agent of the defendants, filled up the plaintiff's application without noticing the incumbrance, and the plaintiff, in ignorance of the conditions and of the statute, signed it: that before the fire, G. being still agent, informed plaintiff that he had omitted to state the incumbrance in the application, and that it would be necessary to assign the policy to the mortgagee, and to obtain defendants' assent thereto; that the policy before the fire was so assigned: that G. gave notice to defendants that the plaintiff had mortgaged the premises for about $800, and defendants assented to the assignment, and the mortgagee has ever since held it; and the action is brought as to the amount of such incumbrance for the mortgagee, and as to the residue for the plaintiff; and that subject to the incumbrance plaintiff was the owner. Replication to second plea, on equitable grounds, substantially the same. Rejoinder to first replication, that by one of the conditions in the application, G. was the plaintiff's agent for the purposes of the application: that until after the fire defendants had no notice that at the time of insuring there was any incumbrance: that the notice given by G. did not state that the mortgage had been made before effecting the insurance, nor the true amount of the mortgage, but a much smaller amount, and that the defendants assented to the assignment in ignorance of these facts:—Held, on demurrer, replications bad, and rejoinder good; for G. must be considered plaintiff's agent in the second application (to allow the assignment) as well as in the first; and this second application untruly implied, if it did not expressly state, that the mortgage was not made until after the insurance. *Johnstone* v. *Niagara District Mutual Insurance Co.*, 13 C. P. 331.

At the time of effecting an insurance on certain property, the insured erroneously stated in his application that there was only an incumbrance for $1,000, whereas there was a further incumbrance of $500, whereby the policy became liable to be forfeited. The $500 was subsequently paid off, and after this, and after the policy had expired, the plaintiff, who had become the owner of the property, applied for a new insurance, and on being interrogated by the agent as to the incumbrances, told him of the $1,000, being the only one. The plaintiff, at the agent's suggestion, instead of effecting a new insurance, took an assignment of the expired policy:—Held, that under these circumstances the defendants could not set up the misrepresenta-

tion in the original application as to incumbrances; but that it was sufficient that at the time of the plaintiff's insurance the application was literally true. *Chapman* v. *Gore District Mutual Insurance Co.*, 26 C. P. 89.

Second Policy.]—By the policy the assured covenanted that his application contained a just and true exposition of all the facts respecting the condition, &c., of the property insured, and that if any material fact should not have been fairly represented the policy should be void; and it was also provided that the insurance might be continued for any agreed length of time, the continuance to be considered as under the original representation, except where varied by a new representation in writing, &c. On the application the assured stated that there was no incumbrance on the property. Subsequently the premium was reduced, and a new policy issued on the same property for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an incumbrance on the property:—Held, that in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the original application; and, therefore, that the assured could not recover. *Martin* v. *Home Insurance Co.*, 20 C. P. 447.

Special Agreement — *Joint Interest—Statements in Application.*] — An agreement by which M. undertook to cut and store ice provided:—That said ice houses and all implements were to be the property of P., who after the completion of the contract was to convey same to M., and that M. was to deliver said ice to vessels to be sent by P., who was to be obliged to accept only good merchantable ice so delivered and stored. The ice was cut and stored, and M. effected insurance thereon and on the buildings and tools. In the application for insurance, in answer to the question "Does the property to be insured belong exclusively to the applicant, or is it held in trust, or on commission, or as mortgagee?" the written reply was "Yes, to applicant." At the end of the application was a declaration "that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value and risk of property to be insured so far as the same are known to the applicant, and are material to the risk." The property was destroyed by fire, and payment of the insurance was refused on the ground that the property belonged to P., and not to M. the insured. On the trial of an action on the policy the defendants also sought to prove that P. had effected insurance on the ice, and that under a condition of the policy the amount of M.'s damages, if he was entitled to recover, should be reduced by such insurance by P. This defence was not pleaded. The policies to P. were not produced at the trial, and parol evidence of the contents was received subject to objection. A verdict was given in favour of M. for the full amount of his policy:—Held, that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. under the agreement, and not the ice, which was at M.'s risk until shipped. Held, further, that the incurance to P. and the condition of the policy should have been pleaded, but if it had been, the evidence as to it was improperly received, and must be disregarded. Held, per Ritchie, C.J., that the application of M. for insurance not being made part of the policy by insertion or reference, the statements in it were not warranties, but mere collateral representations, which would not avoid the policy unless the facts misstated were material to the risk. If materiality was a question of law, the non-communication of the agreement with P. could not affect the risk: if a question of fact, it was passed upon by the jury. Per Strong, J.—The application being properly connected with it by parol testimony, formed part of the policy, and the statements in it were warranties, but as M. only pledged himself to the truth of his answers "so far as known to him and material to the risk," and as such knowledge and materiality were for the jury to pass upon, the result was the same whether they were warranties or collateral representations. *North British and Mercantile Ins. Co.* v. *McLellan*, 21 S. C. R. 288.

Statement in Application.]—The third condition was that, if the property were leasehold, or other interest not absolute, it should be represented to the company and expressed in the policy in writing. There was a mortgage which was mentioned in the application:—Held, sufficient, inasmuch as the application was by the terms of the policy a part of the latter. *Fourdrinier* v. *Hartford Fire Insurance Co.*, 15 C. P. 403.

Title to Goods.]—The policy was for $1,000 on the stock-in-trade, and $100 on shop fixtures, in a building described. One question in the application required the applicant to state the nature of her title, whether fee simple, leasehold, or by bond or agreement, and if others were interested to give names, interest, and value. To this she answered "Fee simple:"—Held, that the question did not relate to the title in the goods, and that there was no misrepresentation. The judgment in 26 Gr. 341 affirmed. *Butler* v. *Standard Fire Insurance Co.*, 4 A. R. 391.

Two Applications Read together.]—In an application dated 1st March, 1876, for insurance in a mutual company for $500 on a saw mill, in answer to the question, "Incumbrances. Is the property mortgaged? If so, state the amount. Is there any insurance by the mortgagee?" the applicant answered, "Yes, $500 mortgage. In case of loss, payable to McG. as interest may appear," without mentioning another mortgage for $1,000 on the property. This application was one of three applications made at the same time, and forming one transaction, and though each was on a different building all were on the same piece of land, four and three-quarter acres. In one of such other applications, in answer to the question, "What incumbrance, if any, is now on said property?" the answer was $1,500 mortgage on this and saw mill property, all insured in this company; 1st March application takes effect on saw mill."—Held, under these circumstances there was no misrepresentation as to incumbrances, and that the company had notice in writing of the truth with regard to them, by means of the two applications which referred to each other. *McGugan* v. *Manufacturers and Merchants Mutual Fire Insurance Co.*, 29 C. P. 494.

Unpaid Balance of Purchase Money.]—One of the conditions of a policy was that every incumbrance affecting the property at the time of assurance must be mentioned in the application otherwise the policy should be

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

Vendor's Lien—*Ownership of Building.*]—A vendor's lien for unpaid purchase money, according to the law of Quebec, of land situated in that Province, is an incumbrance within the meaning of the question in that behalf in the application. *Chatillon* v. *Canadian Mutual Fire Insurance Co.*, 27 C. P. 450.

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

See also sub-heads 3 (b.), 5, 7, 9 (c.).

(d) *As to Value.*

Effect of Findings.]—In an action for a policy of $1,800 upon goods which the insured, at the time of insuring, estimated at a cash value of $4,500, the jury was asked among other questions, "Did T. (the insured) reasonably and actually believe such stock-in-trade was then of the fair value of $4,500?" They answered, "We cannot believe that he could think such a thing;" but said, when they handed in their answers, that they wished the verdict to be entered for $1,200, which they found to be the loss sustained:—Held, that on this finding defendants were entitled to succeed; and a nonsuit was ordered. *Newton* v. *Gore District Mutual Fire Insurance Co.*, 33 U. C. R. 92.

Fraud —*Inspection of Property.*] — The plaintiff insured with defendants certain buildings for $1,100, stating their value to be $750. On an action on this policy, it appeared that, a few days before, he had insured the same houses, together with a driving shed worth $400, in another office for $800, and had then valued the whole at from $1,200 to $1,400. The evidence as to the actual value was contradictory, and the great difference in plaintiff's two valuations was not explained. The jury having found for the plaintiff:—Held, that the evidence supported a plea of fraudulent over-valuation, and a new trial was granted, with costs to abide the event. *Dickson* v. *Equitable Assurance Co.*, 18 U. C. R. 246.

Where the insurers have neglected to inspect the buildings for themselves, but have trusted to the statements of the owner, the court will not interfere unless the evidence is very strong to shew fraud. *Ib.*

Good Faith.]—Held, in an action on a policy of insurance, following Riach v. Niagara Mutual District Insurance Co., 21 C. P. 464, that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an over-valuation or not to the knowledge of the applicant, and if so, the policy is void. *Chaplin* v. *Provincial Insurance Co.*, 23 C. P. 278.

When a person on applying to insure buildings overstates their value, the policy will not thereby be avoided, where it appears that such over-valuation was not made with a fraudulent intent. *Laidlaw* v. *Liverpool and London Insurance Co.*, 13 Gr. 377.

——— *Agent's Knowledge.*]—Defendants pleaded that by the application, which formed part of the policy, it was declared that any misrepresentation would render the policy void; and that in the application the plaintiff falsely represented that the value of the dwelling-house insured was $2,000, whereas it was not of that value, but of a much smaller value. Another plea stated the false representation to be that $1,500 was not more than two-thirds of the value of the buildings, whereas it was far more. The plaintiff replied to each plea, on equitable grounds, that one H., being defendant's secretary and their duly authorized agent, and having full knowledge of the value of the buildings, prepared the application, and without any inquiry of the plaintiff, but acting on his own knowledge of the buildings and their value, acquired in the proper discharge of his duty as such secretary and agent of defendants, wrote therein the said values; and the plaintiff honestly believing the values to be correct, and without any concealment, falsehood, or fraud, at the request of said H., signed said application:—Held, on demurrer, a good replication, for the representation as to the value was not a warranty, but statement of matter of opinion, a mistake in which, in the absence of fraud, would not avoid the policy. Held, also, that if no fraud were necessary to support the plea, the replication would be a good answer, for the knowledge of the agent, acquired as alleged, would be the knowledge of defendants. *Redford* v. *Mutual Fire Insurance Co. of Clinton*, 38 U. C. R. 538.

See also *Rice* v. *Provincial Insurance Co.*, 7 C. P. 548; *Park* v. *Phœnix Insurance Co.*, 19 U. C. R. 110; *McCuaig* v. *Unity Fire Insurance Association*, 9 C. P. 85.

Knowledge of Insured.] — Excessive valuation of the property destroyed does not avoid a policy, unless shewn to have been excessive to the knowledge of the assured. *Parsons* v. *Citizens Insurance Co.*, 43 U. C. R. 261.

Over-valuation.]—In effecting insurance in all to the amount of $5,200, the plaintiff represented the property as being of the "cash value" of $5,339 on two occasions, and of $5,500 on a third occasion. In an action on the policies the jury found that the value was $4,000 when first insured, and $4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company; and that the company intended that the goods should be insured to their full value; and rendered a verdict in favour of the plaintiff for $3,100:—Held, that under the circumstances and in view of the nature of the goods insured, the

over-valuation was such as under the first statutory condition in the policy rendered the same void. *Moore* v. *Citizens' Fire Ins. Co.*, 14 A. R. 582.

Qualified Answer.]—The application for the policy described the stock-in-trade to be worth $5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only $3,500, and the stock only belonged to the two, the rest of the property belonging to them in separate portions, and part to the wife of one. The statements in the application were declared by the insured to be "a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liability of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon." It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative:—Held, that the whole declaration was qualified by the words "so far as the same are known to me and are material to the risk;" that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed. Held, also, that the words "in regard to the condition, situation, value, and risk of the property to be insured" did not apply to the goods being joint or several property, and that it was not material to the risk. *Kerr* v. *Hastings Mutual Fire Ins. Co.*, 41 U. C. R. 217.

Undervaluation — *Mistake.*] — By the rules of an insurance company no insurance on houses would be effected for more than two-thirds the value of the premises exclusive of the value of the land. The owner of houses applied for insurance to the extent of $5,850, having previously effected an insurance in another company to the extent of $5,000, and the copy of his application produced at the hearing shewed the value to be $8,500. This the plaintiff swore, if a true copy, was an incorrect statement of the value, as the actual cost of the buildings insured was upwards of $15,000):—Held, that as this was not an over-valuation to the prejudice of the company, the plaintiff should be allowed, in a suit to enforce payment of the insurance money, to shew the true value. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

Warranty.]—No. 1 of the statutory conditions indorsed on a policy of insurance provided that, "if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of property in regard to which the misrepresentation or omission is made." In an application for insurance on a building the plaintiff stated its estimated cash value to be $900, and obtained an insurance for $600. The jury found that the actual cash value was $450, but that his estimate was made in good faith, and that he had not been guilty of any fraud or misrepresentation:—Held, that under the above condition it was immaterial whether a representation of any fact material to be made known to the defendants to enable them to judge of the risk, was falsely (i. e., untruly to the knowledge of the person making it) or fraudulently made, so long as it was in fact untrue: and that the question of value being such a material fact, and the representation relating thereto being untrue, the policy was avoided. *Sly* v. *Ottawa Agricultural Ins. Co.*, 29 C. P. 557.

See S. C., 29 C. P. 28.

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5. *Insurable Interest.*

Advances for Construction of Ship.]—C. made advances to B. upon a vessel, then in course of construction, upon the faith of an oral agreement with B., that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When the vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the respondent company, and the company issued a policy of insurance against loss by fire to C. in the sum of $3,000. The vessel was still unfinished and in B.'s possession when she was burned:—Held, that C.'s interest, relating as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover. *Clark* v. *Scottish Imperial Ins. Co.*, 4 S. C. R. 192.

Agreement to Purchase.]—Where the plaintiff had contracted to purchase the property insured, and had failed in paying punctually, but was proceeding in equity to compel performance by the vendor:—Held, that he had an insurable interest. *Milligan* v. *Equitable Insurance Co.*, 16 U. C. R. 314.

Chattel Mortgage — *Subsequent Advances.*]—A mortgagee of goods has an insurable interest, though the mortgagor continues in actual possession of them. *Ogden* v. *Montreal Ins. Co.*, 3 C. P. 497.

The omission of a mortgagor, in effecting an insurance in the name of the mortgagee, to mention the amount of the mortgage, does not avoid the policy. *Ib.*

Where the mortgage was under seal, and the mortgagee insured before default:—Held, that he was not entitled to recover on his policy more than the amount appearing on the face of his mortgage at the time of insurance, not being allowed to tack subsequent advances by parol. *Ib.*

Collateral Security.]—Declaration on a policy on plaintiff's interest in a mill. Plea, that before the loss the plaintiff had sold and conveyed his interest to one B., without notice to defendants or their assent. Replication, on equitable grounds, that the conveyance to B. was only to secure him against loss as security for the plaintiff, who always continued in possession, and no loss had accrued to B.: and that one F. was entitled to the benefit of the plaintiff's covenant to insure, contained in a mortgage of the property made to him by the plaintiff before the conveyance to B., and this action is brought on F.'s behalf as well as the

plaintiff's:—Held, a good replication, for it shewed an insurable interest in the plaintiff cognizable in a court of law; and the unnecessary statement of F.'s interest could not affect it. *Smith* v. *Royal Ins. Co.*, 27 U. C. R. 54.

See, also, *Smith* v. *Provincial Ins. Co.*, 18 C. P. 225.

Legal Title in Insured's Nominee.]—The plaintiff owned certain land, on which there were buildings erected, under a deed from his father, having paid $500 for it, which he had raised by a mortgage on the land to one A. Afterwards, in consequence of being sued, as he said, about a girl, he reconveyed the land to his father, the consideration being $50, but subject to the mortgage. The plaintiff notwithstanding continued to reside on and work the land, taking the rents and profits as before, and paying off the mortgage, which he had reduced to $200. It was understood between them that the father was merely to hold the land for the plaintiff, and was to reconvey whenever the plaintiff wished, which the father stated he was always ready to do. While the father so held the land the plaintiff effected an insurance on the buildings:—Held, that he had an insurable interest therein. *Pettigrew* v. *Grand River Farmers' Mutual Ins. Co.*, 28 C. P. 70.

Mistake of Title.] — Plaintiff insured with defendants a house in his possession, which he had purchased, with the land on which it stood, as part of lot A., but which was afterwards found to be upon the adjoining lot, B., having been built there in consequence of an unskilful survey. The house having been burned, it was objected that, having no title to the land, he had no insurable interest; but:—Held, otherwise, for under C. S. U. C. c. 93, s. 53, he had a right either to the value of his improvements or to purchase at the value of the land. *Stevenson* v. *London and Lancashire Fire Ass. Co.*, 26 U. C. R. 148.

Quære, whether a company with whom the actual owner of a house, without fraud or wilful misrepresentation, insures it, can set up the legal title of a stranger to the land on which it stands, as a defence against the claim of the assured. *Ib.*

Mortgagee of Land—*Loss of Chattels—Assent to Assignment.*]—The plaintiff, on the 10th September, 1874, insured with defendants a barn and stable for $100, the produce, farming implements, &c., from time to time stored therein $400, and horses and live stock $400. The policy was assigned by the plaintiff absolutely on the 27th January, 1875, with defendants' consent, to the Loan and Agency Company, who had a mortgage on the land on which the barn and stable stood, for $400, but no claim to the chattels, and the actual nature of their interest in the policy was not mentioned in the assignment nor notified to defendants until after the fire, which took place on the 12th July, 1875. A correspondence, set out in the case, took place between defendants and the company, as a result of which defendants paid to the company the $100 insured on the buildings. The declaration alleged that the plaintiff was interested in the properties to the amount insured at the time of making the policy, and until and at the time of the loss; that having mortgaged the land on which said properties were situate, to the Loan and Agency Company, to secure certain money advanced, he with defendants' consent assigned to said company all his interest in the policy; that the property insured was burned, whereby said company became entitled to recover the amount of said loss; that all things happened to entitle them to sue therefor; that defendants paid to them the $100 insured on the buildings, but no more; and that afterwards the company assigned to the plaintiff the policy and all causes of action thereon. Defendants pleaded, that the said Loan and Agency Company were not at the time of the loss interested in the chattel property as owners or otherwise:—Held, that the plaintiff could not recover, for the Loan and Agency Company had not at the time of the loss any interest in the goods; and that there was nothing in the correspondence above mentioned, or in the dealings between the different parties, stated in the case, which made it inequitable in defendants to set up this defence, so as to entitle the plaintiff to relief under 38 Vict. c. 65, s. 1 (O.). *Hazzard* v. *Canada Agricultural Ins. Co.*, 39 U. C. R. 419.

Defendants also pleaded that the incumbrance to the Loan and Agency Company was created by the plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent who took the plaintiff's application for insurance, also obtained the loan for him; that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing; and that after the fire defendants were told by the company that they had a claim only to the $100 insured on the buildings, which they sent to them by letter:—Held, that defendants sending the money by letter was a written consent to the incumbrance; and that their assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment. *Ib.*

Mortgagee of Ship.]—Held, that a mortgagee of a vessel, who was alone named in the policy as the assured, without any general words, or other indication of interest in any other, but who had, in fact, insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured on parol evidence of that fact. *Richardson* v. *Home Ins. Co.*, 21 C. P. 291.

Partnership Interest.]—See *Stillman* v. *Agricultural Insurance Co.*, 16 O. R. 145; *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234.

Sale Subject to Redemption.] — The appellants granted a fire policy to one T. on divers buildings and their contents for $3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of $1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for — (the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for $3,280, the amount of insurance on

the buildings and effects:—Held, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for $1,510, the amount then due by T. to S., the latter was entitled to recover the said sum of $1,510. 2nd. That S. having no insurable interest in the movables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said movables. Art. 2482 C. C. L. C. *Ottawa Agricultural Ins. Co.* v. *Sheridan*, 5 S. C. R. 157.

Special Agreement—*Joint Interest.*]—See *North British and Mercantile Ins. Co.* v. *McLellan*, 21 S. C. R. 288, under sub-head 4 (c).

Subsequent Acquisition of Interest—*Renewal of Policy.*]—J., the manager of appellant's business, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent and J. was appointed creditors' assignee, and the property of the insolvent was conveyed to him by the official assignee. On 8th March, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having had this confirmed by the court. The insurance policy was renewed on 5th August, 1876, one year after its issue. On 12th January, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on 8th March, 1877. One of the conditions of the policy was, "that all insurances, whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has beeen changed, either within itself or by the surrounding or adjacent buildings:"—Held, that the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract. *Howard* v. *Lancashire Ins. Co.*, 11 S. C. R. 92.

Tenant by the Curtesy.]—Held, that C. had an insurable interest in the property in question in this case at the time of the loss as husband of the owner in fee and tenant by the curtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by a deed given by C. to B., who had reconveyed to C.'s wife. *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

Tenant of Glebe Lands.]—A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Insurance Co.*, 20 C. P. 170.

Transfer of Interest.]—In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an indorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an indorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885 when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T. to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886. The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. indorsed thereon and containing a condition not in the old policy, namely, that all indorsements or transfers were to be authorized by the office at St. John, N. B., and signed by the general agent there:—Held, reversing 20 N. S. Rep. 487, that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, must be taken to have intended to deal with W. as owner of the property, and the contract of insurance was complete. *Wyman* v. *Imperial Insurance Co.*, 16 S. C. R. 715.

Trust.]—The owner of a stock of goods effected an insurance thereon, and while the policy was in force assigned the property insured, and with the assent of the company transferred the policy of insurance, to C. C. subsequently sold the property to M., who in payment delivered his promissory notes indorsed by L., an accommodation indorser, only upon the express agreement that the goods should be sold by M., and the proceeds as received paid over to L. to retire the notes, and that the policy should be assigned to L. in trust to secure himself against the notes and pay any surplus to M., and the policy was so assigned with the assent of the company, who had full knowledge of all the facts. The interest of M. in the goods and the liability of L. on the notes continued until the goods were destroyed by fire. In an action brought in the name of the assured, the declaration alleged the above facts, and that the plaintiff had continued to be and still was interested as trustee for M. and L.:—Held, reversing 24 U. C. R. 364, that the declaration shewed a good cause of action, and that L. had an insurable interest in the goods. *Davies* v. *Home Ins. Co.*, 3 E. & A. 269.

Defendants insured the plaintiff, a married woman, for $1,000, on a general stock-in-trade of groceries, which had been bequeathed to her for her sole and separate use. After the testator's death, her husband, who was the sole executor of the will, carried on the business in his own name with her acquiescence:—Held, affirming 26 Gr. 341, that she had an insurable interest in the goods, which the husband clearly held as trustee for her. *Butler* v. *Standard Fire Ins. Co.*, 4 A. R. 391.

Unpaid Vendor — *Representative Capacity.*]—A vendor, who has agreed to sell for full value, has nevertheless, pending the con-

tract of sale, a perfect right to insure the premises sold. If such a vendor insures the premises, describing them as "his," this is no misrepresentation, for pending the contract he remains the legal owner. The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor. *Gill* v. *Canada Fire and Marine Ins. Co.*, 1 O. R. 341.

Vendor and Purchaser—*Fire after Contract of Sale—Parol Contract—Admissibility of Evidence.*]—House property was sold by written contract for $2,000, the parties to the contract at the same time orally agreeing that until payment of the purchase money the vendor would insure the property for that sum, which he did with the defendants by policy insuring himself, his heirs and assigns, against damage by fire not exceeding the above amount nor his interests in the property, without saying anything about the sale. A fire occurred with a total loss of $1,740, before which, however, the purchaser had paid $1,300 of the purchase money:—Held, that evidence of the parol contract was admissible. Parcell v. Grosser, 1 Atl. R. 909, followed. Held, also, that "heirs and assigns" in the policy meant heirs and assigns of the property, and the purchaser was an assign; and the vendor could recover the amount of his own loss, $700, and also the residue of the loss as trustee for the purchaser. *Keefer* v. *Phœnix Ins. Co. of Hartford*, 29 O. R. 394.

See the next case.

——— *Partial Interest.*]—A person who has only a partial interest in the subject matter may insure to the full insurable value of that subject matter, but in that event the policy must define in express terms the nature of the interest insured, and if there is any ambiguity the insured will be entitled to recover only the value of his own interest. Castellain v. Preston, 11 Q. B. D. 380; 31 W. R. 558, specially referred to. A policy issued to a vendor, who had received part of his purchase money, insuring the buildings on the land in question in a specified sum, with a proviso that the insurers are "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage not exceeding in amount the sum or sums insured as above specified nor the interests of the assured in the property herein described," does not cover more than the vendor's interest or enable him to recover for the benefit of himself and the purchaser the full value of the subject matter. Judgment below, 29 O. R. 394, reversed. *Keefer* v. *Phœnix Ins. Co. of Hartford*, 26 A. R. 277.

See Ardill v. *Citizens' Ins. Co.*, *Ardill* v. *Ætna Ins. Co.*, 22 O. R. 529, 20 A. R. 605.

Warehouse Receipt.]—A warehouseman sold 3,500 bushels of wheat, part of a larger quantity he had in store, and gave the purchaser a warehouseman's receipt, under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order, to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller:—Held, reversing 15 Gr. 337, 552, that the purchaser had an insurable interest. *Box* v. *Provincial Ins. Co.*, 18 Gr. 280.

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

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

——— *Warehouseman's Fraud — Onus of Proof.*]—Plaintiff sued upon a policy on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendants pleaded that he was not, at the time of the loss, interested as alleged:—Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest, he would be entitled only to nominal damages. *Clark* v. *Western Ass. Co.*, 25 U. C. R. 209.

Plaintiff obtained a warehouse receipt from one F. for 2,000 bushels of wheat as in store for him, subject to his order, and effected an insurance on it with defendants, as upon so much wheat in F.'s warehouse:—Held, that in order to recover upon the policy, it was not necessary to prove that the identical wheat insured was destroyed; but that the quantity claimed for must have been in the warehouse under F.'s control during the whole period between the insurance and the fire. The warehouseman gave three receipts: 1. on the 24th January, as from himself as owner, (as permitted by 24 Vict. c. 23) for 1,700 bushels; 2. on the 26th, to the plaintiff for 2,000 bushels; and, 3. on the 15th February, to one P. for 3,000 bushels. The first receipt was transferred by F. to a bank as security for $1,000. When P. bought from F. the last mentioned quantity, the $1,000 was paid out of the purchase money, and thus the 1,700 bushels were released. F. had given these receipts fraudulently for more wheat than he really had; but the jury found that there were 2,000 bushels in the warehouse at the time of the fire:—Held, that the receipt for 1,700 bushels could not stand in the plaintiff's way, the claim on it having been extinguished; and that F.'s fraud on other parties could not be set up by defendants in answer to plaintiff's claim on the policy. *Ib.*

When warehouse receipts given on goods are transferred to a bank as collateral security for discounts:—Held, that the owner has still an insurable interest in the goods. *Parsons* v. *Queen Ins. Co.*, 29 C. P. 188.

See also sub-heads 3 (b.), 4 (c.), 7, 9 (c.).

6. *Interim Receipt.*

Approval of Company — *Form of Action.*]—A declaration on an interim receipt for a policy of insurance set out the receipt, signed merely by the agent of the company, acknowledging the payment of $6.50 as the premium on an insurance of $600 on certain property for thirty-six months, subject to the approval of the head office, and unless previously cancelled to bind the company for thirty days, after which it was to be cancelled and of no effect, and on such termination the insured was on demand to recover back the premium paid, less the proportion for the time insured; the insurance also to be subject to all the terms and conditions of the company's policy. It was then averred that the receipt operated in law and in equity as a valid insurance to the extent of $600, and, unless in the meantime cancelled, for the space of thirty days, and that while the insurance was in full force the said property was destroyed by fire; that the defendants did not at any time, before the fire or since, deliver to the plaintiff a policy, or refund to him the premium or any part thereof, or notify him of the determination of the board, or pay him the insurance money:—Held, that although under s. 2 of the Administration of Justice Act, 1873, an action at law is maintainable on an interim receipt, being purely a money demand within the meaning of that section, the declaration was bad, as shewing no contract, or facts from which a contract might be inferred, binding upon this particular corporation, for under their Act of incorporation they can only contract under seal. Held, also, that the declaration contained a sufficient averment of performance of conditions precedent, for the stipulation as to the approval of the head office did not constitute a condition precedent to the insurance taking effect, but merely enabled the company to cancel the insurance so effected, and there was a sufficient averment that the plaintiff had no notice of any such cancellation; and the conditions of the policy referred to could not be assumed to be conditions precedent. *Kelly* v. *Isolated Risk and Farmers' Fire Ins. Co.*, 26 C. P. 299.

Incorporation of Conditions.] — The plaintiff was insured by the defendants under an interim receipt, which stated that it was "subject to approval at the head office, and to the conditions of the policy. Unless previously cancelled this receipt binds the company for thirty days from the date hereof, and no longer:"—Held, that the conditions of the policy applied to the insurance during the thirty days, and included any variations of the statutory conditions adopted by the defendants. *Compton* v. *Mercantile Ins. Co.*, 27 Gr. 354.

An interim note being merely an agreement for interim insurance preliminary to the grant of a policy is not a policy within the meaning of that term in the Ontario Act. "Subject to all the usual terms and conditions of this company" in such note means that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy when issued by following the directions of the statute, subject always to the statutable condition that they should be held to be just and reasonable by the court or Judge. *Citizens' Ins. Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons*, 7 App. Cas. 96.

Loss before Issue of Policy—*Form of Action.*]—The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1,500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to £1,500 until notified to the contrary, subject to the conditions of the policy—that is, the policy usually issued by defendants in like cases; that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured:—Held, bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal. *Jones* v. *Provincial Ins. Co.*, 16 U. C. R. 477.

A person obtained from the agent of an insurance company the usual interim receipt. After the expiration of the time specified in it, but before any policy was completed, the property was destroyed by fire, after which the company refused to pay or to issue any policy; asserting that they had not approved of or accepted the risk. The evidence of the agent shewed that the risk had been accepted, and that he had so stated to the insured. The court, under the circumstances, directed an inquiry as to the amount of loss sustained by him, and that the company should pay it. *Penley* v. *Beacon Assurance Co.*, 7 Gr. 130.

Quære, whether the court could, under such circumstances, compel the company to issue a policy. *Ib.*

Notice of Rejection.]—A receipt in the following form:—"The Times and Beacon Assurance Company' Agents' Office, Brantford, 3rd February, 1858. Received from, &c., the sum of $14, being the premium for an insurance to the amount of $2,000 on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured:—Held, not an absolute insurance for twenty-one days certain, but that the company might within that period reject the risk, and give notice, after which their liability would cease. *Goodfellow* v. *Times and Beacon Ass. Co.*, 17 U. C. R. 411.

By the terms of the interim receipt, it was provided that the directors should have power to cancel the contract at any time within thirty days, "by causing a notice to that effect to be mailed to the applicant," at a specified address. The general manager of the company proved that he directed a letter, declining, to be sent to the plaintiff; that he saw it written and placed with other letters to be sent; and that one H., a clerk in the office, had charge of them, and his duty was to address them to the parties and enter them in the mailing book. The mailing book was produced with an entry in it of this letter; and H. swore that this entry was in his writing, and that he had no reason to doubt that the letter had been mailed. The plaintiff (the insured), however, swore that he had never received it. Per Hagarty, C.J., on this evidence the question of mailing must have been submitted to the jury, who should have found that it had been mailed. Per Gwynne, J., a verdict finding

otherwise could not have been sustained. *Johnson* v. *Provincial Ins. Co.*, 27 C. P. 464.

——— *Agent's Neglect—Alienation.*]—The plaintiff applied to the agent of defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff "the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me, to the insurer's address, within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered. N.B.—Should applicant not receive a policy in conformity with this application within twenty days from the date hereof, he must communicate with the secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company, and the plaintiff not having been notified, applied personally to the agent, who stated such an occurrence was not unfrequent, and by way of satisfying the plaintiff granted a fresh interim receipt, repeating this on four several occasions:—Held, (1) that such renewed interim receipts were valueless, there being, in fact, no new insurance effected; (2) that the neglect of the agent to do his duty by forwarding the application to the company, could not operate to the prejudice of the plaintiff; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void; but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period: but in such a case, if the company does not intimate an intention of terminating the risk, then there is a contract for insurance for the year binding on the company on the same terms and conditions as the ordinary policies of the company. Patterson v. Royal Insurance Co., 14 Gr. 169, followed. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Gr. 139.

By a by-law of the company, it was declared that alienation by mortgage or otherwise, or any change in title or ownership of property insured, would vitiate the policy unless notice was given, and the consent of the board obtained and indorsed on the policy, and signed by the president and secretary:—Held, that the word policy here meant insurance or some equivalent, and that the plaintiff, holding such interim receipt, was not exonerated from giving the notice required, as the consent might be indorsed on the receipt. *Ib.*

An interim fire insurance receipt stated that the plaintiff had paid a certain sum for a three months' insurance, subject to the approval of the directors, and declared that the property should be held insured for thirty days from date unless "notified to the contrary," but that the insurance thereby made was subject to all the conditions, &c., contained in and indorsed on the printed forms of policy then in use by the company. Among these was the 18th statutory condition, providing that the insurance might be terminated by the company by giving ten days' notice to that effect, and by repaying a ratable portion of the premium for the unexpired term, and that the policy should cease after the expiration of ten days from the receipt of such notice and repayment:—Held, that defendants were bound to give the ten days' notice and return a ratable portion of the unearned premium before they could terminate the insurance under the receipt within the thirty days. *Grant* v. *Reliance Mutual Ins. Co.*, 44 U. C. R. 229.

The plaintiff's testator applied to the defendants in writing for an insurance against loss by fire, and undertook in writing to hold himself liable to pay to the defendants such amounts as might be required, not to exceed $46.50, and signed a promissory note, in favour of the defendants, for $15.25. The defendants' agent gave him a written provisional receipt for his undertaking for $46.50, "being the premium for an insurance," &c. The receipt contained a condition to the effect that unless the insured received a policy within fifty days, with or without a written notice of cancellation, the insurance and all liability of the defendants should absolutely be determined. No policy was sent within the time limited, nor was any notice of cancellation given within that time, nor until, by letter, two days before a fire occurred on the insured premises:—Held, that the application, undertaking, note, and receipt constituted a contract of fire insurance within the provisions of R. S. O. 1887 c. 167, which could be terminated only in the manner prescribed by the nineteenth of the conditions set forth in s. 114, that is, when by post, by giving seven days' notice, and thus the contract was still subsisting at the time of the fire. *Barnes* v. *Dominion Grange Mutual Fire Insurance Association*, 25 O. R. 100.

Held, on appeal to the court of appeal, per Hagarty, C.J.O., that this was a contract of insurance that could be terminated only in accordance with the nineteenth statutory condition, and that at any rate there had been a waiver of the provision as to cessation of the risk. Per Burton, and Osler, JJ.A.—That this was a mere incomplete or provisional contract of insurance for four years, and also an actual contract for fifty days, which came to an end by effluxion of time, and that the nineteenth statutory condition did not apply to the provisional contract. Per Maclennan, J. A.—That there was a contract of insurance, and that the provision for determination by effluxion of time was a variation from the statutory conditions, which was not binding, not being printed in the required mode. In the result, the judgment below, 25 O. R. 100, in favour of the insured, was affirmed. *Barnes* v. *Dominion Grange Mutual Fire Insurance Association*, 22 A. R. 68.

Held, on appeal to the supreme court, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R. S. O. 1887 c. 167) governed such contract though not in the form of a policy; that if the provision as to the non-receipt of a policy within fifty days was a variation of the statutory conditions it was ineffectual for non-compliance with condition 115 requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable: and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition nineteen, which provides that notice shall not operate until seven days after its receipt. Held also, that there was some evidence for the jury that the company, by demanding and

receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured. *Dominion Grange Mutual Fire Assurance Association v. Bradt*, 25 S. C. R. 154.

Receipt Wider than Policy.]—Where it appeared that the interim receipt was intended to cover and did cover goods not included in the policy subsequently issued:—Held, that the right of action on the receipt remained, and that the insured was entitled to recover for all his goods. *Wyld* v. *Liverpool, &c., Insurance Co.*, 23 Gr. 442.

Subsequent Insurance by Interim Receipt—*Effect on Prior Insurance.*]—See *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

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7. *Mortgagor and Mortgagee.*

Application of Money.]—Held, that in the absence of an agreement between the parties, the receipt of insurance moneys by the mortgagee during the currency of six months allowed for redemption, does not necessitate the taking of a subsequent account; that the mortgagee is not in all cases bound to apply such moneys in reduction of the mortgage debt; and, conversely, that the mortgagee is not entitled in all cases to charge the mortgagor with the amounts of the premiums. *Russell* v. *Robertson*, 6 L. J. 143.

The owner of land mortgaged the same, and, in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mortgagees. The buildings were shortly afterwards destroyed by fire, and the insurance moneys paid to the mortgagees, who assigned the mortgage to trustees of the insurance company, and they thereupon proceeded to foreclose:—Held, that the plaintiffs were not bound to give credit for the amount paid to the mortgagees. *Westmacott* v. *Hanley*, 22 Gr. 382.

Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure, contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to appy the balance in discharge of overdue interest. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Assignment.]—Declaration upon a policy for $1,000, upon a brick house. Second plea, on equitable grounds; that by the policy whenever the defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants, if requested; that the plaintiff was the mortgagee of the said premises insured, and that although the defendants have always been ready, and have offered to pay the plaintiff the insurance and premium, upon the plaintiff assigning the said mortgage, and although the defendants have tendered an assignment, the plaintiff refused to assign. Equitable replication: that the mortgage contained a provision requiring the mortgagor to insure the premises, and that the plaintiff, under the instructions of the mortgagor, and at his costs and charges, and as his agent, insured the said buildings. Rejoinder, on equitable grounds: that by one of the conditions of the policy, if any person insuring made any misrepresentation or concealment, such insurance should be void, and that at the time of insurance the plaintiff concealed from defendants that he insured under the instructions and for the benefit of the mortgagor, whereby, &c.:—Held on demurrer, plea bad; for if it was intended to rely upon the condition, the mortgage security would give the plaintiff no right to recover from the mortgagor for the loss insured against, but only to recover his debt; and if it was intended to set up, apart from the condition, that because the plaintiff was mortgagee the defendants, on paying his mortgage debt, were entitled to the assignment, then enough was not shewn to entitle defendants in equity to a perpetual and unconditional injunction. Held, also, that the replication shewed a good answer to the plea. Held, also, rejoinder bad, for departure, and because the plaintiff having stated that he was mortgagee, was not bound, unasked, to disclose that he was insuring for the mortgagor, and the concealment was of an immaterial matter. *Reesor* v. *Provincial Insurance Co.*, 33 U. C. R. 357.

Quære, whether when a mortgagee insures property mortgaged to him, the insurance company can, in case of loss, compel him to assign to them the mortgage. *Ib.*

On a sale of real estate, the vendor took back a mortgage for part of the purchase money, which was made according to the short form under the statute, and contained the usual covenant on the part of the mortgagor to insure, but this, in the hurry of preparing the deeds, the mortgagor, who was a solicitor, omitted to fill up. It was proved, however, by both parties to the transaction that the mortgagor was to insure and was also to give a covenant for so doing. The vendor afterwards, during the absence of the mortgagor, insured the houses on the property in his own name, for the sum agreed upon, and charged the premium to the mortgagor, and the buildings being afterwards burnt down, obtained, by process of law, payment from the insurance company of the amount of the policy:—Held, that the company had not, under the circumstances, any right to call upon the mortgagee to assign his mortgage to them; and quære, whether, in any case and under any circumstances, in the absence of fraud, he would be bound to do so. *Provincial Insurance Co.* v. *Reesor*, 21 Gr. 296.

Breach by Mortgagor.]—A fire policy, in favour of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount the assured might be entitled to receive should be paid to A. L., mortgagee:—Held, reversing 14 Gr. 461, that this clause did not make A. L. the assured; and that a subsequent breach by the mortgagor of the conditions of the policy made it void as respected A. L., as well as himself. *Livingstone* v. *Western Insurance Co.*, 16 Gr. 9.

Cancellation of Mortgagor's Insurance—*Double Insurance.*]—The plaintiff insured his barn in the defendant company for $2,000, and afterwards mortgaged his farm, including the barn, to a loan company for $1,500, assigning the policy to the company as collateral security. The mortgage purporting to be under the Short Forms Act contained a covenant that the mortgagor would insure the buildings, unless already insured, for not less than $1,000, provided that the mortgagees might themselves effect such insurance without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of $600. The property having been destroyed by fire the plaintiff notified the company, when they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, saying nothing as to furnishing proofs of loss:—Held, that the plaintiff did not cease to be the person assured within the meaning of the Insurance Act, R. S. O. 1897 c. 203, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act in that behalf. Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of s.-s. 8, s. 168, of R. S. O. 1897 c. 203; nor could it be deemed a "double insurance." *Morrow* v. *Lancashire Insurance Co.*, 29 O. R. 377. See the next case.

A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to mortgagees as collateral security, cannot be cancelled by the insurance company at the request of the mortgagees, without notice to the mortgagor. Insurance effected by mortgagees, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him. *Morrow* v. *Lancashire Insurance Co.*, 26 A. R. 173.

Condition as to Subsequent Insurance—*Effect of Insurance by Mortgagee.*]—See *Sauvey* v. *Isolated Risk and Farmers' Ins. Co.*, 44 U. C. R. 523.

Consolidation.]—The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage containing other lands on which were buildings, and also a covenant to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name, "loss, if any, payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings in the second mortgage were destroyed, the insurance moneys payable being more than sufficient to pay the balance due on the second mortgage, which was in default, and the mortgagees claimed the right to apply the surplus in payment of the first mortgage which was also in default:—Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage. *Re Union Assurance Co.*, 23 O. R. 627.

Covenant to Insure.]—Held, that the usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages operates as an equitable assignment of the insurance when effected. *Greet* v. *Citizens' Insurance Co.*, *Greet* v. *Royal Insurance Co.*, 5 A. R. 596.

Defences Arising Prior to Mortgage.]—M., who had mortgaged his property to the plaintiffs, subsequently on the 2nd April, 1881, insured with defendants, loss, if any, payable to plaintiffs. Attached to the policy on a printed slip, dated 29th May, 1881, was the following clause: "It is hereby agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of the policy;" a loss having occurred, the defendants disputed their liability, and the matter was referred to an arbitrator, who awarded in favour of the plaintiffs, after refusing to admit evidence for the defendants, that the policy had been obtained by fraud:—Held, that the above clause provided only against future acts, that the defendants did not thereby guarantee the policy to the plaintiffs as indisputable, and therefore that they were not debarred from setting up that the insurance had been effected by fraud, and the case was remitted to the arbitrator for the admission of such evidence. Held, also, that the clause did not amount to a new insurance in favour of the mortgagee. *Omnium Securities Co.* v. *Canada Fire Mutual Insurance Co.*, 1 O. R. 494.

Effect of Mortgagor's Acts—*Insurance by Mortgagee.*]—Held, reversing 40 U. C. R. 220, that where a mortgagee takes a transfer of a policy under the latter part of s. 39 of 36 Vict. c. 44 (O.), by way of additional security, the policy continues to be voidable by the acts of the mortgagor. *Mechanics Building and Savings Society* v. *Gore District Mutual Fire Ins. Co.*, 3 A. R. 151.

Held, also, that making a mortgage is an alienation within the meaning of that section, and a mortgagee may therefore avail himself of the power of novation accorded to alienees in general, by taking the steps pointed out in the second paragraph of the above section, in which case he acquires a separate independent interest under the contract, and the policy will not be avoided by the acts of the mortgagor. *Ib.*

Insurable Interest of Mortgagor and Mortgagee.]—See sub-title III. 5, *ante.*

Insurance by Mortgagees.]—Under a covenant in a mortgage the mortgagor effected an insurance in the Queen Insurance Company for $6,000, and transferred the policy to the mortgagees. The mortgagees, not having received the renewal receipt within three days before the expiration of the policy as required by the mortgage, effected an insurance of $5,000 with the Imperial Insurance Company, and by a subsequent arrangement the Queen policy was allowed to lapse. In 1880 a fire occurred and an amount was paid by the insurance company which was applied

on the mortgage, reducing it to $1,750, and the policy was reduced to that amount. The policy was then cancelled, and an application made by the mortgagees for a policy for said sum. The policy was to be, and was, issued in the name of the owner, stated in the application to be the plaintiff. The premiums were paid by the plaintiff. Attached to the policy was a mortgage clause whereby the insurance, as to the mortgagees' interest only, should not be invalidated by any act of the mortgagor; and if payment was made to the mortgagees and as to the mortgagor no liability therefor existed, the company as to such payment should be subrogated to the mortgagees' rights under all securities held collateral to the mortgage debt. In 1882 a fire occurred and the insurance company paid the mortgagees the $1,750. The plaintiff claimed to have his mortgage discharged; but the insurance company disputed this, setting up that plaintiff had no claim under the policy; and that having paid the mortgagees they were subrogated to their rights:—Held, that the plaintiff was entitled to the benefit of the money paid and to have his mortgage discharged, unless he had done something to forfeit his rights; but that there was no forfeiture, certain grounds of avoidance set up by the defendants not being tenable. Klein v. Union Fire Insurance Co., 3 O. R. 234, followed, and Omnium Securities Co. v. Canada Fire Mutual Insurance Co., 1 O. R. 494, observed upon. *Bull* v. *North British Canadian Investment Co.*, 14 O. R. 322; 15 A. R. 421. See the next case.

Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor, who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred, the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this, and insisted that they were subrogated to the rights of the mortgagees under the said condition:—Held, that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause, which was inserted in the policy without the knowledge and consent of the mortgagor, could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage. Held, also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing that they were not liable to him; not having done so, they could not, in the present action raise any question which might have afforded them a defence in an action against them on the policy. In the result the judgment below, sub nom. Bull v. North British Canadian Investment Co., 15 A. R. 421, was affirmed. *Imperial Fire Insurance Co.* v. *Bull*, 18 S. C. R. 697.

Mortgagee Insuring as Owner.]—See sub-title III. 4 (c), *ante*.

Reconstruction of Machinery in Mill —*Rights of First and Second Mortgagees and of Persons Furnishing the New Machinery—Marshalling Insurance Moneys—Subrogation.*]—The owner of a mill property mortgaged it together with all the machinery, which was declared to be fixtures. Subsequently a second mortgage was executed by the mortgagor on the same property. Both mortgages were made under the Short Forms Act, and contained covenants to insure, but the insurance moneys, under the policies effected on the property and machinery, were made payable to the first mortgagee. Afterwards the mortgagor, with the consent of the second, but without that of the first mortgagee, made a contract with the plaintiffs under which they placed new machinery in the mill, using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not required, the mortgagor agreeing with the plaintiffs to insure the machinery and assign the insurance to them. On the mill and machinery being destroyed by fire and the insurances adjusted, the second mortgagee paid off the the first mortgagee's claim, and procured from him an assignment of his mortgage as well as of his interest in the policies:—Held, that the plaintiffs could not claim, by reason of their betterment of the machinery, which prior to its reconstruction was deemed of substantial value, that they were entitled to the insurance moneys thereon to the detriment of the claim under the first mortgage; but that they were so entitled as against the second mortgage; and, therefore, after the claim of the assignee of the first mortgage was satisfied, the plaintiffs were entitled as against the second mortgage to be subrogated to the mortgagee's rights thereunder to the insurance moneys to the extent of the insurable value of the machinery put in by them. Hobson v. Gorringe, [1897] 1 Ch. 182, remarked on with reference to its effect on the decisions in this Province as to fixtures. *Goldie* v. *Bank of Hamilton*, 31 O. R. 142.

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiff's benefit. Before any further insurance was effected the mill and machinery were destroyed by fire:—Held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery, and to be subrogated to the first mortgagee's rights against the land, to the extent to which that insurance money was exhausted by him. Judgment below, 31 O. R. 142.

affirmed. *Goldie* v. *Bank of Hamilton*, 27 A. R. 619.

Subrogation.]—See also, *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234; *McKay* v. *Norwich Union Ins. Co.*, 27 O. R. 251; *Howes* v. *Dominion Fire and Marine Ins. Co.*, 8 A. R. 644, *ante*, sub-head III. 3; *Anderson* v. *Saugeen Mutual Fire Ins. Co.*, 18 O. R. 355, *post*, sub-head III. 9 (d.); *National Ins. Co.* v. *McLaren*, 12 O. R. 682, *post*, sub-head 12.

See sub-head III. 4 (c.), *ante*, as to non-disclosure of incumbrances.

See also sub-heads 3 (b.), 4 (c.), 5, 9 (c.).

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8. *Premium.*

Negotiability of Note—*Misnomer.*]—Quere, whether the note given for the premium in this case was negotiable notwithstanding the special agreement in it, and as to the effect of the defendants being described therein as the "Watertown Insurance Company," while their real name was "The Agricultural Insurance Company of Watertown, N. Y." *Sears* v. *Agricultural Insurance Co.*, 32 C. P. 585.

Non-Payment of Premium—*Estoppel.*]—A condition was, that where credit was given and a note taken for the premium, unless the same should be paid at maturity the policy should be void; and defendants set up non-payment as a defence under this condition. The insured and her husband gave the agent a note for the premium payable in three months. The agent left the application with the husband, telling him, as he was in a hurry, to sign his (the agent's) name to it, and send it to defendants, which the husband did, with a letter, asking defendants to let him know when the note became due. They acknowledged it, and sent the policy to him. The day after the note fell due the husband wrote to defendants asking if they held the note, and if the policy was good without being countersigned by the agent. In answer defendants' secretary wrote on the 8th May, (saying nothing about the policy), that the agent was an impostor, that "we are trying to get on his track and may be able to write you further on this subject again. Your note never came here, and I advise you not to pay it whoever should call on you for same." The fire took place in September. After some correspondence, defendants in December refused to pay, giving for the first time, as one reason, the non-payment of the note; and the secretary at the trial swore that the note not having been paid they considered the policy cancelled when they wrote on the 8th May:—Held, that defendants were clearly estopped by that letter from setting up this defence. *Benson* v. *Ottawa Agricultural Insurance Co.*, 42 U. C. R. 282.

——— *Waiver.*]—See *Smith* v. *Mutual Insurance Co. of Clinton*, 27 C. P. 441; *Lyons* v. *Globe Mutual Insurance Co.*, 27 C. P. 567; *S. C.* 28 C. P. 62; *McGugan* v. *Manufacturers and Merchants Mutual Fire Insurance Co.*, 29 C. P. 494.

Note for Premium.] — See *Gauthier* v. *Waterloo Ins. Co.*, 44 U. C. R. 490.

See, also, sub-titles III. 1. *ante*, and III. 11 (b.), V. 8, and VI. 1, *post*.

Payment After Loss.]—The fire occurred on the 13th September. On the 15th September the plaintiff, through a solicitor, paid the amount of an overdue insurance premium note to the defendants, who were ignorant of the loss. On the 17th September, notice of loss was given to the defendants, when they immediately returned the premium to the solicitor:—Held, that the payment having been made in fraud of the defendants, could not avail the plaintiff. *Sears* v. *Agricultural Insurance Co.*, 32 C. P. 585.

Receipt Acknowledged in Policy.]—See *Western Assurance Co.* v. *Provincial Ins. Co.*, 5 A. R. 190.

Renewal Receipt.]—Where the clerk of an insurance company left a receipt for a renewal premium duly signed at the office of the policy holder, who desired to renew the insurance, the messenger declining to receive the money from the person in charge; and it appeared that the company had in hand money belonging to the insured: that the receipt was never demanded back, and that the insured relied on the renewal as having been effected: —Held, that after a loss it was too late for the company to set up that the premium had not been paid, even though their clerk might not have been authorized by his instructions to leave the receipt. *Staunton* v. *Western Assurance Co.*, 21 Gr. 578; 23 Gr. 81.

Return of Premium.]—In his application the plaintiff untruly represented the building as having a brick chimney:—Held that on this ground the policy never attached, and that the plaintiff, therefore, might recover back his premium. *Mulvey* v. *Gore District Mutual Fire Assurance Co.*, 25 U. C. R. 424.

Where a risk has once begun to run, and is subsequently avoided by some neglect or default of the assured, there cannot be a return ordered of any portion of the premium. *Hawke* v. *Niagara District Mutual Fire Insurance Co.*, 23 Gr. 139.

See Dowker v. *Canada Life Ass. Co.*, 24 U. C. R. 591.

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9. *Recovery of Loss.*

(a) *In General.*

Attachment of Insurance Moneys.]—See *Lee* v. *Gorrie*, 1 C. L. J. 76; *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 26, 308; *Simpson* v. *Chase*, 14 P. R. 280; *Boswell* v. *Piper*, 17 P. R. 257.

Duty to Save Property.]—By the policy the plaintiff was bound to use all possible diligence in case of fire in saving and preserving the property insured, and the jury having found in her favour on this issue, upon the contradictory evidence set out in the case, the court refused to interfere. *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553.

Execution.]—A fire policy, after a loss has taken place, and money has become payable thereon, is such a specialty or security

for money as is seizable under execution, though the amount payable has not been ascertained. *Bank of Montreal* v. *McTavish*, 13 Gr. 395.

Foreign Judgment.]—To an action on a judgment recovered in New York, defendants pleaded that the judgment was on a policy of insurance made by them; that there was a provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and that no proof or adjustment was ever made. The plaintiffs replied, that when called upon to pay defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing; that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered upon proof of such waiver, without any evidence of proof or adjustment:—Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit it might, under 23 Vict. c. 24, be set up here; and whether the condition was waived or performed was a matter of evidence only, on which our law must prevail. *Waydell* v. *Provincial Ins. Co.*, 21 U. C. R. 612.

Fraud Inducing Settlement.] — Where an insurance company chooses, rather than litigate the question of their liability to the assured, to compromise his claim, they cannot afterwards impeach the settlement, although they may be able to shew they have been imposed upon; and where the money paid upon such a compromise had been, by the agent who effected the arrangement with the company, paid over to a bank to whom the claim had been assigned, who thereupon gave up certain notes held by the bank, the court refused to open up the settlement which had been made, although the evidence distinctly shewed that a gross fraud had been perpetrated upon the company; that the fire by which the alleged loss was said to have been sustained was caused by the parties concerned; and that in fact the goods, the loss of which was claimed for, never were destroyed. *British America Ass. Co.* v. *Wilkinson*, 23 Gr. 151.

Where, in obtaining the settlement of a pretended claim against an insurance company, the agent employed to effect the arrangement had been guilty of very improper conduct, which, however, had not had the effect of producing the compromise, the court, although compelled to dismiss the bill, refused him his costs of a suit brought to set aside the settlement, to which such agent had been made a defendant. *Ib.*

In order to prevent a compromise of a disputed claim being set aside, there must have been a matter of doubt to be settled, and there must be no fraud on either side. On the destruction by fire of a house which had been insured, application was made to the insurance company for payment, who, after investigating the matter so far as the facts within their knowledge enabled them to do so, compromised with the assured by paying a portion of the sum insured. Some months afterwards, the company having received information which satisfied them that a fraud had been committed upon them, and that the assured had himself feloniously caused the fire, instituted proceedings to compel repayment; when the court, being satisfied that the act as charged had been committed, made the decree as asked, with costs. *Queen Ins. Co.* v. *Devinney*, 25 Gr. 394.

See Canada Farmers' Mutual Ins. Co. v. *Watson*, 25 C. P. 1.

Joint Tenants—*Application by one for Rebate — Subsequent Loss.*]—See *Clarke* v. *Union Fire Ins. Co., McPhee's Claim*, 6 O. R. 635.

Limitation of Time for Payment or Action.]—The company having refused payment of the insurance, an action was commenced to recover the amount after a lapse of more than thirty days from completion of the proofs of loss, but less than sixty days thereafter which, by a variation and addition to the statutory conditions, indorsed on the policy, was stipulated for:—Held, that the stipulation that no action should be brought until the expiry of sixty days after proof of loss was not a just or reasonable variation of the statutory conditions. The words of the seventeenth statutory condition being that the loss should not be payable until thirty days after completion of the proofs of loss created a privilege in favour of the companies, and the statute does not contemplate any further extension, but simply that the company shall be entitled to that delay unless under their charter or by agreement that period is shortened. *Smith* v. *City of London Ins. Co.*, 11 O. R. 38, 14 A. R. 328, 15 S. C. R. 69.

It was objected that this action was premature, because by a condition of the policy sixty days was given for the payment of a claim, and the action was brought within such period; but held, that as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained. *Hartney* v. *North British Fire Ins. Co.*, 13 O. R. 581.

Covenant on a policy which provided that losses should be paid within sixty days after the proof of them, and that no suit should be maintained unless commenced within twelve months after the cause of action should accrue. Plea, that the fire took place more than twelve months before the suit commenced:—Held, no defence. *Lampkin* v. *Western Ass. Co.*, 13 U. C. R. 361.

It was a condition that "payment of losses shall be made in sixty days after the loss shall have been ascertained and proved:"—Held, that the time was to be counted from the time when the assured had put in all the proof on which he relied; and that any objection to the sufficiency of such proof must be raised by a special plea, not under that condition. *Rice* v. *Provincial Ins. Co.*, 7 C. P. 548; *Hatton* v. *Provincial Ins. Co.*, 7 C. P. 555.

One condition was, that no suit should be sustained against the company, unless brought within six months after the loss. Within this time the plaintiff presented his claim for loss, when it was agreed by parol between him and one D. acting for defendants, that if plaintiff would not prosecute his claim until one S. returned from England, defendants would pay the same and take no advantage of this limitation clause. The insurance had been effected by and through D., and the premiums paid to him or to S.,

who was associated with him in the management of the company, and the policy signed by D. as "manager for the said company in Upper Canada," under an express authority from the directors, two of whom signed the same, opposite a seal, with the name of the company upon it. It also appeared that after the six months there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff:—Held, that D. had power to bind the company as their agent, and what had taken place amounted to a waiver of the condition. *Brady* v. *Western Ins. Co.*, 17 C. P. 597.

In the body of the policy, after stating that it was made subject to the conditions therein contained or thereon indorsed, that is to say, the statutory conditions as varied by the conditions thereunder written, &c., it was added, "In case of loss payment shall be made within sixty days after completion of the proof of loss in accordance with said conditions:" —Held, that this was a condition, and that not being headed in accordance with the statute, it could not vary the 17th statutory condition indorsed, which required payment in thirty days. *Sauvey* v. *Isolated Risk and Farmers' Fire Insurance Co.*, 44 U. C. R. 523.

A condition that any action on the policy should be barred, "unless commenced within the term of six months next after the loss or damage should have occurred," was held to be an unreasonable one, as another condition provided that the company should have sixty days for payment after the completion of proofs of loss. *Peoria Sugar Refining Co.* v. *Canada Fire and Marine Ins. Co.*, 12 A. R. 418.

A fire insurance policy contained a condition that any action upon it should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred:"—Held, that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose. *Ib.*

——— *Disability.*] — A. insured with a mutual insurance company, by a policy expiring on the 26th June, 1863. 29 Vict. c. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the Act, if the loss had happened before, saving the rights of the parties under legal disability. To a plea that the loss happened before the Act, and that the action was not commenced within one year from its passing, defendants replied, that when the Act was passed A. was in prison (not saying for felony,) and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death:—Held, no answer to the plea. *Tallman* v. *Mutual Fire Ins. Co. of Clinton*, 27 U. C. R. 100.

——— *Pleading.*] — Declaration, on a policy alleged to have been sealed and executed by defendants. Plea, that the policy was subject to a condition that no action should be brought on it except within six months from the loss, and that the plaintiff did not sue within that time. Replication, on equitable grounds, that when the loss occurred, defendants had not yet issued a policy to the plaintiff, although he had previously effected the insurance with them: that although requested they refused to execute the policy until after the commencement of this action; and that in consequence of such delay, he was prevented from suing within six months, as he otherwise would have done:—Held, replication bad, as a departure from the declaration, and as shewing in effect that the plaintiff was proceeding upon an equitable cause of action. Defendants also rejoined, on equitable grounds, that long before six months from the fire the policy was executed and ready for delivery to the plaintiff, of which he had notice, and defendants never refused to execute nor withheld the same from plaintiff:—Held, good. *Hickey* v. *Anchor Ass. Co.*, 18 U. C. R. 433.

——— *Pleading.*]—The declaration alleged that the policy sued on was subject to the conditions indorsed thereon, and averred a fulfilment of all the conditions necessary to entitle the plaintiff to maintain the action. Defendants pleaded, that one of these conditions was, that payment of the loss need not be made until sixty days after the same should have been ascertained and proved, and that at the commencement of the action the alleged loss had not been ascertained and proved:—Held, that the plea was good, inasmuch as it clearly appeared from the declaration and plea coupled together that the condition was precedent; and that it was not necessary in the plea to point out how the loss was to be ascertained and proved, that being a matter of evidence. *Johnston* v. *Western Ass. Co.*, 4 A. R. 281.

——— *Policy not Issued.*]—A condition, that any proceedings to be taken against the company in respect of any loss sustained by the assured, should be instituted within six months after such loss should happen:—Held, not to apply to a case where the company refused to complete the policy, and a bill was filed to compel them to execute a policy, or pay the loss sustained by destruction by fire of the property insured. *Penley* v. *Beacon Ass. Co.*, 7 Gr. 130.

——— *Prior Refusal.*] — Appellants, a mutual insurance company, issued in favour of J. F. a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 Vict. c. 44, s. 52 (O.), R. S. O. 1877 c. 161, s. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examination called for by or under the policy must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and on the 13th

July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 25rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded inter alia that the policy was made and issued subject to a condition that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit:—Held, reversing 43 U. C. R. 102, and 4 A. R. 293, that the appellant company under the policy in this case were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *Mutual Fire Insurance Co. of the County of Wellington* v. *Frey*, 5 S. C. R. 82.

——— *Waiver.*]—One condition of a policy was, that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition, and relied upon an alleged conversation between his agent and the president of the company:—Held, that the condition could not be so waived, and that such evidence was properly rejected. Held, also, that the letter, set out in the case, contained no evidence of a waiver of this condition. *Lampkin* v. *Western Ass. Co.*, 13 U. C. R. 237.

——— *Waiver.*] — It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants thereon after the lapse of one year from the loss, this being a condition also prescribed by 36 Vict. c. 44, s. 54 (O.), relating to mutual fire insurance companies. The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending; and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff $500 in full, which they had not paid. The fire took place on the 18th August, 1874. The claim papers were sent in on the 15th September. On the 28th October, the plaintiff was required to produce his books, invoices, and vouchers, &c. He then placed his claim in the hands of an attorney, who wrote to defendants, and was told that without the books there could be no settlement. On the 26th February, 1875, the plaintiff authorized certain creditors of his to settle the claim as they might think proper. These creditors employed other attorneys, who wrote to defendants on the 10th April, threatening a suit, after which defendants' general manager called on them and had an interview "without prejudice," in which he made an offer of $500, which was not then accepted. On the 20th April the attorneys wrote to the manager offering to take $800, and saying that unless the claim was settled at once they would sue on the policy. On the 26th April the board met, when this offer was declined, and the manager, who was called by the plaintiff, swore that this decision of the board was at once communicated to the attorneys. Nothing more took place until the 18th September, when the attorneys wrote accepting the offer of $500. The defendants took no notice of this, or of a subsequent letter of the 15th November, and the action was brought on the 9th December. One of the attorneys, who was also junior counsel for the plaintiff at the trial, being called as a witness, swore that a few days after the letter of the 20th April the manager called on them, talked of a settlement, for which he seemed anxious, and said that if two other companies interested would each pay $100 more, defendants would do so as well. One of the attorneys denied notice of the resolution refusing their offer of $500, but admitted that the manager told him then that defendants declined it. No mention was made of the limitation clause during the negotiation:—Held, that there was no evidence to go to a jury either of the agreement alleged to pay $500, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent defendants from insisting on the forfeiture. *Davis* v. *Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452.

Semble, that defendants could not be bound by the agreement alleged to pay the $500, unless under their corporate seal. *Ib.*

——— *Waiver.*]—The plaintiff sued upon an insurance policy for a loss occasioned by a fire, which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced till the 11th July, 1887. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did so procure and furnish, additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as required by one of the conditions in variation of the statutory conditions, which provided that the loss should not be payable until sixty days after the completion of the claim:—Held, per Armour, C.J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble, and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action. Per Street, J., that in the absence of any agreement not to insist upon the condition, there could be no waiver unless the defendants had so acted as to estop themselves from taking advantage of the condition; there was nothing in the conduct of the

defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and they were therefore, entitled to the benefit of it. Cornish v. Abington, 4 H. & N. 548, and Thomas v. Brown, 1 Q. B. D. 714, discussed. *Cousineau v. City of London Fire Ins. Co.*, 15 O. R. 329.

Loss before Issue of Policy.]—Where an insurance had been effected, and a fire occurred before the policy issued:—Held, that this court had jurisdiction to compel the issue of a policy or the payment of the insurance. *Penley v. Beacon Assurance Co.*, 5 L. J. 213.

Neglect to Save Property Insured.]—Semble, that a fire policy, which is a contract of indemnity, carries with it, even irrespective of conditions to that effect, a provision that the insured shall not, with the fraudulent intention of throwing the loss on the insurer, wilfully cause, or refrain from taking means within his power to prevent, the destruction of the insured property. *Devlin v. Queen Ins. Co.*, 46 U. C. R. 611.

Payment into Court.]—See *Merchants Bank v. Monteith—Ex parte Standard Life Assurance Co.*, 10 P. R. 588; *Peoria Sugar Refining Co. v. Canada Fire and Marine Ins. Co.*, 12 A. R. 418.

Place of Payment.]—Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the lex loci contractus. *Clarke v. Union Fire Ins. Co.*, 30 P. R. 313. See *S. C.*, 6 O. R. 223.

See Pritchard v. Standard Life Assurance Co., 7 O. R. 188.

Rebuilding.]—By a policy upon a dwelling house, the company were to have the option of making good the loss or damage either in money, according to the sum insured, or by re-building, or by repairing the same, according to circumstances. The house having been destroyed by fire, the company, instead of paying, elected to re-build, which they commenced doing without having obtained from the insured any plan of the house destroyed, and against his express objection to their proceeding; they also intentionally departed from what was known to be a feature of the old building. Thereupon the insured filed a bill to restrain the company from proceeding to erect the building in the defective manner pointed out, and praying that they might be decreed specifically to perform the condition by erecting a house exactly, or at least substantially, corresponding with that destroyed. The court dismissed the bill; but, under the circumstances, without costs. *Home District Mutual Ins. Co. v. Thompson*, 1 E. & A. 247.

Refusal before Time for Action.]—A declaration by defendants that they intend to resist payment, is no waiver of the condition that the action shall not be brought until sixty days after proof of loss. *Hatton v. Provincial Ins. Co.*, 7 C. P. 555.

Sorting Out Damaged Goods.]—One of the conditions of the policy required, among other things, that where property was partially damaged by fire, the insured should forthwith cause it to be put in as good condition as the case would allow, assorting the various articles, and separating the damaged from the undamaged goods, so that the damage could easily be ascertained; and should cause a list of the whole to be made, after which the amount of the damage should be ascertained, &c. The declaration on this policy alleged a total loss of the property insured. The defendants pleaded, after setting out this condition, that portions of the property were partially damaged, but the plaintiff did not, with regard to it, comply with requirements of the conditions. The plaintiff replied that the property wholly destroyed far exceeded in value the amount insured, and that he sued only for the loss thereon, and not on the property partially destroyed:—Held, replication good, for that the condition was not applicable where the claim was only for goods wholly destroyed. Held, also, that the replication was not a departure, for the plaintiff under the declaration for a total loss might recover for a partial one. *Williamson v. Hand-in-Hand Mutual Fire Ins. Co.*, 26 C. P. 266.

Third Person Interested — *Prosecution of Claim by Insured—Negligence.*]—See *Rice v. Wells*, 20 U. C. R. 404.

(b) *Amount and Nature of Risk.*

Damage in Removing Goods—*Expense of Salvage.*]—Held, affirming 7 O. R. 64, that the plaintiff was entitled to recover under a policy of insurance against fire, damages resulting from bonâ fide efforts to save the insured property by removal. Quære, whether the fifth statutory condition, which declares that in case of removal of property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage, creates an independent obligation upon the company to contribute ratably over and above the amount insured as for direct loss. *McLaren v. Commercial Union Ass. Co.*, 12 A. R. 279.

Divided Risk — *Proportion of Loss.*] — Statutory condition 9 of the Ontario Insurance Act, provides that in the event of there being other insurances on the property, the company shall only be liable for the payment of a ratable proportion of the loss or damage. Plaintiff had insured his building against fire in two different companies in separate amounts for the front and rear portions, and the whole building, without division, in a third company. A fire took place, damaging both front and rear, nearly all the injury being done to the rear:—Held, that the proper method of ascertaining the relative amounts payable by the different companies was to add the amount of all policies together without reference to the division of the risks, and that each company was liable for its relative proportion to the whole amount insured. *McCausland v. Quebec Fire Ins. Co.*, 25 O. R. 330.

Divisible Insurance.]—A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the company shall be liable to pay to the insured two-thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole

than the aggregate of the amounts insured, and to no more on any of the different properties than two-thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject, and the company is liable only for two-thirds of the loss on each, notwithstanding that on some of the subjects the loss is less than the amount for which those subjects are insured, and the whole loss less than the aggregate amount insured. *King* v. *Prince Edward County Mutual Ins. Co.*, 19 C. P. 134.

Where a separate insurance is effected on separate properties, the company only to pay as if they had insured two-thirds of the actual cash value, the insured can recover two-thirds only of the particular property injured. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610.

Plaintiff insured with defendants for $3,400, of which $1,000 was on his tannery and $500 on the machinery in it, on an application valuing the tannery and fixtures at $1,000, which was said to be two-thirds of the actual value, but agreeing that in case of loss defendants should only be liable as if they had insured two-thirds of the actual cash value, anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damages not exceeding the said sum of $3,400, the said losses or damages to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury found the total cash value of the former to be $1,050, and of the latter $750:—Held, that the plaintiff could recover only two-thirds of these sums. *Williamson* v. *Gore District Mutual Fire Ins. Co.*, 26 U. C. R. 145.

Expense of Removing Property.]—An allowance of $200 was made to defendants under a condition that in case of the removal of property to save it the defendants would contribute ratably with the assured and other companies interested to the expenses of salvage, and the damages sustained by the removal. *Kerr* v. *Hastings Mutual Fire Ins. Co.*, 41 U. C. R. 217.

Flour—*Bags.*]—Paper bags for flour not filled burned in a mill, were, held not to be covered by a policy upon the flour. *Hutchison* v. *Niagara District Mutual Fire Ins. Co.*, T. T. 1876.

Goods Damaged or Stolen.]—Semble, that in the form adopted in ordinary policies, injuries to goods by wet, or in any manner from the exposure during the confusion of the fire before they can be got to a place of safety, and goods lost or stolen in such confusion, and the destruction, injury or loss, of which the fire can be said to be the proximate cause, are within the policy; but in suing for such loss, the plaintiff must describe the occasion and manner of it. *Thompson* v. *Montreal Insurance Co.*, 6 U. C. R. 319.

Grist Mill—*Machinery.*]—A policy on a "grist mill" covers not only the building, but also the fixed and movable machinery in it. *Shannon* v. *Gore District Mutual Ins. Co.*, 2 A. R. 396.

Interest.]—In an action upon fire insurance policies, a referee was directed to inquire, ascertain, and report the amount of the loss:—Held, having regard to the provisions of ss. 87 and 103 of R. S. O. 1887 c. 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him. *Attorney-General* v. *Ætna Ins. Co.*, 13 P. R. 459.

Limitation of Amount Recoverable.]—By by-laws printed on the policy the defendants' liability was limited to two-thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to $2,000. The plaintiff's loss was $2,200, and the other insurance company paid the full amount of their liability, $1,000:—Held, that the plaintiff was entitled to recover as damages, two-thirds of the balance of his loss after deducting the amount of the other insurance. *McIntyre* v. *East Williams Mutual Fire Ins. Co.*, 18 O. R. 79.

Loss by Explosion.]—A policy of insurance against fire contained a condition that "the company will make good a loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion:—Held, reversing 7 O. R. 634, 8 O. R. 343, 11 A. R. 741, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion. *Hobbs* v. *Northern Assurance Co.*; *Hobbs* v. *Guardian Fire and Life Assurance Co. of London*, 12 S. C. R. 631.

Machine and Repair Shop.]—Held, that the term "machine and repair shop," did not necessarily mean a shop in which iron work alone is to be done: that it was properly left to the jury to say whether the business carried on there, of making shingles, was that of a machine and repair shop; and that the evidence, set out, fully warranted their finding that it was. *Chaplin* v. *Provincial Ins. Co.*, 23 C. P. 278.

Main Building—*Annex.*]—The asylum for the insane, London, consists of a centre building containing all necessary accommodation for patients, &c., and a kitchen, laundry, and engine-room, built of brick and roofed with slate, situate some fifty feet to the rear of the middle of the centre building, and connected with it by a passage or covered way, with brick walls about ten feet high, and also roofed with slate and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building:"—Held, that the policy covered the kitchen, laundry, and engine-room. *Ætna Ins. Co.* v. *Attorney-General of Ontario*, 18 S. C. R. 707.

Manufacturing Establishment.]—In the form of application signed by an applicant for insurance, the following notice was printed: "Applications for insurance on manufacturing establishments where steam is used for propelling machinery, must be approved of by the head office at Montreal;"—Held, that this notice did not refer to a vacant distillery, which had not been in operation for some years, and which at the time of the application it was not contemplated to put in operation. *Rowe* v. *London and Lancashire Fire Ins. Co.*, 12 Gr. 311.

Partial Insurance.] — Where a person insures his house or goods for a part only of their value, and suffers a loss equal to the full amount insured, that sum, unless the policy be specially framed, must be paid, and not merely such a proportion of it as would correspond with the proportion between the sum insured and the whole value of the property. The condition in the policy "that in case of the removal of the property to escape conflagration, the company will contribute ratably with the insured and other companies interested, to the loss and expense attending such act of salvage," has not the effect of changing in this respect the law of partial insurance. *Thompson* v. *Montreal Ins. Co.*, 6 U. C. R. 319.

Ratable Contribution.] — Plaintiff insured with defendants $2,000 on a building, and $2,000 on the furniture, and with another company $2,000 on the building and furniture together; and a loss occurred of $1,050 on the building, and $878 on the furniture. Defendants' policy provided that in case of loss, the assured should recover from them only such portion thereof as the amount assured by them should bear to the whole amount assured; and, under this, they contended that the other insurance must be treated as one for $2,000 on the building, and $2,000 on the furniture, so that they would be liable only for one-half of the loss on each; but, Held, that as the whole amount insured was $6,000 of which defendants had taken $4,000, they were liable for two-thirds of the loss. *Trustees of the First Unitarian Congregation of Toronto* v. *Western Ass. Co.*, 26 U. C. R. 175.

Ship — "*Whilst Running.*"]—See *London Assurance Corporation* v. *Great Northern Transit Co.*, 29 S. C. R. 577, *ante* III. 3 (a).

Stock-in-Trade.]—In an action on a policy for $1,000 on stock-in-trade, it appeared that when the fire occurred only $667 worth of the original goods remained in specie, but other goods had been purchased in the course of business, and the stock was then really worth $2,800:—Held, affirming 26 Gr. 391, that the plaintiff was entitled to recover the full amount of the policy. *Butler* v. *Standard Fire Ins. Co.*, 4 A. R. 391.

Temporary Depression in Value.]—Where a policy of insurance on a steamboat, against fire, provided that in the event of loss the damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen:"—Held, that in estimating loss the defendants were not entitled to have taken into account a depression in the value of steamers generally, caused by circumstances which might be temporary only. *McCuaig* v. *Quaker City Ins. Co.*, 18 U. C. R. 130.

Tenant for Life.]—The measure of damages recoverable by a tenant for life of the insured premises is the full value of such premises to the extent of the sum insured. *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

(c) *Person Entitled.*

Assignee.]—An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns. *Beemer* v. *Anchor Ins. Co.*, 16 U. C. R. 485.

The plaintiff, owning property, insured it with a mutual insurance company on the 1st December, 1864, for three years. He mortgaged it to one N., and on the 13th May, 1865, assigned to him the policy. N. paid up all arrears of assessments, but gave no note or security for the amount unpaid. Defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N. His mortgage was paid off in 1868, and in March following the plaintiff sued on the policy. One of the conditions indorsed was, that all persons insured and sustaining loss should forthwith give notice, and within 30 days deliver a particular account of such loss, signed by them and verified by their oath:—Held, that the action could not be maintained. Per Morrison, J. N. was not the person insured, and therefore could not give the notice of loss. Per Wilson, J. He was insured, and could have sued in his own name, but the contract of insurance having been absolutely transferred to him, the plaintiff could not sue. *Fitzgerald* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 97.

The declaration alleged that defendants agreed to insure one S. against loss on wheat and flour owned by the assured, and that the amount of loss, if any, should be paid by defendants to the plaintiffs. It then averred that the policy was delivered by defendants to plaintiffs, and that thence until, and at the time of the loss the plaintiffs were interested in the wheat and flour to the amount insured:—Held, that the declaration shewed sufficient to entitle the plaintiffs to sue in their own name, for the plaintiffs' interest was sufficiently averred, and their claim was a purely money demand, for which, though an equitable one, they were entitled under the A. J. Act, 36 Vict. c. 8, s. 2, to proceed at law. *Bank of Hamilton* v. *Western Assurance Co.*, 38 U. C. R. 609.

Assignment of Mortgage—*Assignment of Loss.*]—A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss. In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code. *Guerin* v. *Manchester Assurance Co.*, 29 S. C. R. 139.

Collateral Security.] — The policy insured V., "loss, if any, payable to E. and M."

(the plaintiffs). The covenants of defendants were with the assured:"—Held, that the plaintiffs could not sue upon such policy, the contract being with V., and that the averment in the declaration of an insurable interest in them was immaterial. *Every* v. *Provincial Ins. Co.*, 10 C. P. 20.

The plaintiffs effected an insurance with defendants, "loss, if any, payable to H.," as security for goods supplied by H. to them. The policy was held by H., and was handed over, it appeared, by some mistake of the latter's clerk, among a number of other policies effected by H., to defendants for surrender or cancellation:—Held, that the plaintiffs were entitled to recover, and that it was not necessary to bring the action in the name of H., whose interest, if any, was wholly contingent on the state of his account with the plaintiffs when the right of action accrued. *Marrin* v. *Stadacona Ins. Co.*, 43 U. C. R. 556, 4 A. R. 330.

Dissolution of Partnership.] — The plaintiffs, M. & H., while in partnership, had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of purchase money. Before the fire they dissolved partnership by a deed, in which it was agreed that M. should wind up the business, and should hold "the mill property" for his own use, but no regular conveyance of it had been executed:—Held, that H. had sufficient interest to enable him to join in suing on the policy. *Mann* v. *Western Ass. Co.*, 19 U. C. R. 314.

Mill Owned by One Partner.] — An agreement by which a third party, having no interest in the freehold, was to carry on the saw-mill insured, in partnership with the plaintiff, and to share in the profit and loss:—Held, not to prevent the plaintiff recovering for the whole loss sustained. *Rice* v. *Provincial Insurance Co.*, 7 C. P. 548.

Mortgage Paid off.]—The plaintiffs sued on a mutual fire insurance policy granted to one F., for $2,000, on certain property mortgaged by him to the plaintiffs, alleging that defendants covenanted with the plaintiffs to pay to F., or his assigns, all loss not exceeding $2,000; and that as to $400, the plaintiffs sued in their own right, and as to the remaining $1,600, as trustees for F. Defendants pleaded that after F. assigned the policy to the plaintiffs, he paid to them the whole of their mortgage pursuant to the condition on which it was assigned, and that before the loss F. was duly assessed on the premium note, and neglected to pay, by which the policy became void. The condition on which the policy was assigned was, that on payment of the mortgage money by F. to the plaintiffs, the assignment should be void:—Held, that the plea shewed a good defence, for the performance of the condition put an end to the plaintiffs' title, and as F. could not have recovered, neither could the plaintiffs as trustees for him. *Oxford Permanent Building and Savings Society* v. *Waterloo County Mutual Fire Ins. Co.*, 42 U. C. R. 181.

Partial Assignment.]—Action on a fire policy issued to the plaintiff for $2,500, by which the loss, if any, was made payable to W. to the extent of $1,000, and to B. to the extent of $400, "as their interest may appear:"—Held, that the plaintiff might sue in her own name, being entitled to the surplus above these sums, which was found by the jury to be $130, the words "as their interest may appear," applying to a reduction of these sums, not to a payment beyond them. The verdict being for $1,530, releases were offered on behalf of B. and W., and the court therefore thought it unnecessary to consider whether they should be made parties to the suit. *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553.

Partners — *Assignment by One to Another.*]—A policy was taken in the name of H. & D., then partners. After the fire, and two months after the making and delivery of the statement of loss, D. assigned all his interest in the policy to H.:—Held, that the action was properly brought, and the statement of loss made, by H. alone. Held, also, that the statement of loss, set out in the case, and sworn to by the plaintiff only, was sufficient. *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*, 39 U. C. R. 483.

Trustee.]—The plaintiff averred that at the time of effecting the insurance, he was interested in the property insured; that his interest was before the loss assigned by him to one B., which assignment was accepted by defendants; and that until the loss B. continued interested, and the plaintiff as trustee for him. Defendants did not demur, but pleaded, 1. that at the time of the loss the plaintiff had no interest; and 2. that before the fire he assigned the policy to B. without having the transfer indorsed, and without defendants' consent. It appeared that the statement in the declaration was true: that is, that the plaintiff had assigned his interest to B., which assignment was approved by defendants:—Held, that the plaintiff was entitled to succeed on the issue. *Park v. Phœnix Ins. Co.*, 19 U. C. R. 110.

Declaration on a policy issued to plaintiff on a house with defendants, alleging that he sued on behalf of and as trustee for one D., to whom he had mortgaged the premises and assigned the policy. Demurrer, because the plaintiff shews no interest in the premises, and having none, cannot sue as trustee for another:—Held, that the objections were clearly untenable. *Richards* v. *Liverpool and London Fire and Life Ins. Co.*, 25 U. C. R. 400.

G. insured a tug when navigating the rivers Sydenham, St. Clair, Detroit, and Thames and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M. at the time of insurance and down to the happening of the loss was mortgagee. The tug was libelled in an American admiralty court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards G. procured a renewal of the policy without disclosing the sale, of which, however, defendants were subsequently notified. G., with defendants' assent, assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarté, one of the channels of the St. Clair. M. and J. delivered proof papers of claim, which were objected to. G. did not deliver any. At the trial leave was given to add G. and J. as co-plaintiffs, and judgment

was directed to be entered for the plaintiffs for the full amount of the insurance:—Held, that the action was properly constituted, and the plaintiff was entitled to recover. On appeal that judgment was affirmed with costs on the ground that the relation of trustee and cestui que trust had been created between G. and the plaintiff in respect of the policy moneys. *Mitchell* v. *City of London Ass. Co.*, 15 A. R. 262.

See also sub-heads 3 (b.), 4 (c.), 5, 7.

(d) *Proofs of Loss.*

Actual Value—*Cost.*]—By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is, what it could have been actually sold for in cash at the time of the loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words "actual cash value" were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected:—Held, that this was not a compliance with the policy and condition:—Held, therefore, there could be no recovery on the policy. *Cameron* v. *Canada Fire and Marine Ins. Co.*, 6 O. R. 392.

Agreement.] — Defendants before the trial agreed that no objection should be taken to the want of a policy, that the question to be tried should be confined to the cause and manner only of the loss, and that all proceedings should be had in the same manner, and to the same effect, as if a policy had been duly issued and were produced:—Held, that they were precluded from objecting to the want of notice and proof of loss. *Walker* v. *Western Ass. Co.*, 18 U. C. R. 19.

Certificate of Magistrate—*Onus.*]—Defendants pleaded the non-fulfilment of a condition which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiff took issue. It appeared that the plaintiff had sent defendants a certificate which they had returned, owing to some alleged insufficiency. At the trial it was not produced, nor was plaintiff called upon to produce it, nor any evidence given of its contents:—Held, that the plaintiff having established a primâ facie case, he was entitled to recover, and that it was for defendants to shew that the certificate was insufficient. *Platt* v. *Gore District Mutual Fire Ins. Co.*, 9 C. P. 405.

——— *Assignee—Coroner.*]—The policy required a certificate under the hand and seal of a magistrate, stating (among other things) that he was acquainted with the character and circumstances of the assured or claimant, and that he verily believed that he, by misfortune, and without fraud or evil practice, had sustained loss and damage on the subject insured to the amount certified. The action was brought by K., the official assignee in insolvency of W., the insured, who became insolvent after the loss. The certificate stated that the magistrate was acquainted with the character of W., and that he verily believed that the claimant, K., had, as such assignee, without fraud or evil practice, sustained loss and damage by the said fire to the extent of $2,500:—Held, clearly insufficient, for it was consistent with the magistrate's belief that the fire occurred through W.'s fraud or evil practice, and it did not state that K. had sustained the loss on the subject insured, but only by the fire. A coroner is a magistrate who may give such certificate. *Kerr* v. *British America Ass. Co.*, 32 U. C. R. 569.

The policy required a certificate of a magistrate, that he was acquainted with the character and circumstances of the insured, and had made diligent inquiry into the facts set forth in his statement, and knew or verily believed that he really, and by misfortune, &c., sustained by such fire loss or damage to the amount therein mentioned. The certificate stated that the magistrate had read plaintiff's statement of loss, "and from diligent inquiries made by me, I verily believe that he hath really and by misfortune, and without fraud or culpable carelessness, sustained loss to the amount of over $3,000:"—Held, clearly insufficient, in not stating that he had made any inquiry into the truth of the matters set forth in the statement, or that the loss was sustained on the subject matter insured. *Mason* v. *Andes Ins. Co.*, 23 C. P. 37.

The condition as to proof of loss required a certificate from the magistrate most contiguous to the place of fire:—Held, that the learned Judge at the trial correctly ruled, under 36 Vict. c. 44, s. 33 (O.), that the requirement of a literal compliance with this condition was not just and reasonable. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380; 2 A. R. 81.

——— *Pleading.*]—The policy of a mutual company required a certificate of the loss, &c., under the hand of the magistrate or notary public most contiguous to the place of the fire; and there was a plea that the plaintiff had not furnished such certificate, on which issue was joined. The plaintiff at the trial applied for leave to reply: 1. That it was by accident or mistake that it was not furnished; 2. that defendants did not within a reasonable time object to the proofs as regarded this certificate; and 3. that the condition was unreasonable. It appeared that the certificate furnished was by a magistrate of another county, who had not inquired into the circumstances: that there were suspicions as to the fire; and that the two nearest magistrates would not have given the necessary certificate. The learned Judge, after hearing this evidence, refused to add these replications, and found as a fact that it was not by accident or mistake the certificate was not furnished, but that the plaintiff refrained from applying to the proper magistrates because he knew they would refuse:—Held, that under 36 Vict. c. 44, s. 33 (O.), the plaintiff might insist that the condition was unjust or unreasonable without specially pleading it; but that it was clearly not unjust or unreasonable:; and the court, under the A. J. Act, s. 34, refused a new trial on the ground that the objection was not allowed at the trial. Semble, that a demurrer is the proper mode of raising the question. *Morrow* v. *Waterloo County Mutual Fire Ins. Co.*, 39 U. C. R. 441.

——— *Time—Several Interests—Defective Affidavit.*]—The condition required that the assured should give immediate notice of any loss or damage by fire, within fourteen days, to the agent of the company, and as soon after as possible should deliver a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation, and should also declare on oath or affirmation in what manner the buildings were occupied at the time of the loss, and who were the occupants. That they should also produce a certificate under the hand and seal of a magistrate most contiguous to the place of the fire, that he had examined the circumstances, and believed the assured had without fraud sustained loss to the amount which the magistrate should certify; and until such proofs, declarations, and certificates were produced, the loss should not be payable:—Held, that the notices, affidavits, and certificates set out in the report were not sufficient and that the plaintiffs could not recover. As to particular objections taken:—Held, 1. That the certificate and the affidavit were in time; and that it was unnecessary that the notice or affidavit should be given or made by all the owners of the property insured. Semble, that a notice given within fourteen days would be sufficient. 2. That the omission to state what persons occupied the building at the time of the loss was fatal. 3. Semble, that the defect in the jurat, in not stating which of the plaintiffs were sworn and which affirmed, would not have been fatal. 4. That both certificates were insufficient, for not stating specifically the amount of the loss; and the second certificate for want of a seal. A nonsuit was therefore entered. *Mann* v. *Western Assurance Co.*, 17 U. C. R.190.

The plaintiffs, after the judgment in the last case, and about eleven months after the fire, furnished a new and sufficient affidavit and certificate, and brought another action, in which defendants pleaded that the plaintiffs did not as soon after the fire as possible deliver these papers. It appeared that when the first papers were furnished, defendants objected to their sufficiency, and that others were a few days after delivered, to which it was not shewn that the plaintiffs were notified of any objection until the first trial:—Held, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances, and that it was properly left to the jury to say whether, considering all the facts, plaintiffs had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the Judge should have decided. Held, also, that the affidavit and magistrate's certificate last furnished were sufficient, though M., who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only. *S. C.*, 19 U. C. R. 314.

——— *Time—Certificate under Seal.*]—The policy contained a condition requiring persons sustaining loss by fire to forthwith give notice thereof in writing, and as soon after as possible to deliver a particular account of the loss, stating various particulars specified; and in case of buildings or other fixed property, to accompany said statement by the certificate of a builder, &c. "They shall also produce a certificate under the hand and seal of a magistrate," &c., "and until such proofs, declarations, and certificates are produced, the loss shall not be payable." Defendants, after setting out this condition in their plea, alleged that although the plaintiff, as soon as possible after the fire, made the statement of his loss and damage according to the condition, yet he did not, as soon as possible after said fire, nor for more than eight months thereafter, produce to defendants such a certificate under the hand and seal of a magistrate as required by the condition. At the trial it appeared that the fire occurred on the 19th April, 1874. On the 10th May an affidavit of loss was sent in, accompanied by a certificate under the hand, but not under the seal, of a magistrate; and on the 4th January, 1875, a second certificate, under the magistrate's seal, was delivered to the company. The jury having found for defendants on this plea:—Held, 1. That the condition requiring a seal was not unjust nor unreasonable. 2. That the words "as soon after as possible" did not apply to the magistrate's certificate, which was required to be produced only within a reasonable time. 3. Semble, that the question of reasonable time here, there being no facts in dispute, was for the court; and, under 37 Vict. c. 7, s. 33, the jury having found for the plaintiff on all the other issues, and the motion being to enter a verdict for the plaintiff on the evidence, the court held that the second certificate was produced within a reasonable time, and entered the verdict for the plaintiff on this issue. *Cammell* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 39 U. C. R. 1.

——— *Waiver.*]—A policy of insurance against fire contained the following conditions:—"The assured must procure a certificate, under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune and without fraud or evil practice, hath or have sustained by such fire, loss or damage to the amount therein mentioned. . . No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N.S." The insured premises having been destroyed by fire the assured applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent on a subsequent occasion told the assured that he objected to the claim, as he "did not think it was a square loss:"—Held, that the non-production of the certificate required by the above condition prevented the assured from recovering on the policy. Held, also, that even if such condition could be waived without indorsement on the policy, the acts of the

agent did not amount to a waiver. Semble, that the condition could not be so waived. *Logan* v. *Commercial Union Ins. Co.*, 13 S. C. R. 270.

Collateral Untruth.] — The condition required the insured within fourteen days to give in writing an account of their loss or damage, such account of loss to have reference to the value of property destroyed or damaged immediately before the fire, and to verify the same by their accounts, and by affidavit, and such vouchers as in the judgment of the company might tend to prove such account and value, and to produce such further evidence and give such explanation as might be reasonably required; and if there should appear any fraud or false statement in such account of loss or damage, or in any of such accounts, evidence, or explanations, or if such affidavit should contain any untrue statement, the policy should be void:—Held, that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account, and that an untrue statement in the affidavit as to the plaintiff's title would not avoid the policy. *Ross* v. *Commercial Union Ass. Co. of London*, 26 U. C. R. 552.

In this case the statement complained of was, that the plaintiff was absolute owner of the building insured, which was unincumbered, whereas he had not yet paid for the land. He had, however, put up the building himself, so that if it had not become part of the realty his statement would have been literally true. *Ib.*

Company Preventing Compliance.]—Declaration on a fire insurance policy not under seal, alleging that, subject to certain conditions, the plaintiff was entitled to recover for loss of goods by fire, and setting out the third condition, which was to the effect that the plaintiff should give notice of every alteration, &c., in the building in which the goods insured were contained, and should have the allowance of the same indorsed upon the policy; and the 14th condition, to the effect that the plaintiff was to give a written statement of his loss, within 14 days after the fire, specifying the particulars and verifying it in the manner described in the condition. The declaration averred that the plaintiff was ready and willing to give the notice in the 14 days as required, but within that time the defendants took possession of the goods which remained, and prevented the plaintiff from giving the required account, and the defendants waived the said condition, and discharged the plaintiff from fulfilling the same. And as to the third condition, it was averred that the plaintiff did give notice of every alteration, &c., in writing, and requested the defendants to allow the same in accordance with the conditions, and the defendants accepted the notice and waived the indorsement upon the policy, and discharged the plaintiff from requiring the same to be so indorsed, and afterwards continued and confirmed the policy. Fifth plea, to the whole count, that by another condition in the policy, no condition should be deemed to have been waived except by writing indorsed upon the policy, and signed by the general agent, and that the condition (14th) requiring a statement of loss to be put in in 14 days was not so waived. Eighth plea, setting out the third condition, requiring notice of change in building, &c., and averring that there had been such change, and the plaintiff did not notify the defendants of it in writing, nor was it allowed by indorsement, nor did the defendants waive such indorsement. Ninth plea, setting up the same defence as to the 3rd condition as the 5th plea did to the 14th, that the condition could not, under the terms of another condition in the policy, be waived, except by writing indorsed on the policy, and that it was not so waived. Replication by way of estoppel, to so much of the 8th plea as alleged that the alteration was not allowed by indorsement, and that the defendants did not waive such non-indorsement—that the plaintiff gave notice in writing of such alteration, and delivered the policy to the defendants to have the allowance of such alteration indorsed thereon, and also to have the allowance of a further assurance indorsed thereon, and the defendants accepted it for these purposes, and afterwards indorsed the allowance of the further insurance thereon, and returned the policy to the plaintiff, and informed him that all had been done under the policy and conditions which was necessary. The defendants rejoined to this replication, the condition already mentioned, that no condition could be waived except in writing indorsed on the policy. The plaintiff demurred to the pleas and to the rejoinder; and the defendants excepted to the declaration, and demurred to the replication:—Held, as to the declaration; 1. that the averment of prevention by defendants was a perfect excuse for non-compliance with the 14th condition; 2. that the averment of waiver and discharge of the third condition was sufficient, as being a parol discharge to the plaintiff from obtaining performance by the defendants of an act which they were to do under an instrument not under seal. Jacobs v. Equitable Ins. Co., 17 U. C. R. 35, dissented from. The fifth plea was held bad, as being pleaded to the whole count, and answering only the act of waiver alleged, not the alleged prevention by defendants of performance; and as setting up a want of waiver in a particular form to a ground of excuse (i. e., prevention of performance by defendants) not dependent on the waiver mentioned in the plea. Semble, that the declaration alleged separately such prevention, and that defendants in some other way waived performance; and did not state the waiver as a result merely of the alleged prevention. The eighth plea held good, as it concluded with a good traverse, that the defendants did not waive the indorsement of the alteration, &c. The ninth plea was also held sufficient, because it properly disclosed a further reason why the waiver alleged by the plaintiff should not be effectual, in this, that the fact of waiver was required to be verified in a particular form, and that such form had not been observed. The replication was held good as an estoppel, for the plaintiff was led by conduct and acts of the defendants to believe and might well have believed that no advantage would be taken of the non-indorsation on the policy of the alteration, and might in consequence have refrained from insuring elsewhere. The rejoinder was held good, for it was not a departure from but supported the plea denying the waiver, and shewed why the estoppel against such denial should not apply. *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 69.

Company Holding Policy.]—A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took the policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put the risk in the latter company. No receipt was given, and the property was destroyed by fire immediately after. The company resisted payment on the ground that the policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had reconveyed to C.'s wife, and that the proper proofs of loss had not been given, claiming in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return the policy on demand:—Held, that the company, by wrongfully withholding the policy, were estopped from claiming that proofs of loss had not been given according to the indorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing if such condition applied to waiver of proofs of loss. *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

Condition Precedent.]—A condition that the particulars of the loss shall be given under oath, within a specified time after the loss, must be complied with before the insured can recover on the policy. *McFaul* v. *Montreal Inland Ins. Co.*, 2 U. C. R. 59.

Constitutionality of Act.]—Held, that 38 Vict. c. 65 (O.), preventing the setting up non-compliance with the conditions as to proof of loss, was not beyond the power of the Provincial Legislature, and applied to the defendants. *Dear* v. *Western Ass. Co.*, 41 U. C. R. 553.

See sub-head III. 3, *ante*.

Copy of Policy.]—Declaration on a policy made to plaintiffs—Plea, that by a condition on the policy, any loss or damage was to be paid within three months after due notice and proof thereof, in conformity with the by-laws and conditions annexed to the policy; and that such proof should further contain a certified copy of the written portion of the policy. Averment, denying that the proof did contain such certified copy:—Held, bad, because the production of the written part of the policy was not a condition precedent to plaintiff's right to recover. *Richardson* v. *Canada West Farmers' Mutual and Stock Ins. Co.*, 16 C. P. 430.

Defective Affidavit.] — The affidavit of loss had no jurat, and was not in the form of an affidavit, and on that ground, amongst others, the plaintiff was precluded from recovering. *Shaw* v. *St. Lawrence County Mutual Ins. Co.*, 11 U. C. R. 73.

Delay—*Agent's Fault.*] — The statement was required by the condition to be given within thirty days. The fire was on the 11th August, and the statement was not sent until the 25th September, but the delay was occasioned by the delay of the company's agent to send a blank form for the purpose, as he had promised:—Held, sufficient. Semble, that at all events the delay of a few days would not, under the condition, avoid the policy. *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*, 39 U. C. R. 483.

Excuse—*Pleading.*]—Held, that the non-compliance with the condition was not excused under 38 Vict. c. 65, s. 1, the omission to give the certificate not having been caused by necessity, accident, or mistake, and the statement or proof of loss not having been given in good faith. The facts relied upon to bring the case within that section must be pleaded. *Morrow* v. *Waterloo County Mutual Fire Ins. Co.*, 39 U. C. R. 441.

Failure to Furnish.]—A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, &c., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire, and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned, and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between $3,000 and $4,000. An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, &c., (as in the condition), were not answered:—Held, that as the evidence conclusively shewed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost, the condition was not complied with. Held, further, that as under the evidence, the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company. *Nixon* v. *Queen Ins. Co.*, 23 S. C. R. 26.

Failure to Produce Papers.] — The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so; but the jury, being satisfied on other evidence that the loss had been actually sustained, found in favour of the plaintiffs:—Held, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted. *Cingmars* v. *Equitable Ins. Co.*, 15 U. C. R. 143.

Held, that the evidence set out here, being substantially the same as at the last trial, fully supported a verdict for defendants on the plea setting up that vouchers and explanations which the plaintiffs could have given, had not ben furnished as required. *S. C.*, *ib.* 246.

False Statement as to Part.]—By the thirteenth statutory condition, "Any person

entitled to make a claim under a policy is . . to deliver . . as particular account of the loss as the nature of the case permits," and is also to furnish therewith a statutory declaration declaring: (1) that the said account is just and true; and by the fifteenth condition: "Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim." The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each, the amount on contents being $200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of $1,165.50; whereas the contents were proved to be worth only $150:—Held, that the misstatement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made. *Harris* v. *Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718.

Forms Furnished by Agent.] — The proofs of loss did not comply with the conditions of the policy sued on, but they were in accordance with printed forms furnished to the plaintiff by the defendants' agent. The company received them on the 6th August, and on the 11th November informed the plaintiff that they had placed the matter in the hands of the Gore District Insurance Company for adjustment "saving their rights at law," but they took no objection to the sufficiency of the proofs until the trial:—Held, that under the circumstances they were estopped from taking advantage of the defect. *Shannon* v. *Hastings Mutual Ins. Co.*, 26 C. P. 380; 2 A. R. 81.

Form of Proofs.]—Held, that the affidavit of loss, and the justice's certificate, set out in this case, were clearly not in compliance with the conditions indorsed on the policy, and that the plaintiff therefore could not recover. Held, also, that mutual insurance companies are not precluded from making such conditions. *Langel* v. *Mutual Ins. Co. of Prescott*, 17 U. C. R. 524.

The account given, under a similar condition, consisted of an affidavit, stating that the premises were occupied by plaintiff as a general merchant's store; that the whole value of the goods and merchandise destroyed was $800; and some accounts were attached of goods sold to him, shewing, however, only charges of "goods per invoice":—Held, clearly insufficient. *Mulvey* v. *Gore District Mutual Fire Ass. Co.*, 25 U. C. R. 424.

The plaintiff, suing upon a policy which required a particular account of the loss, as in the last case, had given only a statement that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices, and papers relating to the business, and that the value, as nearly as could be ascertained without such books, &c., was $3,000. His affidavit was attached verifying this statement. The evidence at the trial, however, shewed that he had the means of furnishing a more particular account through those from whom he had purchased:—Held, no compliance. *Banting* v. *Niagara District Mutual Fire Ass. Co.*, 25 U. C. R. 431.

The reasonable construction of this condition is, that the assured shall produce to the company something which will enable them to form a judgment whether the loss or damage claimed for was actually sustained; and so construed it is wholly unobjectionable. *Ib.*

The plaintiff, suing under a similar policy, sent in his affidavit, stating in general terms the value of the different kinds of goods destroyed, but without in any way mentioning his loss on the buildings insured, the only statement as to them being that they had been totally destroyed, and without verifying his deposition by his account books or other proper vouchers:—Held, clearly not sufficient. *Carter* v. *Niagara District Mutual Ins. Co.*, 19 C. P. 143.

The proofs of loss consisted of an affidavit of the plaintiff, stating that the store was totally destroyed by fire on the 12th March, and that an annexed statement contained a true and correct account of the value of stock on hand on the 20th October, 1870, (about 17 months before the fire), of stock received since, of the invoice value of goods sold since, and of the value of stock saved, and that the plaintiff's loss to personal property was $2,249.90. The statement was attached to the affidavit, but was not itself signed or verified under oath, and gave no details of the stock on hand, received, &c., except the value in bulk. Only one book was produced, in which a number of invoices were pasted, and a diary containing numerous memoranda, from which a more particular account of the loss might have been furnished:—Held, following the last case, that the statement was insufficient. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

Honest Overstatement of Loss.]—Plaintiff having represented his loss at a much larger sum than the jury found he had sustained, the court nevertheless refused to interfere on this ground, as the jury at the same time found that he had acted honestly in making the representation, and the evidence in the opinion of the court sustained that finding. *Parsons* v. *Citizens' Ins. Co.*, 43 U. C. R. 261.

Liability Denied.]—Where insurers repudiate liability on a policy they cannot object that proofs of loss have not been furnished. Judgment below, 29 O. R. 377, affirmed. *Morrow* v. *Lancashire Ins. Co.*, 26 A. R. 173.

Magistrate Interested.]—A fire policy on a saw-mill and machinery therein required, in the event of loss, a certificate containing certain information "under the hand of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise," &c. The magistrate who certified had leased the land on which the mill stood to the plaintiff for fifteen years, of which nine were unexpired. The mill insured by defendants had been built by the plaintiff to replace one previously burned, and no rent was due at the time of the fire. There were no covenants on the part of the lessor to keep in repair, and there was a covenant on plaintiff's part to leave the mill in sufficient repair at the end of the term to saw 2,000 feet in twelve hours; any machinery not required for this purpose to be removed by the plaintiff or paid for by the

lessor. On motion to set aside a verdict entered for the plaintiff in an action on the policy, the court being equally divided on the question of the interest of the magistrate within the meaning of the condition, the rule dropped. *McRossie* v. *Provincial Ins. Co.*, 34 U. C. R. 55.

Misstatement of Value at Prior Date.]—Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock, at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss:—Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there could be no recovery on the record as framed, for plaintiffs having accepted a surrender of the policy, they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit, not only must there be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew; that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but even if invoked they would afford no defence, as there was no misrepresentation as to the amount of loss. Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation. Semble, that on the evidence there was no misrepresentation at all. *Royal Ins. Co.* v. *Byers*, 9 O. R. 120.

Mortgagor and Mortgagee.]—After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objection to them for many months after, and gave no notice that further proofs were required. When paying the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognize any claim by the mortgagor, by reason of non-compliance with the statutory conditions as to proof of loss:—Held, that they must be taken to have dealt with the mortgagees as agents of the mortgagors, and that they had waived further proofs of loss; and that the payment enured to the benefit of the latter. *Bull* v. *North British Canadian Investment Co.*, 14 O. R. 322; 15 A. R. 421; 18 S. C. R. 697.

A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half, to the mortgagee. Attached to the policy was a separate slip called a "mortgagee clause," by which it was provided that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payment should be made. Proofs of loss were not made by the mortgagor and mortgagee until within sixty days of the end of the year after a fire had occurred; and within sixty days after the proofs were delivered, an action was commenced by the mortgagor and the representatives of the mortgagee:—Held, that the mortgagee was not bound as "the assured," under statutory condition 12, to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions 12 and 13. Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition 22, was a neglect from the consequences of which the mortgagee was relieved by the mortgagee clause, and that, as far as he was concerned, the action was not brought too soon. Held, also, that the words "shall claim that, as to the mortgagor, no liability exists," in the mortgagee clause, meant "and as to the mortgagor no liability exists;" and that, as the policy was valid at the time of the fire, and nothing was shewn to have taken place since to render it invalid, there was a liability to the mortgagor; that condition 22 barred the remedy and not the right, and the defendants were not entitled to subrogation. Held, also, that the mortgagor was bound to make the proofs in such time that the sixty days would elapse before the expiration of the year limited for bringing the action, and his remedy as to the other half of the policy was barred. *Anderson* v. *Saugeen Mutual Fire Ins. Co.*, 18 O. R. 355.

Non-disclosure of Incumbrance.]—The plaintiff did not in his declaration of loss disclose an incumbrance in favour of his father. The jury did not find, nor were they asked to find, that there was any fraud or false statement in the plaintiff's statutory declaration:—Held, that fraud or a wilful false statement should have been proved, and that it was not the place of the court to infer it. Mason v. Agricultural Ins. Co., 18 C. P. 19, followed. *Reddick* v. *Saugeen Mutual Fire Ins. Co.*, 14 O. R. 506; 15 A. R. 363.

Objection not Made.] — Held, that the fact of the company, after receiving the insured's proofs of loss, remaining silent for some months and until action brought, was no waiver of the right to receive proper proofs. *Mason* v. *Andes Ins. Co.*, 23 C. P. 37.

The fact of the insurance company after receiving the proofs of loss not notifying their objections to them, could not be considered a waiver of such objections. Canada Landed Credit Co. v. Canada Agricultural Ins. Co., 17 Gr. 418, remarked upon. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

Optional Right—*Objection not Made.*]—Conditions in a policy for avoiding the same have, in case of a breach, the effect of avoiding the policy, not ipso facto, but if the insurance company so elect. Where breaches of such conditions had occurred before loss, and the company, after being notified of such breaches, took no notice thereof, but called for the proofs of loss which were required on the footing of the policy being a subsisting instrument, and these were furnished, the company were held to have precluded themselves from afterwards setting up the forfeiture. *Canada Landed Credit Co.* v. *Canada Farmers' Mutual and Stock Ins. Co.*, erroneously reported as *Canada Landed Credit Co.* v. *Canada Agricultural Ins. Co.*, 17 Gr. 418.

Person Making Proof.]—One condition was, that " in case of loss or damage on a policy assigned, where there is no actual transfer of the property insured, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made," &c. Quære, as to the exact meaning of such condition. *Davies* v. *Home Ins. Co.*, 24 U. C. R. 364; 3 E. & A. 269.

Reasonable Compliance.]—By one of the conditions indorsed on a policy of insurance, the insured was required to deliver a particular and detailed account of the loss, and, if required, to produce the books of account and other papers, vouchers, original or duplicate invoices:—Held, that only a reasonable compliance with the condition was required: that it was therefore sufficient for the insured to furnish such particulars and documents as it was reasonably in his power to do; and that in this case, on the evidence set out in the report, the condition had been complied with. *Goldsmith* v. *Gore District Mutual Fire Ins. Co.*, 27 C. P. 435.

Reasonable Time.]—Held, that the 13th statutory condition, requiring the assured to give notice of his loss and to deliver " as soon afterwards as practicable " a particular account, was complied with by delivering such account within a reasonable time. *Parsons* v. *Queen Ins. Co.*, 43 U. C. R. 271.

Request.]—The insured being bound within fourteen days to furnish a statement of claim, with proof thereof by affidavit or affirmation when requested:—Held, the jury having found that a proper and bonâ fide demand had not been made, that the plaintiff was entitled to recover. *Cameron* v. *Times and Beacon Fire Ins. Co.*, 7 C. P. 234.

Right to Call for Evidence.] — The policy required as particular and accurate an account of the loss as the case would admit, and such other evidence as the directors, &c., should reasonably require. The house insured was burned on the 21st August, 1867. On the 5th October the plaintiff sued, and on the 9th he furnished a builder's certificate of the value of the building, which had been required by the defendants before the action:—Held, that such certificate was reasonable evidence to require: that being demanded before action, the plaintiff could not sue without giving it; and that, in the absence of any special circumstances, the question whether it had been required within a reasonable time did not arise. Whether the condition authorized the demand of such certificate was a question for the court, though whether what was furnished complied with the requisition might be for the jury. *Fawcett* v. *Liverpool, London, and Globe Ins. Co.*, 27 U. C. R. 225.

The demand was made by defendants' inspector, whose duty was to visit the agencies and adjust losses. It was objected that only the directors could make it; but:—Held, sufficient, they having adopted the inspector's act. *Ib.*

Separate Classes of Goods.]—A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; and where such a policy required the assured to deliver " as particular an account of the loss and damage as the nature of the case would admit:"—Held, he must give such account of the loss on each class of goods, and that a statement of loss upon his stock of merchandise, generally, was not sufficient. *Lindsay* v. *Lancashire Fire Ins. Co.*, 34 U. C. R. 440.

Sufficiency of Proofs — *Waiver—Letter without Prejudice.*]—Action on a policy of insurance against fire on a stock of goods. M., the local agent through whom the insurance was effected, stated that he had at the time examined the premises, and considered, from the size of the store, the appearance of the goods, and the stock book, there were goods to the amount insured. The fire occurred on the 20th October, and all the goods on the premises were destroyed. On the same day the defendants' inspector came and saw plaintiff, who furnished him with a statement shewing the amount of the stock in May—the insurance having been effected in June—the sales since then, and the invoices of goods purchased up to the fire. The inspector gave plaintiff a form from which he was to, and did, fill in the proof papers sent him by the inspector; and which plaintiff inclosed to defendants in a letter of 27th October, informing them that, if not correct, he would have same made out to their satisfaction. On 31st October defendants replied that they thought the loss, in place of $13,005, the amount claimed by plaintiff, should be $11,734.90, adding: " This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of any condition of the policy." The plaintiff replied that his claim was a just and honest one, but if settled at once he would accept a deduction of $400. The defendants then wrote that theirs was a fair and liberal offer, and pointed out what they considered objectionable items in plaintiff's claim. The plaintiff then made and sent to defendants a statutory declaration of loss according to the above form. The defendants then replied, stating that without admitting, but denying any liability, they drew attention to alleged informalities in not specifying the items of loss in detail, and in not giving a detailed statement of the claim. The plaintiff then furnished defendants with a statutory declaration, giving such detailed statement. Nothing further was done, and this action was brought. The defendants set up a number of defences, amongst which was arson, and imputing fraud and misconduct to the plaintiff, but no evidence was given in support of them:—Held, there was sufficient evidence of the amount of the goods at the time the insurance was effected: that the goods insured were those destroyed by the fire; and that under s. 2 of the Fire Insurance Policy Act, R. S. O. 1877 c. 162, no objection could be raised

to the proofs; and in any event the proofs were sufficient. Held, also, that the letter of the 31st October, was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view. *Hartney* v. *North British Fire Ins. Co.*, 13 O. R. 581.

Held, in this case that the proofs of loss furnished were a sufficient compliance with the statutory conditions. *Mitchell* v. *City of London Fire Ins. Co.*, 12 O. R. 706.

Time — *Negotiation* — *Waiver.*]—Where notice of the loss and the particulars of it are required by a policy, they may be waived by the conduct of the insurers. In this case the declaration alleged that notice of the loss was given to defendants forthwith, and an account of the particulars of the loss as soon as possible (such being the conditions of the policy); and issues were taken on these allegations. There were two separate policies on a shop and on the goods contained in it. Both building and goods were destroyed. The fire took place on the 13th June, and the notices, both as to the shop and the goods, were given on the 13th July. Defendants then entered into correspondence with plaintiff as to furnishing better particulars, which were afterwards furnished; and they then refused to pay for the goods on account of some suspicious circumstances attending the fire, but they paid the amount insured on the house:—Held, that defendants were precluded from objecting to the sufficiency of the notices, or to the time at which they were given. *Lambkin* v. *Ontario Marine and Fire Ins. Co.*, 12 U. C. R. 578.

——— *Mistake.*]—One of the by-laws of an insurance company provided that a detailed account of any loss verified by oath was to be given to the company within thirty days after the loss sustained; and in case of any misrepresentation, fraud, or false swearing, the assured should forfeit all claim by virtue of his policy; and the Act of the Legislature [36 Vict. c. 44 (O.)] also required such proof to be given within thirty days after the loss sustained. The assured considering it unnecessary to do so, did not give the proof until after the thirty days had elapsed:—Held, that under such circumstances the claimant could not recover the amount of his loss; but, semble, if the proofs had not been furnished by reason of accident or mistake, relief might have been afforded him. *Hawke* v. *Niagara District Mutual Ins. Co.*, 23 Gr. 139.

——— One of the conditions of a policy of insurance against fire on ice and packing contained in an ice house situated in the State of Wisconsin, provided that the proofs of loss should be delivered "as soon after the loss as possible." The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured, who re-delivered them in the same state in the month of July following. The only reason given for not delivering them sooner was, that it was not convenient to do so:—Held, that the condition was not complied with. *Cameron* v. *Canada Fire and Marine Ins. Co.*, 6 O. R. 392.

——— *Waiver — Mutual Company.*] — Upon a policy issued by a mutual company the statutory conditions were indorsed with variations, one of which was (being the same as s. 56 of the Mutual Act, R. S. O. 1877 c. 161), that the proofs, declarations, &c., called for by the statutory conditions should be furnished to the company in writing within thirty days after the loss. The loss occurred on the 2nd October, 1878, and on the 5th the plaintiff notified the defendants by letter. A few days after the plaintiff saw one S., an agent of the defendants for obtaining applications, though not for collecting claims, but one who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion and do what was proper, which S. promised to do. On 17th October the defendants' president came up and saw plaintiff, who informed him of the loss, and of all the circumstances relating thereto, and plaintiff was told by him in answer to his inquiry that nothing further need be done. The plaintiff in consequence did nothing; but subsequently, on the plaintiff hearing that the defendants disputed the claim, some correspondence took place, which resulted in the plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of thirty days:—Held, affirming, 31 C. P. 562, that s. 2 of R. S. O. 1877 c. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim, applies to mutual insurance companies, and to the time of delivery as well as insufficiency in the proofs. Held, also, under the facts set out in the report, that the omission to deliver the proofs in proper time arose from accident or mistake, within the meaning of that clause. Remarks as to the construction and effect of this clause, and the extent of the discretion given by it to the court or Judge. *Robins* v. *Victoria Mutual Fire Insurance Co.*, 6 A. R. 427.

——— *Waiver — Condition Precedent.*]—A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits:"—Held, following Employers' Liability Assurance Corporation v. Taylor, 29 S. C. R. 104, that compliance with this provision was a condition precedent to an action on the policy. Held, also, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after the fifteen days had expired, extend the time without express authority from his principal. Held, further, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition in the policy. *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537.

——— *Waiver — Estoppel.*]—Certain conditions of a policy of fire insurance required proofs, &c., within fourteen days after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced, no money should

be payable by the insurer, and for forfeiture of all rights of the insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid:—Held, that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proofs, within the time specified, the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.—Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified. Atlas Assurance Co. v. Brownell, 29 S. C. R. 537, followed. *Commercial Union Assurance Co.* v. *Margeson*, 29 S. C. R. 601.

Value—*Fraud.*]—The question of fraud is one for the jury, and although the court may be dissatisfied with the value set upon his property by the assured, still unless he appear to have valued it too high mala fidé, and not by error of judgment, they will not disturb the verdict. *Rice* v. *Provincial Insurance Co.*, 7 C. P. 548.

Defendants pleaded, that after the fire the plaintiff, in making his claim, had misrepresented and over-stated the amount of his loss, contrary to the condition in the policy:—Held, that to sustain this plea it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close inquiry. *Park* v. *Phœnix Insurance Co.*, 19 U. C. R. 110.

Held, upon the evidence set out in the report of the case—it being probable that the loss, though over-estimated, was equal to the sum insured, and there being circumstances which might explain the over-charge—that the jury were warranted in finding for the plaintiff. *Ib.*

Where, in an action on a fire policy, the plaintiff in his statement of loss swore that his damage amounted to about twelve times the amount actually proved, and for which he actually obtained a verdict, and the Judge before whom the case was tried was dissatisfied with the finding, the court, notwithstanding the usual practice as to new trials where the defence charges a criminal offence, this being made perjury by 32 & 33 Vict. c. 23, s. 5 (D.), granted a new trial, costs to abide the event. *McMillan* v. *Gore District Mutual Fire Insurance Co.*, 21 C. P. 123.

Vouchers.]—Persons insured were bound, within thirty days after a loss, "to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account and other proper vouchers." The plaintiff sent in his affidavit, stating generally the value of the goods saved and destroyed; a certificate of the reeve, as the nearest magistrate, as to his inquiry into and belief with regard to the fire being accidental, and of two merchants; and a book containing a statement of the goods lost, made up partly from invoices and partly from recollection, but not verified by his account books or other vouchers, which he had, but did not produce, nor by his affidavit:—Held, clearly, no compliance with the condition. *Greaves* v. *Niagara District Mutual Fire Insurance Co.*, 25 U. C. R. 127.

Waiver.]—Defendants, among other pleas, traversed the delivery of a statement of loss, verified on oath, within thirty days. It appeared the value of the premises destroyed was the only question after the fire, and to settle that an arbitration was proposed, but did not take place, and the proofs were not sent in till the thirty days had expired. The proposal to refer, however, was apparently after the thirty days, and after plaintiff had received the secretary's letter stating that he could waive nothing:—Held, that there was no evidence of waiver of the condition on the policy, and a verdict for plaintiff was set aside. *Niagara District Mutual Fire Insurance Co.* v. *Lewis*, 12 C. P. 123.

——— *Pleading.*]—To an action on a policy, defendants pleaded non-performance of a condition requiring the delivery of a particular account of the plaintiff's loss, &c. The plaintiff replied de injuriâ, and at the trial relied upon a parol waiver of this condition by defendants' managing director and secretary. Quære, whether evidence of such waiver was admissible, not being specially replied; but held, that if replied it would have been no answer to the plea, for it would have been setting up a substituted parol contract in answer to the sealed policy; and a nonsuit was therefore ordered. 27 & 28 Vict. c. 38, gives no authority to the directors to waive by parol the performance of a condition precedent, still less to the managing director and secretary. Quære, as to the effect of that statute. *Scott* v. *Niagara District Mutual Insurance Co.*, 25 U. C. R. 119.

Defendants' secretary wrote to the plaintiff after the fire that defendants declined paying his claim in consequence of the facts not being stated in his application for the policy; and the plaintiff relied on this as a waiver of the account:—Held, that such waiver should have been specially replied, and semble, that if it had been, the letter was not evidence of it. *Mulvey* v. *Gore District Mutual Fire Assurance Co.*, 25 U. C. R. 424.

(e) *Procedure in Actions.*

Admission of Evidence—*Amendment.*]—In an action on a policy of insurance, defendants by their plea denied the loss in the usual form, and under it desired to shew that the building had been designedly set fire to:—Held, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused. *Mann* v. *Western Assurance Co.*, 17 U. C. R. 190.

Amendment.]—The plaintiff was allowed to amend his declaration on an insurance policy, so as to shew that the policy was to be subject to such conditions only as were contained in the printed application for insurance, on which it was granted, though the

court intimated that such amendment would be of no avail. *Jacobs* v. *Equitable Insurance Co.*, 18 U. C. R. 14.

The plaintiff at the trial claimed as owner of goods insured, and the Judge ruling against him, he applied and was allowed to prove his interest as mortgagee:—Held, that it was in the discretion of the Judge to permit this, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd* v. *Equitable Fire Insurance Co.*, 8 C. P. 415.

In an action on a policy defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had misdescribed the alteration on which they intended to rely, but it was also shewn that such alteration had not in any way caused or contributed to the fire:—Held, that under these circumstances an amendment of the plea was properly refused. *McKenzie* v. *Vansickles*, 17 U. C. R. 226. But see *Bank of Montreal* v. *Reynolds*, 24 U. C. R. 381.

In an action on a mutual insurance policy, defendants pleaded non-payment of an assessment. The Judge ruled that an insurer is not liable for assessment made before his insurance was effected or premium note given, and refused to allow defendants to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. *Green* v. *Beaver and Toronto Mutual Fire Insurance Co.*, 34 U. C. R. 78.

In an action on a mutual insurance policy:—Held, affirming 43 U. C. R. 102, that a defence under 37 Vict. c. 44, s. 52 (O.), that the action was brought too soon, was not open upon the pleadings set out; and an amendment was, under the circumstances, refused. *Frey* v. *Wellington Mutual Insurance Co.*, 4 A. R. 293.

A policy of insurance, issued after 39 Vict. c. 24, did not contain the conditions made necessary by that statute:—Held, that the fact of the declaration having stated that the policy was subject to conditions, which it set out, did not preclude the plaintiff from contending there were no conditions upon the policy for an amendment would be allowed in order to state the contract proved according to its legal effect. *Parsons* v. *Citizens Insurance Co.*, 43 U. C. R. 261.

Arson.]—As to the defence of arson in actions against insurance companies, and the evidence necessary to support it. *Mann* v. *Western Assurance Co.*, 17 U. C. R. 190; *Richardson* v. *Canada West Farmers' Insurance Co.*, 17 C. P. 341; *Gould* v. *British America Assurance Co.*, 27 U. C. R. 473, *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553; *Frey* v. *Mutual Fire Ins. Co.*, 43 U. C. R. 102; *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 384.

Costs.]—Where an insurance company set up several defences, some of which they failed to substantiate, the court on dismissing the bill did so without costs. *Hawke* v. *Niagara District Mutual Fire Assurance Co.*, 23 Gr. 139.

Effect of Jury's Finding.]—All the evidence on either side as to fraud in the plaintiff's statement of loss having been fairly left to the jury, who found for the plaintiff, the court refused to interfere, though they would have been better satisfied with a verdict the other way. *Lampkin* v. *Ontario Marine and Fire Insurance Co.*, 12 U. C. R. 578.

The jury found for the plaintiff on the plea of arson, for which she had been prosecuted and acquitted; and the court, notwithstanding very strong circumstances of suspicion, which are stated in the case, refused a new trial. *Dear* v. *Western Assurance Co.*, 41 U. C. R. 553.

Where in an action on a fire insurance policy, the jury find against the defendants on a plea of arson, the court will not, in its discretion, grant a new trial, unless the evidence so preponderates in favour of the truth of the charge as to evince, as it were, a determination on the part of the jury not to give effect to the law. *Frey* v. *Mutual Fire Insurance Company of the County of Wellington*, 43 U. C. R. 102.

Evidence.]—Semble, that upon the evidence set out in this case, the pleas denying plaintiff's interest in the goods should have been found in defendants' favour. *Merrick* v. *Provincial Insurance Co.*, 14 U. C. R. 439.

Held, that sworn entries in the custom house of the quantity and value of goods imported by the party claiming damages (occasioned by fire) under a policy, and who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages. *Lazare* v. *Phœnix Insurance Co.*, 8 C. P. 136.

The defendants by their plea denied the loss in the usual form, and under it desired to shew that the building had been designedly set fire to:—Held, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused. *Mann* v. *Western Assurance Co.*, 17 U. C. R. 190.

The defence that the insured or his assignee wilfully and maliciously set fire to the insured premises, ought to be as satisfactorily established in the minds of the jury as to justify them in convicting him of the criminal charge for the same offence. The fact that one of the jurors is a shareholder in an insurance company is no ground for a new trial: the plaintiff should exercise his right of challenge if he objects to the juror's presence. *Richardson* v. *Canada West Farmers Insurance Co.*, 17 C. P. 341.

In an action on a fire policy, it appeared that among the questions answered by the agent of the company on effecting the insurance, was one, "Had the applicant ever had any property destroyed by fire, and under what circumstances? Was it insured, and in what office?" to which the agent answered that the plaintiff had never before had property destroyed by fire that he had heard of:—Held, that the plaintiff, as a witness on his own behalf, might be asked on cross-examination what passed between him and the agent

on this subject, but that the plaintiff's answer would be conclusive. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610.

Action on a fire policy. Plaintiff was called as a witness, and said: "I did not tell E., defendants' agent, I had not been burnt out before. I was not asked by him." E. was called, and it was proposed to ask him questions to contradict the plaintiff upon that point:—Held, that such evidence was properly rejected as raising a collateral issue. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 384.

Defendants pleaded false swearing by plaintiff in his affidavit of loss in stating that he had effected no additional insurance:—Held, that the sworn claim of plaintiff for loss made upon a policy with another company was admissible without producing the policy; but that upon the evidence set out in this case, it did not sufficiently appear that the same property was insured by both companies. *Hazard* v. *Canada Agricultural Ins. Co.*, 39 U. C. R. 419.

Quære, whether an affidavit as to other insurances is an affidavit in relation to the loss or damage. *Ib.*

New Trial.]—New trial granted on payment of costs, to enable plaintiffs to give evidence of a waiver of a condition, where a nonsuit would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced. *Cameron* v. *Monarch Ass. Co.*, 7 C. P. 212.

The defendants had refused to accept a new trial on the plea of arson, which the court below offered them upon their consenting to abandon all other defences; and the court of appeal declined to interfere by granting it. *Frey* v. *Mutual Fire Ins. Co.*, 43 U. C. R. 102, 4 A. R. 293.

Nonsuit.]—The following condition was indorsed on the policy: "Insurance subsisting or effected with other companies must be notified to the board, and if approved of, to be indorsed on the policy and signed by the secretary." Defendants having proved their plea under this condition, plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. Semble, that a verdict should have been entered for defendants on the plea, and the plaintiff left to move for judgment non obstante, for that there cannot be a nonsuit while another issue stands in favour of the plaintiff on the record. *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451.

Particulars.]—The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was that the plaintiffs' claim was vitiated by the fifteenth statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true. Upon an application for particulars:—Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged the fires were caused by his procurement, means, or contrivance.

2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely.

3. Nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient.

4. That as to the alleged falsity and fraud of the declaration with respect to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had over-stated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles. *Katrine Lumber Co.* v. *Liverpool and London and Globe Ins. Co.*, 17 P. R. 318.

Pleading.]—Where in a policy losses by fire arising from riot or civil commotion were excepted, and in an action on the policy, the declaration negatived only that the loss arose from civil commotion:—Held, declaration bad, on general demurrer, as the terms riot and civil commotion were not synonymous. *Condlin* v. *Home District Mutual Fire Ins. Co.*, H. T. 6 Vict.

A declaration on a policy setting out facts from whence it might be inferred that the insurance was effected for the joint benefit of the plaintiff and another:—Held, bad, for not distinctly averring the interest of the other, and that the action was brought on their joint account. *Dunlop* v. *Ætna Ins. Co.*, 2 C. P. 252.

Declaration on a policy alleging that it was "subject to such conditions as are contained in the printed proposals issued by the said company," and that the plaintiff had kept all conditions precedent on his part, "according to the true intent and meaning of the said policy, and of such conditions as are contained in the printed proposals issued by the said company." Plea, that the policy was "subject to such conditions as are printed on the back of the said policy," and that among such conditions was one (setting it out) which the plaintiff had broken. Demurrer, on the ground that the condition pleaded was not shewn to be contained in the printed proposals:—Held, plea good. *Jacobs* v. *Equitable Fire Ins. Co.*, 18 U. C. R. 373.

The declaration alleged loss, and notice, and as soon as possible thereafter, and within thirty days, the delivery of particulars, signed, and all the declarations required, made on

oath, and an account verified by the oath of the plaintiff, and shewing no other insurance on the premises. Plea stating the condition by which the insured was required to give a particular account under oath, and also to declare on oath whether any and what other insurance existed upon the premises at the time of the fire, and alleging that although the plaintiff had delivered due account of his loss, yet he had neglected to inform defendants whether any and what other insurance existed. Replication, that no other insurance was effected on the property insured:—Held, plea bad, for not traversing that the plaintiff had made a declaration upon oath, but alleging only that he had neglected to inform them as to whether there was any other insurance. *Williamson* v. *Niagara District Mutual Fire Ins. Co.*, 14 C. P. 15.

Declaration that by policy dated 29th May, 1861, the defendants insured plaintiff against loss by fire in $1,200 on a stock of hardware, &c., contained in a frame building, &c.; and also that by a policy of 28th June, 1861, defendants insured plaintiff on a stock of hardware, &c., in a building, &c., in $1,200, at twenty per cent.; on his two-story dwelling-house, &c., $800, and on household furniture therein $800, at five per cent, making in all $2,800; and averred that from the making of the policies the plaintiff was interested in the premises and stock till the fire, when he sustained a loss of $6,000; and averment that all things necessary had been performed by plaintiff to entitle him to bring this action:—Held, that the declaration must be considered as containing two counts, and the general allegation at the end thereof as referring to the whole declaration. *Date* v. *Gore District Mutual Fire Ins. Co.*, 14 C. P. 548.

Where a declaration on a policy was in the old form, containing specific averments of performance of conditions precedent, it was referred to the master to strike out the superfluous matter. *Patterson* v. *Provincial Ins. Co.*, 2 P. R. 164.

Held, that in an action on a policy of insurance, it is not incorrect to set out all the conditions which, together with the body of the policy, form the contract between the parties. Semble, that a declaration which did not set out such conditions would be bad. *Fair* v. *Canadian Mutual Fire Ins. Co.*, 6 P. R. 255.

Defendants will not be allowed to plead together an equitable plea that the policy had been assigned by plaintiff to secure a mortgage debt, and that the amount of it had been paid to the mortgagee, and a legal plea that the plaintiff had effected a subsequent insurance without notice, contrary to a condition of the policy. *Ott* v. *Liverpool and London and Globe Ins. Co.*, 5 P. R. 156.

A suit in the court of chancery was brought against an insurance company to recover for loss sustained, on the ground that the policy was not a perfect one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were that the policy had been duly signed by the president and secretary, and countersigned by the agent at L. (the place where the insurance was effected) and was ready to be delivered to the plaintiff:—Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed. *McFarlane* v. *Andes Ins. Co.*, 20 Gr. 486.

A bill against an insurance company on a policy, alleged that the policy was made by the company, but did not state that it was under seal:—Held, sufficient. *Workman* v. *Royal Ins. Co.*, 16 Gr. 185.

The bill alleged that the policy had been destroyed:—Held, that an affidavit of the fact must be annexed to the bill. *Ib.*

The policy was stated to be to pay any loss or damage by fire, "subject to the conditions thereon indorsed:"—Held, that the language did not imply that the conditions were conditions precedent, and therefore that it was not necessary to shew due performance. *Ib.*

Declaration on a policy made to one B., of whom the plaintiff was assignee in insolvency. Third plea, that before the loss, the plaintiff became the assignee, and the policies and insured property became absolutely transferred and vested in him, and he became and was the insured under the policy, and the person sustaining damage, but that he did not give notice of the loss, &c.:—Held, plea bad. Equitable replication, that before the loss the property was not absolutely vested, &c., in plaintiff, but B. still had an insurable interest in the property to the amount of the policy, which defendants knew, and they renewed the policy to him for value for a year, during which the loss occurred; and B., who was the person sustaining loss, &c., gave the notice and proofs:—Held, bad, for it was a departure from the first count of the declaration, which averred a sole interest in the plaintiff; and that B. had no insurable interest apart from the plaintiff. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

To an action on a policy of insurance on a steamer against fire, defendants pleaded, in their sixth plea, that by the policy the plaintiffs warranted that the total amount of said insurance on said steamer should not exceed three-fourths of her declared value, otherwise the policy should be void, and the insurance on her far exceeded three-fourths of said value. The plaintiffs replied that the warranty referred to was to the effect that the total amount of insurance against fire should not exceed three-fourths of the declared value, and that such insurance did not exceed said value:—Held, on demurrer, a good replication, and that the defendants might have rejoined, re-affirming the condition to be as they had alleged, and denying that it was such as the plaintiffs asserted. *Noad* v. *Provincial Ins. Co.*, 18 U. C. R. 584.

The seventh plea set up as a defence other insurances without notice to defendants, or having the same indorsed on their policy; and the plaintiffs replied that they gave due notice of such insurances to defendants, who neglected to indorse the same:—Held, replication bad. *Ib.*

The declaration, after setting out a condition of a policy, that the assured sustaining loss should within fourteen days deliver in a particular account thereof, &c., averred the performance of all conditions precedent. Defendants pleaded that the plaintiff did not, within fourteen days after the loss, deliver in the accounts; and in another plea, that he did

not, although reasonably required, make proof by his declaration and books of account, &c. The plaintiff replied to the first plea, that the policy was not delivered to him until long after the fire, and that within fourteen days after receiving it he delivered the account; and to both pleas, that he delivered an account, and that defendants afterwards made further requisitions, which were complied with, and defendants never notified him in writing that the proof was objected to because not given in time:—Held, on demurrer, replication bad, as being a departure from the declaration. *Caulthard* v. *Royal Ins. Co.*, 39 U. C. R. 409.

The second count of a declaration—after alleging that it was on a fire insurance policy for $1,000, dated 28th May, 1877, which by its terms was said to be subject to certain pretended conditions indorsed thereon, and set out at length in the first count—averred that the policy was one entered into and in force in Ontario, with respect to property situate therein, and that the said conditions were the only conditions stated in said policy, and were not, nor were any of them, conditions mentioned in or in conformity with the Fire Insurance Policy Act, nor variations thereof, as required by said Act, whereby the conditions so indorsed upon the policy were inoperative and void, and the policy was free from all conditions as against the plaintiff. The fifth and sixth pleas alleged that the policy was subject to the conditions in the words and figures following: setting out conditions, in the exact terms of statutory condition No. 13, with respect to proofs of loss, and averred non-performance by omitting respectively to give notice of loss forthwith, and to deliver a statutory declaration that the loss was just and true, &c. To these pleas plaintiff replied respectively, setting up grounds of excuse for the non-performance of the said conditions:—Held, replications bad, as being a departure from the declaration; but that the pleas were also bad, for that they must be read as alleging that the policy was subject to the conditions set out in the pleas, being the statutory conditions, without shewing that they were indorsed upon the policy, or were of the character referred to in Geraldi v. Provincial Ins. Co., 29 C. P. 221. *Brillinger* v. *Isolated Risk and Farmers Ins. Co.*, 30 C. P. 9.

See Morrow v. *Waterloo County Mutual Ins. Co.*, 39 U. C. R. 441.

To a declaration on a policy of insurance made by defendants, but not averring that it was under the corporate seal, the defendants pleaded non est factum:—Held, plea good: for that the declaration set forth a complete instrument, a policy of insurance made by defendants, a corporation, which ex vi termini, imported a seal; and in any event the plaintiff could not be embarrassed by the plea, as it must under the O. J. Act, rules 141 and 403, be treated as a mere denial of the making of the contract of insurance in fact, and not of its legality or sufficiency in law. *Burnett* v. *Union Mutual Fire Ins. Co.*, 32 C. P. 134.

Previous Acquittal in Criminal Trial.]—Defendants gave such evidence to shew that the house had been burned by one K., by the plaintiff's procurement, as would well have warranted a finding for defendants. K., however, had been indicted for the arson and acquitted. The jury having found for the plaintiff, the court refused to interfere. *Gould* v. *British America Ass. Co.*, 27 U. C. R. 473.

Proving Averments.]—The declaration averred that certain affidavits required by the conditions, were made by B. and D.:—Held, that proof of affidavits by such parties was indispensable, as well as that the affidavits should strictly conform to the terms of the policy. *Alderman* v. *West of Scotland Ins. Co.*, 5 O. S. 37.

Several Trials.]—This case having been four times tried, the plaintiff having succeeded twice, and the jury having disagreed on the other occasions, and the defence being in the nature of a charge of arson, a new trial was refused. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 384.

(f) *Reference to Arbitration.*

Action After Award.]—Held, that it was no misdirection to leave to the jury the question of value of property destroyed, although the same had been found by arbitrators under the condition of the policy; first, because there was no condition affecting either this or any other matter; secondly, because, even if there were, the award could not be held to be valid, inasmuch as the arbitrators had received no evidence and turned the parties out of the room during the investigation. *Parsons* v. *Citizens Ins. Co.*, 43 U. C. R. 261.

Appeal.]—In an action on a fire insurance policy, the Judge at the trial, by consent of the parties, directed a reference, which did not contain any agreement allowing an appeal on the merits:—Held, that an appeal would not lie. *Walker* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 30 C. P. 211.

Ascertainment of Loss — *Arbitration.*]—Proceedings under R. S. O. 1887 c. 167, s. 114 (16), for the ascertainment of the amount of a loss under a fire policy, are proceedings in the nature of an arbitration and not of a valuation merely. Arbitrators must be indifferent, and an award made by arbitrators, one of whom was at the time of arbitration subagent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void. Race v. Anderson, 14 A. R. 213, followed. *Vineberg* v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293.

Compulsory Reference — *Evidence.*]—Held, that an order of reference made upon "it appearing that the matters in dispute consist in part of matters of mere account . . to ascertain and certify what amount, if anything, the defendants should pay to the plaintiff under the policy in the pleadings mentioned," after the negotiations set forth in the report, was not to be considered as an order for compulsory reference under the C. L. P. Act, but rather as an order by consent for arbitration in pursuance of the conditions of the policy; and that it was open to defendants to prove that the plaintiff's claim was false and fraudulent; and that, although the arbitrator could not decide the case upon the ground of arson alone, or receive evidence thereon as an independent defence, yet he should not be fettered in his discretion as to

receiving any such evidence incidentally appearing in support of the defence that the claim was utterly unfounded and fraudulent. *Anhalt* v. *Phœnix Ass. Co.*, *Anhalt* v. *London Ass. Co.*, 7 P. R. 341.

See Anchor Marine Ins. Co. v. *Corbett*, 9 S. C. R. 73.

Costs of Reference.]—After an action had been commenced on a policy of insurance the defendants gave notice of arbitration under the statutory condition, when the court made an order that, on the defendants abandoning all defences and admitting their liability under the policy sued on, all proceedings in the action should be stayed, the plaintiff to sign final judgment and proceed in the action for the amount which might be awarded him, together with the costs of the action, &c. And it was further ordered, without the consent of the defendants, that either party, after the making of the award, might apply to a Judge in chambers in respect of the payment of the costs of the reference and award. The arbitrators awarded to the plaintiff the full amount of his claim. On application to a Judge, 7 O. R. 465, an order was made directing the defendants to pay the costs of the reference and award. On appeal the court being equally divided, the judgment was affirmed. *Hughes* v. *Hand in Hand Ins. Co.*, 7 O. R. 615.

A church was insured under a three years' policy on 14th November, 1885, and was destroyed by fire 31st May, 1888. The insurance company admitted the loss, but required the damages to be proved, and a submission to appraisers was entered into by the parties, in which it was provided that "the award made by them, (the appraisers) or any two of them, shall be binding upon both of said parties as the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," &c. Two of the appraisers joined in an award giving the insured the full amount claimed, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees:—Held, that R. S. O. 1887 c. 167, s. 114, was applicable to the policy in question, and that the legislature intended, by the use of the words, "or otherwise in force in Ontario, with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under s.-s. 16 of that section. *Re St. Philip's Church, Weston, and Glasgow and London Ins. Co.*, 17 O. R. 95.

Reference after Action.]—After action the company, under the sixteenth statutory condition, demanded an arbitration as to the value of the premises destroyed, the result of which was an award finding the value to have been $2,500, and the loss payable to the plaintiff $1,700; while the jury at the trial of the action found that the plaintiff had truly represented the property as having been worth $3,500, and estimated his loss at that amount:—Held, that there having been no misrepresentation on the plaintiff's part, no mutual mistake, and the defendants not having proved that they granted the policy in consequence of any mistake on their part the parties were ad idem and the plaintiff was entitled to judgment for the amount of the award. *Smith* v. *City of London Ins. Co.*, 14 A. R. 328. See *S. C.*, 11 O. R. 38.

Reference in Action.] — Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation, and concealment of facts were raised upon the pleadings:—Held, that an order referring all the issues in the action to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way. *Clarry* v. *British America Assurance Co.*, 12 P. R. 357.

Refusal to Admit Liability.]—The defendants required the plaintiff to proceed to arbitration to ascertain the amount of loss under a policy issued by the defendants in favour of the plaintiff, which contained the statutory condition as to reference to arbitration. The plaintiff was willing to arbitrate as to amount provided the defendants would admit liability for the loss. This the defendants refused to do:—Held, that the defendants were not entitled to a stay of proceedings until the amount had been ascertained by arbitration. *Hughes* v. *London Assurance Co.*, 4 O. R. 293.

Staying Action.] — By a condition indorsed on a policy of insurance, the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators. An action having been brought on the policy, and an application made under C. L. P. Act, s. 167, to stay proceedings:—Held, 1. that the arbitration intended by the condition was not merely a valuation; 2. that the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute; 3. that the plaintiff was a "party" within the meaning of that section. Proceedings were accordingly stayed. *McInnes* v. *Western Ass. Co.*, 5 P. R. 242; 30 U. C. R. 580.

Waiver.] — The condition by which the defendants sought to defeat the action provided that all disputes touching loss or damage, should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within sixty days after the loss had been ascertained, and proved in accordance with the terms of the policy. It appeared that the assured had furnished the defendants with proof of the loss on the 5th April, to which the defendants made no objection until the 11th June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action:—Held, that even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as "ascertained and proved," and the plaintiff therefore, had a right of action on the expiration of that period. *McIntyre* v. *National Ins. Co.*, 5 A. R. 580.

Written Request.]—In an action on a policy of insurance the defendants, amongst other pleas, pleaded that the policy was subject to a condition that in case difference should arise touching any loss or damage, after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy; and that no suit or action against the company for the recovery of any claim by virtue of the policy should be sustainable in any court of law or chancery until after an award had been obtained fixing the amount of claim in manner therein provided; and averred that before the suit differences did arise touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any award fixing the amount of the plaintiff's claim under the policy by reason of the alleged loss or damage made before the commencement of the suit. There was no averment of a written request to refer the dispute. There was a demurrer to the replication to this plea, but the plaintiff took no exception to the plea. At the trial the facts alleged in the plea were established, and the Judge entered a verdict for the defendants upon this plea. It appeared that no such written request to refer had been in fact made. The court, 42 U. C. R. 141, made absolute a rule to enter a verdict for the plaintiff, holding that the defendants, not having complied with the statute 39 Vict. c. 24 (O.), could not avail themselves of the condition. The court of appeal, without pronouncing upon that question, held that the condition, even if valid, had not been broken, because there had been no written request to refer the dispute to arbitration; and therefore dismissed the appeal. *Ulrich* v. *National Ins. Co.*, 4 A. R. 84.

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10. *Re-insurance.*

General Transfer of Business—*Statutory Conditions—Waiver.*] — The Dominion Insurance Company insured one H. against loss by fire to the amount of $5,000, and under a contract of re-insurance made between the defendants and the Dominion Company, the latter company re-insured $2,500 with the defendants. Subsequently the Dominion Company entered into an agreement with the Fire Association, whereby, after reciting that the Dominion Company desired to be relieved from and guaranteed against loss on existing risks, and that the Fire Association had agreed to do so and to re-insure said risks, the company transferred all their business and the goodwill thereof to the association, who thereby re-insured all the existing risks, subject to the terms of the policies, &c.; the association to take and accept all re-insurances made with other companies, with power to use the company's name. A loss occurred on H.'s policy which was adjusted and paid by the association. In an action against the defendants to recover the amount of the reinsurance:—Held, that the defendants could not escape liability for either one or the other of the plaintiffs was entitled to recover; and that there was nothing in an objection raised as to double indemnity. Held, also, that the statutory conditions could not be imported into and read with either the agreement between the plaintiffs, or that between the Dominion Company and the defendants. *Fire Ins. Association* v. *Canada Fire and Marine Ins. Co.*, 2 O. R. 481.

Held, that the defendants' contract of re-insurance did not prevent the plaintiffs from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the re-insurers; and therefore an assent given by the Dominion Company to a chattel mortgage on some of the insured goods, without the defendants' knowledge and assent, did not release the defendants. *Ib.*

Under a state of facts similar to those stated in the preceding case, except that the insurance was of one C.'s property:—Held, that the plaintiffs were entitled to recover, for treating the agreement between the plaintiffs as a re-insurance, (though more properly a transfer of business with its liabilities and collateral securities), if it was of the whole amount of the Dominion Company's liability, the association having paid the whole loss to the company, or which was the same thing, to C., were entitled irrespective of any assignment to contribution from defendants; if, however, it was only of the residue of C.'s risk the defendants were still liable to the company on their policy, and by the very terms of the agreement it was effectually assigned to the association, who acquired all their co-plaintiff's rights and interest in it:—Held, also, that the statutory conditions were not applicable to such a contract of re-insurance as in this case. *S. C.*, 2 O. R. 495.

Misrepresentation as to Premium—*Reduction of Liability.*]—The plaintiffs' agent re-insured the defendants, another insurance company, for a portion of their risk on property belonging to H. & Co., in November, 1875, being well acquainted with the property and every circumstance necessary to consider in deciding whether to accept or reject the risk. He renewed the insurance on the 10th March, 1876, at eight per cent., but swore that he was induced to accept seven per cent. premium on the 25th April, owing to a misrepresentation by the defendants' agent that the defendants and the other insurance companies holding risks on the property had reduced their rate from eight to seven per cent.:—Held, that such representation, if made, could form no ground for avoiding the policy, inasmuch as the plaintiffs had already accepted the risk on their own judgment of its nature, and the misrepresentation could only have had the effect of inducing them to take a lower premium. *Canada Fire and Marine Ins. Co.* v. *Northern Ins. Co. of Aberdeen and London*, 2 A. R. 373.

One of the conditions of the policy was: "This re-insurance is subject to the same specifications, terms, and conditions, as policy No. 434,292 of the Northern, which it re-insures; it being well understood that the Northern Insurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto on other parts" of the property. The defendants then held three policies on different portions of H. & Co.'s property, that which they re-insured in full with the plaintiffs for $2,500, and two others for $2,500 each. It happened that before the fire occurred, one of the defendants' policies for $2,500 expired, so that at the time of the fire they only had a risk on the property of $2,500, over and above

their re-insurance. H. & Co. did not desire to renew the other policy, and defendants paid the whole $2,500 on the policy in force, while the claim against the plaintiffs was only $2,200:—Held, that the defendants had not violated the condition, as the effect of it merely was that they were not to re-insure so as to reduce their own risk below the stipulated amount. Held, also, that the difference in the rate of premium was not such a departure from the "specifications, terms, and conditions" of the defendants' policy as to vitiate the plaintiffs' policy. *Ib.*

Same Agent—*Notice.*]—B., who was the agent in Montreal of two insurance companies, had authority from one to accept marine risks to a sum not exceeding $5,000. An application having been accepted by B. to grant an insurance for $7,700, he immediately directed his clerks to enter a memorandum of application and acceptance in the books of the other company of a re-insurance of $2,700, which was done, thus limiting the liability of the first company to $5,000; but no notice was given of the re-insurance to the re-insuring company until after a loss occurred:—Held, that the fact of there having been an entry made of the application for and acceptance of the risk by the clerk of the agent was sufficient, and the amount so re-insured having been paid, the company could not recover back the amount, although no certificate of insurance had ever been issued by one company to the other; the evidence in the cause negativing entirely anything like mala fides on the part of the agent in the transaction. *Canada Fire and Marine Ins. Co.* v. *Western Ins. Co.*, 26 Gr. 264.

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11. *Mutual Fire Insurance Companies.*

(a) *In General.*

Application of Acts.]—The plaintiff in this case being insured upon the cash premium system, though defendants were a mutual insurance company, the policy was held not to be subject to the provisions of the Mutual Insurance Acts. *White* v. *Agricultural Mutual Ass. Co.*, 22 C. P. 98.

36 Vict. c. 44, ss. 37, 38 (O.), applies to all policies issued by mutual companies, cash premium as well as mutual. *Fair* v. *Niagara District Mutual Fire Ins. Co.*, 26 O. R. 398.

Section 28 of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to the provisions of the said Fire Insurance Policy Act:"—Held, this includes all mutual insurance companies doing business in the Province; and it was not alleged in the pleadings herein, that there was anything in the defendants' Act "expressly inconsistent with" the Fire Insurance Policy Act, but merely that the matters were variations of the statutory conditions. Held, also, that the questions so far as raised, were not of a constitutional character so as to require notice to the attorney-general of the Province, and the minister of Justice of the Dominion. *Goring* v. *London Mutual Fire Ins. Co.*, 11 O. R. 82.

Borrowing Money.]—Held, that the directors of a mutual insurance company may, under R. S. O. 1877 c. 161, s. 29, borrow money on promissory notes or debentures without passing a by-law under seal. *Victoria Mutual Fire Ins. Co.* v. *Thompson*, 32 C. P. 476.

Change of Title — *Cancellation.*]—Section 41 of R. S. O. 1877 c. 161, provides that "in case any property real or personal is alienated by sale," &c., "the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes upon payment of his proportion of all losses which have accrued prior to such surrender:"—Held, that under this section the said alienation avoided the policy wholly, so as to deprive the assured of any remedy thereon, and enabled him, upon payment of all prior losses and surrendering the policy to be cancelled, to relieve himself from further liability to assessment on his premium note. *Niagara District Mutual Fire Ins. Co.* v. *Gordon*, 29 C. P. 611.

Chattel Mortgage to Treasurer.]—A treasurer of a mutual insurance company may take a chattel mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have power to take it. *Brodie* v. *Ruttan*, 16 U. C. R. 207.

Costs.]—The claim being one of B. & D. for costs after a retainer by a mutual fire insurance company, B. assigned his interest in it to D., upon certain trusts in which, however, B. had no interest:—Held, that the assignment was absolute, and D. entitled to sue. Held, also, that B. having been president of the company when the costs were incurred was no objection. *Duff* v. *Canadian Mutual Fire Ins. Co.*, 9 P. R. 292. See the next case.

Held, reversing 9 P. R. 292, that under the Mutual Insurance Act, R. S. O., 1877 c. 161, the costs of a solicitor for services rendered to a mutual insurance company, are chargeable not against the general assets of the company, but against the respective branches for which the services were in fact rendered, and in case of deficiency of assets of any of the branches the other branches are not liable for the claims thereon. *S. C.*, 2 O. R. 560.

Debentures.]—Trustees being indebted to the plaintiffs and holding stock in the defendant company assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debenture to the plaintiffs:—Held, that the transaction did not constitute a "loan of money" from the plaintiffs to the defendants within the meaning of 31 Vict. c. 52, s. 12 (O.), and that the issue of the debenture was therefore ultra vires. *Bank of Toronto* v. *Beaver and Toronto Mutual Ins. Co.*, 28 Gr. 87.

Execution.]—Held, reversing 9 P. R. 185, which followed Lount v. Canada Farmers' Insurance Company, 8 P. R. 433, that R. S. O. 1877 c. 161, s. 61, providing as to mutual insurance companies, that no execution shall issue against such company upon any judgment until after the expiration of three months from the recovery thereof, does not apply

where the judgment has been recovered on a policy issued by the company on the cash principle. *Lowson* v. *Canada Farmers' Mutual Fire Ins. Co.*, 8 A. R. 613.

Form of Policy.]—The defendants were authorized by their charter to carry on both proprietary and mutual insurance business: but they were debarred from taking risks which were extra-hazardous in the mutual branch. The plaintiffs' property falling within the prohibited class, was insured with the defendants by a policy which was not on its face a mutual one, but an absolute undertaking to pay the loss, but instead of making a cash payment they gave a premium note, upon which they paid several assessments. The application also was headed: "Premium Note System:"—Held, reversing 28 Gr. 525, that the policy was not a mutual one, there being nothing except the premium note, which was not conclusive, to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch. Quære, whether the risk was sufficiently shewn to be one which defendants could not insure in their mutual branch. *Lowson* v. *Canada Farmers' Mutual Fire Ins. Co.*, 6 A. R. 512.

Perjury.]—C. S. U. C. c. 52, s. 73, empowers any justice of the peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a mutual insurance company is interested, and to administer to him the requisite oath. Upon an indictment for perjury assigned upon an affidavit made in compliance with one of the conditions of a policy:—Held, that the policy must be produced, although the defendant's affidavit referred to the policy in such a way that its existence might be fairly inferred. *Regina* v. *Gagan*, 17 C. P. 530.

Proofs of Loss.]—To an action by plaintiffs against defendants for non-payment of the amount of a policy issued by defendants, so far as the declaration shewed, on the cash system principle, defendants pleaded that the plaintiffs did not deliver to defendants the proofs of loss required by said policy three months before the commencement of the action:—Held, no defence; for even if under the Mutual Companies' Act, 36 Vict. c. 44, s. 33, (O.), such lapse of time was necessary, that Act merely applied to mutual and not to cash system policies. *Welsh* v. *Niagara District Mutual Fire Ins. Co.*, 27 C. P. 134.

See Robins v. *Victoria Mutual Fire Ins. Co.*, 6 A. R. 427; *Langel* v. *Mutual Insurance Company of Prescott*, 17 U. C. R. 524.

Quebec Insurance.]—Held, that the defendants as a mutual insurance company, were capable of granting insurance in Quebec as well as in Ontario. *Duff* v. *Canadian Mutual Fire Ins. Co.*, 27 Gr. 391.

Statutory Conditions.]—Held, that a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O. 1877 c. 162. *Ballagh* v. *Royal Mutual Fire Ins. Co.*, 5 A. R. 87; *Mutual Fire Ins. Co. of the County of Wellington* v. *Frey*, 5 S. C. R. 82.

See the preceding sub-heads for decisions upon questions of general application.

(b) *Assessments and Premiums.*

Action for Assessments—*Ultra Vires Insurance—Branches.*]—In actions by plaintiffs, a mutual insurance company incorporated by special Act, 32 & 33 Vict. c. 70, (D.), against defendants on their policies for the losses and liabilities on the winding up of the company under 40 Vict. c. 70, (D.):—Held, that defendants were not liable, as their insurances were effected in branches not authorized by the Acts affecting the company, and were therefore invalid. Held, also, that even if the insurances were valid, the liability would only be for the losses and liabilities in the particular branches in which the insurances were effected, and not for the general losses and liabilities of the company, and that s. 4 of the Winding-up Act in no way extended their liability; that, in such event, a claim for re-insurance was sustainable, although the company had not paid the amount, but only to the extent of the re-insurance of each particular policy, and that no such claim could arise where the policies were cancelled for nonpayment of the assessments, neither could there be any such claim against an insured where he had become insolvent, and the policy was assigned to the assignee with the consent of the company; that a claim of guarantee stock was sustainable, notwithstanding the by-law creating it was objectionable in pledging the whole instead of two-thirds of the premium notes as security for the payment thereof, and in other respects as stated in the report; that a liability for debentures issued by the company could also be supported, but only the members liable for the losses and liabilities for payment of which the debentures were issued would be liable for the debentures themselves; and that the fact of the issue of debentures being in excess of the amount authorized by the statutes, namely, one-fourth part of the premium notes, did not render the whole issue invalid, but only the amount so issued in excess. *Beaver and Toronto Mutual Fire Ins. Co.* v. *Spires*, 30 C. P. 304.

See, also, *Beaver and Toronto Mutual Fire Ins. Co.* v. *Champness*, *ib.*, 307; *Beaver and Toronto Mutual Fire Ins. Co.* v. *Bradford*, *ib.*, 307.

Assessment by the Court.]—Where an application was made to the court to add the persons who had signed premium notes as parties in the master's office, and to direct the master to assess the amounts due upon the notes, and to order payment of the same to the receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. 1877 c. 161, s. 45, et seq.:—Held, that as the liability attached only upon such assessment by the directors, the court could not add to, or alter the liability of the parties who had made the notes by referring it to the master or a receiver to do that which the directors only could do, clause 75 of 36 Vict. c. 44, which gave power to a receiver to do this, having been omitted from the statute on revision. *Hill* v. *Merchants and Manufacturers Ins. Co.*, 28 Gr. 560.

Branches.]—The Toronto Mutual Fire Insurance Company had divided their business into two branches, one being called the mercantile, in which both cash and mutual policies were effected. The defendant insured in the mercantile branch on the mutual principle. After the amalgamation of that company

with the Beaver Mutual Fire Insurance Association, the directors of the new company transferred all cash system policies in their farmers' branch to the mercantile branch, crediting the latter branch at the same time with the estimated value of all unexpired cash policies:—Held, that this was unauthorized: that it was not a "re-insurance" with "any mutual or other insurance company," within the meaning of the Acts; and that the defendant could not be assessed for losses on the policies so transferred. *Beaver and Toronto Mutual Fire Ins. Co.* v. *Trimble*, 23 C. P. 252.

——— *Assessment by the Court.*]—The defendants, a mutual insurance company, in existence at the time of the passing of the Mutual Companies' Act of 1873, 36 Vict. c. 44 (O.), had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital. In a suit by a creditor to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches, would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose:—Held, 27 Gr. 391, that the policy-holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund. Held, on appeal, that whatever might be the power of the directors, the court of chancery had no jurisdiction to make the assessment. *Duff* v. *Canadian Mutual Ins. Co.*, 6 A. R. 238.

Quære, as to the effect of s. 75 of R. S. O. 1877 c. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of the members of one branch from liability for claims on another. *Ib.*

Charge on Property.]—By s. 67 of C. S. U. C. c. 52, all the right or estate of any party effecting an insurance with a mutual insurance company, in the property insured, at the time of effecting the same, is subjected to all claims against the assured under such insurance; and a purchaser, taking a conveyance from the assured, will take subject to the charge of the company although without notice, and that although such charge does not appear on the registry affecting the property; the registry laws not providing for the registration of such charge. *Montgomery* v. *Gore District Mutual Ins. Co.*, 10 Gr. 501.

The liability of parties insured in mutual insurance companies is a charge on the property insured; and on an application under the Quieting Titles Act, an affidavit is necessary stating that there is no such policy in existence, or that the policies named are the only ones in existence. *Ex parte Hill*, 2 Ch. Ch. 348.

Class Action.]—Where a right of suit exists in a body of persons too numerous to be all made parties, the court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the waterworks branch, the plaintiff insured, giving his promissory note or undertaking to pay $168, and the company made an assessment on all notes and threatened suit in the division court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the division courts had not the machinery necessary for that purpose:—Held, that according to the statements of the bill the policy-holders in the waterworks branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs. *Thomson* v. *Victoria Mutual Fire Ins. Co.*, 29 Gr. 56.

Extent of Assessment.]—Held, affirming 32 C. P. 476, that an assessment for the purpose of paying promissory notes given by a mutual insurance company must be confined to the premium notes or undertakings current at the time the loss occurred in respect of or to meet which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company. *Victoria Mutual Fire Ins. Co. of Canada* v. *Thomson*, 9 A. R. 620.

The directors of the plaintiff company assessed the defendant, a policy-holder, for several sums, one of which was illegal, and they sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum:—Held, reversing 32 C. P. 476, that the plaintiffs were not entitled to recover any of the assessments. *Ib.*

An insurer with a mutual insurance company is not liable for assessment made before his insurance was effected, or premium note given. At the trial the learned Judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. *Green* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 34 U. C. R. 78.

False Swearing—*Non-payment.*]—To a declaration on a mutual insurance policy, averring the payment of the necessary premium for insurance, and setting out a certain condition indorsed on the policy issued to plaintiff, among other things, that any fraud or attempt at fraud or false swearing on the part of the assured, should vitiate the policy, and stating a compliance with this condition, defendants pleaded, repeating this condition, that the plaintiff stated under oath that he had paid to defendants all premiums, dues, and assessments which were due and owing at the

time of the fire, whereas plaintiff had not at that time paid all premiums, &c., to defendants, whereby plaintiff was guilty of false swearing within the meaning of said condition. There was a further plea setting up the provisions of s. 5 of 29 Vict. c. 37, relating to mutual insurance companies, and averring that on effecting said insurance plaintiff gave his premium or deposit note to defendants for his insurance, and that defendants afterwards lawfully made and levied an assessment on said premium or deposit note so given by plaintiff to the amount of $4, and the same remained in arrear and unpaid for more than thirty days, whereby by force of said statute said policy became void:—Held, on demurrer, that both pleas were bad. *Crowley* v. *Agricultural Mutual Ass. Asso. of Canada*, 21 C. P. 567.

Mandamus to Compel Assessment.]—A judgment was recovered against a mutual insurance company, for the amount of a loss by fire. The execution was returned nulla bona, and the plaintiff applied for a mandamus to compel the defendants to pay over the money. In support of the application it was stated that an assessment had been levied by the defendants under their Act of incorporation, for the purpose of paying this loss, and that they had received the money so levied. The writ was refused, because it was not clear on the affidavits that the corporation had no property out of which the debt could be levied, the statement being merely that the execution had been returned nulla bona; and because the defendants alleged that they were, and always had been, ready to pay over the money to the persons entitled, and the court would not decide in a summary manner on conflicting claims. But quære, whether the fact of the corporation having nothing which could be taken in execution, would be a sufficient ground for interposing by mandamus. *Hughes* v. *Mutual Ins. Co. of the District of Newcastle*, 11 U. C. R. 241.

A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment by those who had been mutual insurers with the plaintiff, but no longer belonged to the company, their deposit notes having been cancelled. Plaintiff's attorney wrote on the 20th December, to the treasurer of the company, demanding a portion of the claim, and on the 21st received an answer, saying that the defendants' solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney; and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum:—Held, a sufficient refusal. *S. C.*, 13 U. C. R. 153.

Mortgagee.]—The defendants claimed the right, under R. S. O. 1887 c. 167, s. 131, to retain the amount of the premium note given by the mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon:—Held, that, as against the mortgagee, they were not entitled to retain the amount. *Anderson* v. *Saugeen Mutual Fire Ins. Co.*, 18 O. R. 355.

Negotiability of Note.]—Declaration on a promissory note alleged to have been made by one C., payable to the order of the Gore District Mutual Insurance Company, by them indorsed to defendant, and by defendant to plaintiffs. Plea, that the said company are the plaintiffs, and that the plaintiffs are the persons to whom said note is made payable, and who indorsed to defendant, and are liable to him as such indorsers. The replication shewed that the note was given by C. under the statute on his insuring certain premises with the plaintiffs to secure the due payments of the premiums or assessments in respect of his policy:—Held, on demurrer, that the replication was bad, as shewing the note not to be what the declaration would import. *Gore District Mutual Fire Ins. Co.* v. *Simons*, 13 U. C. R. 560.

A mutual insurance company sued upon a note alleging it to have been made by C., payable to the company or order, indorsed by them to defendant, and by defendant to them again. It was one of their ordinary premium notes, given to obtain a policy of insurance for C., indorsed by the secretary of the company, without recourse, and specially by defendant as follows: "I hereby make myself responsible for the within.—T. M. S." It was proved that defendant when spoken to by the secretary had said that C. ought to pay the note, but that if he did not, he supposed he must:—Held, that the plaintiffs could not recover upon the declaration, for such notes are not negotiable, and the company cannot transfer them by indorsement. If this were otherwise—Semble, that the secretary might have indorsed the note for the company; but that the declaration of defendant could not be treated as dispensing with notice of non-payment to him. *S. C.*, *ib.* 555.

Held, that a promissory note made in 1871, payable to the order of a mutual insurance company, or its officers, in respect of a policy, was negotiable. Gore District Mutual Ins. Co. v. Simons, 13 U. C. R. 555, commented upon. *McArthur* v. *Smith*, 1 A. R. 276.

Non-payment after Assignment.]—N., in September, 1872, effected an insurance for three years with the defendants, a mutual insurance company, acting through an agent, on two houses, which property N. had previously mortgaged to one G., by whom the application stated the policy was to be held as security, and was so entered in the books of the company, and he with N. attended at the agent's office, and joined in signing the premium note. The policy was issued on the 14th September, and the usual consent of the company to such assignment was indorsed thereon, "subject to all the terms and conditions therein referred to," one of which was, that if any assessment to be made on the premium note should remain unpaid for a period of thirty days after notice thereof to the assured, the company would be at liberty to cancel the policy. On the 31st May, 1873, N. made an assignment in insolvency. On the 11th August, 1873, an assessment of $10.80 was made on the premium note, of which notice was given to N. only; no notice whatever having been sent to or served upon the representatives of G., who had died in the

previous month of March. The property insured was destroyed by fire on the 25th March, 1875, the company having, on the 25th April previously, assumed to cancel the policy for non-payment of the assessment:—Held, under the circumstances stated, that the company had not any power to cancel the policy; that the same was still a continuing security in favour of the estate of G., whose representative was entitled to recover from the company the amount secured by such policy. *Guggisberg* v. *Waterloo Mutual Fire Ins. Co.*, 24 Gr. 350.

The non-payment of a cash premium note given by the original assured in a mutual assurance company, the company having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy, the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment. *Storms* v. *Canada Farmers Mutual Ins. Co.*, 22 C. P. 75.

Non-payment of Note.]—Held, that a note, made by the insured in the mutual branch of a mutual insurance company, for the sum of $3, part of the sum of $36, for which the insured had already given his deposit or premium note, such $3 representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C. c. 52, s. 22, was not a note given for a cash premium of insurance within the meaning of 29 Vict. c. 38, s. 5, so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable. *Ellis* v. *Beaver and Toronto Mutual Ins. Co.*, 21 C. P. 84.

Non-payment—*Pleading.*]—To an action on a mutual insurance policy on a dwelling-house and furniture, defendants pleaded that a certain assessment was declared by defendants on plaintiff's premium note, of which assessment the plaintiff had due notice, but did not pay the same, whereby the policy became void:—Held, plea good; for that the allegation of due notice, without stating the particulars of the notice or the manner of giving it, was sufficient. A replication alleged that subsequent to the alleged avoidance, and previous to the loss, defendants levied another assessment, which the plaintiff was duly notified of and paid, whereby defendants waived the alleged forfeiture and revived the said policy; and, therefore, they ought not to be allowed to plead the said plea:—Held, replication good, as shewing a clear revival of the policy, and estopping defendants from setting up the previous forfeiture. A rejoinder alleged, that no part of the assessment mentioned in the plea was or is included in the assessment mentioned in the replication: that before the making of such last assessment the policy had been cancelled and so marked in defendants' books; and that such last assessment was not in fact made upon plaintiff's policy, but that defendants' secretary through inadvertence and mistake notified plaintiff of said assessment and the amount thereof; and that subsequent thereto, and prior to the loss, several further assessments were made by defendants, to which plaintiff would have been liable unless the policy were cancelled, but by reason of such cancellation no assessment on the said policy was made, and the said amount in the plea mentioned still remains unpaid; and alleging that defendants were willing and thereby offered to return the amount paid. Held, rejoinder bad, there being no averment of any notification to the plaintiff of the notice having been sent to her and the money received by mistake, nor of it being tendered to or paid back to her, and it appearing that she had been allowed after making the payment to consider herself still insured. *Smith* v. *Mutual Ins. Co. of Clinton*, 27 C. P. 441.

——— *Subsequent Assessments Accepted.*]—To an action on a policy of insurance dated 18th February, 1874, for three years, defendants pleaded the non-payment of an assessment made on 24th December, 1875, of $13.34, on the plaintiff's premium note, payable within thirty days; setting out the particulars, whereby the policy became void. The plaintiff replied, that on 1st August, 1876, defendants directed a further assessment of $13.34 on the plaintiff's note for the period between the 18th July, 1876, and 18th February, 1877, of which they notified the plaintiff on the 2nd September, 1876, who thereupon paid defendants $27.88, in full for said two assessments, and interest on the first assessment from the date of its being payable, which defendants accepted, and thereby waived the forfeiture:—Held, replication good, without alleging that such payment was before the fire, for it shewed that defendants treated the plaintiff as insured with them when they called on him to pay long after the alleged default, and that when the loss happened the policy was an existing risk. *Lyons* v. *Globe Mutual Fire Ins. Co.*, 27 C. P. 567.

Defendants, a mutual insurance company, assessed the plaintiff in 1875, on his premium note; and in August, 1876, and before the plaintiff had effected a further assurance without notice to the defendants, whereby the policy became forfeited, the defendants made a further assessment. On the 23rd September following defendants notified the plaintiff of this and the former assessment, the notice informing the plaintiff that unless both assessments were paid within thirty days the policy would become forfeited. On the 17th October, 1876, the premises were destroyed by fire, and on the 27th January, 1877, the company received from the plaintiff the amount of these assessments:—Held, that such receipt was not a waiver of the forfeiture caused by the further assurance; and semble, that neither was it a waiver of the forfeiture by non-payment of the assessments within the thirty days; for such assessments were a debt which the company had a right to claim, loss or no loss. *S. C.*, 28 C. P. 62.

——— *Note.*]—For an assessment made on the premium note, the insured, at the request of the company's secretary, gave a note at two months, signed by himself and one L., which the secretary stated would be accepted as payment, and in the company's register the assessment was entered as paid by this note. The note was not paid at maturity, in consequence of which the company refused to pay the loss:—Held, that under s. 44 of the Mutual Insurance Companies Act, 36 Vict. c. 44 (O.), the note could only be deemed as suspending the debt during its currency, and therefore its non-payment at maturity avoided the insurance. *McGugan* v. *Manufacturers and Merchants Mutual Fire Ins. Co.*, 29 C. P. 494.

——— *Note — Forfeiture.*] — Default of payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under s. 129 of the Act, R. S. O. 1897 c. 203, does not ipso facto work a forfeiture. A notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of non-payment the policy would be suspended, is not an assessment under s. 130, and non-payment pursuant to the notice does not suspend the operation of the policy. *Woolley* v. *Victoria Mutual Fire Ins. Co.*, 26 A. R. 321.

Retroactive Legislation.]—53 Vict. c. 44, s. 4 (O.), substituting a new section for R. S. O. 1887 c. 167, s. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards. *Re Saugeen Mutual Fire Insurance Co., Knechtel's Case*, 19 O. R. 417.

Special Act.]—Held, that the Beaver and Toronto Mutual Fire Insurance Company must be considered as incorporated under 32 & 33 Vict. c. 70 (D.); that 36 Vict. c. 44 (O.), which applies only to companies incorporated under C. S. U. C. c. 52, or any special Act of the former Province of Canada or of Ontario, did not affect them: and that they were therefore not authorized to make an assessment for prospective losses. *Orr* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 26 C. P. 141.

Time for Payment.]—A notice of assessment mailed on the 12th February, requested payment to be made on the 24th of the same month:—Held, that on this and other grounds stated, the assessment was invalid, as under ss. 43 and 45 the day named in the notice for payment must be at least thirty days subsequent to the mailing. *Frey* v. *Wellington Mutual Ins. Co.*, 4 A. R. 293; 43 U. C. R. 102.

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12. *Miscellaneous Cases.*

Building—*Tug.*]—A tug is not a building within the meaning of clause a of the tenth statutory condition. *Mitchell* v. *City of London Fire Ins. Co.*, 12 O. R. 706.

Conveyance after Insurance.] — B. having insured a mill erected on lands conveyed to him by A. in trust to sell, and after paying his own debts to pay any surplus to A., and having received the insurance money:—Quære, whether he was accountable to A. therefor. Semble, not. *McPherson* v. *Proudfoot*, 2 C. P. 57.

Lease—*Covenant to Insure.*]—Covenant by lessee to insure premises in the name of the lessor, the insurance money to be expended in the erection of new buildings:—Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee. Held, also, that the measure of damages was the value of the premises lost to the plaintiff by defendant's neglect to insure, such value not exceeding the sum in which defendant was to have been insured by his covenant; and that it could make no difference that on failure of the lessee to insure, the lessor was allowed by the lease to do so, and charge the premium as rent. *Douglass* v. *Murphy*, 16 U. C. R. 113.

Negligence causing Fire.] — An insurance company by whom a fire loss has been paid has no locus standi as co-plaintiff in an action by the assured against the wrong-doer whose negligence had caused the fire. *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297. Reversed in the supreme court on another point. 24 S. C. R. 309.

Policy Invalidly Executed.]—Under s. 10 of 6 Wm. IV. c. 18, a policy signed by the secretary, but not by the president, is invalid. The company could be compelled, however, upon the defect being noticed, to execute a valid policy of the proper date; and their by-law would estop them from objecting that the policy was not in fact executed before the loss. *Perry* v. *Newcastle District Mutual Fire Ins. Co.*, 8 U. C. R. 363.

Preference.]—Where a fire policy after a loss had taken place was orally assigned to a creditor by a person in insolvent circumstances, in satisfaction of a debt not yet due, and in consideration of an advance of money at the time, the assignment was held void as a fraudulent preference within C. S. U. C. c. 26, s. 18. *Bank of Montreal* v. *McTavish*, 13 Gr. 395.

See, also, *Ivey* v. *Knox*, 8 O. R. 635.

Surety.] — Defendant, as surety, entered into a bond that his principal would insure and keep insured, certain buildings on land mortgaged by him to the plaintiff. Afterwards the position of the buildings was altered, the out-buildings being brought nearer to the house, and the risk thus increased:—Held, that defendant was thereby discharged. *Grieve* v. *Smith*, 23 U. C. R. 23.

Tenant in Common.] — One of several tenants in common, being in sole possession of the premises and claiming to be solely entitled, insured the buildings on the property; the buildings having been destroyed by fire the insurance moneys were paid to the party insuring, and new buildings were erected by a person to whom he had contracted to sell the property:—Held, varying 19 Gr. 155, that the party insuring was entitled to appropriate the insurance money to his own benefit. *McIntosh* v. *Ontario Bank*, 20 Gr. 24.

Held, also, that he was not entitled to any allowance in respect of the new buildings. *Ib.*

Wrongdoer—*Subrogation.*]—There can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied. *National Fire Ins. Co.* v. *McLaren*, 12 O. R. 682.

In case of partial insurance where a third party is liable to make good the loss, the assured is not clothed with the full character of trustee quoad the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery. In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies. *Ib.*

IV. Guarantee Insurance.

Employees' Guarantee Contract—*Renewal — Condition — Misstatements.*] — By a contract in writing made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums:"—Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of s. 33. Held, also, that upon the true construction of s.-s. (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract. *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520.

Interest on Claim.]—See *City of London* v. *Citizens Ins. Co.*, 13 O. R. 713.

V. Life Insurance.

1. *In General.*

Action — *Parties.*] — Defendants by a policy dated 25th August, 1870, insured the life of J. C. for $1,000, to be paid at his death to the plaintiff and two others, children of said J. C., and to his wife, if living, otherwise to the representatives and assignees of said wife and children:—Held, under 29 Vict. c. 17 (C.), and 33 Vict. c. 21 (O.), that the plaintiff, on the death of J. C., might sue for his one-fourth share separately, without joining the others interested in the policy. *Campbell* v. *National Life Assurance Co. of the United States*, 34 U. C. R. 35.

The plaintiff H., and the other plaintiffs, infants, by H. as their guardian and next friend, declared on a policy of insurance, alleging that by it, in consideration of the premium paid to them by the plaintiffs, defendants assured the life of F., and by said policy promised to pay the sum insured to the plaintiffs, who at the time of making the policy were respectively the wife and children of F.; and that while the policy remained in force, the plaintiffs then being respectively the wife and children of F., the said F. died, &c.:—Held, following Campbell v. National Life Assurance Company of the United States, 34 U. C. R. 35, that the plaintiffs could not sue jointly, but must bring separate actions for their respective shares. The plaintiff H. was, however, allowed to amend by declaring anew for her share separately, and the names of the other plaintiffs were struck out. *Fraser* v. *Phœnix Mutual Life Insurance Co.*, 36 U. C. R. 422.

——— *Time.*]—The words of s. 148 (2) of the Ontario Insurance Act, 60 Vict. c. 36, "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment. *Styles* v. *Supreme Council of the Arcanum*, 29 O. R. 38.

Apportionment — *Annuity Bond.*] — In consideration of $12,000, paid by plaintiffs' testator to defendants, they, by an instrument in writing, agreed to pay him $1,800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy, and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void:"—Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. 1887 c. 143, s. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within s. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator. *Cuthbert* v. *North American Life Assurance Co.*, 24 O. R. 511.

Attachment.] — Where the judgment debtor, after making a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at its value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage by him on real estate, and held by the garnishees, and the garnishees accepted the surrender, but on terms different to those proposed, it was held, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor. *Lee* v. *Gorris*, 1 C. L. J. 76.

Deduction from Damages.]—Right of defendants to deduct amount of insurance money from damages assessed in actions of negligence. See *Grand Trunk R. W. Co.* v. *Beckett*, 16 S. C. R. 713; 13 A. R. 174; 8 O. R. 601; *Grand Trunk R. W. Co.* v. *Jennings*, 15 A. R. 477; 13 App. Cas. 800; *Brown* v. *McRae*, 17 O. R. 712; *Farmer v. Grand Trunk R. W. Co.*, 21 O. R. 299.

Disability.]—The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma. In an action to recover one-half the amount of the insurance the evidence shewed that the plaintiff was totally disabled, permanently, and for life, from doing manual labour, and that the

diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy:—Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shewed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance. *Dodds* v. *Canadian Mutual Aid Association*, 19 O. R. 70.

Divisible Surplus — *Discretion of Actuary and Directors—Statements of Company in Letters and Pamphlets.*]—The plaintiff insured with the defendants upon their "endowment participating plan," and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period. The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed a right to hold a portion of their apparent surplus to ensure the future stability of the company:—Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, bonâ fide exercised, and to take his share of what was apportioned as divisible surplus; and that being so, that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus. *Ham* v. *Ætna Life Ins. Co.*, 20 O. R. 6; 21 O. R. 233.

Domicile of Insured—*Foreign Administrator — Domestic Administrator — Domestic Insurance Company — Foreign Creditors.*]—The company, having its head office in Ontario, insured the life of a person then domiciled in Ontario, by two policies, one for $2,000 and the other for $3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain person in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory notes for $500 each, and by which it was also provided that the policies should be reassigned to the insured "upon the payment . . of the first of the said $500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said $500 note . . and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor." The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies. Letters of administration to his estate were granted by a court in the country where he died to a person there, and also by a surrogate court in Ontario to one of the assignees of the policies:—Held, that, although the locality of a specialty is where it is conspicuous at the time of the death, that means, where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been; and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country where it is found at the death; and, assuming that letters were properly granted by the foreign court, the policy could not have been enforced and the moneys payable thereby recovered in the foreign country, for the insurance company, being as to that country a foreign corporation and not doing business therein, could not be sued there. The appointment of an administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into court, they should be handed over to that administrator to be administered. Held, also, that, upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from its maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest. *Re Ontario Mutual Life Assurance Co. and Fox*, 30 O. R. 666.

Escrow—*Countersigning.*] — In an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by ———, agent at ———, countersigned this ——— day of ———, ——— Agent." The agent, in his evidence, said that he delivered the policy to W. O'D. (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered the year up to the 1st October, 1873. W. O'D. died the 10th July, 1873:—Held, that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable. Per Gwynne, J., that the instrument was delivered as an escrow to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid, and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed. *Confederation Life Association of Canada* v. *O'Donnell*, 10 S. C. R. 92. See, also, *S. C.*, 13 S. C. R. 218.

At a subsequent trial evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the insured as a completed instrument: — Held,

affirming 21 N. S. Rep. 169, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand. The judgment on the former appeals in this case was, on this point, substantially adhered to. *S. C.*, 16 S. C. R. 717.

Fraud—*Injunction.*]—Injunction granted to restrain an action at law to recover money secured by a life assurance effected by fraudulent misrepresentations. *National Life Ass. Co.* v. *Egan*, 20 Gr. 469.

Interest on Claim.]—See *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 14 Gr. 509.

Loan by Company—*Usury.*]—The exception in the last clause of 22 Vict. c. 85, which prevents corporations, &c., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it. The defendants, a life insurance company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of their loan:—Semble, that even if the above mentioned exception had applied to them, this would not constitute usury. *Edinburgh Life Ass. Co.* v. *Graham*, 19 U. C. R. 581.

Medical Examiner—*Breach of Contract—Authority of Agent.*]—The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privileges of such examinations as should be assigned to him by, or required during the absence, disability, or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance:—Held, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority to contract with L. for any employment other than that specified in his commission; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment. *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 595.

Negligence—*Death—Insurance.*]—An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant:—Held, reversing 6 Ex. C. R. 276, that the rule of the association was an answer to an action by his widow under Art. 1056 C. C. to recover compensation for his death. *The Queen* v. *Grenier*, 30 S. C. R. 42.

Place of Payment—*Insurance Payable in Quebec.*]—To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the money:—Held, on demurrer, a good defence. *Pritchard* v. *Standard Life Ass. Co.*, 7 O. R. 188.

See Clarke v. *Union Fire Ins. Co.*, 10 P. R. 313, 6 O. R. 221.

Policy Inconsistent with Application—*Repayment of Premiums—Laches.*]—The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. The plaintiff did not read the policy, and pursuant to notices from defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium:—Held, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract; that the plaintiff was under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application; that he was therefore not barred by acquiescence or delay, and that he was entitled to repayment of the premiums with interest. *Mowat* v. *Provident Savings Life Assurance Society*, 27 A. R. 675.

Receiver — *Execution — Security for Money.*]—The plaintiffs, judgment creditors, were held entitled to a receivership order in respect to the defendant's interest in a fully paid up life policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the bonus additions. A paid up policy is a "security for money" within R. S. O. 1897 c. 77, s. 18, the Execution Act. *Canadian Mutual Loan and Investment Co.* v. *Nisbet*, 31 O. R. 562.

Rectification.]—Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at

the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000; that as soon as the mistake had been discovered, they had offered a policy for $1,000, and that previous to the institution of the action, they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered), they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice, to be obtained after the insurance should have become due and payable. Parol evidence was given to shew how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy: — Held, that the insurance effected was for $1,000 only, and that the policy had by mistake been issued for $2,000. *Ætna Life Ins. Co.* v. *Brodie*, 5 S. C. R. 1.

Seal — *Fraud.*]—Section 7 of 37 Vict. c. 85 (O.), incorporating the appellants after specifying the powers of the directors, enacts:—"but no contract shall be valid unless made under the seal of the company, and signed by the president, etc." J. E. W. brought an action to recover the amount of a policy issued by the appellants in favour of her father. The policy sued on was on a printed form, and had the usual attestation clause. To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but the seal was inadvertently omitted to be affixed, and contending that the defendants should be estopped from setting up the absence of the seal or ordered to affix it: —Held, affirming 29 C. P. 221, and 5 A. R. 218, that the setting up of "the want of a seal" as a defence, was a fraud which a court of equity could not refuse to interfere to prevent without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears, and therefore the respondent was entitled to the relief prayed, as founded upon the facts alleged in her equitable replication. *London Life Ins. Co.* v. *Wright*, 5 S. C. R. 466.

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2. *Assignment.*

Assignment for Creditors.] — Quære, are the words "all bills, bonds, notes, securities, accounts, books, book-debts, and documents securing money," contained in a general assignment for the benefit of creditors, sufficient to pass a policy at the time existing on the life of the assignor, and held by him for his own benefit. *Lee* v. *Gorrie*, 1 C. L. J. 76.

Interest — *Discharge.*]—The assignee of a person upon whose life a policy of insurance has been effected, is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge. *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 14 Gr. 509.

Mesne Assignments.] — The appellant's interest in the policy was as assignee of Dame M. H. B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on 27th October, 1876:—Held, that the appellant had no locus standi, there being no evidence that M. H. B. had been authorized by her husband to accept or transfer said policy. *Boyce* v. *Phœnix Mutual Life Ins. Co.*, 14 S. C. R. 723.

Notice.]—A debtor, or trustee of a fund, is not responsible to an assignee of the creditor, or payee of the fund, for dealing with the latter persons without reference to the assignment unless it is found either that at the time of so dealing he actually knew of the assignee's title, or that he had previously received a notice sufficiently distinct to give him an intelligent apprehension of the fact that the assignee had acquired an interest in the claim or fund. A life insurance company issued two policies upon a man's life, one policy being payable generally and the other to his wife. The assured made an assignment for the benefit of his creditors, and the assignee, who at the time knew only of the policy payable generally, wrote to the company referring to this policy by number and informing them of the assignment. The assured's wife had died before the assignment was made, and the policy in her favour had become part of the assured's estate and had passed to the assignee. A few weeks after notice of the assignment had been given to the company the assured informed them of his wife's death, and obtained from them the surrender value of the policy in which she was named as beneficiary. There was no imputation of bad faith, and the officers of the company swore that they had, at the time, no recollection of notice of the assignment for the benefit of creditors having been given:—Held, that under the circumstances the company were not responsible for paying the surrender value of the policy to the husband. *Crawford* v. *Canada Life Assurance Co.*, 24 A. R. 643.

Vested Interest — *Assignment to Secure Debt.*]—Where an insurance was effected upon the life of a person for the benefit of her father, brothers, and sisters, the plaintiffs:—Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them or of their right to call upon the insurers for payment; and an assignment made by her and her father to a stranger to secure a debt had no effect upon such interest or right of the plaintiffs, except that of the father; and the assignee, under the circumstances in evidence, became the mortgagee of such interest and right; and the recovery of a judgment by the assignee against the father for the amount of the debt, did not prejudicially affect the security. *Dolen* v. *Metropolitan Life Ins. Co.*, 26 O. R. 67.

——— *Foreign Contract—Foreign Law.*] —By a contract between the insured and her husband, in consideration of his agreeing not to apportion amongst his children any part of

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

See, also, sub-heads 3 and 4.

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3. *Benefit of Wife or Children.*

Assignee—*Issue—Onus.*]—Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to $1, and had then made the assignment to the other claimant:—Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants. *Re Hubbell*, 19 P. R. 240.

Benevolent Societies.]—The Act to secure to wives and children the benefit of life insurance, 47 Vict. c. 20 (O.), applies to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. 1877 c. 167. Re O'Heron, 11 P. R. 422, overruled. *Swift* v. *Provincial Provident Institution*, 17 A. R. 66.

Certificate—*Revocation by Will—By-laws of Society.*]—A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but subsequently by will directed that only a portion of it should be paid to her, and the balance to his half brothers and sisters:—Held, that the insurance was subject to the provisions of the Ontario Insurance Act, R. S. O. 1877 c. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute. Mingeaud v. Packer, 21 O. R. 267, 19 A. R. 290, applied and followed. *Re Harrison*, 31 O. R. 314.

Change of Beneficiary—*Trust—Revocation.*]—A person whose life was insured in a benefit society, incorporated under R. S. O. 1887 c. 167, as amended by 41 Vict. c. 8, s. 18 (O.), R. S. O. 1887 c. 172, on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on the 1st June, 1889, at his request a change was made, and a new certificate issued, making the money payable to his second wife. He died on the 19th November, 1889:—Held, that the effect of 51 Vict. c. 22 (O.), was to make the certificate of the 28th January, 1888, subject to the provisions of R. S. O. 1887 c. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under s. 5 of R. S. O. 1887 c. 136, and ceased, so long as the objects of the trusts remained, to be under the control of the deceased, except only in accordance with ss. 5 and 6, which did not authorize him to revoke the certificate and replace it by the subsequent one. *Mingeaud* v. *Packer*, 21 O. R. 267.

An appeal to the court of appeal was dismissed, the Judges being divided in opinion. 19 A. R. 290.

——— *Statutes—Inconsistent Clauses.*]—Where two clauses in a statute cannot be reconciled the latter must prevail over the earlier one. By s. 151 of the Ontario Insurance Act, R. S. O. 1897 c. 203, the insured may by an instrument in writing substitute a new beneficiary in a life policy, provided that he does not divert the benefit of any person who is a beneficiary for value. By s. 160 he may in like manner transfer the benefit to his wife alone, although the policy is expressed to be for his mother's benefit, unless the policy expressly states that the original beneficiary is a beneficiary for value. A person having effected an insurance on his life in favour of his mother as beneficiary, the policy not expressly stating that she was a beneficiary for value, subsequently transferred the benefit of it to his wife alone:—Held, that s. 160 must govern and that the wife was entitled to the policy moneys. *Potts* v. *Potts*, 31 O. R. 452.

——— *Trust—Revocation—Will.*]—In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will, dated in July, 1888, he left all his estate to his children in equal shares:—Held, that under the powers conferred by R. S. O. 1887 c. 136, even as amended by 51 Vict. c. 22, the insured had only a limited authority

to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife. Mingeaud v. Packer, 21 O. R. 267, 19 A. R. 290, followed. By virtue of 53 Vict. c. 39, s. 6, he might, when he made the indorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, deprive his children of all benefit in it, and so render the Act nugatory. *Neilson* v. *Trusts Corporation of Ontario*, 24 O. R. 517.

An endowment certificate issued in 1889 by a benevolent society to a member, and payable on his death, half to his father and to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium:—Held, that this was not sufficient to displace the terms of the contract, as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vict. c. 39, s. 5 (O.), which applied to the certificate in question, creating a trust in her favour. That statute is retrospective as to current policies, issued before it came into force. *Simmons* v. *Simmons*, 24 O. R. 662.

Death of Beneficiary.] — In 1868, M. effected a policy on his life for the benefit of his daughter, who intermarried with the plaintiff, and predeceased her father, having bequeathed her interest in such policy to the plaintiff (her executor) in trust for her only child. M.'s wife died, and in 1877, prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow, and one child surviving, without making any other disposition of his life policy. In an action by plaintiff against defendant, the widow and administratrix of M., it was:—Held, affirming 10 O. R. 283, that the insurance money formed part of the personal estate of M., and as such was payable to defendant. *Wicksteed* v. *Munro*, 13 A. R. 486.

Death of Children — *Re-apportionment—Will—Grandchildren—Cancellation and Reissue of Policies—Creditors.*]—A person insured his life for the benefit equally of six of his children, three of whom died without issue in his lifetime. By his will he altered the shares of the three survivors, giving a portion to another child and portions to four grandchildren and caused the policies to be cancelled and re-issued payable to "his executors in trust," and died in 1894 while R. S. O. 1887 c. 136 was in force:—Held, that the apportionments to the four children were valid, but those to the grandchildren, while valid as legacies, were invalid as against creditors. Held, also, that the provision in 60 Vict. c. 36, s. 159 (O.), permitting an apportionment in favour of grandchildren "to any contract of insurance heretofore issued and declaration heretofore made," did not apply to a policy which had become a claim by the death of the insured, but was limited to policies current at the time of the passing of the said Act. Held, also, that the issue of the new policies did not affect the rights of the parties as the executors would take in trust for those who were beneficially entitled. Videan v. Westover, 29 O. R. 1, distinguished. *McIntyre* v. *Silcox*, 29 O. R. 593; 30 O. R. 488.

Direction in Will—*Payment into Court.*] —A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death, the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vict. c. 20 (O.), provides that such policy moneys to which infants are entitled, shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the insurance company under s. 15 of the Act, and G. O. 197, and rule 541a O. J. Act, applied to the master-in-ordinary in chambers for leave to pay the money into court. The master held (1) that voluntary applications to pay in money may be made in chambers (2) that under rule 541a O. J. Act, he had jurisdiction by virtue of the administration proceedings before him, to make the order; (3) that by the renunciation of the executors, there was no "trustee, executor, or guardian competent to receive the share of the infant;" (4) that the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the statute; (5) that the administrator was not a trustee by the will, except as holding surplus assets, after administration with notice of trust; (6) that the money was no part of the estate subject to the control of creditors, and when paid in, should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrator P., an order was made directing that the money in court be paid out to the insurance company. *Merchants Bank* v. *Monteith, Ex parte Standard Life Assurance Co.*, 10 P. R. 588.

Gift—*Will.*]—A person insured his life and signed a document directed to the managers of the insurance company, in these words:—"I give and bequeath to . . the amount stated on the policy given on my life by the S— Life Insurance Co. To be paid to none other unless at my request, dated later." After shewing or reading the policy which he retained, he handed the document to the plaintiff, remarking, "there, that is as good as a will:" —Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Krch* v. *Moses*, 22 O. R. 307.

Insurance before Marriage.]—The husband of the defendant, while a bachelor domiciled in this Province, had, in the years 1871 and 1876, effected three policies of insurance on his life with companies whose head offices in Canada were at M., in the Province of Quebec, where the insurance moneys were

payable. After his marriage, while still domiciled in this Province, he indorsed declarations on the policies in favour of defendant, and handed them to her. After his death the insurance moneys were claimed by the defendant and by the plaintiffs as administrator of his estate, against which there were creditors: —Held, that the indorsements on the policies were governed by the law of this Province. Lee v. Abdy, 17 Q. B. D. 309, followed. Held, however, that as defendant's husband was not a "married man" at the time he effected the policies, he could not (not being within the exception provided in 47 Vict. c. 20, s. 2) withdraw from the claims of his creditors the benefit of the policies effected before marriage by indorsements or declarations after marriage for the benefit of his wife, and the plaintiffs were entitled to the insurance moneys. *Toronto General Trusts Co.* v. *Sewell*, 17 O. R. 442.

Payable to "Children".—*Representative of Deceased Child—Exclusion of Grandchildren.*]—By a policy of life insurance the insurers agreed to pay the amount of the insurance, after the death of the insured, to his wife or her legal representatives; or, if she should not then be living, to her children, or to their guardian, if under age. The wife predeceased the insured. Two of her children died before her, one of them leaving a child: —Held, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy. *Murray* v. *Macdonald*, 22 O. R. 557.

Payable to "Legal Heirs". — *Children of First Marriage and Second Wife.*]—A widower, having two children, insured in a benevolent society and took out his certificate payable to his "legal heirs" and subsequently married a second time, and died without having altered the certificate, leaving his wife surviving with the two children of the first marriage:—Held, that the two children took the whole fund payable under the certificate, to the exclusion of the wife. *Mearns* v. *Ancient Order of United Workmen*, 22 O. R. 34.

Payable to Wife—*Assignment by Wife.*] —The interest of a wife in a policy effected by her husband on his own life, and which has been declared by him to be for her benefit, under s. 5 of the Act to secure to wives and children the benefit of life insurance, is her separate estate and may, in her husband's lifetime, be assigned by her. The assignee, under such an agreement, will be entitled to claim thereunder, subject to the exercise by the husband of the powers conferred on him by s. 6 of the Act and amendments. *Graham* v. *Canada Life Ass. Co., Proctor* v. *Graham*, 24 O. R. 607.

Payable to Wife and Children—*Devise to Executors—Creditors' Rights.*]—Two policies on his life were bequeathed by a testator to his executors to be invested by them as a provision for his wife and children:—Held, that the testator had declared the insurance to be for the benefit of his wife and children within the meaning of R. S. O. 1887 c. 136, and therefore the proceeds were exempt from the claims of creditors. Re Lynn, Lynn v. Toronto General Trusts Co., 20 O. R. 475, followed. *Beam* v. *Beam*, 24 O. R. 189.

Payable to Wife, "Her Executors, Administrators or Assigns"—*Predecease of Wife.*]—A married man insured his life, the policy being made payable "to his wife, Sarah, her executors, administrators, or assigns." The wife died before her husband, who married again, and died, leaving a widow and children without having assigned the policy or altered the direction as to payment in it:—Held, that the policy fell under the provisions of the Act to secure to wives and children the benefit of life insurance, and was for the benefit of the wife absolutely, the words of limitation having no effect; that the provision for payment lapsed by the death of the wife, and that the policy moneys belonged to the personal estate of the husband. *In re Eaton*, 23 O. R. 593.

Payment of Infants' Shares of Insurance Money.]—See INFANT, II. 3.

Preferred Beneficiaries — *Will—Apportionment—After Acquired Policy.*] — A bequest by a testator of all his life insurance policies in favour of "preferred beneficiaries" as defined by the Ontario Insurance Act, R. S. O. 1897 c. 203, is sufficient under s. 160 of the Act to vary a policy or declaration or apportionment previously made without specifically identifying the policies by number, name, date, or amount insured. Such a devise does not affect a policy issued after the date of the will. Re Lynn, 20 O. R. 475, and McKibbon v. Feegan, 21 A. R. 87, commented on. *Re Chesborough*, 30 O. R. 639.

Preferred Class—*Beneficiary for Value —Will—Premiums Paid by Beneficiary.*]—A person whose life was insured by a benevolent society in favour of his wife, who was a beneficiary for value, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance money to one of his sons:—Held, that he had power to do so by virtue of s. 160 of the Ontario Insurance Act, R. S. O. 1897 c. 203, the proviso at the end of s.-s. (2) shewing that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly in the policy are protected against the wide power to change beneficiaries conferred by the section. It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest. *Book* v. *Book*, 32 O. R. 206.

Receiver—*Order to Sell Interest of Debtor in Insurance on His Life—Subsequent Declaration by Insured for Benefit of Wife and Children.*]—See *Weeks* v. *Frawley*, 23 O. R. 235.

Satisfaction—*Evidence — Oral Declarations of Insured.*]—In the course of proceedings for the administration of an intestate's estate, the amount of a life policy taken out by deceased under the Act to secure to wives and children the benefit of life insurance, in favour of his daughter absolutely, and which had been paid to her guardian, was set up as satisfaction of a claim made on behalf of the daughter and of the personal representative of her mother against the estate, and certain oral declarations of the deceased made before effecting the insurance were proved to

shew such to have been his intention:—Held, that if the evidence was admissible at all, which was doubtful, there should at least be something in writing evidencing the obligation to accept the amount in satisfaction of the claim, as formal as the Act requires in the case of changes in the description of, or appointment among, the beneficiaries. *In re Mills, Newcombe* v. *Mills*, 28 O. R. 563.

Separate Actions.]—Defendants, by a policy dated 25th August, 1870, insured the life of J. C. for $1,000, to be paid at his death to the plaintiff and two others (the children of J. C. and his wife), if living, otherwise to the representatives and assigns of said wife and children:—Held, under 29 Vict. c. 17 (C.), and 33 Vict. c. 21 (O.), that the plaintiff on the death of J. C. might sue for his (the plaintiff's) one-fourth share separately, without joining the others interested in the policy. *Campbell* v. *National Life Ins. Co.*, 34 U. C. R. 35.

——— *Pleadings.*]—The plaintiff H. and the other plaintiffs, infants, by H. as their guardian and next friend, declared on a policy of insurance, alleging that by it, in consideration of the premium paid to them by the plaintiffs, defendants assured the life of F., and by said policy promised to pay the sum insured to the plaintiffs, who at the time of making the policy were respectively the wife and children of F.; and that while the policy remained in force, the plaintiffs then being respectively the wife and children of F., the said F. died, &c.:—Held, on demurrer, that the declaration sufficiently averred that the insurance was effected by F. under 29 Vict. c. 17, for the benefit of his wife and children. But, held, also, following the last case, that the plaintiffs could not sue jointly, but must bring separate actions for their respective shares. The plaintiff H. was, however allowed to amend by declaring anew for her own share separately, and the names of the other plaintiffs were struck out. *Fraser* v. *Phœnix Mutual Life Ins. Co.*, 36 U. C. R. 422.

Sisters—*Voluntary Settlement.*]—A benefit certificate in a mutual insurance society was expressed to be payable to the insured's mother, and by contract between him and the society it was agreed that it should not be payable nor could it be transferred to any one else than his mother, wife, children, dependents, father, sister, or brother; and that if he died without having made any further direction as to payment the money should be paid to the beneficiaries in the above order, if living. The insured died intestate, unmarried, his father and mother predeceasing him, but two sisters survived, who were supported by him and claimed the policy moneys in the character of "dependents" as well as "sisters." His estate was insolvent, and his administrator claimed that the money was assets for the creditors:—Held, that the insurance amounted in effect to a voluntary settlement on the sisters of the insured, who though not within the protection of R. S. O. 1887 c. 136, were beneficiaries named in the policy, and as it was not shewn that the insured was not in a position to make a voluntary settlement at the time he effected the insurance, or at any time, they were entitled to the money. *In re Roddick*, 27 O. R. 537.

Wife Designated as Beneficiary—*Assignment to Creditor.*] — An application for a benevolent society's certificate stated that the insurance money was to be paid to the applicant's wife, and the certificate as issued and accepted provided that the money should, upon the death of the member, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the certificate, and in default of any such designation to his legal personal representatives:—Held, that the certificate came within the Act to secure to wives and children the benefit of life assurance, R. S. O. 1887 c. 136, and that the wife's interest was not affected by an absolute assignment, indorsed upon it, by the assured to a creditor. Judgment below, 28 O. R. 459, reversed. *Fisher* v. *Fisher*, 25 A. R. 108.

Will.]—A testator insured his life in a benevolent society, the policy being payable to his "widow and orphans and personal representatives," and afterwards indorsed on the policy a direction that the same should be paid to his infant daughter. Subsequently by his will he devised the proceeds of the policy with other moneys to his executors upon certain trusts:—Held, that the will was inoperative so far as it presumed to deal with the policy which by the indorsement contained a statutory trust under s. 5 of R. S. O. 1887 c. 136, in favour of the daughter, and that as the devise to the executors was repugnant to the trust they were not competent trustees within the meaning of s. 11 of the above mentioned Act. The mother of the infant having been appointed guardian and having given security for the proper application of the policy moneys was appointed trustee. *Scott* v. *Scott*, 20 O. R. 313.

A testator by his will devised an insurance certificate or policy to the defendants as his executors for the benefit of his wife and children:—Held, that the will was a sufficient declaration under R. S. O. 1887 c. 136, s. 5, and that creditors were not entitled to the proceeds. *Re Lynn, Lynn* v. *Toronto General Trusts Co.*, 20 O. R. 475.

A bequest of a policy of life insurance to the testator's wife is a valid declaration of trust within the meaning of R. S. O. 1887 c. 136, s. 5. Re Lynn, Lynn v. Toronto General Trusts Co., 20 O. R. 475, and Beam v. Beam, 24 O. R. 189, approved. *McKibbon* v. *Feegan*, 21 A. R. 87.

——— *Apportionment.*]—Before the coming into force of 53 Vict. c. 39, a testator insured his life in a benefit society, payable to his wife if she survived him, if not, to his children; and also subsequently insured his life in another similar society, payable to his wife and children. After the coming into force of the above Act, he made his will, bequeathing to his wife one-half of his life policies, for her life and widowhood; and, after her decease, to his children in equal proportions:—Held, that R. S. O. 1887 c. 136, s. 6, the Act to secure to wives and children the benefit of life insurance, as amended by 51 Vict. c. 22, s. 3, and 53 Vict. c. 39, s. 6, applied; and that the wife was entitled to one-half of the sum payable under the policy first mentioned for life, and the other moiety, being untouched by the will, went to her absolutely; while, as to the other insurance, she

was entitled to one-half for life or widowhood by virtue of the will. *Re Cameron, Mason* v. *Cameron*, 21 O. R. 634.

Under s. 6 (1) of the Act to secure to wives and children the benefit of life insurance R. S. O. 1887 c. 136, as amended by 51 Vict. c. 22, s. 3, and 53 Vict. c. 39, s. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be. *Re Grant*, 26 O. R. 120, 485.

——— *Election.*]—Testatrix by her will left all her property, by general words, to her executors, upon trust, inter alia, (5) to set apart $4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and, after providing for maintenance of unsold portions, to pay $1,400 to a second son and $2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff to divide the $4,500 among his children, adding—"It is my will that my son Robert (the plaintiff) is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for $2,000 on her life payable to the three sons, which was in force at the time of her death:—Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the $2,000 policy. Held, also, that the will had not varied the apportionment of the $2,000 policy under the powers conferred by R. S. O. 1887 c. 136, s. 6 (1), and amendments, so as to exclude the plaintiff or put him to his election. *King* v. *Yorston*, 27 O. R. 1.

——— "*Ordinary Beneficiary*" — *Re-apportionment.*]—A life insurance certificate on its face made the sum of $800 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred before the passing of 60 Vict. c. 36 (O.):—Held, that ss. 151, 159 and 160 of that Act applied to the certificate and declaration made by the will, and by those sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary" and the re-apportionment made by the will was valid. *Videan* v. *Westover*, 29 O. R. 1.

——— *Revocation of Trust.*]—By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow and children, but in this case the member, by a codicil to his will, made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of maintenance on the farm, until she married, at the age of nineteen. The plaintiff claimed her share alleging a trust in her favour which could not be revoked by the codicil:—Held, following Videan v. Westover, 29 O. R. 1, that the provision made by the codicil was a reapportionment of the fund, which the deceased had power to make. *Racher* v. *Pew*, 30 O. R. 483.

——— *Re-apportionment — Abatement.*]—A testator had three policies upon his life each for $2,000, payable to his wife and children; and, had no change been made, they would have been entitled to the whole sum in equal shares. By his will he gave a specific portion of the $6,000 to each of eight of his nine children, some of the portions being more and some less than $600, the total given being $5,100; but said nothing as to his wife or remaining child. By s. 160 of the Ontario Insurance Act, he had power to "make or alter the apportionment:"—Held, that what he did by his will was a reapportionment; and the former apportionment remained, except in so far as it was changed by the reapportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the remaining child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the $900 balance, divided between them equally. But, as one of the policies turned out to be worthless, and there was only $4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion. *Re Carbery*, 30 O. R. 40.

——— *Change in Rules — Creditors.*]—In his application for membership in a benevolent society the applicant directed that the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding $3,000, and he now directs that in case of his death the said sum be paid subject to his will." The insured died on the 5th January, 1897, having on the 12th September, 1896, made his will by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. In July, 1896, new rules were passed limiting the persons who could take as beneficiaries and excluding expressly creditors and persons designated only by will:—Held, that the new rules did not affect certificates then existing and that the insured's executors were entitled to the amount (fixed at $1,500) for distribution among the insured's creditors. Johnston v. Catholic Mutual Benevolent Association, 24 A. R. 88, distinguished. *Fawcett* v. *Fawcett*, 26 A. R. 335.

——— *Foreign Benevolent Society—Rules of Society.*]—A policy upon the life of the plaintiff's deceased husband was issued before the marriage by a foreign benevolent society not incorporated or registered under any Act

of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it ipso facto became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his wife the amount of this and another insurance, subject, however, to the payment of his debts:—Held, that the policy was capable of being controlled by conditions not set out upon its face, because s. 4 of 52 Vict. c. 32 (O.), amending the Ontario Insurance Act, R. S. O. 1887 c. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. 1887 c. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. c. 22, s. 2 (O.); and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract. Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors; and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts. *Morgan* v. *Hunt*, 26 O. R. 568.

——— *Payment to Executors or Testamentary Guardian.*]—A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian. In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors:—Held, that the insurance moneys being made payable to the daughters were by 53 Vict. c. 39, s. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. 1887 c. 136. Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by s. 11, R. S. O. 1887 c. 136, might by s. 13, invest in manner authorized by the will; but while the insured could give directions as to the investment she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the corpus for advancement. Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund. Held, also, that s. 12 of R. S. O. 1887 c. 136, does not justify an insurance company in paying the amount of a policy to a testamentary guardian, the guardian there named being one who has given security; and that the court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors. *Campbell* v. *Dunn*, 22 O. R 98.

——— *Payment to Executors—Security—Discharge.*]—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under ss. 11 and 12 of R. S. O. 1887 c. 136, be paid to the executors of the will of the insured, as provided by s. 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

See the next sub-head.

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4. *Benevolent Societies.*

Adoption of Constitution — *Implied Contract to Pay Dues—Change in Rules—Notice.*]—A benevolent society incorporated under R. S. O. 1877 c. 167, attached to the declaration which they filed under s. 2 (5), a printed book stated to contain a copy of the constitution and by-laws by which the said society was to be governed:—Held, that the constitution and by-laws thus included in the declaration became by virtue of s. 2 (1) R. S. O. 1897 c. 211, s. 3 (1), a part of the organic law of the society, and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding. Held, also, that the mere fact of a person being a member of such a society so constituted or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which according to the rules of the society afterwards become due; and that in the absence of such a contract on his part, there is no obligation to pay for breach of which an action against him will lie. No such contract is implied in an agreement by an applicant for a beneficiary certificate, contained in his application, that compliance on his part with all the laws, regulations, and requirements which were or might be thereafter enacted by the order was the express condition on which he was to be entitled to participate in the beneficiary fund. Liabilities may be imposed upon members by changes in the constitution and by-laws of the society, which did not exist when they became members. R. S. O. 1897 c. 203, s. 164, does not create a personal liability to pay assessments where none exists apart from it. Held, also, that a suspended member is none the less a member of the society; and where there is a personal liability on his part to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues and assessments payable at that time, but also as to those which become payable during the suspension, and before, by the operation of the rules, his default results in his ceasing to be a member. Held, also, that all conditions prescribed by the constitution in order to withdrawal from membership must be rigorously observed. Notice to members of an assessment is not sufficiently proved by the fact that the official paper of the society was distributed by a distributing agency, without proof of delivery by the latter to the individual members.

Certain clauses in the constitution of the society construed. *In re Ontario Insurance Act and Supreme Legion Select Knights of Canada*, 31 O. R. 154.

Assignment for the Benefit of Creditors—*Interest of Debtor in Fund.*]—An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. 1887 c. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of s. 11 of the Benevolent Societies Act, R. S. O. 1887 c. 172, such an assignment does not pass to the assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act. *Re Cuitt and Pratt*, 23 O. R. 78.

Certificate—*Designation of Beneficiary—Wife and Children—Executors—Will.*] — A gratuity certificate, issued by the Board of Trade of Toronto, to a member of the gratuity fund, for the payment, on his death, of a sum of money to his representatives, was made subject to the by-laws of the board, whereby the amount was payable to certain persons or class of persons, and in such proportions as might be designated by the member in writing and under his signature, a blank being left in the certificate for such designation, but, unless he so designated, the amount was payable, where there was a wife and children, as was the case here, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member, and his will in no way referred to it:—Held, that under the terms of the certificate and by-laws the amount went to the widow and children to be divided between them and formed no part of his estate in the hands of his executors. *Babe* v. *Board of Trade of Toronto*, 30 O. R. 69.

Change of Beneficiary.] — An endowment certificate issued in 1889 by a benevolent society to a member, and payable on his death, half to his father and half to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium:—Held, that this was not sufficient to displace the terms of the contract, as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vict. c. 39, s. 5 (O.), which applied to the certificate in question, creating a trust in her favour. That statute is retrospective as to current policies, issued before it came into force. *Simmons* v. *Simmons*, 24 O. R. 662.

Change in Rules.]—The plaintiff became a member of an Oddfellows' Lodge by subscription that he had examined the general laws and by-laws, and was ready and willing to yield obedience thereto. At that time there was a by-law in force fixing the amount of the weekly sick benefit payable to members, and also another by-law by which the society could repeal, suspend, or amend existing by-laws by a by-law passed by a two-thirds vote. Subsequently a by-law was passed reducing the amount of the sick benefit, whereupon the plaintiff availed himself of the various appeals permitted by the constitution, and on his failing thereon, brought an action seeking a declaration that the action of the lodge was contrary to natural justice and that he was entitled to payment of the amount fixed when he became a member:—Held, that this was a matter within the competence of the society and therefore the court could not interfere. *Baker* v. *Forest City Lodge*, *Parkhouse* v. *Dominion Lodge*, 28 O. R. 238; 24 A. R. 585.

A certificate issued by a benevolent society providing for payment of the endowment to the member's "next of kin," and expressed to be subject to the constitution and by-laws of the society then in force and also to such amendments and alterations as might thereafter be regularly adopted, is not affected by a subsequent change of the rules of the society omitting "next of kin" by that name from the classes of persons to whom certificates may be made payable. *Yelland* v. *Yelland*, 25 A. R. 91.

——— *Creditors.*]—In his application for membership in a benevolent society the applicant directed that the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding $3,000, and he now directs that in case of his death the said sum be paid subject to his will." The insured died on the 5th January, 1897, having on the 12th September, 1896, made his will by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. In July, 1896, new rules were passed limiting the persons who could take as beneficiaries and excluding expressly creditors and persons designated only by will:—Held, that the new rules did not affect certificates then existing and that the insured's executors were entitled to the amount (fixed at $1,500) for distribution among the insured's creditors. Johnston v. Catholic Mutual Benevolent Association, 24 A. R. 88, distinguished. *Fawcett* v. *Fawcett*, 26 A. R. 335.

——— *Notice of Assessments — Fixed Dates.*]—Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and repealed by the society during the membership of the insured:—Held, that he was bound by such action. Baker v. Forest City Lodge, 28 O. R. 238, 24 A. R. 585, followed. By s. 105 of R. S. O. 1897 c. 203, it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless

specific notice of the amount is given, as mentioned in s.-s. 2, and default thereafter for not less than thirty days; the meaning of which is that in the case of assessments which by implication are of fixed amount, and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure. By the constitution and rules of the society, the amount and frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble, according to the needs of the society:—Held, that the assessments could not be regarded as "payable at fixed dates," and as, in the case of the member whose standing was in question, the notices to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred. Hartley v. Allen, 4 Jur. N. S. 500, 31 L. T. O. S. 69, 6 W. R. 407, not followed. *Re Supreme Legion Select Knights of Canada, Cunningham's Case*, 29 O. R. 708.

Dispute as to Age.]—After an application for membership in a benevolent association had been accepted a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age and thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate on the ground that the applicant's age was not in fact that stated by his brother:—Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate. *Sons of Scotland Benevolent Association* v. *Faulkner*, 26 A. R. 253.

Domestic Forum.] — Members of charitable and provident societies should not be allowed to litigate their grievances within the society in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies. Therefore, where the plaintiff being expelled from the Ancient Order of Foresters, filed his bill for restitution thereto on the ground of illegal expulsion, but it appeared that the rules of the society provided certain internal tribunals to which he might have appealed for redress, but had not, the court refused to interfere. *Essery* v. *Court Pride of the Dominion*, 2 O. R. 596.

——— "*Member in Good Standing.*"]—Where the rules of a benevolent society give to a member, dissatisfied with a decision as to sick benefits, a right of appeal to a domestic forum, the widow of a member, whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits. Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way. In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover. *Dale* v. *Weston Lodge*, 24 A. R. 351.

Expulsion of Member.] — L. was expelled from membership in an incorporated benefit society, for being in default to pay six months' contributions. Article 20 of the society's by-laws, s. 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fee, and then any one may move that such members be struck off from the list of members of the society." L. therefore brought suit under the shape of a petition, praying that a writ of mandamus should issue, enjoining the company to reinstate him in his rights and privileges as a member of the society: 1. On the ground that he had not been put en demeure in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrear for similar periods, and that it was not competent for the society to make any distinction amongst those in arrear. 3. On the ground that no motion was made at any regular meeting. The court below, Held, that L. should have had "prior notice" of the proceedings to be taken with the view to his expulsion:—Held, on appeal, that as L. did not raise by his pleading the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal. Per Taschereau and Gwynne, JJ.: —A member of that society who admits that he is in arrears for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues. *Union St. Joseph de Montreal* v. *Lapierre*, 4 S. C. R. 164.

A society, incorporated under the Benevolent Society Act, for affording assistance to members in case of illness or death, by one of its rules provided for the expulsion of any member who "kept irregular and intemperate conduct" after notice to amend. On complaint made to the society that the plaintiff, a proprietary member, was guilty of such conduct, notice was sent him directing him to amend or be subject to expulsion, and a resolution was subsequently passed expelling him, and his name was erased from the society's books. No notice of the intention to move for

his expulsion was given, or any opportunity afforded him of being present and explaining his conduct:—Held, that the expulsion was illegal as being contrary to natural justice, and the resolution therefor null and void. *Beland v. Union St. Thomas*, 19 O. R. 747.

The plaintiff, as executor of his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favour, but the society at a meeting refused to adopt the report, and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an ex parte statement made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that if it should be established that a new member had not answered truthfully, he should ipso facto be excluded from the society; and also that if it was proved after his admission that he had not answered truthfully, he should, by reason thereof, be struck off the list of members. The committee of management was the body appointed under the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the society:—Held, that upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to those principles and to their own rules; and, therefore, the expulsion was not legally accomplished, and the plaintiff was entitled to recover. *Gravel v. Union St. Thomas*, 24 O. R. 1.

Foreign Society—*Non-payment of Dues.*]—The defendants were an incorporated union or society of workingmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province:—Held, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments, and compliance with certain conditions, to certain pecuniary benefits, were not subject to the provisions of s. 144 of the Ontario Insurance Act, 60 Vict. c. 36. Held, also, that even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity. *Wintemute v. Brotherhood of Railroad Trainmen*, 27 A. R. 524.

——— *Rules of Society.*]—A policy upon the life of the plaintiff's deceased husband was issued before his marriage by a foreign benevolent society not incorporated or registered under any Act of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it ipso facto became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this and another insurance, subject, however, to the payment of his debts:—Held, that the policy was capable of being controlled by conditions not set out upon its face, because s. 4 of 52 Vict. c. 32 (O.), amending the Ontario Insurance Act, R. S. O. 1887 c. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. 1887 c. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. c. 22, s. 2 (O.); and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract. Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts. *Morgan v. Hunt*, 26 O. R. 568.

Initiation — *Condition Precedent.*]—Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificates can be legally issued. Where, therefore, the holder of a certificate, though in all other respects duly qualified and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable. *Derins v. Royal Templars of Temperance*, 29 A. R. 259.

Insurance Act — *License.*]—The defendant, with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in this Province induced a number of persons to make application for membership therein, and to pay a joining fee of $5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid;

but, if accepted, the payer was constituted a member, &c., entitled to the full benefits of all social, &c., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—Held, that the defendant was carrying on the business of accident assurance without having obtained the necessary license therefor, contrary to s. 49 of the Insurance Act, R. S. C. c. 124; and that no protection was afforded by s. 43, relating to fraternal, &c., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction therefor of the defendant for carrying on such business was therefore affirmed. *Regina* v. *Stapleton*, 21 O. R. 679.

Mistake as to Age.]—Section 6 of the Ontario Insurance Amendment Act, 1889, 52 Vict. c. 32 (O.), does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted as a member and given an endowment certificate, it was held that the beneficiary named therein could not recover. Judgment below, 28 O. R. 111, reversed. *Cerri* v. *Ancient Order of Foresters*, 25 A. R. 22.

Payment into Court.]—On an application by a benevolent society for leave to pay insurance money into court, claimed by different parties:—Held, that s.-s. 5 of s. 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in. *Re Bajus*, 24 O. R. 397.

Postponing Payment.] — In 1889 the police force of Hamilton established a benefit fund to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows: "No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand ($8,000) dollars:"—Held, that in case of a member of the force dying before the fund reached the said sum the gratuity to his family was merely suspended and was payable as soon as that amount was realized. *Miller* v. *Hamilton Police Benefit Fund*, 28 S. C. R. 475.

Practice — *Master's Report.*] — The provision of con. rule 769 that notice of filing a master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute. Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R. S. O. 1897 c. 203, notice of filing the report given in the Ontario Gazette and other newspapers, pursuant to s. 193 of that Act, is not tantamount to personal service. *Re Supreme Legion Select Knights of Canada, Cunningham's Case*, 29 O. R. 708.

Renewed Contract.]—It is not a renewal of a contract of insurance within the meaning of s. 33 of the Insurance Corporations Act, 1892, 55 Vict. c. 39 (O.), but a continuance of the original contract, when after default in payment of assessments and consequent suspension of rights, a member of a benevolent society pursuant to the rules of the society, pays the assessment as of right and becomes thereby ipso facto reinstated. *Long* v. *Ancient Order of United Workmen*, 25 A. R. 147.

Rule Directing Payment to Named Beneficiaries — *Certificate Payable to Assured's Executors.*]—A certificate issued by a benevolent society incorporated under R. S. O. 1887 c. 172, in favour of an unmarried man, declared the sum therein mentioned to be payable to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the member, or his next of kin, or to the beneficiary fund of the society:—Held, that this was not a legal appointment or declaration of the fund under the statute and rules of the society, that the fund did not pass to the member's executors under his will, and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment and the money applied as directed by the rules. *Johnston* v. *Catholic Mutual Benevolent Association*, 24 A. R. 88.

Subordinate Councils—*Power to Waive Initiation — Relief Fund.*]—A subordinate council of a friendly society, incorporated under R. S. O. 1877 c. 167, has no authority to waive the requirements for initiation of members prescribed by the rules, where such initiation is a condition precedent to a claim on the relief fund of the society. *Hoefner* v. *Canadian Order of Chosen Friends*, 29 O. R. 125.

Suspension—*Affiliation with Another Order—Wife's Rights.*]—O. was a member of Court Maple of the defendants' order and was insured under the endowment provisions thereof for $1,000. This court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill-health and had gone to California for change, should be taken and insured with the others. By the rules of the defendants' order members of suspended courts in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of $1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but if after thirty days, they must pass a medical examination. O., on his return from California, on ascertaining that Court Maple had been suspended, within the thirty days, being then in good standing applied to the defendants' supreme secretary for his card of membership, tendering $1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavoured to do so, with another court. By the endowment certificate the $1,000 was payable to the widow, orphans, or legal heirs of O., and by indorsement thereon O. directed the amount to be paid to the plaintiff, the widow:—Held, that under the directions so given, as well as under R. S. O. 1877 c. 167, s. 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another order did not ipso facto deprive him of his rights and membership in defendants' order. *Oates* v. *Independent Order of Foresters*, 4 O. R. 535.

At the trial an amendment was asked to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the Judge:—Held, under the circumstances, the refusal was proper. The frame and effect of the pleadings in this case considered. *Ib.*

Quære, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, if properly pleaded, have required some consideration. *Ib.*

——— *Failure to Comply with Rules—Waiver—Costs.*]—W., who was a member of a subordinate court of the defendant society, died on the 6th May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should at the time of his death be a member of the society in good standing. W. had not paid his monthly assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared upon the list of suspended members in the minutes of a meeting held that month. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th of April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April and 1st May was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension has been in force for thirty days were according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It was not possible for W. to have complied with the second condition, and he did not attempt to do so:—Held, that the by-laws were binding upon W. and the plaintiff, and that he, not having been reinstated in accordance therewith, was not a member in good standing at the time of his death. *Wells* v. *Independent Order of Foresters*, 17 O. R. 317.

It was contended that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, shewed a waiver or created an estoppel on the part of the defendants. It appeared that the financial secretary was not familiar with the by-laws, and thought and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1884. The financial secretary had the right under the by-laws, to receive the arrears, but only as a first step towards reinstatement:—Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that, under all the circumstances, there was neither the intention nor the authority on the part of the supreme secretary to waive the examination. *Ib.*

As the plaintiff had been led by the action of the supreme secretary and the officers of the court below to believe that W. had been reinstated, no costs were given against her. *Ib.*

——— *Failure to Comply with Rules—Waiver.*]—The plaintiffs' husband was the holder of two certificates of the defendants, a provident institution, whereby on his paying $1.50 and $2.50 respectively semi-annually on 15th May and 15th November, together with assessments, and conforming to the conditions thereof, the defendant promised to pay the plaintiff a certain amount on his death. Among the conditions were that thirty days' default in payment would suspend him from membership and void the certificates, and that he should then be reinstated on furnishing satisfactory proof of good health within ninety days from such suspension and paying arrears, and in the meanwhile the certificates should be void, and of no effect. Plaintiff's husband was in his ordinary good health on 27th August, 1886, but died on 2nd September, 1886, having paid all dues and assessments regularly up to 15th May, 1886. It appeared that on 14th August, the plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th, 1886, and of a certain assessment, and the same day he remitted the money, and on 21st August, 1886, the defendants sent written receipts therefor, marked across their faces: "Conditional that you are in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member, which communication, however, never reached him. On 23rd August, 1886, the plaintiff wrote to the defendants offering to pay the assessment, and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained on the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of the payments. The plaintiff now brought this action against the defendants to recover upon the certificates:—Held, affirming 16 O. R. 382, that the plaintiff was entitled to judgment, for the evidence shewed that there was no intention, up to her husband's death, and for some time thereafter to take advantage of his default in payment, and the receipt of the money in August by the defendants, and their crediting him on the books therewith, clearly revived the certificate, and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right. *Horton* v. *Provincial Provident Institution*, 17 O. R. 361.

——— *Forfeiture—Waiver—Pleading.*]—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived:—Held, that the waiver, not having been pleaded, could not be relied on as an answer to the plea of non-payment. Allen v. Merchants Marine Ins. Co., 15 S. C. R. 488, followed.

Supreme Tent Knights of the Macabees of the World v. *Hilliker*, 29 S. C. R. 397.

Total Disability — *Non-payment of Assessments—Forfeiture—Winding-up Order.*]—Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to the insured. This was subject to the following conditions, among others:—"3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay . . the assessments . . then . . . the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine." "7. In every case when this certificate shall cease and determine . . all payments thereon shall be forfeited to the association . . ." A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to T., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim:—Held, that he was not entitled. B. made a claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the association. He paid the call due on the 1st April, and no further call was made till the 1st June:—Held, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after default arose on the part of the association to pay his claim; and therefore there was no bar to his establishing his claim upon the reference. Default of the association arose after sixty days from the furnishing by B. of proofs of total disability; for s. 42 of 55 Vict. c. 39 (O.), applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885. Another certificate issued by the association provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the association, there should be paid to the member, at the option of the board, if he should so request in writing at any time, while the policy was in full force, upon the surrender to the association and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance. Under this a claim for total disability was made after an order for the winding-up of the society:—Held, that the effect of the order was to destroy the functions of the directors and officers and practically to determine the contract; and as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy. *Re Massachusetts Benefit Life Association. Junkin's Case, Babcock's Case, Palframan's Case*, 30 O. R. 309.

Wives and Children's Benefit Act.]—The Act to secure to wives and children the benefit of life insurance, 47 Vict. c. 20 (O.), applies to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. 1877 c. 167. Re O'Heron, 11 P. R. 422, overruled. *Swift* v. *Provincial Provident Institution*, 17 A. R. 66.

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5. Cancellation or Surrender.

Change of Habits.]—An application for life insurance signed by the applicant contained in addition to the question and answer, "Are your habits sober and temperate? Yes," an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application for this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void." In an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk:—Held, that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract. *Boyce* v. *Phanix Mutual Life Ins. Co.*, 14 S. C. R. 723.

Surrender — *Fraud.*] — The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property. A contract for the surrender of a life policy, unlike a contract for life insurance, is not uberrimæ fidei. The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale. In an action by his executors to set aside the transaction:—Held, that there was no evidence of fraud to submit to a jury. Hill v. Gray, 1 Stark. 434, explained and distinguished. Smith v. Hughes, L. R. 6 Q. B. 597, followed. Jones v. Keene, 2 Moo. & R. 348, distinguished. *Potts* v. *Temperance Life Assurance Co.*, 23 O. R. 73.

Transfer of Business—*New Contract—Misrepresentation as to Age.*]—A Canadian benefit association, in which the assured held certificates of insurance, transferred its assets and business to an American association, who issued new certificates, sealed with its seal and signed in the United States by the president and treasurer, which were sent to, but were not to be operative until countersigned by, the Canadian agent, and delivered to the insured on payment of the premiums, all of which was done. The claimants sought to prove claims on the certificates in winding-up proceedings, and the master found on the evidence, in one case consisting partly of an entry in an alleged family Bible containing a record of births, that misrepresentations as to age had been made in both cases by the assured and disallowed the claims, and that as the contracts had been made with a friendly society previous to the passing of 55 Vict. c. 39 (O.), the Insurance Corporations Act,

1892, the claimants were not entitled to the benefit of s. 34 of that Act, under which misstatements as to age made in good faith do not avoid the contract, and, following *Cerri* v. Ancient Order of Foresters, 25 A. R. 22, the misrepresentation being material was fatal to the contracts:—Held, on appeal, that there was a novation and a new contract between the American association and the assured, which came into existence after the above Act came into force, as the association were validly doing business in Canada by license under s. 39 of R. S. C. c. 124; that the contract being completed in Canada was subject to statutory conditions imposed for the benefit of the public, and that the claimants were entitled to the benefit of ss. 33 and 34 of 55 Vict. c. 39 (O.) *Mason* v. *Massachusetts Benefit Life Association, Allen's Case, O'Dea's Case*, 30 O. R. 716.

Winding-up—*Assessment.*]—A resolution for the voluntary liquidation of a mutual insurance company under the Ontario Winding-up Act was adopted at a general meeting on a report of directors, which contained a recommendation that policies be sent in to the liquidator, and that members seek insurance elsewhere. One of the policy holders sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards an assessment was made upon the policy by the directors with the concurrence of the liquidator:—Held, that the policy had not been cancelled, and the assessment was good. *In re City Mutual Insurance Co., Steifelmeyer's Case*, 24 O. R. 100.

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6. *Insurable Interest.*

Insurance by Wife in Husband's Name—*Insurable Interest of Mother in Life of Child.*]—Where a policy of insurance was effected by a wife in her husband's name without his knowledge or consent, contrary to the rule of the insurance company, but subsequently, and after acquiring such knowledge, the husband procured two other policies to be issued in his name in the same company, signing the applications therefor, and acquiescing in the payment of the premiums on the three policies, and on these policies lapsing for default in payment of the premiums reviving the first policy, he was held estopped from denying its validity. Where the name of a person interested in a policy of insurance is not inserted therein, but is set out in the application therefor, which is made part of the policy and incorporated therewith, it is sufficient under 14 Geo. III. c. 48, ss. 1 and 2, and R. S. O. 1897 c. 203, s. 150 (1). An insurance in a New York company, effected by a mother on the life of her child under age, is valid, whether governed by the Ontario or New York law, R. S. O. 1897 c. 203, s. 150, s.-s. 5, making such insurance valid in Ontario, whether effected before or after the passing of that Act; while the American decisions, referred to in the case, shew its validity according to the law of the State of New York. *Wakeman* v. *Metropolitan Life Insurance Co.*, 30 O. R. 705.

As "protector of the deceased whenever he stood in need of protection" the plaintiff was held not to have an insurable interest in his life, within the meaning of article 2590 of the Civil Code of Lower Canada. Held, also, that a condition in the policy that the same should on the lapse of a year or upwards during which premiums have been regularly paid become incontestable is no answer to an objection founded on the terms of the Code. *Anctil* v. *Manufacturers Life Ins. Co.*, [1899] A. C. 604.

Wager Policy—*Trustees—Re-payment of Premiums.*]—A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children:—Held, that such policy was illegal, under 14 Geo. III. c. 48, s. 2; for the name of the person interested therein, or on whose account it was made, was not inserted in it as such, and the declaration of trust, which shewed that the plaintiffs had no interest, could not be incorporated as part of the policy. Held, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a "delictum" on their part, so as to make the maxim "in pari delicto," &c., applicable: but that they could recover only the first premium paid, the other payments not appearing upon the evidence to have been made by them with their own money. Held, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as the basis of the contract. *Dowker* v. *Canada Life Assurance Co.*, 24 U. C. R. 591.

——— *Assignee.*]—G. applied to respondents' agent at Quebec for insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L. at the request of the agent at Quebec, who had been entrusted with a blank, executed an assignment of the policy, paid the premium, and took the assignment to himself. Subsequently L. assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company inquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee:—Held, that at the time the policy was executed for G., he intended to effect a bonâ fide insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy. *Vezina* v. *New York Life Ins. Co.*, 6 S. C. R. 30.

The statute 14 Geo. III. c. 48, enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatever, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering, and that every insurance made contrary to the true intent and

meaning of this Act, shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the lives of any person or persons, or other event or events without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten. 3. That in all cases when the insured hath an interest in such life or lives, event or events no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events:—Held, that this statute never was intended to prevent a person from effecting a bonâ fide insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the Act. Held, also, that s. 2 of the said Act applies only to a policy on the life of another, not to a policy by a man on his own life. *North American Life Ass. Co.* v. *Craigen*, 13 S. C. R. 278.

A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy. *Manufacturers Life Insurance Co.* v. *Anctil*, 28 S. C. R. 103.

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7. *Misstatement or Suppression of Facts.*

Ambiguous Answer.]—On an application for life insurance, deceased, in answer to a question as to how many brothers he had had, answered "three, two living," whereas it appeared that he had also four half brothers, of whom one only was living. It was left to the jury to say whether the applicant in this answer was guilty of an untruth, and whether the statement was material:—Held, that it was properly so left, and a verdict for the plaintiff was sustained. Quære, as to the proper meaning of the word "brother." *Bridgman* v. *London Life Ass. Co.*, 44 U. C. R. 536.

Bona Fide Belief—*Statements without Knowledge — Forgetfulness — Findings of Jury.*]—See *Miller* v. *Confederation Life Association*, 11 O. R. 120, 14 A. R. 218, 14 S. C. R. 330; *Moore* v. *Connecticut Mutual Life Ins. Co.*, 41 U. C. R. 497, 3 A. R. 230, 6 S. C. R. 634, 6 App. Cas. 644.

Claim Papers — *Age* — *Onus.*] — One H. effected an insurance on his life with defendants, a life insurance company, and died. Plaintiff, his administratrix, in the proofs of death, stated the age of the insured as being two years more than his own representation of his age in the application. Defendants pleaded misrepresentation of age by the deceased, and relied on the claim papers as proving it. At the trial, plaintiff swore that she had no ground for stating the age as she did, except that she had been misled into making it by entries in an old book, being a record of his service in the army, in the possession of the insured at the time of his death, and that deceased had said that he was younger than the age in the record of service:—Held, that plaintiff was not bound by the statement in the claim papers, but that she could on her own evidence explain it, and that the burden of proof was not so shifted as to compel her to shew the true age of the insured to be as stated in the application, but that defendants were bound to prove the alleged misrepresentation. *Hayes* v. *Union Mutual Life Ass. Co.*, 44 U. C. R. 360.

Evasion.]—The bond of membership in an insurance society, insured the member holding it "in consideration of statements made in the application hereof," &c., and in a declaration annexed to the application, the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue:—Held, that the application was part of the contract for insurance and incorporated with the bond. The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to be answered was: "Have you ever had any of the following diseases? Answer opposite each, yes, or no." The names of the diseases were given in perpendicular columns, and at the head of each column the applicant wrote "no," placing under it, and opposite the diseases named, marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application, it was found that the applicant had had a disease opposite to which one of these marks was placed:—Held, that whether the applicant intended this mark to mean "no," and thus to deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question. *Fitzrandolph* v. *Mutual Relief Society of Nova Scotia*, 17 S. C. R. 333.

Injunction to Restrain Action.]—Injunction granted to restrain an action at law to recover money secured by a life insurance effected by fraudulent misrepresentation. *National Life Assurance Co.* v. *Egan*, 20 Gr. 469.

Latent Disease — *Return of Premium.*] —The provisions of the second sub-section of s. 33 of the Insurance Corporations Act, 1892, limiting conditions and warranties, indorsed on policies, providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third subsection. Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. Venner v. Sun Life Insurance Company, 17 S. C. R. 394, followed. *Jordan* v. *Provincial Provident Institution*, 28 S. C. R. 554.

Materiality—*Pleading.*]—On an application for insurance in a mutual assessment insurance society, the applicant declared and warranted that if in any of the answers there should be any untruth, evasion, or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shewn that the insured had misstated the date

of his birth, giving the 19th instead of the 23rd February, 1835, as such date; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose, and that the attack of apoplexy which he had admitted, occurred five years before the application, when the fact was that it had occurred within four years. The trial Judge found that the misstatement as to the date of birth, was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, and not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose, to which the insured was subject, was not a disease, and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack of apoplexy, was material, and on this last issue he found for the society, and on all the others for the plaintiff. The court in banc reversed the decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial Judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement:—Held, that the decision of the court in banc, 20 N. S. Rep. 347, was right, and should be affirmed. *Mutual Relief Society of Nova Scotia* v. *Webster*, 16 S. C. R. 718.

——— *Production.*]—It is provided by s.-s. 2 of s. 33 of the Insurance Corporations Act, 55 Vict. c. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto; and by s.-s. 3, that the question of materiality is for the jury, or if there is no jury, for the court. Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not, and never had been, subject to asthma, in an action to have it declared that the contract was a subsisting contract, production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued. *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366.

Mistake as to Age.]—See *Cerri* v. *Ancient Order of Foresters*, 28 O. R. 111, 25 A. R. 22, sub-head 4, *ante*.

Warranty — *Policy in Third Person's Favour—Return of Premium.*]—An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company, then in such case the premiums paid would become forfeited and the policy be null and void. Upon the death of the assured the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insured's own medical attendant stating that the insured was a life not insurable:—Held, that the policy was thereby made void ab initio, and the insurer could invoke such nullity against the person in whose favour the policy was made payable, and was not obliged to return any part of the premium paid. *Venner* v. *Sun Life Ins. Co.*, 17 S. C. R. 394.

Held, that the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of ss. 27 and 28 R. S. C. c. 134, could not be relied on to validate the policy, assuming such enactments to be intra vires of the Parliament of Canada, which point it was not necessary to decide. *Ib.*

Held, that the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation. Art. 1174 C. C., and the provisions contained in Art. 1180 C. C., are not applicable in such a case. *Ib.*

Wilful Untruth—*Pleading—Question for Jury—Independent Inquiry.*] — The application contained a number of questions and answers, and at the foot was a declaration signed by the assured, that to the best of his knowledge and belief the foregoing statements and other particulars were true; that the declaration should form the basis of the contract; and that if any untrue averment had been intentionally made therein or in the replies to the company's medical adviser in connection therewith, the policy should be void. By the policy the declaration and "relative papers" were made the basis of the contract, with the proviso that if any fraudulent or wilfully untrue material allegation was contained in said declaration, or if it should thereafter appear that any material information had been withheld, and any of the matters set forth had not been truly and fairly stated, then the policy should be void. To the questions in the application as to the name and residence of usual medical attendant, and for what serious illness had he attended, the assured answered "none;" and to the questions by the medical adviser as to what other disease or personal injury and from whom had he received professional assistance, &c., the assured answered "none." It was found that these answers were wilfully untrue, and that the information was wilfully withheld from and was material to be stated to the company:—Held, that these answers constituted a breach of the express contract between the parties, and therefore the policy was void. *Russell* v. *Canada Life Assurance Co.*, 32 C. P. 256.

A replication set up that certain correspondence between the company's general manager and their local agent, but of which the assured had no notice, directing the agent to make inquiries as to habits, &c., of the assured, upon the result of which the agent was to issue the policy, constituted an agreement that the company would rely on the judgment of the agent alone founded on such inquiries:—Held, that the replication could not be supported, either at law or on the facts. *Ib.*

Where the materiality of certain inquiries is obvious, and is assumed at the trial—as e.g.

with regard to the temperate habits or otherwise of the deceased—there is no need to submit it to the jury. *Ib.*

The manager of the defendant company entertaining doubts as to the propriety of accepting A. R.'s application for a risk on his life, caused the local agent of the company to make further inquiries as to A. R.'s habits, &c. On receiving a satisfactory report from the agent a policy was issued:—Held, that the defendants were not thereby precluded from relying upon the written application of A. R., and shewing that it contained wilfully untrue statements, the effect of which was by the express stipulations thereof sufficient to avoid the policy. Judgment below, 32 C. P. 256, in other respects affirmed. *S. C.*, 8 A. R. 716.

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8. *Premium.*

Assessments—*Waiver.*]—Where a mutual insurance company have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist, and there is no conduct on their part tending to mislead the insured. *Redmond* v. *Canadian Mutual Aid Association*, 18 A. R. 335.

Cheque—*Death before Payment.*] — By a policy of insurance upon the life of J. N., it was stipulated that if any premium should not be paid when due, the consideration of the contract should be deemed to have failed, and the company released from liability. By another clause, if an overdue premium was received, it was to be upon the express condition that the assured was in good health, &c., and if the fact were otherwise, the policy should not be put in force by such receipt. A cheque was given for a quarterly premium, with the request to hold it for a few days, as there were not then funds, and it was received by the agent, but the premium receipt was not given up. It was afterwards presented but not accepted. On the 21st October, funds were provided, but it being then after banking hours, the cheque was not presented. That night J. N. was killed:—Held, affirming 45 U. C. R. 593, that the policy lapsed the day after the premium fell due; that nothing but payment could then revive the policy, and that there was not any evidence of payment, or of anything dispensing with it. *Neill* v. *Union Mutual Life Ins. Co.*, 7 A. R. 171.

Conditional Application — *Action to Recover Premium.*]—The defendant at the request of the local agent of the plaintiff company applied for a policy of insurance on his life and submitted to the usual medical examination, at the same time telling the agent that he was not then prepared to pay the premium. By the application the defendant agreed to accept the policy when issued, and to pay the premium. The company accepted the application and sent the policy to the agent. It contained an express notice that until payment of the premium it would be considered void; and by the rules of the company the agent had no authority to waive this condition. The agent called upon defendant with the policy, when he said he was still unable to pay the premium, but told him to let it lie, and he would attend to it in a little while. Three or four weeks after this and without a further communication with defendant the agent forwarded the policy to him by mail. The defendant took no notice of it and the plaintiffs brought this action to recover the premium as due upon a completed contract of insurance and a policy duly issued. The jury found that the defendant signed the application not intending it to be used as an application and on the representation by the agent that it would not be used without his consent:—Held, that the action failed because it was brought upon an executed contract and there was no completed contract in fact, as it appeared by the plaintiffs' own declaration on the face of the policy that it was not to be operative until payment of the premium; and no waiver of that condition prior to or contemporaneously with the delivery to the defendant was proved. *Sun Life Assurance Co.* v. *Page*, 15 A. R. 704.

Note—*Agent's Authority.*]—J. M. was insured by a life policy, under which thirty days' grace were allowed for payment of premiums, and a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager, and there was a local board of directors in Canada, but S. managed all matters connected with the receipt of premiums, communicated directly with the board in England, took his instructions from them, and laid before them monthly accounts from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S. asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose you draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S. to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that as the two premiums of November, 1878, and May, 1879, were so long overdue he should have to refer the matter to S. on his return, adding, "until these back premiums are paid the society is off the risk." The death occurred on the 29th October, 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th February, and due 10th August, 1879, which was unpaid, and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death the amount of these two notes was tendered to the defendants and refused. S. being examined, said he did his best to keep the policies alive, and had no doubt at the time of his authority to do so. The jury found that the notes were taken by the defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for plaintiff:—Held, that the evidence shewed that it was within the authority of the resident secretary to

accept notes in payment of premiums, and there was nothing shewing notice to the assured of any want of such authority; that the non-payment of the note in August, 1879, while the other note was current, did not determine the policy; and the verdict ought not to be disturbed. *Moffatt* v. *Reliance Mutual Life Assurance Society*, 45 U. C. R. 561.

——— *Agent's Authority.*]——Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the onus is on the policy-holder to prove cash payment of the premium. Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds. And where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder. Acey v. Fernie, 7 M. & W. 151, approved. Judgments below, 27 O. R. 477, 23 A. R. 666, reversed. *London and Lancashire Life Assurance Co.* v. *Fleming*, [1897] A. C. 499.

——— *Non-payment—Waiver.*]—Under a policy of life insurance with a condition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable, the insurers are not bound on non-payment of the note to do any act to determine the risk. In the absence of an election to continue the risk, it comes to an end, and mere demands for payment of the note and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy are not sufficient evidence of such election. Judgment below, 22 O. R. 151, reversed. *McGeachie* v. *North American Life Assurance Co.*, 20 A. R. 187, 23 S. C. R. 148.

——— *Non-payment—Forfeiture.*]—Under a life policy providing that "a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," and also that "if any note given on account of the premium be not paid when due this policy shall be void and all payments made upon it shall be forfeited to the company," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force, and proceedings by the insurers to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct. McGeachie v. North American Life Assurance Co., 20 A. R. 187, applied and followed. *Manufacturers Life Ins. Co.* v. *Gordon*, 20 A. R. 309.

——— *Non-payment—Forfeiture.*]—The assured gave to the company, to cover the first annual premium payable under a policy of life assurance containing no condition as to forfeiture for non-payment of premiums, two instruments in the form of promissory notes payable at 90 days and 180 days from the date of the application, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid and before maturity of the second note the assured died:—Held, that without any election or declaration of forfeiture on the part of the company the contract came to an end upon non-payment of the first note and was not kept alive by the currency of the other note. McGeachie v. North American Life Assurance Co., 20 A. R. 187, and Manufacturers Life Insurance Co. v. Gordon, 20 A. R. 309, applied. *Frank* v. *Sun Life Assurance Co.*, 20 A. R. 564, 23 S. C. R. 152 (n.).

——— *Payment of Subsequent Premiums—Waiver.*]—By a policy of insurance, dated 13th April, 1869, for the payment of the annual premium of $29.56, payable quarterly, the defendants jointly assured the lives of the plaintiff and his wife in $1,000, and engaged to pay the same on the death of the assured when the event provided for happened, deducting therefrom all notes for premiums on the policy unpaid as at that time, together with any balance of the year's premium remaining unpaid. And in case the assured should not pay the said premiums on or before the said several days, &c., and the interest on all notes on account of premiums until the same were paid, the company should not be liable for any sum, "with the exception that in case this policy is allowed to lapse, after one full annual payment has been made, the insurance will be continued in force for the period which the equitable value of the policy at the time of lapse would purchase." Payments of premiums were made in cash from 13th April, 1869, to, but not including, 13th January, 1874, upon which day the policy lapsed, being for four years and three-fourths of a year, which, by the company's tables under the equitable and non-forfeiting system, extended the policy after the lapse for a period beyond the 2nd January, 1877, when the plaintiff's wife died. It appeared that on the 28th January, 1875, the plaintiff gave defendants' agent a so-called promissory note for the four instalments due in 1874, being up to, but not including 13th January, 1875, which note was payable in three months, and provided that if not paid at maturity with interest at seven per cent., the policy should be null and void. It also appeared that on the 8th April, 1875, during the currency of the note, the plaintiff paid, and the company received payment in cash of the premium which fell due on the 13th January, 1875. In an action by the plaintiff to recover the amount of the policy:—Held, that he was entitled to recover; that by the cash payments made up to the 13th January, 1874, there was a right to the benefits of the policy for such extended period; that it could not be deemed to be the intention of the parties to abridge such rights by the note of the 28th January, 1875, but that the effect of non-payment thereof was merely to put the parties in the same position as if the note had not been given. Per Galt, J.—To work a forfeiture for the non-payment of a promissory note, as the one in this case, the company must demand payment of it on the day it becomes due, and, if not paid, declare the policy forfeited or void. Semble, per Wilson, C.J., the company,

by receiving the premium in cash for a period subsequent to that for which the forfeiture was claimed, had waived such forfeiture, though the receipt was before the forfeiture had accrued. *Watts* v. *Atlantic Mutual Life Ins. Co.*, 31 C. P. 53.

Payment—*Agent's Authority.*]—An agent of an insurance company has no power to bind the company by giving a policy-holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy-holder to the company, the policy on its face providing that payment of the premium in cash to the company was necessary. Judgment below, 26 O. R. 596, affirmed. *Iverson* v. *People's Life Ins. Co.*, 23 A. R. 542.

Payment post Diem — *Proviso as to Health.*]—By the non-payment of the renewal premiums at the stipulated times, a policy of life insurance became forfeited. The policy provided that payments, if made when overdue, would not be considered as continuing the policy unless the insured was in good health at the time; but the practice of the company was, to receive payment of such premiums, and to issue the renewal receipts within thirty days after the stipulated times, provided the insured were then in good health:—Held, that the proviso as to the insured being in good health, did not apply to his actual state, but to the general understanding of the parties and their consequent action thereon. Where, therefore, at the time of paying the premium and giving the receipt, the insured had in fact received an injury which soon after resulted in death; but it clearly appeared that no danger was anticipated by either the insured or his medical attendant, or by the defendants themselves, who had made inquiry and had full knowledge of his condition:—Held, that the payment was good, and the forfeiture waived. Held, also, that the proviso as to the insured being in good health, was to guard against frauds committed on the company, and not to prevent the company themselves, when in full possession of the facts, dealing with the insured. Held, also, that the general agents in Canada of a foreign company, must be regarded in the same light as the general agents at the head office in the foreign country. *Campbell* v. *National Life Ins. Co.*, 24 C. P. 135.

Refusal to Accept Policy—*Damages.*]—By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept it:—Held, that the company could not claim the whole amount of the premium as liquidated damages, but was entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy. *Royal Victoria Life Ins. Co.* v. *Richards*, 31 O. R. 483.

Time for Payment.]—"Month" in an insurance policy in the form here in question, with provisions for payment of semi-annual premiums on named days of specific calendar months, means a calendar month. Per Hagarty, C.J.O., and Osler J.A.—Semble, payment must be made during the life of the insured, and if the life drop before the expiration of the time of grace and before payment the risk comes to an end. Per Burton and Maclennan, JJ.A.—Payment may be made at any time before the expiration of the time of grace, whether the life has dropped or not. *Manufacturers Life Ins. Co.* v. *Gordon*, 20 A. R. 309.

See, also, sub-titles II., III. 1, 8.

VI. Marine Insurance.

1. *General.*

Acceptance of Risk.]—One B., who was the agent at Montreal of the plaintiff and defendant companies, accepted a risk on a vessel of $7,700 for the defendants, but as the limit prescribed by them on any one vessel was $5,000 he had to re-insure for $2,700, and he immediately directed his clerk to write a memorandum of application and acceptance in the books of the plaintiffs for a re-insurance of $2,700, which was done; but the clerk whose duty it was to indorse the particulars on the open policy issued by the plaintiffs, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the re-insurance was given to the plaintiffs until after the loss occurred. After they had paid the loss, the plaintiffs discovered the irregularity and filed a bill to recover the money as paid under a mistake of fact:—Held, affirming 26 Gr. 264, that the plaintiffs were not entitled to recover, as the application and acceptance of the risk were, under the circumstances, sufficient to constitute a binding contract of re-insurance. *Canada Fire and Marine Ins. Co.* v. *Western Assurance Co.*, 5 A. R. 244.

——— *Settlement by Primary Insurers—Average.*]—On 1st September, 1881, the plaintiffs insured the vessel Mary Merritt for $6,000 for fifteen days, by acceptance of an application made to them by M. the owner. On the same day a memorandum was written in the margin of the application and signed by the manager and secretary of the defendant company, that they covered one-fourth, subject to survey and approval at first port of arrival, &c. It was understood that there was an allowance of eight per cent. for particular average. On 4th April, 1881, an agreement had been entered into between the companies, under which defendants were to cover a fourth part of all vessel risks accepted by plaintiffs; but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B1. By defendants' Act of incorporation, 35 Vict. c. 103 (D.), all policies, instruments, &c., issued or entered into by defendants, were to be signed by the president or vice-president, and countersigned by the manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed they should be deemed valid, &c.:—Held, that the plaintiffs could not rely on the agreement of the 4th April, as it was limited to vessels not below B1, and the vessel insured had not been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed as to be binding on the

defendants, for that, in the absence of evidence to the contrary, it must be deemed to be signed according to the rules and regulations of the company. Held, also, (1), defendants as re-insurers were not bound by the plaintiff's settlement with the owner or the acceptance of the notice of abandonment, and as to them there had been no total loss and no valid abandonment; (2) defendants were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo, &c.; (3) there was no particular average loss for which the plaintiffs were responsible or towards which defendants were liable to contribute. The pleadings were ordered to be amended according to the findings; and the costs apportioned. *Phœnix Ins. Co.* v. *Anchor Ins. Co.*, 4 O. R. 524.

Agent—*Person to whom Loss is Payable.*]—A marine policy was in this form: The Ætna Ins. Co., of, &c., on account of C., loss if any, payable to McC. (the plaintiff), in gold, do make insurance, &c.:—Held, that the contract on this policy was entered into with C.; that McC. was not insured, and could not sue on the policy. Semble, that the insertion in the policy of the words "for or in the name of all persons interested," &c., or "for whom it may concern," would have enabled McC., on shewing interest, to recover; also that the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy. *McCollum* v. *Ætna Ins. Co.*, 20 C. P. 289.

Agent to Insure—*Ordinary Form.*]—The plaintiff entrusted the defendants, as commission agents, with a quantity of flour either to sell for him at Toronto, or to send it to be sold at Quebec or other places, as circumstances might require. He directed that the flour should be insured, and the defendants effected an insurance with the British America Assurance Co. The flour was shipped by the defendants at Port Credit, consigned to G. & Co., Quebec. Owing to the negligence and want of skill of the captain, and of a pilot who was taken in at Kingston the vessel was stranded in the St. Lawrence, and the cargo lost. The policy contained an express stipulation that the company would not be liable for any loss occasioned by the want of ordinary care or skill in the navigation of the vessel, and the plaintiff therefore failed to recover on it; but it appeared that this was the ordinary form of policy, and that the defendants could not have procured any other:—Held, that the plaintiff could maintain no action against the defendants for taking such a form of policy; and that, in the absence of any ground for suspicion, it was not their duty to inquire into the skill and experience of the captain or crew of the vessel. And semble, that if an insurance might have been effected on more favourable terms, yet the defendants would have been justified in insuring as they did, having received no special instructions, and the company being one with which such insurances were usually effected by the trade. *Silverthorne* v. *Gillespie*, 9 U. C. R. 414.

Agent's Agreement — *Arbitration.*]—A parol agreement, entered into by "the duly authorized agents" of the company, to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them and lost:—Held, not binding upon the company, as not being a contract relating to the purposes for which it was incorporated. *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 267.

Amendment at Trial—*Sale under Execution.*]—Upon an action for insurance upon a vessel under the usual interim receipt:—Held, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a fi. fa., s. 23 of 8 Vict. c. 5, only declaring that the registered owner, although he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a fi. fa. of the mortgagor's interest in a non-registered vessel, the legal estate did not pass. The plaintiff, at the trial, claiming as owner under a sale as above stated, and the Judge ruling against him, applied, and was allowed to prove his interest as mortgagee. Upon a motion for nonsuit upon that ground, held, that it was a matter in the discretion of the Judge at nisi prius to permit such a variance in the line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd* v. *Equitable Fire Ins. Co.*, 8 C. P. 415.

Claim by Company against Harbour Commissioners.]—Held, that an insurance company which had a risk on a vessel were not entitled to recover from a harbour company in the name of the insured moneys expended by them in an attempt to raise the vessel. *Sweeney* v. *Port Burwell Harbour Commissioners*, 17 C. P. 574.

Double Insurance—*Difference in Extent.*]—Defendants insured for the consignor cattle from Boston to London, England, against all risks, except to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The cattle were consigned to F., and the consignor drew for £1,740 upon F., who accepted the bill and insured the cattle in England for £5,000, seventy-five per cent. against all risks, and twenty-five per cent. for total loss. It was sworn that F. had been told by the consignor to insure in all cases where they had made advances. After the loss F. received £1,500 on account of the English policies, but hearing that an insurance had been effected in Canada, and assuming that it would have the anti-contribution clause, so that the first insurance alone would be liable, they returned the money pursuant to an undertaking which they had given, but the policies were not cancelled:—Held, that there was a double insurance, for the risk, the interest and the subject were the same, and the difference between the several policies as to the extent of liability did not vary the risk. Held, also, that the defendants were liable to the plaintiffs for the whole amount insured, leaving them to recover contribution from the other insurers, according to the rule in force in England and here; but that they were entitled to deduct the £1,500 paid, and that this sum having been repaid under a mistake of fact and without prejudice, the plaintiffs might have recourse to the underwriters for it. *Bank of British North America* v. *Western Ass. Co.*, 7 O. R. 166.

Limitation of Time for Action.]—Plaintiffs having insured a steamer for £1,500, re-insured with defendants for £500, under a policy which provided that no suit should be maintained thereon unless commenced "within the term of twelve months next after any loss or damage shall occur." The steamer was injured in November, 1854, and the plaintiffs having paid the amount claimed on the 9th August, 1855, brought this action on the 8th August, 1856, to recover from the defendants their proportion:—Held, too late, for that the loss or damage referred to in defendants' policy was the injury to the vessel, not the payment by the plaintiffs. Whether under the other construction the action would have been in time, was a question raised but not decided. *Provincial Ins. Co.* v. *Etna Ins. Co.*, 16 U. C. R. 135.

A condition in a marine policy that all claims under the policy shall be void unless prosecuted within one year from date of loss, is a valid condition not contrary to article 2184 C. C., and all claims under such a policy will be barred if not sued on within one year from the date of the loss. The plaintiff cannot rely in appeal on a waiver of the condition, unless such waiver has been properly pleaded. The debtor cannot stipulate to enlarge the day to prescribe, but the creditor may stipulate to shorten that delay. *Allen* v. *Merchants Marine Ins. Co.*, 15 S. C. R. 488.

A clause in a marine policy required action to be brought on it within twelve months from the date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective, and some months later an amended claim was deposited:—Held, that an action begun more than twelve months after the original, but less than twelve months after the amended claim, was deposited, was too late. *Robertson* v. *Pugh*, 15 S. C. R. 706.

Loss before Issue of Policy — *Non-payment of Premium.*]—The owners of a quantity of wheat on board a vessel, applied to the agent of an insurance company to insure the same, who took the risk, subject to the approval of the head office, who authorized the insurance and directed the agent to remit the amount of premium at once. The owners of the wheat, instead of paying the premium, credited the amount to the agent in their books, and before any policy was delivered information was received of the loss of vessel and cargo, which had in fact occurred before the proposal for insurance was made. The company then refused to issue a policy, and a bill filed to compel them to do so, or pay the amount of loss sustained, was dismissed with costs. *Walker* v. *Provincial Ins. Co.*, 7 Gr. 137.

Quære, whether if in a receipt for premiums the words, "lost or not lost," are not inserted, and before the policy issued a loss had occurred and become known to both parties, the insurers would be liable for the loss. *Ib.*

Held, on appeal, affirming the decree, that the mere fact of the agent of an insurance company sending a receipt for the premiums to the place of business of the assured, without actually receiving the money, although the receipt was left relying on the amount being sent, was not sufficient to complete the contract of insurance. *S. C.*, 8 Gr. 217.

Non-payment of Premium—*Award.*]—W. et al. effected in A. M. Ins. Co. insurance on a ship. The policy, among other clauses, contained the following: "In case the premium, or the note or other obligation given for the premium or any part thereof, should not be paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also in the policy an arbitration clause by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada; and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the company. W. et al. gave a promissory note for the premium, which was not yet due when they became insolvent; and C., the respondent, was appointed assignee. A guarantee was then given and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid but remained overdue and unpaid at the date of the loss, on the 12th October, 1878. After the loss the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded $5,769.29. An action was then brought on the policy, the declaration containing a count on the award:—Held, 1. that the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on the non-payment of the premium note at maturity; 2. that the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise. *Anchor Marine Ins. Co.* v. *Corbett*, 9 S. C. R. 73.

Overvaluation.]—Where an applicant in his proposal to an insurance company for a policy for £1,000 on a vessel and tackle already insured for £3,000, valued her at £6,000, and on the trial the average valuation of competent persons was between £3,000 and £4,000:—Held, that the applicant's valuation did not in itself constitute a fraud to vitiate a contract, but was evidence to go to a jury with other circumstances in the case, and the court upheld a verdict for plaintiff. *McCuaig* v. *Unity Fire Ins. Association*, 9 C. P. 85.

Pleading.]—In an action on a marine policy it is necessary to aver that the loss occurred during the continuance of the policy; and if the policy extend only over certain waters, and the vessel is stated to have been lost on a voyage commenced from a certain

place, such a place must be alleged to be within the waters over which the policy extended. *Mittleberger* v. *British America Fire and Life Ins. Co.*, 2 U. C. R. 439.

Where there is an express covenant in a policy that a vessel shall be seaworthy and well found, &c., at all times during the continuance of the policy, it must be so expressly averred in an action on the policy. *Ib.*

Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company: that the vessel was lost: that by the policy the defendants were allowed in certain cases to interpose, recover, and repair the vessel; that the vessel sank while towed by plaintiff's tug; that the defendants and the other company, being desirous of recovering the vessel, by their respective duly authorized agents in that behalf, entered into an agreement in writing with plaintiff, reciting the loss, that plaintiff should raise vessel for $3,000, and plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators—one to be chosen by plaintiff, another by defendants and the other company, and the third by two so chosen—the question by whom said money and other expenses should be paid, &c.; that the plaintiff raised the vessel, had always been willing to appoint, and did appoint, an arbitrator, and was willing to submit such question, &c., of which the two companies had notice, and although the plaintiff requested them, &c., yet defendants always since wrongfully refused, either in concert with the other company or otherwise, to appoint an arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf and that of the other company, and by reason of such wrongful refusal, &c.:—Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was by an agent duly authorized, it could not be assumed that the authority was not full and sufficient. Held, also, that the contract disclosed was joint; that defendants could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and that, there being no plea in abatement, the declaration was good against the demurrer. *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 21. See *S. C.*, 27 U. C. R. 403.

Verdict against Evidence.]—Where in an action on a marine policy the plaintiff recovered as for a total loss, the facts shewing only a partial loss, which, however, were not so distinctly left to the jury, the court granted a new trial without costs. *Davis* v. *St. Lawrence Inland Marine Ins. Co.*, 3 U. C. R. 18.

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2. *Abandonment and Loss.*

Agent.]—An agent effecting insurance under authority for that purpose only, may, in case of loss, give notice of abandonment to the underwriters without any other or special authority. *Merchants Marine Ins. Co.* v. *Barse*, 15 S. C. R. 185.

Cancellation after Loss.]—Where to an action on a policy of insurance on plaintiff's vessel, the defendants pleaded that before the loss the parties cancelled the policy, while the evidence shewed that the cancellation took place after the loss:—Held, that the plea was disproved, and that the plaintiff was entitled to recover. Per Hagarty, C.J.—Knowledge on the part of the defendants, and ignorance in the plaintiff of the loss having occurred at the time of such cancellation would render it inoperative, and even if the defendants were equally ignorant with the plaintiff, the cancellation would still be valid as made under a common mistake of fact. *Brown* v. *British America Ass. Co.*, 25 C. P. 514.

Constructive Total Loss—*Notice of Abandonment—Sale of Vessel.*]—If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss. If the ship is in a place of safety, but cannot be repaired where she is nor taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore, and the probability of great deterioration in value during the delay, will justify the master, when acting bonâ fide and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment. *Nova Scotia Marine Ins. Co.* v. *Churchill*, 26 S. C. R. 465.

Deck Load.]—Defendants insured the plaintiffs' vessel by a policy containing nothing as to deck loads. A hold full and deck load of coal were shipped upon her at Cleveland for Toronto by a bill of lading, which provided, "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo, which was thereby accomplished. It was admitted that the usage at the date of the policy, as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads:—Held, looking at the special terms of the bill of lading, that the defendants were not liable to contribute their share of the loss. Semble, however, that but for the bill of lading the defendants would be liable, for that the usage to carry deck loads being admitted, the jettison of such load, in the absence of any usage to the contrary, must be contributed for in general average. *Spooner* v. *Western Ass. Co.*, 38 U. C. R. 82.

——— *Repairs.*]—A marine policy upon a vessel described as a "steam barge" was warranted by the assured "to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge." There was nothing else in the policy as to the vessel insured carrying a deck load:—Held, that the "barge" mentioned in the policy did not mean the insured vessel, nor did it refer to a steam barge. The vessel went ashore on Lake Huron, and was beached, after the throwing out of part of the cargo, as the only means, in the judgment of the captain, of saving all concerned:—Held, that the plaintiff was entitled to recover for the deck load as for general average, it not being excluded by the condition above mentioned, and there being

evidence of a custom on the lakes for steamers to carry such loads, and to deal with them as subject to general average. Held, also, that the plaintiff was not entitled to recover from defendants for the wages and provisions of the crew while the vessel was stranded, and in endeavouring to get her off the beach, even though the damage done to the vessel was itself a ground for general average. Held, also, that defendants were liable for the value of the repairs rendered necessary by the stranding, whether it was a general average loss or not, for it was a loss by the perils of the sea. Held, also, that the plaintiff was entitled to recover from defendants the proportion charged against the cargo and freight, and was not himself obliged to collect the share, if any, of general average stated against the owners of the cargo. *Steinhoff* v. *Royal Canadian Ins. Co.*, 42 U. C. R. 307.

Delay in Discovering Loss—*Evidence.*]—The policy of insurance on a vessel provided that no partial loss or particular average should be paid unless amounting to five per cent. The vessel went on a shoal at Matanzas, but did not leak immediately, and was therefore supposed to have received no injury, and the contrary was not discovered until after she had sailed for Europe with a cargo. She touched at Queenstown for orders, and thence sailed for Stockholm, where she discharged her cargo, and returned to England. On being examined there she was found to have sustained damage exceeding five per cent. The court, being satisfied that the injury was either wholly sustained at Matanzas, or was the immediate and necessary consequence of what occurred there, held that the insured was entitled to recover. *Berry* v. *Columbian Ins. Co.*, 12 Gr. 418.

Evidence of Loss.]—On the 28th September, 1875, a steam barge loaded with sand, sank while at anchor near Chateauguay, in the river St. Lawrence. The barge was raised and floated within a week after the disaster. It was shewn that on the starboard side there was an auger hole in the bilge of the barge which had been plugged up with a little wooden plug, and that the plug had come out. The vessel was raised by the insurers under the salvage clause of the policy. On the 1st October there was a formal protest, made at the request of the master and officers of the barge, setting forth all the details of the wreck. On the 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice of abandonment concluding with the words: "It is hardly necessary for me after your taking possession of the vessel to make any further declaration of abandonment, but I now do so in order to put that fact formally of record, and now again give you notice thereof." The vessel was eventually sold by consent of all parties interested, for $150:—Held, that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel. *Western Ass. Co.* v. *Scanlan*, 13 S. C. R. 207.

Freight.]—The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and the grain was damaged. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original destination. M., however, refused to deliver it to the plaintiffs until his freight was paid in full, and the plaintiffs thereupon paid it, and took an assignment of his policy on the freight, on which they now sued the defendants. It was found as a fact at the trial that the cargo might have been taken to its destination in specie, and the freight earned:—Held, affirming, 30 C. P. 570, that the plaintiffs were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as the freight had not only not been lost by the perils insured against, but had not been lost at all, he having received it in full. *Anchor Marine Ins. Co.* v. *Phœnix Ins. Co.*, 6 A. R. 567.

——— *Subsequent Completion of Voyage.*]—A vessel proceeeding on a voyage from Arecibo to Aquim and thence to New York, encountered heavy weather, was dismasted and was towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage, and complete the voyage. The agent had the vessel repaired and brought to New York, with the cargo:—Held, that there being a constructive total loss of the ship, the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering. *Troop* v. *Merchants Marine Ins. Co.*, 13 S. C. R. 506.

General Average—*Insurance on Hull—Cost of Saving Cargo — Average Bond.*]—A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given to the underwriters on the hull. The cargo was not insured. The owners of the cargo offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the said loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the Province in similar cases, by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond to recover this amount:—Held, affirming 19 A. R. 41, 20 O. R. 295, and 19 O. R. 462, that the owners of the cargo were only liable, under the bond, to pay such amount as would be legally due according to the principles of the law relating to general average; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average; that the money expended, beyond what was the actual cost of the salvage of the cargo saved, was in no sense expended for the benefit of the cargo owners; and the defendants having paid into court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount. *Western Ass. Co.* v. *Ontario Coal Co.*, 21 S. C. R. 383.

——— *Ice.*]—A liability to general average contribution arises only where both ship and

cargo are in imminent and uncontemplated peril and there is expenditure or sacrifice to secure their safety. There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage. *Kidd* v. *Thomson*, 26 A. R. 220.

General Insurance — *Specific Loss.*]—Held, following Ralli v. Janson, 6 E. & B. 422, that where by a marine policy goods of the same species, shipped in packages, are insured, free from average, unless general, and it is not distinctly expressed that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, (not being general average), though one or more package or packages be entirely lost or destroyed by the specific perils. Here some of the packages were tin plates, and others tinned sheets. Semble, that if either of the entire species had been entirely lost, the plaintiffs might have recovered as for a total loss of that species. *Moore* v. *Provincial Ins. Co.*, 23 C. P. 383.

Goods Insured in Bulk—*Loss of Portion.*]—M. shipped on a schooner a cargo of railway ties for a voyage from Gaspé to Boston, and a policy of insurance on the cargo provided that "the insurers shall not be liable for any claim for damages on . . . lumber . . . . but liable for a total loss of a part if amounting to five per cent. on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memorandum in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy:—Held, that M. was entitled to recover: that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss: and that the memorandum on the certificate did not alter the terms of the policy, the words "free from partial loss," referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract embodied in the terms of the policy. Held, further, that the policy, certificates and memorandum together constituted the contract and must be so construed as to avoid any repugnance between their provisions, and that any ambiguity should be construed against the insurers, from whom all the instruments emanated. *Mowat* v. *Boston Marine Ins. Co.*, 26 S. C. R. 47.

Notice—*Mortgagor's Interest.*]—A. having with B. (though B. was not named in the mortgage) a mortgage upon a vessel, insured her for £600. The vessel was wrecked and abandoned by the mortgagor, and the insurers sent their agent to take charge of her. The loss was proved to be equal to the amount of insurance:—Held, that A. had an interest in the vessel to the amount of the mortgage; and that the loss under the circumstances being an actual loss, requiring no notice of abandonment, the verdict for the plaintiff could not be disturbed. *Crawford* v. *St. Lawrence Ins. Co.*, 8 U. C. R. 135.

——— *Sale of Vessel.*] — T., respondent, was the owner of a vessel called the "Susan," insured for $800 under a valued time policy of marine insurance, underwritten by G., the appellant, and others. The vessel was stranded and sold, and T. brought an action against G. to recover as for a total loss. From the evidence it appeared that the vessel stranded on the 6th July, 1876, near Port George in the county of Antigonish, adjoining the county of Guysboro', N. S., where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th July for $165. The captain did not give any notice of abandonment and did not endeavour to get the vessel off. The purchasers immediately got the vessel off, &c., had her made tight, and taken to Pictou, and repaired, and they afterwards used her in trading and carrying passengers:—Held, that the sale by the master was not justifiable, and that the evidence failed to shew any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total. *Gallagher* v. *Taylor*, 5 S. C. R. 368.

——— *Test of Total Loss.*]—In marine insurance, notice of abandonment is indispensably necessary in all cases where the insured elects to abandon. In this case the vessel insured ran upon the rocks on the 11th October, and the defendants' agent was informed of it by the insured on the 16th October, but he was not informed of his abandonment as for a total loss until he made the protest before the agent on the 17th October, and no formal abandonment in writing, under the terms of the policy, was made until 27th December following, when the vessel had been floated off and utterly lost by the carelessness of the insured:—Held, that the notice was too late to be available, even if there had been such a loss as would have entitled the insured to abandon. Whether a loss is to be considered a total loss, depends on the fact whether the vessel, as injured, is useless to the owner unless at an expense that no prudent man, if uninsured, would incur, an expense exceeding the value of the ship when repaired. In this case it appeared that on the ninth day after the vessel went upon the rocks, the captain, on returning to her, found her in as good a state as on the second day, and that she remained between two and three weeks on the rocks, and then floated two or three miles below. It further appeared that there was not the slightest attempt made to get her off or recover her, or even to examine her, while all the witnesses said they would have tried to get her off, and it seemed beyond doubt there were eight days during which, from the calm state of the water, an attempt could have been successfully made; for within three days after she first ran on the rocks she floated again without any assistance, and there was evidence that even one man could have hauled her off, but the captain, a witness stated, intimated to him that he did not mean to do anything with the vessel:—Held, that the evidence wholly disproved a total loss, either actual or constructive. Held, also, that the fact of the plaintiff not having made any exertion to get the vessel off was no

ground for a new trial, as if the vessel got on the rocks by perils of the sea and was injured, the plaintiff was entitled to be indemnified for that; and that he was not obliged to take her off, but might leave her on the rocks until she went to pieces, though he could not recover for the destruction thus voluntarily suffered. *Hartley* v. *Provincial Ins. Co.*, 18 C. P. 325.

——— *Vessel afterwards Saved.*] — When the owners of a vessel which was stranded gave notice of abandonment, and the master afterwards on behalf of those concerned entered into a contract to get the vessel off, which was done; and the jury expressly found that the evidence was such as to warrant a prudent owner in abandoning the vessel as a total loss, and rendered a verdict for the plaintiff generally; the court being of opinion that the evidence warranted the finding of the jury, and that the plaintiffs were entitled under it to give notice of abandonment, (as of total constructive loss) sustained the verdict. *King* v. *Western Ass. Co.*, 7 C. P. 300.

——— *Waiver.*] — Owners of the vessel gave notice to an agent of the underwriters that they would abandon, which the agent refused to accept. Owners telegraphed to captain that they had abandoned, and for him to proceed under the best advice:—Held, that this act of telegraphing to the captain did not constitute a waiver of the notice of abandonment. *Melville Mutual Marine and Fire Ins. Co.* v. *Driscoll*, 11 S. C. R. 183.

Where, by a certificate of marine insurance, effected in this Province on cattle, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the M. Insurance Company of Liverpool, as soon as the goods were landed or the loss known, to be adjusted according to usages there, and the special condition of the contract of insurance:—Held, that the adjustment by the M. Insurance Company was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted. *Bank of British North America* v. *Western Assurance Co.*, 7 O. R. 166.

Partial Loss—*Total Loss.*]—A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on October 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On November 2nd, a tug came to the place where the vessel was, the master of which, after examining the situation, refused to try to get her off the rocks. On November 16th one of the owners and the captain went to the vessel and caused a survey to be had, and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters, and the owners brought an action on the policy, claiming a total loss. The only evidence of loss given at the trial was that of the captain, who related what the tug had done, and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefited the underwriters: — Held, per Ritchie, C.J., and Strong, J. That there was evidence to justify the trial Judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss, being one which reasonable men might have arrived at, should not be disturbed. Per Taschereau, Gwynne, and Patterson, JJ. That the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss. Held, per curiam, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a nonsuit could not be entered, but there should be a new trial, unless the parties agreed on a reference to ascertain the amount of such damages. *Phœnix Ins. Co.* v. *McGhee*, 18 S. C. R. 61.

Partial Loss on Cargo—*Stranding—Evidence for Jury—Jury Trial.*] — See *British and Foreign Marine Ins. Co.* v. *Rudolf*, 28 S. C. R. 607.

Premium — *Set-off.*] — An insurance company accepted a note for the premium of insurance on a vessel, and the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred, it was held, that the insured had a right in equity to set off the amount against the note. *Berry* v. *Columbian Ins. Co.*, 12 Gr. 418.

Repairs—"*Boston Clause*"—*Findings of Jury — Setting aside Verdict.*] — *Insurance Company of North America* v. *McLeod*, *Western Assurance Co.* v. *McLeod*, *Nova Scotia Marine Insurance Co.* v. *McLeod*, 29 S. C. R. 449.

A policy of insurance on a ship contained the following clause:—"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy." The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made:—Held, that the "cost of repairs" in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in adjusting a partial loss, and not the estimated amount of the gross cost of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value. *Gerow* v. *British America Assurance Co.*, *Gerow* v. *Royal Canadian Ins. Co.*, 16 S. C. R. 524.

Safety—*Assignment of Interest—Abandonment — Mortgagee's Rights.*] — While the

barque Charley was at Cochin, on or about the 12th April, 1879, the master entered into a charterparty for a voyage to Colombo, and thence to New York by way of Alippee. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on 13th May, and while on her way to Alippee she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master cabled to the ship's husband, at New York, on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction. On the 21st May the respondent, a mortgagee of forty-six sixty-fourths in the vessel, which he had assigned to the Bank of Nova Scotia by indorsement on the mortgage, as a collateral security for a pre-existing debt to the Bank of Nova Scotia, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy: "Upon the body, &c., of the good ship or vessel called the barque Charley, beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochin via Colombo and Alippee to New York:"—Held, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance; 2nd. that the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest so as to disentitle him to recover; 3rd. that the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary. Per Strong, J., that a mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss. *Anchor Marine Ins. Co.* v. *Keith*, 9 S. C. R. 483.

Sale — *Necessity for Abandonment — Time for Judging.*]—C. as assignee of W., was insured upon the schooner Janie R., to the amount of $2,000 by a voyage policy. On the 14th February, 1879, the Janie R., which had been in the harbour of Shelburne since the 7th February, left with a cargo of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to Shelburne, and on the morning of the 15th she went ashore, when the tide was about its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbour, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for $1,560:—Held, 1. That the sale by the master was not justified in the absence of all evidence to shew any "stringent necessity" for the sale after the failure of all available means to rescue the vessel. 2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss. Per Strong, J., that the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given. *Providence Washington Ins. Co.* v. *Corbett*, 9 S. C. R. 256.

Ship's Husband—*Agency.*] — A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest:—Held, that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of her interest by any action of the underwriters but by the decree of the court under which she was sold for salvage. *Rourke* v. *Union Ins. Co.*, 23 S. C. R. 344.

Special Provision in Policy — *Pleading.*]—Declaration (alleging a total loss) on a policy for $5,000 on the hull, tackle, apparel, and other furniture of the steamer "Boston," which stated the value to be $15,000—that in case of loss, prompt notice of the disaster and plan adopted for the recovery and saving, &c., should be given; to sue, labour, and travel, &c., without prejudice to the insurance, and after survey, as therein provided, insured were to cause the same to be repaired; and in case of refusal insurers were authorized to interpose and cause the same to be repaired, &c. All acts done or committed to be for the benefit of all concerned, and not to prejudice parties: that the insured should have no right to abandon unless under particular circumstances, and under no circumstances except by written notice delivered to the authorized agent of the insurers, nor unless such notice should be sufficient to vest in the company an unincumbered and perfect title to the subject abandoned. By an indorsement on the policy the vessel was insured against total loss only. Averment, that the plaintiff duly abandoned to said defendants, who thereupon accepted the said abandonment. Second plea, that the vessel became stranded while proceeding upon her voyage, and the plaintiff ought to have used prompt and efficient means for her safeguard and recovery, and repaired her when recovered; but plaintiff neglected and refused, and thereupon defendants interposed according to the terms of the policy, recovered and repaired the vessel, and put her in as good repair as before she was stranded, and offered to restore her on payment by plaintiff of his fair proportion, but he refused; and that defendants caused a proper survey to be made before repairing. Upon demurrer:—Held, no answer, because it did not shew there was no construc-

tive total loss, and the right so to act must, under the terms of the policy, be taken to be for the benefit of all concerned, and without prejudice to the rights of either party. Third plea, that plaintiff did not duly abandon, nor did defendants accept the abandonment, as alleged; fifth plea, that the abandonment as alleged was not sufficient to convey to and vest in defendants an unincumbered title to the vessel. Both pleas held good on demurrer, because if not traversed they would lessen the proof to be given for a constructive total loss (with a view to which the declaration seemed framed). Fifth plea, that if the note given for the premium should not be paid at maturity, the full amount of premium should be considered earned, and the policy should become void while said note remained over-due; and that the plaintiff did give his note, which remained over-due at the time of the commencement of suit. Upon demurrer:—Held, that there being a provision in the policy that the premium note in case of loss should be deducted before payment of the amount insured, and the premium note not being shewn to be due when the loss occurred, the plea was bad. *Meagher* v. *Home Ins. Co.*, 10 C. P. 313. Followed in the Queen's Bench pro formâ. *Meagher* v. *Ætna Ins. Co.*, 19 U. C. R. 530.

Survey.] — The declaration on a marine policy set out, as among its provisions, that a regular survey should be held as soon after an accident as possible, by competent persons mutually chosen, &c., and when a vessel after survey should be found capable of being repaired and made as good as she was prior to the accident, no abandonment would be allowed without the consent of the defendants; that she should be sound and seaworthy, and well manned and found, and if on a regular survey she should be declared and found unseaworthy on account of being unsound or rotten, or incapable of prosecuting her voyage on the same account, then the assurers should not be bound to pay anything. Plaintiffs then alleged a total loss, for which they sought to recover. Defendants pleaded that no such regular survey was held as required by the proviso set out in the declaration, although the vessel was at the time of the accident and of commencing this suit above water, and was a proper subject of survey, and they were willing to choose a surveyor:—Held, on demurrer, plea good, for that the provision for a survey was not confined, as the plaintiffs contended, to the case of a partial loss; and on this declaration the plaintiffs could have recovered for that as well as for a total loss. *Hamilton* v. *Montreal Ass. Co.*, 23 U. C. R. 437.

On a voyage from Porto Rico to New Haven, respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition, would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea:—Held, that there was no evidence to justify the jury in finding that the vessel was a total loss. *Millville Mutual Marine and Fire Ins. Co.* v. *Driscoll*, 11 S. C. R. 183.

Test of Right to Abandon—*Special Provisions—Inconsistent Conditions — Implication from Negative Stipulation.*]—Defendants insured a vessel for $5,000 by a policy which provided, among other things, that no acts of the insurers or insured in case of disaster with a view to saving the property should be considered as a waiver or acceptance of abandonment, but should be without prejudice to the rights of either party; that the insured should not have a right to abandon in any case, unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured. A memorandum was written on the face of the policy, and set out in the plaintiff's declaration, as follows: "N.B.—It is hereby understood that the above named vessel is insured against total loss only, and no claim for general average loss or particular average loss to attach under the policy." The vessel struck upon a reef in the St. Lawrence, on the 30th July, in calm water, and where no wind could affect her. On the 6th August the plaintiff gave notice of abandonment, but defendants refused to accept it, and ten days after they got her off and repaired her, at an expense in all of about $3,000, the declared value of the vessel being $15,000:—Held, 1. That the written memorandum providing against a recovery except for a total loss must prevail, although several printed conditions inconsistent with such an agreement were left in the policy; 2. that the negative provision, that the insured should not have a right to abandon unless, &c., (as above,) would not enable him to do so as of course in the event specified, if not otherwise entitled; 3. that the evidence shewed no total loss, actual or constructive, and that the plaintiff therefore had no right to abandon. The test by which this right must be determined is, whether a prudent man would think it worth his while to attempt to save and repair the vessel; 4. the policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here, with whom the plaintiff insured—that the law of this country, and not of the foreign country, should govern, the contract being in fact made here. *Meagher* v. *Ætna Ins. Co.*, 20 U. C. R. 607. See, also, *Meagher* v. *Home Ins. Co.*, 11 C. P. 328.

Vessel Repaired by Company—*Sale at a Profit.*]—The underwriters, ten days after they got the vessel off the rock, carried her to a harbour in the United States, where they had her repaired at an expense of $3,000—one-fifth of the declared value of the vessel—which sum the plaintiff neglected to pay. Thereupon the underwriters caused such proceedings to be taken against the vessel in the courts of the United States as resulted in the sale of the vessel under process, at which the agents of the insurers became the purchasers in their own names, but in reality in trust for their principals. The insurers subsequently sold the vessel, and their vendee shortly afterwards resold her, and, owing to peculiar circumstances, at a very large advance. The plaintiff instituted proceedings at law to recover the amount of the policy, which resulted in favour of the defendants, and ten years afterwards filed a bill seeking to charge the insurers as trustees for him of the vessel:—Held, without reference to the delay in proceeding, that the insurers were entitled to hold the property unaffected by any claim of the plaintiff, and the court, although it considered the plaintiff entitled to any surplus that remained in the hands of the insurers after payment of the amount expended by them upon

the vessel, were unable to grant him that relief, and dismissed his bill with costs. *Meagher* v. *Ætna Ins. Co.*, 20 Gr. 354.

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3. *Conditions and Warranties.*

Care and Skill.]—Action on a marine policy. The jury, upon issues raised as to the negligence of the captain and crew, having found for defendants, a new trial was refused upon the evidence. *Gillespie* v. *British America Fire and Life Ass. Co.*, 7 U. C. R. 108.

Semble, that with respect to the cargo insured, as well as the vessel itself, a marine policy may, by an express (though not by an implied) agreement, become legally invalid for the want of care and skill on the part of the captain and crew in navigating the vessel; and semble, that the wording of this policy amounted to such an express agreement. *Ib.*

——— *Collision—Foreign Law.*]—Declaration on a policy of insurance on a propeller. Plea, that the vessel was lost in Lake Michigan by coming into collision with a schooner in American waters, and that the rights and liabilities under said policy on account of such collision ought to be governed by the laws of the United States, according to which all steamers must keep out of the way of sailing vessels, and in case of collision and loss occasioned thereby to the steamer, it is presumed that the fault was hers, and her owners cannot recover from the owners of the sailing vessel or from insurers; that the plaintiff's steamer did not avoid the schooner as she might have done, whereby the wreck was occasioned. Replication, that the plaintiff's vessel did not collide with the schooner through the want of ordinary care and skill in navigating her, such as is proper in the navigation of the lakes. Rejoinder, that the propeller was an American vessel, sailing under American colours, and in American waters at the time of the loss; that the defendants are an American company; that by the American law, as the plaintiff well knew, the schooner was justified in keeping her course, while the steamer should have turned out of her way to enable her to do so, as she might have done; yet the steamer's course was not altered, as it easily might have been, and so, by reason of the said facts, the collision did take place from the want of ordinary care and skill in navigating the steamer. Surrejoinder, that the steamer was not lost through the want of ordinary care and skill in those navigating the steamer:—Held, on demurrer, that the surrejoinder was good. As to the plea, held that the allegation of want of care on the plaintiff's part formed no defence; and that, if it had been averred in the declaration that the contract was made in this Province, the American law would not govern, though the loss happened in their waters. *Patterson* v. *Continental Ins. Co.*, 18 U. C. R. 9.

Delay in Voyage.]—A vessel insured for a voyage from Charlottetown to St. Johns, Nfld., left the wharf at Charlottetown on 3rd December, with the bonâ fide intention of commencing her voyage. After proceeding a short distance she was obliged, by stress of weather, to anchor within the limits of the harbour of Charlottetown and remained there until 4th December, when she proceeded on her voyage:—Held, that this was a compliance with a warranty in the policy of insurance to sail not later than 3rd December, but a breach of a warranty to sail from the Port of Charlottetown not later than 3rd December. *Robertson* v. *Pugh*, 15 S. C. R. 706.

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss. *Spinney* v. *Ocean Mutual Marine Ins. Co.*, 17 S. C. R. 326.

Deviation — *Custom.*] — The plaintiff effected an insurance with defendants on certain wheat to be carried in a schooner from Port Darlington to Kingston, and thence to Montreal by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, about three miles below Kingston; the wheat was there transferred to a barge, which returned to Kingston in order to complete her cargo, and while so returning the barge was stranded, and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only shewed that certain forwarders, having storehouses at Port Sidney, had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised:—Held, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage. *Fisher* v. *Western Ass. Co.*, 11 U. C. R. 255.

The voyage specified in a marine policy included "loading port on the western coast of South America," and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, from twenty-five to forty miles off the coast. On the trial of an action to recover the insurance, evidence was given by shipowners and mariners to the effect that, according to commercial usage, the description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy:—Held, that the words in the policy must be taken to have been used in a commercial sense and as understood by shippers, shipowners, and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a guano freight being contemplated, the finding should not be disturbed. *Providence Washington Ins. Co.* v. *Gerow*, 17 S. C. R. 387.

In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to shew that the peril has been enhanced in order to avoid the policy. *Spinney* v. *Ocean Mutual Marine Ins. Co.*, 17 S. C. R. 326.

Misrepresentation—*Repairs to Old Vessel.*]—Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made. Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when materially and substantially incorrect. Representation in a marine policy that the vessel insured was built in 1880, when the fact was that it was an old vessel, extensively repaired and given a new name and register, but containing the original engine, boiler, and machinery, with some of the old material, is a misrepresentation and avoids the policy, whether made with intent to deceive or not. *Nova Scotia Marine Co.* v. *Stevenson*, 23 S. C. R. 137.

Promissory Representation.]—An application for insurance on a vessel in a foreign port, in answer to the questions, "Where is the vessel? When to sail?" contained the following. Was at "Buenos Ayres or near port 3rd February bound up river; would tow up and back." The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk:—Held, that the words "would tow up and back" in the application did not express a mere expectation or belief on the part of the assured, but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void. *Bailey* v. *Ocean Mutual Ins. Co.*, 19 S. C. R. 153.

Representation as to Sailing.] — Where a party insuring a vessel omits to mention to the underwriters that she has then sailed, the omission, though the insured knew the fact, will not vitiate the policy, unless the vessel be at the time of the insurance what is called a "missing ship." Aliter, if the insured, when expressly questioned as to the fact, says, not by way of opinion or expectation, but positively, that the vessel has not sailed when she really has. Semble, that there is a distinction to be taken when the owner of the cargo, who is not at the same time the owner of the vessel, is insuring his cargo, as to the probability of any positive statement being made to the underwriters with respect to the time of the vessel's sailing. *Perry* v. *British America Fire and Life Ass. Co.*, 4 U. C. R. 330.

Seaworthiness — *Varying Standard.*] — Semble, that the seaworthiness of a vessel is a fact to be considered with reference to the particular navigation in which the loss of the vessel may occur—as, for instance, if a vessel insured between Toronto and Quebec, were lost by stranding in the river St. Lawrence, the question for the jury would be, not was she well found and seaworthy for the navigation of the open lake Ontario, but was she so for the navigation of the river; and if in the opinion of the jury she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated, unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation an absolute cause of forfeiture, without reference to the particular navigation in which the loss should occur. *Gillespie* v. *British America Fire and Life Ass. Co.*, 7 U. C. R. 108.

——— *Cause of Loss.*]—Action on a policy on a vessel, alleging a total loss. Plea, that the plaintiff knowingly and wrongfully sent the vessel from the port of Toronto in an unseaworthy state, and permitted her to remain on the lake in such state, and without being properly equipped, and that by reason of the premises only the vessel was wrecked and lost:—Held, that the plea was not proved by shewing that the vessel was unseaworthy when she was wrecked, unless such unseaworthiness was the immediate cause of the loss. *Woodhouse* v. *Provincial Ins. Co.*, 31 U. C. R. 176.

——— *Onus.*]—In a policy on the plaintiff's vessel, insuring only against perils of the sea, one condition was, that defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question, some fifteen minutes after she had left port, began to leak, and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by plaintiff to rebut the presumption, which, it was contended, therefore arose, that the loss was not occasioned by perils of the sea:—Held, that the plaintiff was bound to have given this evidence, and that the absence of it disentitled him to recover. The court granted a new trial, though of opinion that defendants were entitled to a nonsuit, suggesting whether, if evidence were given of defendants' knowledge of the age, build, and material of the vessel, at the time of the insurance, it might not be held to modify the condition as to seaworthiness, so as to make it subordinate to the particular vessel being insured. *Coons* v. *Ætna Ins. Co.*, 18 C. P. 305.

On the new trial one H. was called by plaintiff, who proved that he, as defendants' agent, accepted the risk on the vessel in question; that he had seen but did not examine her, but judged her wholly from the registry, and insured her as B. 1; that a B. 1 vessel would be insured as readily as an A. 1, the charge on freight being the same, and the seaworthiness would be expected to be the same, though the A. 1 would not be so likely to go to pieces:—Held, that these facts did not bring the case within the principle laid down in Burgess v. Wickham, 3 B. & S. 669, and Clapham v. Langton, 34 L. J. Q. B. 46; and, therefore, held, that the new evidence did not alter the position of the parties, and that a nonsuit was properly directed. *S. C.*, 19 C. P. 235.

In a marine insurance policy issued by defendants to plaintiff, among other excepted perils or losses, were those arising from rottenness, inherent defects, and other unseaworthiness. At the trial it appeared from plaintiff's own evidence that the vessel in question, after sailing all day on a summer sea, with a light breeze, in the evening suddenly came up into the wind, or broached to, refused to answer her helm, and at once began settling down, when the crew abandoned her, and after they had rowed about thirty-five yards she sank. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to shew that she was old and

rotten in parts, that she in fact leaked before starting across the lake, in the canal, and at the port of lading, and that men would not go in her without being paid extra wages; and the plaintiff himself stated that she was old and he had given instructions not to canal her by night or leave port in a gale. The diver, who examined her, also found one stave wholly out and another partially so. The whole case having been left to the jury on this evidence:—Held, that the trial Judge should have ruled according to Coons v. Ætna Insurance Company, 18 C. P. 365, and 19 C. P. 235, and if plaintiff declined a nonsuit, should have explicitly told the jury to find for defendants; and a new trial was, therefore, ordered. *Myles* v. *Montreal Ins. Co.*, 20 C. P. 283.

——— *Evidence.*]—In an action on a marine policy, insuring plaintiff against perils of the lakes, loss arising from unseaworthiness excepted, where the evidence shewed that the vessel was in excellent condition and seaworthy when she left port, and apparently up to the time of loss; that a squall struck her and more than three hours afterwards it was found that she was leaking much, in consequence of which she filled and went down, there being no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against the plaintiff, the only remarkable circumstance being, that in the protest made by the master and mate there was no mention of the squall, nor was any cause assigned for the leak or consequent loss:—Held, that the Judge was right in submitting the case to the jury, and that the evidence fully warranted the finding for the plaintiff. *Dawson* v. *Home Ins. Co.*, 21 C. P. 20.

It appeared that the vessel was driven ashore on the 6th September, and that the plaintiffs got her off and towed her to Detroit, where she was put into dry dock and repaired. The salvage charges amounted to $4,000. On 26th September, the owner gave notice of abandonment, and claimed as for a total loss, and the plaintiffs settled with him for $3,000. On 29th September, the vessel while lying at the port of Detroit was libelled for seamen's wages and salvage charges, and was subsequently sold to pay the same. The actual damage done to the vessel only amounted to $175. At the time of the accident the vessel had only one anchor, having a short time previously lost a second one she had. There was no express warranty of seaworthiness:—Held, that the policy being a time policy there was no implied warranty of seaworthiness. *Phœnix Ins. Co.* v. *Anchor Ins. Co.*, 4 O. R. 524.

Towing.]—The appellants issued a marine policy of insurance at Toronto, dated the 28th November, 1875, insuring, in favour of the respondent, $3,000 upon a cargo of wood goods laden on board of the barque Emigrant, on a voyage from Quebec to Greenock. The policy contained the following clause: "J. C., as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance and cause three thousand dollars to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the harbour of Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the Traverse:—Held, that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty. *Provincial Ins. Co. of Canada* v. *Connolly*, 5 S. C. R. 258.

Verdict against Evidence.]—In an action upon a policy of insurance, where the questions of unseaworthiness and deviation were involved, and where there had been two verdicts in favour of the plaintiff, the court, entertaining a strong conviction that on the plaintiff's own shewing, and giving every weight to his evidence, he was not entitled to recover, granted a new trial. *Haworth* v. *British America Ass. Co.*; *Coulson* v. *Ontario Fire and Marine Ins. Co.*, 6 C. P. 60, 63.

Warranty of Safety.] — See *Anchor Marine Ins. Co.* v. *Keith*, 9 S. C. R. 483.

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4. *Construction and Effect of Policies.*

Barratry—*Perils of the Sea.*]—Insurance in a marine policy against loss "by perils of the seas," does not cover a loss by barratry. It is not necessary that barratry should be expressly excepted in a marine policy to relieve the insurers from liability for such a loss. *O'Connor* v. *Merchants Marine Ins. Co.*, 16 S. C. R. 331.

Class of Vessel.]—The policy insured against perils of the lakes, rivers, &c., and declared that the goods were to be laden on board vessels classed not below B. 1, and the memorandum declared that the policy covered goods from Great Britain to Montreal and Hamilton by standard steamers and sailing vessels. The declaration averred in one count a loss in the river St. Lawrence; and in another, that at Quebec the goods were transferred to a standard lighter to be carried to Montreal, according to the custom of navigation, in which they were lost. The defendants pleaded that the Sarmatian, which carried the goods from Liverpool, went only to Quebec, 150 miles from Montreal, where the goods were transferred to another vessel, not a standard steamer or sailing vessel, and not classed. The plaintiffs replied that the navigation from Quebec to Montreal was dangerous for steamers like the Sarmatian, and that for the purpose of safely landing the goods shipped from Liverpool to Montreal it was the custom to ship such goods into local lighters at Quebec, of which the vessel in which these goods were lost was one:—Held, on demurrer, plea good and replication bad, for it was admitted that the vessel was not such as the policy required, and it was not alleged that the goods could not be safely carried in such vessels from Quebec to Montreal. *Moore* v. *Provincial Ins. Co.*, 23 C. P. 383.

Description of Goods.]—See *Merchants Marine Ins. Co.* v. *Rumsey*, 9 S. C. R. 577, under the next sub-head.

Limits of Voyage.]—In an action on a voyage policy containing this clause, "warranted not to enter or attempt to enter or to use the Gulf of St. Lawrence prior to the 10th May, nor after the 30th October (a line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof shall be considered the bounds of the Gulf of St. Lawrence)," the evidence was:—The captain says: "The voyage was from Liverpool to Quebec, and ship sailed on the 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. Shortened sail, and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main top-sail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in the ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log-book showed that the ship got into the ice on the 7th May, and an expert examined at the trial swore that from the entries of the 6th, 7th, 8th, and 9th May, the captain was attempting to enter the Gulf of St. Lawrence:—Held, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause. *Taylor* v. *Moran*, 11 S. C. R. 347.

Perils of the Sea—*Ice.*]—A vessel on her way to Miramichi, N.B., was chartered for a voyage from Norfolk, Va., to Liverpool with cotton. She arrived at Miramichi on 25th November, and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the river, and she remained frozen in the ice all winter, and had to abandon the cotton freight:—Held, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas," covered by an ordinary marine policy. *Great Western Ins. Co.* v. *Jordan*, 14 S. C. R. 734.

Port of Lading—*Question for Jury.*]—A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America, and was afterwards lost:—Held, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection. *Providence-Washington Ins. Co.* v. *Gerow*, 14 S. C. R. 731.

Surplusage—*Insurance on Advances.*]—A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co., do cause to be insured, lost or not lost, the sum of $2,000, on advances, upon the body, &c., of the Lizzie Perry. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which were not insurable:—Held, that the instrument must, if possible, be construed as valid and effectual, and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship. *British America Assurance Co.* v. *Law*, 21 S. C. R. 325.

Voyage Policy—"*At and from*" *a Port.*]—A ship was insured for a voyage "at and from Sydney to St. John, N.B., there and thence," &c. She went to Sydney for orders and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour and having received her orders by signal attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call, that ships going there for orders never entered the harbour, and that the insured vessel was within the port according to a royal surveyor's chart furnished to navigators:—Held, that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John. *St. Paul Fire and Marine Insurance Co.* v. *Troop*, 26 S. C. R. 5.

Written and Printed Provisions.]—Held, that the condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it. *Meagher* v. *Home Ins. Co.*, 11 C. P. 328. See *S. C.*, 20 U. C. R. 607.

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5. Insurable Interest.

Advances—*Description of Goods.*]—The respondents (plaintiffs), by an arrangement with M., who had chartered the schooner Mabel Claire for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining to S. and others. In trading on the voyage S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding $6,000, and after having done so, and upon the day on which the vessel sailed from Halifax, obtained from the appellants (defendants), the policy sued upon, an extract from which was as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of $2,000 on the undermentioned property, from Halifax to Labrador, and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner Mabel Claire, whereof Mouzar is master this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed

on the back hereof. Description of goods insured, merchandise under deck, amount $2,000, rate five per cent., premium $100, to return two (2) per cent. if risk ends 1st October, and no loss claimed; additional insurance of $5,000, warranted free from capture, seizure and detention, the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at Liverpool, N.S., were not covered by this policy, and that it was not to cover the return cargo:—Held, that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy. Held, also, that there was sufficient evidence to shew that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel. *Merchants Marine Ins. Co.* v. *Rumsey*, 9 S. C. R. 577.

——— *Stranger.*] — A party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel. *Orchard* v. *Ætna Ins. Co.*, 5 C. P. 445.

Part Owner.]—The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured, under a policy issued to himself insuring the vessel "for whom it may concern." *Merchants Marine Ins. Co.* v. *Barss*, 15 S. C. R. 185.

See CONSTITUTIONAL LAW, II. 14—FOREIGN LAW—MORTGAGE, XII. 6.

INSURABLE INTEREST.

See INSURANCE, III. 5, V. 6, VI. 5.

INSURANCE COMPANY.

See ASSESSMENT AND TAXES, II.—INSURANCE.

INTEREST.

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IV. USURY.

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I. IN WHAT CASES ALLOWED.

Administration.] — Interest held to be allowable to a creditor on a preferred debt consisting of drafts and promissory notes from the date until paid, and pending suit. *City Bank* v. *Maulson*, 3 Ch. Ch. 334.

Advances—*Usage of Trade.*]—A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him at Q. for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, he, with the assent of the plaintiff, held the timber over till the following spring, and claimed interest on his advances from the 1st December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:—Held, that interest could not be charged. *De Hertel* v. *Supple*, 14 Gr. 421; 13 Gr. 648.

Advances by Executor.] — An executor is entitled to interest on moneys advanced by him out of his own means, and properly expended in the management of the estate. *Menzies* v. *Ridley*, 2 Gr. 544.

Agent.] — Interest charged against an agent, on money entrusted to him for investment under a special agreement. See *Holmes* v. *Thompson*, 38 U. C. R. 292.

——— *Rests.*]—Where it appeared that an agent had received large sums of money for his principal, and had used it for many years in his own business, instead of remitting it, as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests. *Landman* v. *Crooks*, 4 Gr. 353.

Amount Payable at Time Certain.]—Interest is usually allowed, without demand made, on sums awarded to be paid to a particular time. *Townsley* v. *Wythes*, 16 U. C. R. 139.

Appeal.] — Where the court of appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the court of chancery; at all events in cases in which though interest is usually given, it was not a matter of strict legal right but of discretion. *Box* v. *Provincial Ins. Co.*, 19 Gr. 48.

Arrears of Annuity.] — No interest is allowable with respect to arrears of an annuity. *Goldsmith* v. *Goldsmith*, 17 Gr. 213. See *Crone* v. *Crone*, 27 Gr. 425; *Snarr* v. *Badenach*, 10 O. R. 131.

Assignee of Policy.]—The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim. *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 14 Gr. 509.

Attorney.] — Against an attorney on money for investment. See *Re Attorney*, 7 P. R. 321.

Award.]—When an award fixes no day for the payment of money, a party suing for the sum awarded is not as a matter of right entitled to interest. *Bentley* v. *West*, 4 U. C. R. 98.

——— *Insurance.*] — In an action upon fire insurance policies, a referee was directed to inquire, ascertain, and report the amount of the loss:—Held, having regard to the provisions of ss. 87 and 103 of R. S. O. 1887 *c.* 44, that the referee had authority to allow interest on the amount of the loss as ascertained by him. *Attorney-General* v. *Ætna Ins. Co.*, 13 P. R. 459.

Bankruptcy.] — Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt, by express contract or by statute, bears interest, or where a contract to pay it is to be implied; but on no other debts will interest be allowed. *Re Langstaffe*, 2 Gr. 195.

See Stewart v. *Gage*, 13 O. R. 458, *In re McDougall*, 8 A. R. 309.

Calls.]—Action by judgment creditor of a railway company against shareholder—Right to recover interest on calls made by the company. See *Nasmith* v. *Dickey*, 44 U. C. R. 414.

Charges Paid under Mistake of Title.]—See *Munsie* v. *Lindsay*, 11 O. R. 520.

Claim in Master's Office.] — The circumstances under which interest on a claim ought to be allowed or refused in the master's office considered and acted on. See *Re Ross*, 20 Gr. 385.

Costs.]—In the absence of special agreement, interest cannot be recovered upon an untaxed bill of costs. *Cameron* v. *Heighs*, 14 P. R. 56.

Costs out of Estate—*Interest not Allowed.*]—See *Archer* v. *Severn*, 12 P. R. 648.

See also *Trinity College* v. *Hill*, 8 O. R. 286.

Crown.]—Interest may be allowed against the Crown upon a judgment on a petition of right arising ex contractu in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance. But such interest should only be computed from the date when the petition of right is filed in the office of the secretary of state. *Laine* v. *The Queen*, 5 Ex. C. R. 103; *St. Louis* v. *The Queen*, 25 S. C. R. 649.

——— *Expropriation.*]—Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date. *Drury* v. *The Queen*, 6 S. C. R. 204.

——— *Goods Sold.*]—Interest is payable by the Crown on a balance due for goods sold and delivered under contract, from the date of filing of the reference of the claim in the exchequer court. *Henderson* v. *The Queen*, 6 S. C. R. 39.

——— *Quebec Law.*]—Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of the Exchequer Court Act does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that Province. *The Queen* v. *Henderson*, 28 S. C. R. 425.

Discretion—*Loose Mode of Dealing.*]—It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office. *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

Executor — *Disallowance of Claim.*]—See *Blain* v. *Terryberry*, 12 Gr. 221.

See EXECUTORS AND ADMINISTRATORS, VI. 3.

Expropriation.] — On money awarded against a railway company for lands taken, and paid into court. See *In re Foster and Great Western R. W. Co.*, 32 U. C. R. 503.

Improvements under Mistake of Title.]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was held that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession:—Held, that the mortgagee was an "assign" of the person making the improvements within the meaning of s. 30 R. S. O. 1887 *c.* 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce. Held, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from the date till the date of the mortgage. Held, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life. *McKibbon* v. *Williams*, 24 A. R. 122.

See Fawcett v. *Burwell*, 27 Gr. 445; *Munsie* v. *Lindsay*, 11 O. R. 520.

Interest on Interest.]—Where principal and interest are paid for another, interest may be recovered on the whole payment. *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 82.

Held, that the township of Waterloo was liable under the statute 14 & 15 Vict. c. 5, for its share of the debts of the Guelph and Dundas road incurred by the county of Waterloo (of which it formed one township), while that county was united to the county of Wellington and Grey; notwithstanding, too, that an arbitration took place between those counties upon their separation by which it was determined that "Wellington" should assume the liability of the former joint counties. Held, also, that interest on the ascertained debt was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for the defendants. *County of Wellington* v. *Township of Waterloo*, 8 C. P. 358.

Municipal Jury Expenses.]—Plaintiffs sued defendants under 18 Vict. c. 130, and C. S. U. C. c. 31, ss. 155, 157, for the proportion of jury expenses payable by defendants from 1855 to 1869, inclusive. As to 1867 and 1868, defendants in 1868 levied the sum due for 1867, but applied it to other purposes. In 1869 they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest, which the plaintiffs demanded:—Held, that such interest was recoverable. *County of Frontenac* v. *City of Kingston*, 32 U. C. R. 348.

Principal and Agent.]—Where a principal was found indebted to his agent on the taking of accounts, the court in exercise of its discretion allowed interest on the amount from the time of filing the declaration (which contained a count for interest) in an action at law brought by the agent and to restrain which the bill had been filed. *Ridley* v. *Sexton*, 19 Gr. 146.

Rent.]—A plaintiff may claim interest on a demand for money rent made payable by a covenant contained in the lease executed by defendant. But, quære, as to his right to recover interest on each instalment of rent as it falls due, without shewing a previous demand or other warning to defendant of an intention to demand interest in the event of non-payment. In this case an order was made for the allowance of interest from the commencement of the suit. Semble, the master ought not to allow interest on computation in such a case without a Judge's order to that effect. *Crooks* v. *Dickson*, 1 C. L. J. 211.

Held, affirming the order in the last case, that in an action of covenant for rent, an order by a Judge directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially indorsed, from the date of said writ, was properly made, although no interest was claimed in the declaration. *S. C.*, 15 C. P. 523.

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

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

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

See VENDOR AND PURCHASER, VI. 2.

Sheriff.]—The court being left to decide as a jury, allowed interest to the plaintiffs on money levied and improperly withheld by the sheriff. *Michie* v. *Reynolds*, 24 U. C. R. 303.

Solicitor.]—A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client. *Re O'Donohoe*, 12 P. R. 612.

Stakeholder—*Profit.*]—The plaintiffs were sureties to a bank for a debt due by a company, for which the bank held other notes as collaterals. Under a special agreement made in a prior suit, the receiver in such suit deposited the proceeds of such collaterals in such bank subject to the order of the court. The plaintiffs claimed to apply the proceeds so deposited to reduce the debt of the company, but the bank refused so to apply them without an order of court:—Held, (1) that the bank was constituted a stakeholder of such moneys, and could not so apply them without the sanction of the court: (2) that the bank was not chargeable with interest on the moneys so deposited, even though it might have made a profit on such moneys. *Hutton* v. *Federal Bank*, 9 P. R. 568.

Trade Agreement—*Net Profits.*]—In an action brought in 1891, upon a written agreement—silent as to interest—to recover the

amount of net profits of a certain business for a period ending 1st May, 1885, as ascertained in the manner provided for in the agreement, but not so ascertained until after the time fixed thereby, it was adjudged at the trial that the ascertainment was void, and a reference was directed to a master to take an account:—Held, that the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, to ascertain which something more than an arithmetical computation was required; and therefore interest could not be allowed under s. 86, s.-s. 1, of the Judicature Act, R. S. O. 1887 c. 44. Merchant Shipping Co. v. Armitage, L. R. 9 Q. B. 99, and London, Chatham, and Dover R. W. Co. v. South-Eastern R. W. Co., [1892] 1 Ch. 120, [1893] A. C. 429, followed. Spartali v. Constantinidi, 20 W. R. 823, considered. Nor could interest be allowed under s. 85, as in a case in which it had been usual for a jury to allow interest; for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or by the account taken in the action. Smart v. Niagara and Detroit Rivers R. W. Co., 12 C. P. 404, and Michie v. Reynolds, 24 U. C. R. 303, distinguished. Nor could equitable damages, in the nature of interest, for delay, be allowed to the plaintiffs, having regard to their own delay in bringing the action, and to the fact that the omission to ascertain the amount within the time fixed by the agreement was not by the fault of the defendant. *McCullough* v. *Clemow*, 26 O. R. 467.

Verdict.]—In an action against the sureties of an absconding assignee in insolvency on the assignee's bond a verdict was entered for $800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed that in case of such a decision, the verdict should be entered for $700:—Held, that the verdict was not for a debt or sum certain within R. S. O. 1877 c. 50, s. 239, and that it should not carry interest from its entry. *Woodruff* v. *Canada Guarantee Co.*, 8 P. R. 532.

——— *Interest between Verdict and Judgment.*]—The interest which a verdict or judgment bears by virtue of R. S. O. 1887 c. 44, s. 88, is no part of the claim; and the question as to the scale upon which costs are to be taxed is to be determined by the amount of the verdict or judgment irrespective of such interest. Malcolm v. Leys, 15 P. R. 75, distinguished. Semble, interest is to be allowed between the date of the verdict and the judgment. *Sproule* v. *Wilson*, 15 P. R. 349.

Work and Services.]—On a reference in an action in which money is claimed for work and services agreed to be paid for at a fixed rate, the referee may under 58 Vict. c. 12, s. 118 (O.), allow interest on the amounts claimed from the times they became payable. *McCullough* v. *Newlove*, 27 O. R. 627.

II. Mode of Computation and Amount Allowed.

Account—*Payments from Time to Time of More than Interest.*]—The method usually adopted in making out an account between debtor and creditor upon a loan of money—viz., that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and deducting all the payments and interest from the whole debt and interest—is not the correct way of arriving at the balance. It is so much in favour of the debtor, that where there has been a long arrear of interest, and payments made on account of the debt not covering the interest alone, the debtor in a few years, without making any payment in the meantime, will make his creditor his debtor to a very large amount. *McGregor* v. *Gaulin*, 4 U. C. R. 378.

The proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments, and charging interest on the balance. *Bettes* v. *Farewell*, 15 C. P. 450.

——— *Payments from Time to Time of Less than Interest.*]—But where various payments had been made upon a note payable with interest, not always sufficient to cover the interest due at each time of payment:—Held, that the usual mode of adding the interest to the principal, deducting the payment, and charging interest on the balance, could not be adopted; but that interest could only be computed on the balance of principal remaining due at each payment. *Barnum* v. *Turnbull*, 13 U. C. R. 277.

Administration.] — Creditors who had filed bills to enforce their claims having, by order made under an administration decree, been restrained from proceeding with their own suits, were directed to prove under the administration decree. It was held that they were entitled to six years' arrears of interest computed back from the commencement of their own suits. *Meyers* v. *Meyers*, 19 Gr. 185.

Agreement—*Damages.*]—Held, following Howland v. Jennings, 11 C. P. 272, and Montgomery v. Boucher, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. The jury having perversely allowed only ten per cent. per annum, although they found that defendant had signed the note or instrument agreeing to pay five per cent. a month, a new trial was granted without costs. Held, also, that the amount agreed upon was recoverable under the common count for interest and account stated. *Young* v. *Fluke*, 15 C. P. 360.

Appointment.]—The rule as to the allowance of interest from one year after the death of a testator, does not apply, in the absence of express directions, where the bequest is by way of appointment under a settlement. *Deedes* v. *Graham*, 20 Gr. 258.

A testatrix who, under her marriage settlement, had the power of appointment over certain moneys invested on mortgage, appointed certain parts thereof to her two daughters, and, until payment, to pay them the interest secured by the mortgage:—Held, that interest had been properly allowed on the sums so appointed from the death of the testatrix, and not from one year after the death. *Ib.*

Arrears — *Covenant.*] — Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley* v. *Ledyard*, 10 P. R. 182.

Assignment of Insurance—*Special Account.*]—Held, that the referee, in charging the assignee with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to the same fixed date had not proceeded upon a wrong principle. *Jones* v. *McKean*, 27 S. C. R. 249.

Award—*Giving Time.*]—In an action on an award it appeared that the plaintiff in April gave in a statement of his claim, with interest up to that time, at twelve per cent., the usual rate allowed in the dealings between the parties. Time was allowed defendant to prove his defence; and in making their award on the 6th October, the arbitrators added interest at the same rate up to the 1st September, on the sum claimed in April for principal and interest:—Held, that they had power to do this, and to award interest on the amount until paid. *Stewart* v. *Webster*, 20 U. C. R. 469.

An award found that on 1st September, 1860, defendant was indebted to plaintiff in £3,249, and ordered him to pay it accordingly, with interest half yearly until paid:—Quære, as to the intention and effect of this discretion. *Ib.*

Bank — *Interest after Maturity.*] — Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than seven per cent. were not entitled to avail themselves of the provisions of their Act of incorporation (27 & 28 Vict. c. 85, s. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than seven per cent., which was held to be the meaning of the Act: and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than six per cent. from its maturity. *Royal Canadian Bank* v. *Shaw*, 21 C. P. 455.

Bond—*Indemnity.*]—A plaintiff on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty. *McMahon* v. *Ingersoll*, 6 O. S. 301.

——— *Demand.*] — The plaintiffs sued for interest on two bonds, made by defendants on the 27th January, 1855, for the payment to the plaintiffs, or order, of the principal money named on the 1st November, 1855, at the agency of the Bank of Upper Canada in Hamilton, together with interest thereon. Both counts alleged that although defendants paid the principal on the 29th January, 1861, with interest up to the 1st November, 1855, yet they had not paid any interest after that day:—Held, that such interest was recoverable; but that it was a good defence that they were ready to pay the principal and interest on the day and at the place, and had always been ready and willing to pay, but that the bonds were not presented then or at any time. At the trial it was proved that when the bonds fell due, and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented. Held, that the pleas were proved: that defendants were not liable to pay interest after the bonds matured. *McDonald* v. *Great Western R. W. Co.*, 21 U. C. R. 223.

——— *Successive Assessments.*] — Sci. fa. on a bond conditioned to pay $2,828.68, in five equal annual instalments, with interest on the whole amount from time to time remaining due, on the 1st June in each year. The declaration recited that the first instalment and interest, due on the 1st June, 1862, had been paid: that on 30th November, 1864, damages were assessed for the second and third instalments, and interest on the unpaid principal, $2,226, up to 1st June, 1864, which were paid on 15th April, 1865: that there was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st June, 1865, with interest on the said $2,226, from 1st June, 1864, to 15th April, 1865, and interest from said 15th April, on the principal remaining unpaid on that day, to 1st June, 1865. The plaintiffs claimed execution for the damages to be assessed on this further breach:—Held, that interest on the $2,226 could not be recovered; for the plaintiffs on their sci. fa. for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that sci. fa., 30th November, 1864, which would include interest; and their execution for such damages would bear interest also. *Randall* v. *Burton*, 25 U. C. R. 9.

Action on bond payable by instalments. Judgment was entered for the penalty. Proceedings were had from time to time by sci. fa.:—Held, that defendants were bound to pay the expense of levying the sum due, but that the plaintiffs could recover only the penalty, and might not charge interest on the penalty, or amounts remaining due thereon. *S. C.*, 4 P. R. 9.

A guarantee bond to a bank contained a stipulation that in the event of any sum being found due by M. to the bank interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank* v. *Springer*; *Exchange Bank* v. *Barnes*, 13 A. R. 390.

——— *Interest post Diem — Damages.*] — Upon a bond for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, and thereafter interest is not recoverable as interest but as damages. *Goodchap* v. *Roberts*, 14 Ch. D. 49, referred to. (2) In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable. *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132.

Calls.]—Interest allowed from the time when the last call on stock became due. See *Provincial Ins. Co.* v. *Cameron*, 31 C. P. 523.

Cognovit.]—Where defendant gave a confession on the 13th May, 1856, containing an agreement that judgment might be entered at once, but no execution to issue until default in payment of a sum named on the 1st June then next, "with interest thereon from this day till paid," and judgment was not entered till 28th April, 1857:—Held, that the plaintiffs were entitled to interest from the date of the cognovit, not from the entry of judgment only. *Ramsay* v. *Carruthers*, 23 U. C. R. 21.

Contract —*Certificate.*]—In an action for balance of contract and extra work interest was allowed from the date of the final certificate. *Peters* v. *Quebec Harbour Commissioners*, 19 S. C. R. 685.

Demand.]—In an action on a promise to pay on request, there being no proof of a request before action:—Held, that interest should not be allowed. *Jones* v. *Brown*, 9 C. P. 201.

Under s. 207, s.-s. 2, of R. S. O. 1877 c. 50, where a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing. *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387.

Where interest was claimed on a sum of $96, admitted to be due before action commenced, for extra work and material furnished by the plaintiff, but not under a written contract, and no demand of interest was proved:—Held, that the claim for interest could not be allowed. *Ib.*

Execution.]—Explanation as to the mode of computing interest, &c., where under an execution part is paid, and a new writ issued for the balance. *Cummings* v. *Usher*, 1 P. R. 15.

Expropriation.]—Land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest is payable on the whole sum from that date. Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and In re Shaw and Birmingham, 27 Ch. D. 614, followed. An arbitrator has jurisdiction in such case to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. Judgment below, 29 O. R. 685, reversed. *In re Leak and City of Toronto*, 26 A. R. 351; 30 S. C. R. 321.

See CROWN, I.—MUNICIPAL CORPORATIONS —RAILWAY.

Guarantee.]—Held, that the defendants, a guarantee company, were liable for interest for the amount due from them from three months after the proofs of loss were delivered. *City of London* v. *Citizens' Ins. Co.*, 15 O. R. 713.

Judgment — *Interest before Entry or Pending Appeal.*]—See JUDGMENT, XVII. 2.

Legacy.]—The testator gave legacies of $1,000 each to two of his daughters, payable in seven years from the date of the will:—Held, that they were not entitled to interest from the expiration of such seven years, but only interest as in an ordinary case. He also gave a legacy to another daughter in these words, "I give and bequeath to my daughter E. M. the sum of $1,200, such sum to be invested by my executors seven years from the date hereof, until the said E. M. attains the age of 21 years, which said sum of $1,200 and the interest accrued thereon, shall be paid over for her benefit when she attains the age of 21 years as aforesaid:"—Held, that she was entitled to interest from the death of the testator only. *Miller* v. *Miller*, 25 Gr. 224.

A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death:—Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson, McDonell* v. *Robinson*, 22 O. R. 438.

Where land was directed to be sold within three years from the testator's death, it was held that legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632. See *Toomey* v. *Tracey*, 4 O. R. 708.

——— *Accumulations.*]—A testator made several pecuniary bequests payable twelve months after his decease, and in the event of any of the legatees being then not of age, he directed their legacies to be invested and the accumulations paid to them on their attaining majority. By an alteration of the draft will, he directed one legacy of £25,000 not to be paid to the legatee until he attained the age of 23, "and being desirous that provision should be made for his support and maintenance after he attains the age of twenty-one years, and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him after he so attains the age of twenty-one years, and until he arrives at the age of twenty-three years, the annual interest, dividends, and income of the sum of £25,000, which they are to invest and keep invested for that purpose:"—Held, that the legatee was entitled to the accumulations of interest from one year after the death of the testator, and not from the time of his attaining twenty-one only. *Fuller* v. *Macklem*, 25 Gr. 455.

——— *Refusal to Pay.*]—A legatee gave to a creditor an order on the executors for payment of her share of the estate, which order was accepted by them and certain payments made on account. The executors denied having funds in their hands sufficient for the payment of the order and properly applicable thereto, but on taking the accounts in court it appeared that since 1860 the executors had had sufficient funds for that purpose. On a petition filed by the creditor, the court, under these circumstances, ordered the amount in court to be paid out to him, and directed the executors to pay the costs of the application, and to make good to the legatees the interest accrued since 1860, until the executors paid the money into court. *Sovereign* v. *Freeman*, 25 Gr. 525.

——— *Special Mode of Realization.*]—Where a testator directed his real and personal estate to be converted into money,

the proceeds to be invested, such investments to be continued until the whole of his property should be realized: and from and out of the same, when so reanzed and invested in the whole, and thus available for division, and not before, to pay certain legacies:—Held, that until the whole was realized the legatees were not entitled to interest. *Smith* v. *Seaton*, 17 Gr. 397.

Mortgage.] — Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

——— *Arrears of Interest—Acknowledgment.*]—Upon the sale of a property which was subject to mortgage, the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memo., indorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser:—Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an incumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. *Colquhoun* v. *Murray*, 26 A. R. 204.

——— *Interest post Diem.*] — A mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied:"—Held, affirming 17 A. R. 85, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. St. John v. Rykert, 10 S. C. R. 278, followed. *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262.

——— *Interest post Diem—Special Agreement.*]—See *Archbold* v. *Building and Loan Association*, 15 O. R. 237, 16 A. R. 1.

See, also, *Powell* v. *Peck*, 12 O. R. 492, 19 A. R. 138.

——— *Instalment — Acceleration Clause.*]—A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided interest at the said rate should be paid on all sums so in arrear:—Held, that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years. *Biggs* v. *Freehold Loan and Savings Co.*, 26 A. R. 232.

——— *Opening Foreclosure—Costs.*] — In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed (2 O. R. 348.) The court of appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal, interest, and costs, including the plaintiffs' costs of opposing the petition (10 A. R. 99):—Held, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877. Held, also, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the court of appeal. *Trinity College* v. *Hill*, 8 O. R. 286.

——— *Payment before Maturity.*] — Mode of calculating interest on a mortgage to a savings and loan society, on paying it off before maturity. See *Crone* v. *Crone*, 26 Gr. 459.

——— *Payment of Prior Incumbrance.*]—When a loan is effected for the purpose of paying of incumbrances, at once or as they become due, at the option of the new mortgagees, and one of the incumbrances, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior incumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagee. An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and the mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as this, charge the mortgagor with the increased rate. The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees. *Manley* v. *London Loan Co.*, 23 A. R. 139.

——— *Redemption.*] — R. S. O. 1887 c. 111, s. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle. In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

——— *Redemption.*]—In an action of redemption by a second mortgagee against a first mortgagee the latter is entitled to only six years' arrears of interest. Delaney v. Canadian Pacific R. W. Co., 21 O. R. 11, overruled on this point. *McMicking* v. *Gibbons*, 24 A. R. 586.

——— *Redemption—Amendment.*] —Since the passing of the Administration of Justice Act, 36 Vict. c. 8 (O.), and to avoid circuity of action, the court will allow interest to a defendant for more than six years in a suit to redeem. *Howeren* v. *Bradburn*, 22 Gr. 96.

Where the answer of a defendant omitted to set up a claim to interest for a period exceeding eight years, the court, on an appeal from the master, offered, if it was necessary that such a claim should be set up, to allow the defendant then to do so, as all the facts were before the court. *Ib.*

——— *Redemption—Interest post Diem—Excessive Payment — Mistake.*]—A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. All the receipts given stated that the payments made were on account of interest. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal:—Held, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action. Rogers v. Ingham, 3 Ch. D. 351, followed. *Stewart* v. *Ferguson*, 31 O. R. 112.

——— *Special Agreement.*] — A mortgagor paid the mortgagee from time to time money, in pursuance of an agreement, contemporaneous with the mortgage, that five per cent per annum, in addition to the legal rate of interest, should be paid on the amount loaned. In taking the account in a suit brought by the mortgagee to foreclose, the master gave credit for the money thus paid, as so much money paid on account of principal and legal interest:—Held, that the master was right in his mode of taking the account. *Stimson* v. *Kerby*, 7 Gr. 510.

Held, that 16 Vict. c. 10, does not bar the right to recover in an action of assumpsit for money paid in excess of legal interest. *Ib.*

See MORTGAGE.

Municipal Corporation.] — Municipal corporations are not restricted any more than individuals, as to the rate of interest, but they may take any rate agred upon. *Corporation of North Gwillimbury* v. *Moore*, 15 C. P. 445. Followed, but not agreed with in *Re Nichol and Township of Alnwick*, 41 U. C. R. 577.

Remarks as to the necessity of legislation on this subject. *Ib.*

Municipal Debentures.] — The rate of interest on certain municipal debentures was seven per cent.:—Held, that s. 217 of 29 & 30 Vict. c. 51 has not been repealed, though marked effete in the schedule prefixed to and not re-enacted in 36 Vict. c. 48 (O.), and that the above rate was therefore lawful. *Scottish American Investment Co.* v. *Village of Elora*, 6 A. R. 628.

Note—*Damages.*]—Where a day is named for payment of a note, with interest at a rate specified, the claim for interest after that day is a claim for damages for breach of the contract, not as upon an implied contract, and is in the discretion of the court or jury. Where a note was made, in British Columbia, payable 150 days after date, with interest at two per cent. a month, the court, under the circumstances stated in this case, allowed only six per cent. after maturity. *Dalby* v. *Humphrey*, 37 U. C. R. 514.

——— *Interest post Diem.*]—A note dated 11th January, 1862, payable to and indorsed by one S. H., was for $3,000 with interest at the rate of two per cent. per month till paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of $3,000 on the 11th July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St John* v. *Rykert*, 10 S. C. R. 278.

Pawnbroker.] — A pawnbroker, under C. S. C. c. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. *Regina* v. *Adams*, 8 P. R. 462.

Right of Action Suspended.] — On a purchase of land the vendee gave his promissory note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was:—Held, that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Gr. 570.

Specific Performance — *Heir.*] — In a suit for specific performance:—Held, that where the purchaser dies, the right of no incumbrancer intervening, the vendor is entitled to a charge on the land in the hands of the heirs for a period beyond the six years, in order to prevent circuity of action. *Airey* v. *Mitchell*, 21 Gr. 510.

Verdict — *Award.*] — When a verdict is given subject to an award, 29 & 30 Vict. c. 42, s. 2 (O.), does not authorize the charging of interest on the sum awarded from the time of taking the verdict. *Hope* v. *Beatty*, 7 P. R. 39.

Will — *Express Trust.*]—A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children or child, if there should be but one, "the sum of £1,500, due to me by C., and secured by a

certain mortgage," &c.:—Held, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute of Limitations therefore not applying to the case. *Loring* v. *Loring*, 12 Gr. 374.

III. Miscellaneous Cases.

Action of Debt.]—Held, that an action of debt is not maintainable for interest only on debentures, the principal not being due. *Lyall* v. *Mayor, &c., of the City of London*, 8 C. P. 365.

Appeal — *Court of Appeal.*]—See *Rox* v. *Provincial Ins. Co.*, 19 Gr. 48; *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Application of Payments.]—Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that the payments be applied in the first place to keep down the interest. *McGregor* v. *Gaulin*, 4 U. C. R. 378.

Award — *Quebec Law.*]—See *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Bank — *Overcharges.*] — Held, following Quinlan v. Gordon, 20 Gr. 1, that overcharges beyond the lawful rate of interest, if paid, cannot be recovered back, or applied in reduction of a debt alleged to be due. *Hutton* v. *Federal Bank*, 9 P. R. 568.

British North America Act—*Provincial Subsidies—Half-yearly Payments.*]—By s. 111 of the British North America Act, Canada is made liable for the debt of each Province existing at the Union. By s. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the Union over $62,500,000 and chargeable with 5 per cent. interest thereon; ss. 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively; and by s. 116, if the debts of those Provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of five per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several Provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province, but the government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the Union exceeded the sum mentioned in s. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec:—Held, that the subsidy of the Provinces under s. 118 was payable from 1st July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance of the excess of debt under s. 118. By 36 Vict. c. 39 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the Union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict. c. 4, in 1884, it was provided that the accounts between the Dominion and the Provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from 1st July, 1867, to 1st January, 1873, with interest at five per cent. from the day on which it would have been so paid to 1st July, 1884, should be deemed capital owing to the respective Provinces bearing interest at five per cent. and payable after 1st July, 1884. Held, also, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the Provinces half-yearly but leaves such deduction as it was under the British North America Act. *Dominion of Canada* v. *Provinces of Ontario and Quebec*, 24 S. C. R. 498.

Common Count.]—A count for the interest for the forbearance of money, at the rate of thirty per cent. per annum:—Held, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged. *Bleakley* v. *Easton*, 22 U. C. R. 348.

Exorbitant Interest.]—Quære, whether the amount of interest reserved by a mortgage may not be so great as to evidence such a case of oppression as would induce the court to refuse to interfere in behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws. *Goodhue* v. *Widdifield*, 8 Gr. 531.

Although the court will not interfere with any bargain made by competent parties, since the repeal of the usury laws, for the payment of interest, still if any dispute as to such contract exists, it is the duty of the court to see that the parties to any agreement for payment of exorbitant interest clearly understood the bargain before effect will be given to it. Where, therefore, on the loan of money it was agreed to pay at the rate of two per cent. a month in advance, and the lender in making up the account contended that the agreement being that it should be paid in advance was the same as two and a-half per cent. a month, and insisted upon his right to charge that sum, the court directed the master to allow at the rate of two per cent., the effect of the interest being payable in advance not having been explained to the borrower. *Teeter* v. *St. John*, 10 Gr. 85.

Interest as Damages.]—See *Mennie* v. *Leitch*, 8 O. R. 397.

Judgment — *Subsequent Action for Increased Interest.*]—Plaintiff sued defendant as maker and A. as indorser of two notes, adding a count for interest, and at the trial to support this count he offered in evidence a written undertaking, signed by defendant, and a similar one by A. to allow him interest at the rate of thirty per cent. until payment, in consideration of the plaintiff allowing three

months' time. The learned Judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this, and satisfied, he sued defendant on his undertaking to recover twenty-four per cent., the balance of interest agreed to be paid by it:—Held, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay* v. *Fee*, 20 U. C. R. 268.

Jury.]—Interest is in practice much more frequently allowed by our juries than English authority would seem to warrant. *Spence* v. *Hector*, 24 U. C. R. 277.

Mortgage for Purchase Money—*Right to Discharge.*]—Under a mortgage given to secure the balance of purchase money, in which the principal is payable by instalments extending beyond five years, the mortgagor is at any time after such last named period, entitled to a discharge under s. 7, R. S. C. c. 127, the Act respecting interest, upon payment of the principal and interest together with three months' additional interest. *In re Parker, Parker* v. *Parker*, 24 O. R. 373.

Motion for Judgment—*Claim for Interest.*]—*See* JUDGMENT, X.

Prohibition Quousque.]—Where a division court has jurisdiction at the time of the institution of an action, but by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Bietle*, 21 O. R. 595.

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

Special Indorsement.]—In an action on a merchant's account, where the writ was specially indorsed, claiming interest, the defendant did not appear—Held, that his non-appearance was an admission of the charge of interest. *Standing* v. *Torrance*, 4 L. J. 297.

A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons is good, and cannot be disputed after judgment signed in default of appearance, but if a claim for interest is indorsed in order to gain an improper advantage and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside. *Mearns* v. *Grand Trunk R. W. Co.*, 6 L. J. 62.

Semble, the indorsement for interest on a specially indorsed writ, is in general a matter of claim only. If it be correct judgment goes rightly for it without any inquiry where the plaintiff claims it and defendant does not dispute it. *McKenzie* v. *Harris*, 10 L. J. 213.

A writ of summons was specially indorsed for interest on the balance of an account, and for protest charges on an unaccepted draft:—Held, that the indorsement was right as to the interest, but not as to protest charges. Bank of Montreal v. Harrison, 4 P. R. 331, explained. *Sinclair* v. *Chisholm*, 5 P. R. 270.

By ss. 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages and it is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate. And where, in an action upon two promissory notes, the plaintiff by the indorsement on the writ af summons claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity:—Held, a good special indorsement. London, &c., Bank v. Clancarty, [1892] 1 Q. B. 689, and Lawrence v. Willcocks, *ib.* 696, followed. Ryley v. Master, *ib.* 674, and Wilks v. Wood, *ib.* 684, distinguished. *McVicar* v. *McLaughlin*, 16 P. R. 450.

Surety—*Increase in Rate of Interest.*]—A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety. And a provision in such agreement, reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286.

——— *Giving Time for Payment of Interest.*]—*See Land Security Co.* v. *Wilson*, 22 A. R. 151.

Will—*Over-payment of Interest on Legacy.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands through the executor in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of each instalment on the amount of such payment to be computed from the time of his decease; and by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal: and the legatee now brought this action against the executor and devisee, claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—Held, that the over-payments of interest were made under mistake of fact, and could be recovered or set off; and that the plaintiff, by reason of the over-payments, was enabled to, and did, invest just so much of the

corpus, at interest, and so in effect, got, and should be charged with, interest upon the over-payments; and it being admitted that upon this footing the plaintiff was fully paid, the action was dismissed. Held, affirming that judgment, that the over-payments were made under a mistake of fact, and might be recovered or set off; but, varying it, that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained. Corbam v. Kingston, 17 O. R. 432, and United States v. Sanborn, 135 U. S. 271, specially referred to. *Barber* v. *Clark*, 20 O. R. 522, 18 A. R. 435.

IV. Usury.

1. *Generally.*

Where the payee of a note indorsed the same to A. upon a usurious consideration, and A. afterwards failed in an action against the maker upon the ground of usury:—Held, that such payee might nevertheless recover against the maker, and, semble, that the ground of the failure of the former action might be proved by any person at the trial, and it was not necessary to prove a reindorsement by the usurer to the payee. *Bidwell* v. *Stanton*, Tay. 366.

A commission of two and a half per cent. on drawing and accepting bills of exchange:—Held, usurious. *Bradbury* v. *Holton*, 5 O. S. 735.

Notes given bearing interest from a period antecedent to their date, are not usurious on that account, where the debt for which they were given was due at that period. *Gates* v. *Crooks*, Dra. 459.

A stipulation to make certain specified payments, or in default that the other party may do so, and charge more than the legal interest thereon:—Held, not usury. *Emmons* v. *Crooks*, 1 Gr. 159.

A security void at its creation on the ground of usury, was not rendered valid by 16 Vict. c. 80, passed subsequently. Where, therefore, a mortgage had been made upon a usurious agreement, the court held a judgment creditor of the mortgagor entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment. *Isherwood* v. *Dixon*, 5 Gr. 314.

Where the money advanced on mortgage is less than the sum mentioned as the consideration money, the mortgagor is at liberty, in taking the account in the master's office, to shew the true sum advanced. He cannot, however, shew that the contract was usurious. *Penn* v. *Lockwood*, 1 Gr. 547.

The rule of the court, that a person seeking to impeach a security on the ground of usury must offer to pay the amount actually advanced and interest, applies equally to the assignee of the debtor, although ignorant of the terms on which the security was effected. *Drake* v. *Bank of Toronto*, 9 Gr. 116.

Where a plaintiff had been guilty of gross usury in taking a confession of judgment from a defendant, the court stayed the proceedings on payment of the true debt and interest, although the judgment had been assigned, the assignee having had notice. *Knapp* v. *Forrest*, 6 O. S. 557.

Where in an action against the makers of a note for £61 5s., it was proved that A. had an execution against defendants, and that the plaintiff had a note made by A. for the same amount as the execution, namely, about £51, and defendants obtained the note from the plaintiff, hoping by that means to stop A.'s execution, and gave the plaintiff their note, the subject of this action, for £61 5s., payable one year after date with interest:—Held, in the absence of any further proof, that the note was void for usury. *Doran* v. *Bush*, M. T. 6 Vict.

A gave his note for a debt justly due by him, untainted with usury, which note was indorsed by B. to C. upon usurious terms, and A. afterwards made a mortgage to C. to secure the amount payable by the note with interest:—Held, that although the mortgage was only given to secure what A. was legally liable for, as maker of the note, yet C. could not recover upon it, because he had taken it to secure the debt arising from his usurious discount. *Chamberlin* v. *Chambers*, 1 U. C. R. 126.

A bonâ fide holder, without notice, taking a bill or note in payment of an antecedent debt, and not upon a new consideration given at the time by discount or otherwise, was not protected against the offence of usury by the Provincial Act, 7 Wm. IV. c. 5, s. 3. There was no distinction in this respect between that Act and the Imperial Act, 58 Geo. III. c. 93. *Geddes* v. *Culver*, 3 U. C. R. 162.

By the usury laws all securities given in furtherance of an usurious transaction, with the knowedge of the person who took the security, were void. *Armstrong* v. *Somerville*, 3 U. C. R. 472.

An agreement that A. and B. should allow C. and D. (lumberers upon the Ottawa), in addition to legal interest, a further sum of four per cent. upon all moneys advanced for the purpose of getting out timber:—Held, usurious and void. *Bryson* v. *Clandinan*, 7 U. C. R. 198.

If C. and D., instead of being mortgagees of the timber for money advanced under such an usurious agreement, had taken the timber absolutely in payment of their advances, then, though their account might have included usurious interest, the property could not have been divested on that ground. *Ib.*

An annuity deed:—Held, a contract for an usurious loan under the appearance of buying an annuity, and therefore invalid. *Wright* v. *Marralls*, 8 U. C. R. 511.

Upon a covenant to pay interest at ten per cent., made while 16 Vict. c. 80 was in force, and before 22 Vict. c. 85:—Held, that the court being bound to notice the statute, no more than six per cent. could be recovered, although non est factum only had been pleaded. *Girdlestone* v. *O'Reilly*, 21 U. C. R. 409.

A plaintiff who has paid more than the legal interest for money loaned to him, may maintain an action for money had and received, to recover back the excess. *Barnhart* v. *Robertson*, 6 O. S. 542.

The Trust and Loan Company, holding a mortgage bearing eight per cent. interest, transferred the same to a private individual:—Held, that the assignee could enforce payment of the stipulated interest, though at the creation of the incumbrance the company only could legally have reserved such a rate. *Reid* v. *Whitehead*, 10 Gr. 446.

An assignment to the Trust and Loan Company of a valid existing mortgage, bearing more than eight per cent. interest, is not necessarily void. *Trust and Loan Company of Canada* v. *Boulton*, 18 Gr. 234.

The exception in the last clause of 22 Vict. c. 85, C. S. C. c. 58, s. 6, which prevents corporations, &c., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it. *Edinburgh Life Assurance Co.* v. *Graham*, 19 U. C. R. 581.

The defendants, a life insurance company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of the loan:—Semble, this would not constitute usury. *Ib.*

Held, under 16 Vict. c. 80, that money voluntarily paid in excess of interest cannot be recovered back, nor can it be set up as a discharge of so much of the principal. *Kaines* v. *Stacey*, 9 C. P. 355; *Jarvis* v. *Clark*, 10 C. P. 480.

A mortgage was created on real estate to secure £375 with interest, which, according to law, meant six per cent. per annum. The mortgagor, it appeared, agreed to pay additional interest for further forbearance each year, and gave promissory notes for the amount of such additional interest, which notes were duly paid. Subsequently the mortgagee instituted proceedings in chancery to enforce payment of the mortgage debt and interest, and in taking an account of what was due the court gave credit to the mortgagor for the amounts paid on these promissory notes as against the principal and six per cent. interest:—Held, 1. Reversing this decision that the mortgagor was not entitled to credit for the amount so paid; and 2. That although the Act then in force, 16 Vict. c. 80, allowed parties to lend money at any rate of interest that might be agreed upon, still, in the event of their subsequently having to sue to enforce their securities they could not recover more than the sum actually advanced and six per cent. Stimson v. Kerby, 7 Gr. 510, overruled. *Quinlan* v. *Gordon*, 20 Gr. Appendix 1.

Since 16 Vict. c. 80, and before the abolition of the usury laws, a mortgage at ten per cent. cannot be enforced for more than six per cent., though as to payments made without appropriation, the mortgagee can appropriate the money to the satisfaction of the usurious interest before coming into court. In part payment of the usurious mortgage, another mortgage of a third party was assigned which had not fallen due:—Held, that the amount of the mortgage could not be applied by anticipation to the payment of usurious interest not due. *Fuller* v. *Parnell*, 4 Ch. Ch. 70.

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2. In the Case of Banks.

In an action on a bond, penalty £10,000, given to secure a cash credit of £5,000, defendant pleaded usury in that the plaintiffs charged him a quarter per cent. on all cheques drawn on this account, besides the usual interest of six per cent. It appearing in evidence that the charge was made on cheques drawn on all deposits as well as such cheques:—Held, that the transaction was not usurious. *Commercial Bank* v. *Cameron*, 9 C. P. 378.

Held, that 29 & 30 Vict. c. 10, s. 5, is not retrospective, so as to enable a bank to recover upon usurious notes given before it was passed. *Commercial Bank of Canada* v. *Harris*, 26 U. C. R. 594.

Held, on demurrer to the pleas set out in this case, that in a plea of usury to an action brought by a bank on a promissory note discounted by them, it was unnecessary to allege that there was a contract for the taking of a greater rate of interest than seven per cent., the rate allowed by statute; and that the defence of usury was sufficiently set up by describing the offence in the very words of the statute. *City Bank* v. *Macdonald*, 16 C. P. 215.

Semble, that with respect to all other bodies but banks the usury must arise by contract, as heretofore. *Ib.*

The first plea was held sufficient, as shewing that the note sued on was made by defendants as stipulated for by plaintiffs, and that the plaintiffs did thereupon stipulate for and take, reserve, and exact by taking the half per cent. upon the note, which was bonâ fide payable in Montreal, but was made so payable with the "corrupt intent," expressly alleged, "of taking more than seven per cent. in contravention of the statute." Held, that a bank stipulating for more than seven per cent., (although prohibited by the statute) is not usury under the statute, which consists in the reservation or taking of more than seven per cent. *Ib.*

Quære, whether, in order to render void a note made in contravention of the Act, the making of the note must have been stipulated for, as well as that the excessive rate of interest shall be afterwards taken upon it. *Ib.*

Other pleas held insufficient as not shewing a case of usury. *Ib.*

Held, affirming 17 C. P. 214, that 29 & 30 Vict. c. 10 s. 5, exempts banking corporations not merely from liability to the pecuniary penalty imposed by C. S. U. C. c. 58, s. 9, but from the loss or forfeiture under that statute of the security received by them for the moneys advanced. *Commercial Bank of Canada* v. *Cotton*, 17 C. P. 447.

On the trial of an action on a promissory note brought by a bank, and to which defendants pleaded usury, consisting in the plaintiffs making the note payable at a distance from the place of discount, and thereby securing an illegal rate of interest, in the shape of

commission:—Held, that the jury not having been directed that the note sued on, being the last of a series which had always been made payable as this one was, was not tainted with usury, because made payable at a distance from P., was not misdirection, but non-direction at most. Held, also, that the defence of usury having been pleaded and established against the plaintiffs, before the passing of 29 & 30 Vict. c. 10, s. 5, was not in any way affected by that statute, and a new trial was therefore refused. The distinction between vested rights and mere modes of procedure pointed out. *Bank of Montreal* v. *Scott*, 17 C. P. 358.

Under C. S. U. C. c. 58, if the authorities of a bank procure a note to be made payable elsewhere solely for the purpose of obtaining the rate allowed by s. 5, for the expenses of collection, in addition to the seven per cent. interest, the transaction is usurious and void. They are not called upon, however, to inquire as to the reason for making a note thus payable, when the parties themselves have so chosen to draw it. Evidence of a general agreement with the bank that all notes made by defendants should be drawn payable in that form, is admissible to support a plea of such an agreement as to the note sued on. *Bank of Montreal* v. *Reynolds*, 25 U. C. R. 352.

To an action on promissory notes amounting to $10,000, defendants, among other defences, pleaded usury, consisting of a charge of one-quarter per cent. made by the plaintiffs on cheques. When the case was called on no one appeared for defendants, and the plaintiffs had a verdict. The court refused to relieve the defendants on the merits, except on condition of their withdrawing the plea of usury. *Commercial Bank* v. *Harris*, 27 U. C. R. 301.

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3. *Questions Arising in Actions.*

Held, on demurrer to a plea of usury, that the court would intend that by the words "legal interest" six per cent. was meant. *Nourse* v. *Goodeve*, 12 U. C. R. 198.

Declaration against defendant on a bond conditioned for the payment of money by one R. Plea, that defendant was surety for R., as the plaintiff well knew: that the time for payment had elapsed; and that the plaintiff, without the knowledge or consent of defendant, agreed with R. to give him time for one year, in consideration of certain usurious interest paid by him:—Held, on demurrer, plea clearly no defence. *Corrigal* v. *Boulton*, 17 U. C. R. 131.

To an action on a note for £110, dated 20th November, 1856, defendants pleaded that the note was given for £100, lent by plaintiffs to defendants for one year at ten per cent. interest, and for the interest:—Held, plea bad, under 16 Vict. c. 80, being no defence except as to the interest above six per cent. *Township of Westminster* v. *Fox*, 19 U. C. R. 203.

The plaintiff in a bill to impeach a security held by a bank stated that the notes held by the bank, and in respect of which the bank claimed a lien under their charter upon certain stock, had been "discounted for the said G., R. & H., upon an illegal and corrupt agreement, whereby and by reason whereof the said bank should and did receive from G., R. & H. upon the discount of the said promissory notes a much larger and greater rate of interest than at the rate of seven per cent. per annum, and that it was only through and by reason of such discount upon such illegal and usurious consideration that the said bank became and is now holder of the said promissory notes:"—Held, a sufficient allegation of the usury, as between a stranger and a party to the transaction to let in the evidence of the usury. *Drake* v. *Bank of Toronto*, 9 Gr. 116.

See also *Fraser* v. *Hickman*, 12 C. P. 584; *Emmons* v. *Crooks*, 1 Gr. 159; *Proudfoot* v. *Bush*, 7 Gr. 518.

A plea of usury alleged a promise to forbear for twelve months from the 28th October, 1842, until the 28th October, 1843, and that the note was given payable in twelve months to secure the payment. Demurrer—because the note was not due, including the three days of grace, until the 31st October, and therefore the contract was erroneously stated:—Held, plea sufficient, as the three days of grace were the act of the law, and not a part of the contract of the parties. *McCrae* v. *Reynolds*, 1 U. C. R. 36.

Although by the words of the statute 51 Geo. III. c. 9, s. 6, against usury, contracts, bonds &c., are declared void only when usurious interest is reserved and taken yet the court will construe "and" to be "or," particularly as 7 Wm. IV. c. 5, s. 3, declares in the preamble, "that by law all contracts and assurances whatever for payment of money made for an usurious consideration are utterly void;" and therefore a plea to an action on a promissory note, that the note was given to secure a debt, and was for an usurious consideration for forbearance, was held good, although it did not state that the usurious interest was paid or received. *Boag* v. *Lewis*, 1 U. C. R. 357.

Assumpsit. 1st count on a promissory note for £83. 2nd count on account stated. 3rd plea to first count: setting up the defence of usury; and averring that it was corruptly agreed between the defendant and one A. B., that A. B. should lend to the defendant £200, and that the defendant should pay therefor the sum of £21 yearly interest: that A. B. should convey to the defendant certain land in O. for the pretended price of £150, and take a mortgage of certain other land for £350, with legal interest thereon; and that on a certain day named the defendant should pay to A. B. £260, and reconvey the land in O., in full satisfaction of the mortgage: that this agreement was carried out; and that the note sued upon was given to the defendant, as agent for the assignees of the estate of A. B., for £84, being interest due on the £350 in the mortgage mentioned:—Held, on demurrer, that the plea was sufficient, and that the facts stated shewed clearly a case of usury. The fifth plea to the second count set out the same agreement, but did not aver that the account was stated of the interest due on the mortgage, or shew that the plaintiff was in any way connected with the usurious contract, and for these objections it was held bad. *Twynam* v. *Bingham*, 9 U. C. R. 409.

In a qui tam action for usury any variance between the statement and proof as to the

time of the forbearance laid in the declaration was fatal. *Fraser* q. t. v. *Thompson*, 1 U. C. R. 314.

Before 16 Vict. c. 80, a qui tam action was commenced under 51 Geo. III. c. 9, s. 6, for taking an illegal rate of interest:—Held, that the suit could not be continued, for by the first mentioned Act the court had lost the power of giving judgment for the penalty; but semble, that contracts prohibited by the former law must still be held void. *Jones* q. t. v. *Ketchum*, 11 U. C. R. 52.

In an action on notes, the defence set up being usury:—Held, that variances in the amount stated as intended to be loaned, and in the sum stated as the excess beyond legal interest, were material. The learned Judge at the trial refused to amend in these respects, desiring the opinion of the court:—Held, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P. Act, s. 222, to allow it. The amendment was therefore ordered, and a new trial granted. *Bank of Montreal* v. *Reynolds*, 24 U. C. R. 381.

Debt on an annuity deed. Pleas of usury amended as to the sum and dates. *Wright* v. *Morrells*, 8 U. C. R. 511.

See Bills of Exchange, I. 1—Constitutional Law, II. 15 — Laches, III. — Limitation of Actions, VI. — Mortgage, XII., 11 (b) — Payment, I. 5 — Municipal Corporations, VIII. 2 (b) — Railway, XXIV. 5— Specific Performance, V. 12 — Trusts and Trustees, VII. 4 (d) — Vendor and Purchaser, VI. 2 — Will, IV. 13 (d)— Work and Labour, VI. 2.

INTEREST, DISQUALIFYING.

See Arbitration and Award, II. 1 — Justice of the Peace — Municipal Corporations, XVIII. 4.

INTERIM ALIMONY.

See Husband and Wife, I. 5.

INTERIM RECEIPT.

See Insurance, III. 6.

INTERLOCUTORY COSTS.

See Costs, V. 2.

INTERNATIONAL LAW.

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INTERPLEADER.

I. In What Cases Granted.

1. *In General*, 3494.

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II. Practice and Procedure.

1. *In General*, 3504.

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3. *Costs*.

(a) *In General*, 3518.

(b) *Scale of Costs*, 3522.

(c) *Security for Costs*, 3523.

III. Rights in Actions, 3524.

I. In What Cases Granted.

1. *In General.*

Adverse Claims of Insurance.] — The plaintiff, J. P., and one E. T., severally claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P. deceased, the plaintiff claiming as administrator pendente lite of T. P., J. P. claiming that the certificate had been indorsed to her by the deceased, and E. T. as administrator. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear to answer to the application, and her claim was barred, and the money ordered to be paid to E. T. upon certain terms. Upon an appeal by E. T. from this order it was:—Held, that there was a right to interpleader upon a summary application, either under s. 17, s-s. 6, O. J. Act, or under the former practice of the court of chancery. Rule 2, O. J. Act, does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill. Held, also, that the defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands, and that the balance should be paid to E. T. instead of into court; as the other claimant had withdrawn, upon E. T. indemnifying the defendants against the production of the original certificate, and that the action should be stayed. *McElheran* v. *London Masonic Mutual Benefit Association*, 11 P. R. 181.

Attachment.]—An interpleader will not be granted in order to try the validity of an attaching order, or to determine the amount due to the judgment debtor. *McNaughton* v. *Webster*, 6 L. J. 17.

Where proceedings are taken to garnish a debt which is claimed by a third party as assignee, there is no power to direct an interpleader issue to try the validity of the alleged assignment. *Kerr* v. *Fullerton*, 3 P. R. 19.

One G. recovered a verdict against the plaintiff, in March, 1863, in the county court

of P., which G. assigned during the same month to D. & R., of which assignment notice was given to the plaintiff in November following. In April, the month after the verdict, the debt was attached by certain creditors of G., and they, as well as D. & R., pressed the plaintiff for payment, but took no steps to settle the right as between themselves. An execution in the suit having been placed in the hands of the sheriff, the plaintiff paid the amount to the sheriff, which was immediately paid over to D., the attorney in the action. In the meantime a writ had been ordered to issue at the suit of the attaching creditors, by the Judge of the county court of N., which action D. refused to defend; and judgment was entered by default the same day that the debt and costs had been paid to the sheriff:—Held, under the circumstances, that the plaintiff was not bound to take upon himself the responsibility of deciding between the rival claimants, and that he was entitled to file a bill in this court, calling on them to interplead, without paying the money into court. *Davidson* v. *Douglas*, 12 Gr. 181.

The master in chambers made an order directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution:—Held, that the issue directed was warranted by s. 10 of R. S. O. 1877 c. 54 (the Interpleader Act). *Leech* v. *Williamson*, 10 P. R. 226.

The order provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud or as being a preference:—Held, that these provisions were warranted by s. 3, R. S. O. 1877 c. 54. *Ib.*

Held, following Leech v. Williamson, 10 P. R. 226, that attaching creditors may be "claimants" within the meaning of the Interpleader Act. Macfie v. Pearson, 8 O. R. 745, which in effect decides that the execution creditor, who has seized before process against the defendant as an absconding debtor has issued, is to be paid in priority, having been decided by consent in a summary way, was held not binding upon the claimants in this case, who might choose to litigate upon issues which can be carried to appeal. *Standard Ins. Co.* v. *Hughes*, 11 P. R. 220.

Rent being due by A. to B., A. was served as garnishee with division court summonses by E. and G., each claiming part of the rent. A. refusing to pay his rent unless he was protected from these claims, was sued by B. for the full amount of the rent in a county court. Before this action was begun, G. presented to A. an order upon him signed by B. for part of the rent due. A. applied to a Judge of the high court of justice in chambers for an interpleader order. The affidavits on which he moved were intituled "In the H. C. J., Chy. Div., between A., applicant, and B. and others, claimants:"—Held, that A. was entitled to be relieved by calling on the rival parties to interplead under the procedure indicated by con. rules 1141 et seq.; and an objection to the manner of intituling the affidavits was overruled. There was no jurisdiction in the county court to give relief by way of interpleader in the action brought by B.: the jurisdiction in that court being limited by con. rules 1162 et seq. to proceedings against absconding debtors, and after judgment when execution has issued. G.'s claim might have been litigated in the county court, and would not have been the subject of interpleader proceedings; but the order made being for a stay of the county court action and payment into court by A. of the rent, G.'s claim should be the subject of inquiry in the high court. Held, also, that A.'s costs of the application should be borne by E. and G., who submitted to have their claims barred, and who had been the cause of the expense and delay, and that there should be no costs to either party of the county court action. *Re Anderson and Barber*, 13 P. R. 21.

Auctioneer.]—An interpleader order was granted in this case in favour of an auctioneer, who had sold goods for the mortgagee of the owner, but had, in obedience to a Judge's order, paid over the proceeds to an assignee of the owner, subsequently appointed in insolvency proceedings. *Watson* v. *Henderson*, 12 L. J. 149.

——— *Payment to one Claimant.*]—The plaintiffs having in their hands a sum of money, the proceeds of certain goods sold by them as auctioneers at the instance of one W., but which was claimed by B., the official assignee of one H., an insolvent, were ordered by the Judge in insolvency to pay the amount to B., which they did, and notified the attorneys of W. of the fact, who thereupon proceeded with an action at law which he had previously instituted against the plaintiffs to recover this money. The plaintiffs thereupon, claiming to be stakeholders only, filed a bill of interpleader against W. and B.:—Held, (1) that the plaintiffs, having already paid over the money to one of the claimants, were not in a position to call upon W. and B. to interplead; (2) that the plaintiffs' obvious duty, upon being sued at law, was to have pleaded the facts and applied to the court, who would in a proper case have made an order allowing the money to be brought into court, adding B. as a party to that suit, and discharging the plaintiffs here from further attendance therein, and directing B. and W. to test their respective claims to the fund so brought into court; there being no reason why such proceedings should be an exception to that which has been laid down as the general rule introduced by the A. J. Act, that wherever proceedings are commenced, there complete relief between the parties is to be worked out. *Henderson* v. *Watson*, 23 Gr. 355.

Bailees — *Inability to Deliver Specific Property—Claim for Unliquidated Damages.*]—Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway company's elevators in common with other grain of like grade, and at its destination was claimed by the indorsee of the bill of lading, and also by an investment company claiming under a mortgage from the shipper, an interpleader order was made, upon the application of the railway company as carriers or bailees, notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, and notwithstanding that the investment company's claim was, as contended,

one for unliquidated damages for conversion of the grain. Attenborough v. St. Katharine's Dock Co., 3 C. P. D. 450, followed. *Re Canadian Pacific R. W. Co. and Carruthers*, 17 P. R. 277.

Bona Fides of Judgment.]—Issue directed to try the bona fides of a judgment. See *Wilson* v. *Wilson*, 2 P. R. 374.

Cestui que Trust.]—By an ante-nuptial settlement executed 25th March, 1885, made between J. C. of the first part, M. H. (the plaintiff) his intended wife of the second part, and one M. of the third part, in consideration of the intended marriage certain lands and the goods in question were conveyed and assigned to M. to hold to the use of J. C. until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns. The marriage took place on the 27th March, and the goods were afterwards seized by the execution creditor of the husband; the plaintiff claimed them and an interpleader issue was directed by the high court to be tried in the county court:—Held, that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. Shroeder v. Harnett, 28 L. T. N. S. 702, followed. *Connell* v. *Hickock*, 15 A. R. 518.

Claim by Crown.]—The Crown cannot be a claimant within the meaning of the statute authorizing the settlement by interpleader of claims to goods taken under execution. *McGee* v. *Baines*, 3 L. J. 151.

Conditional Deposit.] — Where money was placed in defendants' hands by plaintiffs, on an agreement between plaintiffs and A., to be paid over by defendants to A., in the whole or in part, on his making up certain accounts and performing his agreement with plaintiffs, but plaintiffs sued defendants for the money before they had come to any decision as to A.'s claim, which they were to determine upon:—Held, that defendants were not entitled to an interpleader. *Cotton* v. *Cameron*, 2 P. R. 62.

Conflicting Attaching Orders.] — In certain garnishee proceedings in the division court of the county of Wentworth several creditors had obtained orders attaching the whole amount, $582, found due under an award from the plaintiffs to the judgment debtor for a loss by fire, and ordering payment thereof. Subsequently the Judge of the county court of Essex, nowithstanding the opposition of the company, made a similar order to pay $208 to another creditor, on the ground that when the summonses in the division court of the county of Wentworth were issued there was no attachable debt due. The company unsuccessfully applied to the Judge of Wentworth to rescind his orders, and then filed a bill calling on the defendants, the different attaching creditors, to interplead:—Held, affirming 23 Gr. 568, that it was not a proper case for interpleader. *Victoria Mutual Fire Ins. Co.* v. *Bethune*, 1 A. R. 398.

Co-sureties.] — Quære, whether interpleader is a proper remedy for trying the right to securities as between co-sureties. See *Trevice* v. *Burkett*, 1 O. R. 80.

Execution.] — On an application to set aside a fi. fa. lands on the ground that the judgment had been paid before issuing it, the Judge directed a feigned issue as to the fact of payment. *Reynolds v. Streeter*, 3 P. R. 315.

Foreigners — *Foreign Debt.*]—Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction:—Held, that the agreement was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and that the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order. Held, also, affirming 17 P. R. 300, that the court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here. Credits Gerundeuse v. VanWeede, 12 Q. B. D. 171, distinguished. *Re Benfield and Stevens*, 17 P. R. 339.

On application to rescind or vary an interpleader order:—Held, that the claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562.

Goods in Warehouse.]—Goods belonging to plaintiff and stored in defendants' warehouse, were alleged to have been sold by plaintiff to M., who, with plaintiff, came there and marked them in a certain way, after which, under plaintiff's instructions, they were dispatched by defendants to T. as plaintiff's property, and delivered to his order. M. having claimed the goods, an interpleader as between plaintiff and M. was refused to defendants. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 9.

High Court and County Court Executions.]—Superior and county court executions.—Jurisdiction to make the order. See *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1.

Insurance Moneys — *Adverse Claims—Foreign Claimants.*] — Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the high court for a summary interpleader order:—Held, reversing 19 P. R. 16, that the company were entitled to avail themselves of the provisions of rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order

was properly allowed under rule 162 (3). *Re Confederation Life Association and Cordingly*, 19 P. R. 89.

Manitoba Law.] — See *Federal Bank of Canada* v. *Canadian Bank of Commerce*, 13 S. C. R. 384.

Money in Bank—*Adverse Claims—Foreign Claimants—Discretion.*]—A summary application under rule 1103 (a) for an interpleader order in respect of certain moneys deposited with the defendants in England, and claimed by the plaintiff by this action brought in Ontario, and also in England by the depositors, an English corporation, was dismissed:—Held, that the mere fact that an action was possible here, because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application. *Harris* v. *Bank of British North America*, 19 P. R. 51.

Replevin.]—Where a person in good faith, but from wrong information, replevied property which did not belong to him: and after a verdict against him, a new claimant insisted that the property was his, and threatened an action:—Held, not a case for an interpleader in the court of chancery. *Fuller* v. *Patterson*, 16 Gr. 91.

Surplus after Sale.] — Interpleader between adverse claimants of surplus proceeds of sale under power in mortgage. See *Western Canada Loan and Savings Co.* v. *Court*, 25 Gr. 151.

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2. *To Sheriff.*

General Rule.] — Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff, if he has such belief, and by a similar affidavit of the execution creditor. *Duncan* v. *Tees*, 11 P. R. 66.

Acting in Interests of Execution Creditor—*Delay.*]—A sheriff, having in his hands a writ of fi. fa. against the defendant's goods, on the 23rd June, 1898, went into the hotel of which the defendant was the tenant, with the execution, and informed the defendant that he seized his furniture and effects. He then made a pencil memorandum of a number of articles stated to be in the house, first notifying the judgment debtor that everything was under seizure, and accepting his oral undertaking to hold them for him. This course was pursued in accordance with instructions from the solicitor for the execution creditor, in order to endeavour to get the defendant to make payments on account of the execution. On the 8th August the landlords of the defendant put in a bailiff to seize the same furniture and effects for rent due on the 6th August. The bailiff spoke to the sheriff, who said that he would not undertake to sell the goods and pay the rent. Nothing further was done until the 6th October, 1898, when the landlords put another distress warrant into the bailiff's hands for rent since accrued. The sheriff was notified of this in writing on the 29th October, and on the 7th November, 1898, he swore to an affidavit upon which he applied for an interpleader order, and in which he stated that he had remained in possession from the 23rd June until the time of application. Being cross-examined, he said that he was holding on till the landlords put him out of the place:—Held, upon the evidence, that the sheriff had been acting throughout in the interest of the execution creditor as against the interest of the claimants, and for this reason, as well as for his delay, was not entitled to an interpleader order. *Flynn* v. *Cooney*, 18 P. R. 321.

Adverse Claim.] — Where an adverse claim is made to property seized in execution, a Judge will direct an issue, unless the execution creditors give the sheriff a sufficient indemnity. *McKay* v. *McKay*, 1 C. L. Ch. 165.

Assignee in Insolvency.] — The goods seized by the sheriff were claimed by the guardian in insolvency of the estate of the defendant, against which defendant a writ of attachment under the Insolvent Act had also issued to the same sheriff:—Held, that under 28 Vict. c. 19, s. 2, the sheriff was entitled to protection, and an issue was directed. *Burns* v. *Steel*, 2 C. L. J. 189.

A sheriff has a right to interpleader where the proceeds of the sale of goods under execution are claimed by the official assignee in insolvency of the judgment debtor. *Brand* v. *Bickle*, 4 P. R. 191.

Held, that although an execution debtor claiming goods in the possession of an assignee in insolvency may sue the assignee and oblige him to interplead, neither the sheriff nor the execution creditor can do so. *McMaster* v. *Meakin*, 7 P. R. 211. See *Wells* v. *Hews*, 24 Gr. 131.

Before Seizure.]—A sheriff cannot have an interpleader until he has seized the goods. *Goslin* v. *Tune*, 2 U. C. R. 177.

A mortgagee, under a mortgage which, from certain irregularities in it, was void against subsequent mortgagees or purchasers in good faith for value, took possession of the chattels mentioned in it, and secreted them. An execution was afterwards issued, and the sheriff endeavoured, but was unable, to seize the goods. It was alleged, and not contradicted, that the execution creditor and defendant were colluding to defeat the mortgagee's claim:—Held, that the sheriff was not entitled to an interpleader. *Ogden* v. *Craig*, 10 P. R. 388.

Where a sheriff intends to take goods under an execution, the court has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, and never unless it is shewn that the property or possession in the goods is in the defendant. *Ib.*

Claim for Rent—*Second Application.*]—At the instance of a sheriff, an interpleader order was granted and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order being granted, the landlord of the premises laid claim to the goods, which claim the sheriff did not mention when applying for the order:—Held, that after the trial of the issues,

the sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application. *Clarke* v. *Farrell*, 8 P. R. 234.

——— *Indemnity.*]—S. placed an execution in the sheriff's hands on the 11th December, and A. one on the 12th December. On the 20th December the landlord put in a claim for rent. The sale took place on the 21st, and the sum of $1,707.06 was realized. On the 24th one H. notified the sheriff that he claimed all the money in his hands, and not to pay any over to any one else. On the 27th December the sheriff paid S. in full, and took a bond of indemnity from him:—Held, that the sheriff was not entitled to an interpleader against H. the landlord. *Adams* v. *Blackwell*, 10 P. R. 168.

The express statutory provision giving sheriffs the right to interplead where a claim against the goods seized is made by a landlord for rent, was omitted in the Revised Statutes of 1887, it being stated in the appendix thereto that it was superseded by con. rule 1141, which provides that the sheriff, &c., may interplead where a claim is made, &c., to any money, goods, or chattels, &c., taken in execution, &c., by any person other than the person against whom the process issued:—Held, that the right to interplead where a claim for rent is made, still exists. *McLaughlin* v. *Hammill*, 22 O. R. 493.

Delay.]—A writ was delivered to the sheriff on the 9th October, returnable on the first of Michaelmas Term next. A seizure was made next day, and on the 12th two parties separately gave notice of claim. On the 5th day of Michaelmas Term the sheriff applied for an interpleader:—Held, the delay not being accounted for, that the application was too late. *Thompson* v. *Ward*, 1 P. R. 269.

An application for relief after the return day of the writ, is too late unless the delay be satisfactorily explained. *Cole* v. *McFaul*, 1 U. C. R. 276.

Held, that the sheriff was not justified, by the fact that the first seizure did not embrace all the goods of defendant, in delaying to apply till he could get possession of the residue. *Miller* v. *Nolan*, 1 C. L. J. 327.

——— *Application after Sale.*]—The sheriff seized the goods in question on the 31st January, 1883, and on the 1st February was notified of a claim by an assignee of the judgment debtor (the assignee being an officer employed by the sheriff), and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th February, and on the 15th February the sheriff received the money arising therefrom. On the 20th February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd March the plaintiff received a notice from the assignee's solicitors that they were instructed to sue him. On the 5th March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and his affidavit, filed on the interpleader application, referred to a conversation which he had had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods, or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the sheriff's hands. The sheriff also swore that he related what the claimants' solicitors had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th February to the 5th March was, that he did not understand that it was his duty to take the initiative:—Held, that the sheriff sold with the consent of both parties and did not, therefore, improperly exercise his own discretion, so that the contest properly arose as to the proceeds of the sale. Held, also, that the delay from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable. Held, also, that the fact of the claimant being an officer in the employment of the sheriff made no difference. *Darling* v. *Collatton*, 10 P. R. 110.

Delay by Consent—*Execution Creditor Abandoning.*]—The parties having agreed that the sheriff need not interplead until it was ascertained what the estate of the defendants, who had become insolvent, would realize:—Held, that the sheriff was entitled to a reasonable time to inquire into the matter before applying for relief, and was entitled to his costs. Held, also, that the execution creditor was entitled to see the claimant's affidavit for the purpose of ascertaining the bona fides of the claim before abandoning; and the claimant was therefore refused his costs. *Wilkins* v. *Peatman*, 7 P. R. 84.

Exemptions.]—A sheriff sued in the county court by an execution debtor for $100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption. Prohibition granted, the county court having no jurisdiction to make such an order. Judgment below, 21 O. R. 624, reversed. *In re Gould* v. *Hope*, 20 A. R. 347.
See Field v. *Hart*, 22 A. R. 449.

Payment by Claimant.] — The sheriff having seized goods of much greater value than the amount of plaintiffs' execution, which were claimed by a third party, received from the claimant the amount due on the execution in cash, and withdrew from the seizure:—Held, that the sheriff had not thereby disentitled himself to relief by interpleader. *Paris Manufacturing Co.* v. *Wells*, 10 P. R. 138.

Possession Given up.]—Sheriff cannot have an interpleader where he has allowed any large portion of the goods to be taken out of his possession. *Wheeler* v. *Murphy*, 1 P. R. 336.

Sale.]—Interpleader may be directed for the proceeds of a sale in the sheriff's hands. The sheriff seized goods on the 1st October, and sold portions on the 17th and 26th. On the 4th November one R. claimed, and much correspondence ensued. On the 23rd December R. sued the sheriff, who, on the 31st, obtained an interpleader summons. On the hearing it was admitted that R. owned all that he at last claimed, part of which had been sold.

and the rest, with the proceeds of the sale, remained in the sheriff's hands, and it was not shewn clearly that the plaintiff had directed the seizure of these particular goods. Under these circumstances it was ordered that R.'s action against the sheriff should be stayed, and his claim against the execution plaintiff barred on delivery to him of his goods unsold, and the proceeds, without deduction, of the sale, and that the plaintiff should be barred as to such goods and proceeds. The sheriff was ordered to pay the costs of R.'s action, as he might have applied before it was brought, and the parties to pay their own costs of this application. *Booth* v. *Preston and Berlin R. W. Co.*, 3 P. R. 90.

Sale by Consent.]—The sheriff, under the plaintiff's execution, seized certain goods which had been distrained by a mortgagee. Prior to the sale the plaintiff and the mortgagee agreed with the sheriff that he should sell the goods and hold the proceeds until it should be decided between the plaintiff and the mortgagee who was entitled to the same. After the sale the proceeds were claimed by the mortgagee, the plaintiff, and by two prior execution creditors:—Held, that the sheriff, after making such agreement, was not entitled to an interpleader order. *Boswell* v. *Pettigrew*, 7 P. R. 393.

Second Order.] — On application for a rule nisi to rescind two interpleader orders granted to the sheriff, or to revive a previous rule nisi for the same purpose which had been allowed to lapse, the court, under the facts stated in the case, refused to interfere, holding, 1. That the sheriff was entitled to interplead the second time, the claimant having alleged a different title from that on which the first summons was obtained, claiming first as partner and next as sole owner. 2. That the second order, restraining an action against the execution creditors and their attorneys, was authorized and proper; and the loss of the papers, therefore, in consequence of which the first application against it lapsed, formed no ground for interference. *Gaynor* v. *Salt*, 24 U. C. R. 180.

Seizure without Proper Inquiry.]—A sheriff, instructed by the execution creditors, went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this, and without further inquiry, made a seizure. Upon a claim to the goods being made, the sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure:—Held, that an interpleader order should not have been granted, and an order was made barring the execution creditors. *Duncan* v. *Tees*, 11 P. R. 66.

This order was varied on appeal by directing the parties to proceed to the trial of an issue at the next assizes, the execution creditors to be the plaintiffs and the claimants to be defendants, and the question to be tried to be, whether at the time of the seizure the goods in question were exigible under the creditors' execution, or the execution of either of them, as against the claimants. *S. C.*, 11 P. R. 296.

Shares.]—Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. 1877 c. 66, by a sheriff under a fi. fa. goods, and he is entitled to an interpleader under s. 10 of the Interpleader Act, R. S. O. 1877 c. 54, where an adverse claim to the stock is advanced. The trial of the issue was, however, stayed until after the trial of an action between the same parties attacking the conveyance from the judgment debtor. *Brown* v. *Nelson*, 10 P. R. 421.

Sheriff Defending Action.] — Defendant, as sheriff, having seized under a writ in the county court certain goods, which were claimed by the plaintiff, on the 4th March applied to the Judge of the county court for an interpleader. The plaintiff commenced this action of trespass, to which defendant pleaded while the interpleader summons was pending, and issue was joined in April, but the case was made a remanet at the spring assizes. On the 19th June the Judge of the county court made an order barring the claimant, and in September the defendant applied for leave to plead that order in bar of this action. The application was refused. *Roblin* v. *Moodie*, 2 P. R. 216.

Writ of Possession—*Adverse Claim.*]—In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure, and possession were claimed, and the executors, to whom the real estate had been devised, were the only defendants. Judgment for possession, inter alia, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor, had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action:—Held, that the sheriff, by virtue of rule 1141 (b), was entitled to interplead. Held, also, that the action, as regards the claim for possession, was properly constituted; and the infants were bound by the judgment against the executors. Keen v. Codd, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

——— *Interference with Execution—Claim to Land—Costs.*]—Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest. Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order. Costs of the sheriff ordered to be paid in the first instance by the party putting him in motion. *Hall* v. *Bowerman*, 19 P. R. 268.

II. Practice and Procedure.

1. *In General.*

Alias Writ.]—The sheriff seized upon a fi. fa., and the goods being claimed, obtained

an interpleader summons. The creditor did not attend, and the sheriff was ordered to withdraw from possession, but the claimant was not barred from any action against him:—Held, that the sheriff might seize the same goods under an alias writ, though he could not have been compelled to do so. *Dempsey v. Cooper*, 1 P. R. 189.

Alternative Claims.]—In an interpleader issue the claimant claimed under his purchase from the chattel mortgagee, and the issue was found against him:—Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the court. *Barker v. Leeson*, 1 O. R. 114.

Amending Issue.]—The court has jurisdiction, and will exercise a discretion to do substantial justice between the parties, and to that end will grant relief or indulgence to the party who has not given notice of his intention to ask for it, and although the matter is before the court, upon the application of the opposite party. *Mulholland v. Downs*, 2 Ch. Ch. 253.

Where an interpleader order had been granted to try the ownership of certain goods seized under fi. fa., an interpleader issue was tendered by one party which contained an error, the other side, whilst pointing out the error, refused to agree to its amendment, but gave notice that the issue would not be accepted or acted on, and then moved to set aside the writ of interpleader and notice of trial. The secretary refused the application and gave leave to amend the issue nunc pro tunc. On appeal the decision was sustained. *Ib.*

Attaching Creditor's Status.]—The Interpleader Act makes no distinction between an attaching and an execution creditor, and whatever transfers the sheriff may impeach, the attaching creditor may impeach also. In such an issue it must be assumed that the attaching plaintiff is a creditor in fact; and, semble, that this cannot be disputed in any case. *Doyle v. Lasher*, 16 C. P. 263.

Claim under Prior Execution.]—Interpleader issue to try the right to goods in possession of and bought by plaintiff at sheriff's sale under fi. fa. against execution debtors, as against defendant, the execution creditor:—Held, that plaintiff was not bound to prove a judgment to support the prior execution under which she bought the goods. *Hamnill v. De Wolf*, 10 C. P. 419.

Claimant in Possession.]—Semble, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue. *Duncan v. Tees*, 11 P. R. 66, 296.

Remarks on the inconvenience of the practice of making the execution creditor the plaintiff in interpleader where the goods when seized are in the possession of the claimant. *Winfield v. Fowlie*, 14 O. R. 102.

Claimant's Title.]—On an interpleader issue to try the title to goods seized, the plaintiff claimed all, asserting that he had derived some by purchase from the assignee of the execution debtor, and others by subsequent purchase from third parties. The assignment being invalid:—Held, that it was necessary for him to shew what goods he was entitled to without it, and on his failure to do this that the jury were rightly directed to find for defendants. *Crapper v. Paterson*, 19 U. C. R. 100.

Conflicting Defective Judgments.]—A. obtained possession of goods by bill of sale from a sheriff upon an execution issued on a judgment recovered against a married woman without joining her husband. B. having recovered a judgment and issued an execution in the same way (without joining the husband) seized the same goods which A. claimed, and B. contended in an interpleader that A.'s judgment was void, and that he was entitled to the goods:—Held, that A.'s judgment, not being absolutely void, and he being in possession with a primâ facie title, he was entitled to raise the same objection to B.'s judgment, and both judgments being open to the same objection, he was entitled to prevail. *Davis v. Levey*, 11 C. P. 292.

Contents of Affidavit.]—The affidavit on which to apply for an interpleader summons on behalf of the sheriff, should state that the application is made solely for the benefit of the sheriff, and that he does not collude with either claimant or plaintiff. *Whittier v. Whittier*, 3 L. J. 28.

County Court—*Jurisdiction.*]—Held, that interpleader being a proceeding in the action, a county court Judge under rule 422, O. J. Act, has jurisdiction to entertain it, but in this case the Judge having disposed of the matter summarily without the consent of the parties, an issue was directed. *Coulson v. Spiers*, 9 P. R. 491. See *Swain v. Stoddart*, 12 P. R. 490.

Delay in Trial.]—Where the claimant neglects to bring the issue to trial, the proper course is to move to rescind the interpleader order. *Sewell v. Buffalo, Brantford and Goderich R. W. Co.*, 3 L. J. 29.

Directing Issue—*Seizure Abandoned.*]—The execution creditors did not dispute the claimant's title to the goods by purchase from one to whom they were sold by the debtor's assignee for creditors, but contended that the claimant's present professed ownership was a mere sham and a fraud contrived to enable the plaintiff to carry on business independently of the demands of his creditors:—Held, that the question presented was not one of law, but of fact, and an issue should have been directed. But the sheriff having relinquished possession of the goods pending the appeal, it was too late to direct an issue; and unless the parties could agree upon one, the proper course would be for the execution creditors to seize again. *Rondot v. Monetary Times Printing Co. of Canada*, 19 P. R. 23.

Discontinuance.]—An interpleader proceeding is not an action; and rule 641 (c), which enables the court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues. Hamlyn v. Betteley, 6 Q. B. D. 63, and Re Dyson, 65 L. T. N. S. 48, followed. Semble, that the execution creditors can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom v. Gillies*, 16 P. R. 402.

Discretion.]—On an application for an interpleader order it is only necessary to make

out a primâ facie case. The secretary has a discretion to grant such an order and unless it can be shewn that no primâ facie case was made out, it will not be set aside on appeal. *Gourlay* v. *Ingram*, 2 Ch. Ch. 238.

An order for an interpleader had been applied for to try the right of a married woman to certain goods seized under fi. fa., to which application her husband was not a party, and the motion was refused with costs, as reported in Gourlay v. Ingram, 2 Ch. Ch. 238. On that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application, the solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband, the motion was renewed, and an interpleader order granted by the secretary, which on appeal was sustained. *Ib.*

Disobeying Order.]—The sheriff, upon the plaintiff refusing to indemnify, applied to the court for an interpleader order, which was granted. Pending the interpleader issue the plaintiff offered the indemnity, and the sheriff sold and paid the proceeds to the plaintiff:—Held, upon an application by the party in whose favour the interpleader issue had been found by the jury, that the sheriff was liable to an attachment for selling the goods in violation of the interpleader order, obtained at his instance, and for his own protection. *Henderson* v. *Wilde*, 5 U. C. R. 585.

Liability of sheriff to attachment for disobedience of interpleader order. See *Maclean* v. *Anthony, Slater* v. *Anthony*, 6 O. R. 330.

Distributive Effect.]—An interpleader issue is to be taken distributively, and an assignee claiming should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registration. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

District Court—*Jurisdiction.*]—The district court of the provisional judicial district of Thunder Bay has jurisdiction in interpleader under R. S. O. 1887 c. 91, s. 56; for it has "the jurisdiction possessed by county courts," which is by R. S. O. 1877 c. 45, s. 19, s.-s. 6, in "interpleader matters as provided by the Interpleader Act;" and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the district court, and not by the amount for which the recovery was had or the process issued. *Isbister* v. *Sullivan*, 16 O. R. 418.

Division Court—*Jurisdiction and Practice.*]—See DIVISION COURTS, VIII.

Estoppel—*Claimant Denying Debtor's Title after Purchase from him.*]—See *Macaulay* v. *Marshall*, 20 U. C. R. 273.

Examination.]—An order to examine the defendant in an interpleader issue may be granted under the Administration of Justice Act, 1873, s. 24, the words "action at law," including an interpleader proceeding. *Canada Permanent Building Society* v. *Forest*, 6 P. R. 254.

Execution Debtor's Status.]—Held, that the execution debtor is not entitled to move, in the cause in which judgment is obtained against him, to set aside the interpleader order, &c., the same being between the execution creditor and strangers to the cause; and he has no right to be heard in the interpleader suit, the result of which establishes nothing to affect his interest. Held, also, that there was no warrant for an application to a common law Judge to declare the interpleader bond assets of the execution debtor. *McNider* v. *Baker*, 10 L. J. 193.

Exemptions.]—An execution debtor can do what he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor. Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with. *Field* v. *Hart*, 22 A. R. 449.

See In re Gould v. *Hope*, 20 A. R. 347.

Form of Issue.]—The proper issue in an interpleader case is to try whether the goods at the time of the seizure, not at the time of the delivery of the writ to the sheriff, were the goods of the claimant. *VanEvery* v. *Ross*, 11 C. P. 133.

The proper frame of an interpleader issue between the claimant and an attaching creditor is, whether the goods attached were at the time of seizure, the property of the claimant as against the attaching creditor, and not as against the absconding debtor. *Doyle* v. *Lasher*, 16 C. P. 263.

——— *Jus Tertii.*]—An interpleader issue as to goods seized by a sheriff was directed to be tried between the claimants, as plaintiffs, and the execution creditor as defendant. The form of the issue was whether the goods at date of seizure were the property of the claimants as against the execution creditor. The claimants' contention was that the goods were not owned by or in possession of the execution debtor at all, but in possession of his wife, and if they were not actually owned by the claimants themselves, they were owned by the wife, and that there was between her and them a bargain such as to give them an equitable right to the goods. The trial Judge ruled that, under the form of the issue, the claimants could not give evidence to shew that the property was in the debtor's wife:—Held, that the ruling was too strict; that the claimants should not be shut out from adducing in evidence the whole facts about the transaction; and that the issue should be amended so as to let in the question of the jus tertii for the benefit of the claimants and their privity therewith, and also the claim of the wife; and that there should be a new trial. *Bryce* v. *Kinnee*, 14 P. R. 509.

Forum.]—As a rule, applications arising out of or consequent upon an interpleader ought to be made to the Judge who made the interpleader order. *Gladstone* v. *McDonell*, 4 L. J. 210.

Where proceedings in interpleader have begun under a Judge's order, all subsequent applications must be made to the same Judge.

Commercial Bank v. *Clarke, Taylor* v. *Clarke*, 1 P. R. 276.

Goods in Possession of Debtor—*Barring Execution Creditor in Part.*]—Where goods seized by a sheriff under execution are at the time in the possession of the execution debtor, and the sheriff interpleads in consequence of a claim made upon them by a person out of possession, claiming by transfer from the execution debtor, the claimant should be plaintiff in the interpleader issue. Semble, that the claimant should, as a rule, be made plaintiff, where he claims by transfer from the execution debtor, whether he is in possession or not. In order to entitle himself to an interpleader order, the sheriff is not obliged to shew that the claim of the person out of possession is open to objection. Where upon an interpleader application there is more than one claimant, and the execution creditor declines to contest the right of some or one of them, the order should absolutely bar the execution creditor as to the claim or claims which he declines to contest. *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103.

High Court and County Court Claims.]—Held, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a superior court suit, the other a plaintiff in a county court suit, the application for an interpleader order was properly made in the superior court, although the seizure was made under the county court writ before the superior court writ came into the sheriff's hand. *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1.

Husband and Wife—*Onus.*]—Where husband and wife live together in the same house, the husband being owner or tenant, and the sheriff, under an execution against the husband, seizes the household furniture, which is claimed by the wife as her own, the onus is on her, and she must be plaintiff in the issue directed where the sheriff interpleads. *Hogaboom* v. *Grundy*, 16 P. R. 47.

Interlocutory Orders.]—A local Judge in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed. Coulson v. Speers, 9 P. R. 491, followed. *Swain* v. *Stoddart*, 12 P. R. 490.

Issue—*Parties—Onus.*]—Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to $1, and had then made the assignment to the other claimant:—Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants. *Re Hubbell*, 19 P. R. 240.

Jury—*Feigned Issue.*] — A common law Judge has no power, unless by statute, to direct a feigned issue to be tried by a jury. *McLaughlin* v. *McLaughlin*, 15 C. P. 182.

Jus Tertii.]—The bank, the three defendants C., and the defendants R., each had executions in the division court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July, 1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant. On 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who, on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them. The plaintiff having sued in trespass and trover, was nonsuited:—Held, that as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them; that the assignee had priority over the execution creditors, but not necessarily over the plaintiff as mortgagee; and a new trial was granted in order to determine whether the plaintiff could, by setting up the insolvency proceedings and the claim of the assignee, recover against defendants. On a second trial, the jury having found a general verdict for defendants:—Held, that the plaintiff, unless suing under and by authority of the assignee of which there was no evidence, had no right to avail himself of the assignee's title; and the verdict was affirmed. Quære, if this were otherwise, whether the plaintiff, on the evidence set out in the report, could have recovered against defendants as for a joint trespass or conversion. *O'Callaghan* v. *Cowan*, 41 U. C. R. 272.

Lost Affidavit.]—In interpleader applications if the affidavits forwarded by claimant be lost he will be allowed an opportunity to file others; or if the nature of his claim appear on the affidavits filed by the execution creditor, then the usual issue may be directed. *Wilson* v. *Bull*, 3 L. J. 202.

Making up Issue.]—Where no time has been limited by an interpleader order for the plaintiff to make up the issue, the court will order the issue to be made up by the claimants by a certain day, or on default thereof to be barred from prosecuting the claim. *Shiels* v. *Davis*, 6 U. C. R. 682.

Married Woman Claimant.]—Where a married woman claimed goods seized under a fi. fa., and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion. *Gourlay* v. *Ingram*, 2 Ch. Ch. 237.

New Trial.]—Held, that on an application to set aside a verdict and grant a new trial on the ground of merits, the affidavits must disclose what the merits are, but held, that in an interpleader issue it is not necessary to set out the merits, inasmuch as the very issue itself discloses what the defendants' claim is. *Vidal* v. *Bank of Upper Canada*, 15 C. P. 421.

Where there has been a trial by jury of an interpleader issue directed from the chancery division, an application for a new trial must be made to the divisional court, and not to a single Judge. *Cole* v. *Campbell*, 9 P. R. 498.

——— *Indorsement of Verdict.*]—Where on an interpleader issue the amount in dispute was $60.40 only, a verdict having been given in favour of the claimant and the Judge of the county court who tried the issue having certified that he was satisfied with the verdict, the court refused a new trial, although they thought that if the case had originally come before them for trial on the same evidence, the opinion of the court might have been against the claimant. *Gourlay* v. *Ingram*, 2 Ch. Ch. 309.

The verdict not having been indorsed on an office copy of the order of interpleader, but on the record only:—Held, to be immaterial. *Ib.*

Nonsuit.]—A plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act. *Bryson* v. *Clandinan*, 7 U. C. R. 198.

Notice of Trial.]—Notice of trial is as essential in interpleader and feigned issues, as in ordinary cases. *Wilson* v. *Dewar*, 4 P. R. 13.

Parties.]—The tendency of modern practice is to dispense with parties, where it can be done with safety. Therefore, where in certain interpleader proceedings one R. disclaimed any right to the proceeds of a sale under execution, and subsequently obtained possession of the property sold by means of a writ of replevin, but afterwards gave notice to the person holding the money that he claimed the proceeds of the sale, and forbade him paying back the purchase money to the purchaser, whereupon the latter filed a bill seeking to recover back the amount, on the ground of an entire failure of consideration, to which he made R. a defendant, who demurred, as being not a necessary or proper party—the demurrer was allowed with costs, liberty being given to the plaintiff to amend, in order to make a better case, if so advised. *McDonald* v. *Reid*, 25 Gr. 139.

Postponing Trial.]—Remarks as to the power of the Judge to order the postponement of the trial of an interpleader issue, where the interpleader order directs it to be tried at a particular sitting. *Robinson* v. *Richardson*, 32 U. C. R. 344.

An interpleader issue arising out of an action in the high court of justice, was directed to be tried in a county court pursuant to 44 Vict. c. 7, s. 1 (O.):—Held, that a motion to postpone the trial of the issue should have been made in the county court. *London and Canadian Loan and Agency Co.* v. *Morphy*, 11 P. R. 86.

Proceeding in Chancery.]—The plaintiff in an interpleader issue at law having filed his bill for relief in the court of chancery, while the interpleader is pending, is not bound to elect. *McLean* v. *Beaty*, 1 Ch. Ch. 84.

Proceeds of Sale.]—Right of claimant to make application in regard to the proceeds of the goods when sold considered.. *Gladstone* v. *McDonell*, 4 L. J. 210.

Production.]—After delivery of an interpleader issue a party to it may take out a præcipe order for production by the opposite party. Such order should be issued and the record passed in the principal office of the court in Toronto, as no locality is pointed out by the usual proceedings in interpleader. *Dominion S. and L. Co.* v. *Kilroy*, 12 P. R. 19.

——— *Issue from High Court to County Court.*]—Where, after judgment in an action in the common pleas division, an issue on a garnishee application was directed to be tried under rule 373 O. J. Act, by a county court Judge and jury:—Held, that such Judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane* v. *Morrison*, 10 P. R. 606.

Proof of Judgment.]—The form of an interpleader issue under C. S. U. C. c. 30, s. 8, to try title of claimants of goods as against the execution creditor, assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a judgment recovered against him, and consequently the execution creditor is not bound to prove the judgment. *Holden* v. *Langley*, *Patterson* v. *Langley*, 11 C. P. 407, 411.

Interpleader, to try the right to certain shares in a schooner, seized under an execution at the suit of the defendant against W. S. M., on the 2nd April, 1863. The plaintiff's title arose thus: 1. On the 27th April, 1859, W. S. M. made a voluntary conveyance to his son; 2. On the 5th March, 1860, the sheriff, under a ven. ex. against W. S. M., sold to S. M.; 3. The son on the 24th March, 1863, confirmed this title by a voluntary deed to S. M., who on the same day conveyed to the plaintiff. S. M. had in December, 1861, mortgaged to one T., who on the 28th March, 1863, assigned to the plaintiff. All these conveyances were duly registered at the custom house. The defendant objected that a judgment should have been shewn to support the ven. ex., and he desired to prove fraud affecting the sheriff's sale, by shewing that W. S. M. supplied the money then paid; but it was not denied that the plaintiff was a bonâ fide purchaser for value without notice:—Held, that the defendant, who, so far as appeared, was not a creditor of W. S. M. until long after the deed to his son, and who was a stranger to the judgment on which the ven. ex. issued, was not in a position to impeach the plaintiff's title, or to require that such judgment should be proved. *Vindin* v. *Wallis*, 24 U. C. R. 9.

Held, that defendant was not required in an interpleader issue between himself and an assignee in insolvency, to prove his judgment and execution. *McWhirter* v. *Learmouth*, 18 C. P. 136.

Question for Trial.]—The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether the plaintiff had such an interest in them as entitled him to resist the seizure. *Grant* v. *Wilson*, 17 U. C. R. 144.

Rescinding Order.] — Goods of defendant being seized on the 27th May, 1858, one B. claimed them, and an interpleader issue was directed. The nature of the claimant's title was not shewn on the application, and he afterwards applied to amend or rescind the order, on the ground that the writ was received by the sheriff in June, 1857, and his title was acquired subsequently. The sheriff gave

no explanation of his delay, and the execution plaintiff denied that he had authorized it:—Held, that the interpleader order must be rescinded, with costs to the execution plaintiff, but not to the claimant, to be paid by the sheriff. *McMaster* v. *Milne*, 2 P. R. 386.

——— *Delay.*]—Held, that an application against an interpleader order was too late after lapse of four terms, the affidavit of the claimant that he knew nothing of it until shortly before the time in which he applied, being inconsistent with the statements of his counsel, and with other facts sworn to. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562.

Reserving Questions.]—The Judge of a county court has no power under 28 Vict. c. 19, to refer an interpleader issue to be tried before the Judge of the county court from which the execution issued, reserving to himself the question of costs and all other questions. He must either dispose of the whole proceedings himself or order them to be disposed of before the Judge of the court from which the process issued; and where such a reference had been directed, on appeal from the decision of the Judge who acted thereunder and tried the issue:—Held, that such proceedings were coram non judice. *Nicholls* v. *Lundy*, 16 C. P. 160.

Restraining Action.]—A Judge has authority by interpleader order to restrain an action against the execution creditor as well as against the sheriff. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 U. C. R. 562.

Return of Writs.]—Where an interpleader issue is pending, the court will in its discretion enlarge the time for returning writs in the sheriff's hands. *Walker* v. *Niles*, 3 Ch. Ch. 59.

Two writs were in the hands of the sheriff, and while an interpleader issue was pending he was served with a notice to return one of the writs; and not having done so an application was made to compel him to make a return. Under the circumstances the secretary enlarged the time for making the return, and made no order for costs. *Ib.*

Sale by Sheriff—*Subsequent Judgment.*]—An interpleader order had been made, which directed the sheriff to pay over to the claimants $1,000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co. obtained judgment in a division court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution should be retained by the sheriff out of the $1,000, until garnishee proceedings against the debtor in the division court, in which the sheriff was garnishee, should be disposed of:—Held, that the moneys in the sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees; that there being no want of bona fides in the mortgage, no want of formalities in it would make it invalid as between the parties to it, so as to entitle the debtor to claim the money secured by it, or to entitle A. & Co. to claim it under their execution. *Macfie* v. *Hunter*, 9 P. R. 149.

Security for Goods Seized — *Barring Claimant.*]—Upon a sheriff's application, an interpleader order was made in the usual terms, and the claimant having given security thereunder by an approved bond for the forthcoming of the goods, the sheriff withdrew from possession. Before the interpleader issue came to trial the goods were sold for taxes, and the surety on the claimant's bond became insolvent:—Held, that the security had nothing to do with the determination of the claimant's rights, but only with the preservation of the property pending the litigation; and the court had no right to make an order barring the claim in default of giving fresh security. *Hogaboom* v. *Gillies*, 16 P. R. 96.

An appeal to the court of appeal was dismissed, the court being equally divided in opinion; 16 P. R. 260.

Several Claimants.]—Upon an interpleader application by the sheriff of York there were two execution creditors, viz., the Merchants Bank of Canada and one James Walsh, and three claimants, viz., one Clarkson, the assignee of the execution debtor for the general benefit of creditors, the Imperial Bank of Canada, and the Standard Bank of Canada, both claiming under warehouse receipts. The master in chambers directed the trial of four issues, viz., (1) The Merchants Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) The Standard Bank, plaintiffs, against the Merchants Bank and Clarkson, defendants; (3) The Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) The Merchants Bank, plaintiffs, against James Walsh, defendant (as to priority of execution). On appeal the order of the master was varied by substituting for the above first three issues a single issue, viz., the Merchants Bank, plaintiff v. the Imperial Bank, Standard Bank, and Clarkson, defendants. *Merchants Bank* v. *Herson*, 10 P. R. 117.

Solicitor's Authority.]—A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases. *Hackett* v. *Bible*, 12 P. R. 482.

Where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which $441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed $441 among the creditors entitled, and paid only the balance into court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended:—Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties. *Ib.*

Style of Cause.]—A summons to rescind an interpleader order must be styled in the original cause, and not in the interpleader suit, which is a mere collateral proceeding to the original cause. *Salter* v. *McLeod*, 10 L. J. 299.

Summary Disposition of Claim—*Creditors' Relief Act.*]—Under an execution issued by the plaintiffs, the sheriff, whilst such execution was the only one in his hands, seized certain goods of the debtor, which were claimed by D., whereupon an interpleader summons was obtained by the sheriff, and an order was made barring the claimant without any issue being directed. This order did not state that the parties consented to a summary disposal of the matter and the facts did not clearly appear. The sheriff proceeded and sold the property and made an entry under the Creditors' Relief Act. The appellants and several other creditors delivered within the proper time, certificates to the sheriff, who framed a scheme for the distribution of the money as if no interpleader proceedings had been had. On appeal from him the county court Judge gave the whole fund to the plaintiffs under s.s. 4, s. 3, of the Creditors' Relief Act. An appeal was dismissed, the court being equally divided. *Bank of Hamilton* v. *Durrell*, 15 A. R. 500.

Title under Chattel Mortgage.]—In an interpleader issue the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor, and duly filed:—Held, clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff and claimed. *Jones* v. *Jenkins*, 25 U. C. R. 151.

Variance.]—Where there was a variance between the issue directed by an interpleader order and the issue stated in the record, the latter being the issue which, if asked, the court would have directed:—Held, that after the trial no advantage could be taken of the variance. *Gourlay* v. *Ingram*, 2 Ch. Ch. 309.

Writ Set aside.]—After the issue of an interpleader summons founded on two writs of fi. fa., issued respectively out of the court of Queen's bench and the court of chancery, the writ from the former court was set aside:—Held, that the Judge in chambers had jurisdiction, notwithstanding, to continue the proceedings, and make the interpleader order as to the other writ; but quære, even if the want of jurisdiction had been clear, whether a party could avail himself of it after having agreed to the order, accepted the issue, defended it at the trial, and moved against the verdict, &c. *Haldan* v. *Beatty*, 43 U. C. R. 614.

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2. *Appeal.*

Certiorari.]—A certiorari does not lie to remove an interpleader issue from a county to a superior court. If such a writ do improvidently issue the application should be to quash the certiorari, and not for a procedendo. *Jones* v. *Harris*, 6 L. J. 16.

County Court.]—An appeal will lie from the county court to the superior courts upon an interpleader as well as other matters. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

District Court.]—The high court of justice has no jurisdiction, by virtue of R. S. O. 1887 c. 91, s. 56, s.-s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the district court in an interpleader issue. *Isbister* v. *Sullivan*, 16 O. R. 418.

Final Order.] — The proviso at the end of s. 52, R. S. O. 1897 c. 55, as to the order being final, governs the whole section, and an order made in county court chambers in an interpleader application directing an issue in the event of security being given, and in default a sale of the goods and payment of the proceeds to the execution creditor, was held not appealable. *Hunter* v. *Hunter*, 18 C. L. T. Occ. N. 114.

Issue Tried in County Court.]—An interpleader issue arising out of an action in the chancery division of the high court of justice was sent to a county court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (O.), rather than under the interpleader jurisdiction of the old court of chancery; and that being so, that a divisional court of the high court of justice had no jurisdiction to hear an appeal from the judgment of the county court on such issue, and that such appeal should have been to the court of appeal under R. S. O. 1877, c. 54, s. 23. *Close* v. *Exchange Bank*, 11 P. R. 186.

A verdict was entered for the plaintiff on the trial of an issue directed by the court of chancery to be tried at the sittings of a county court. The county court Judge set aside the verdict, and entered a nonsuit, on grounds embracing matters of law as well as of fact and evidence:—Held, that he had no power to do so, and that the application should have been made to the court that directed the issue. *Barker* v. *Leeson*, 9 P. R. 107.

Judgment on Issue.]—An appeal will lie from the judgment on an interpleader issue. *Wilson* v. *Kerr*, 18 U. C. R. 470.

A motion to quash an appeal from the judgment, 9 O. R. 314, upon the trial of an interpleader issue, upon the ground that the decision was interlocutory, and not appealable under s. 35, O. J. Act, was dismissed without costs, the members of the court being divided in opinion. On appeal to the supreme court it was:—Held, that an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued is not an interlocutory order within the meaning of that expression in s. 35 of the Judicature Act, or if it is, it is such an order as was appealable before the passing of that Act, and in either case it is appealable now. *Whiting* v. *Hovey*, 12 A. R. 119; *S. C., sub nom. Hovey* v. *Whiting*, 14 S. C. R. 515.

Master's Order as to Costs.]—Appeal to Judge in chambers from master's decision as to costs. See *Christie* v. *Conway*, 9 P. R. 529.

Order Acted on.]—The execution creditor declining to admit the bona fides of a mortgage under which the property in question was claimed, an issue was directed by the court of chancery, and was drawn up for trial before the county court Judge. At the trial the good faith of the claimant was admitted, and the attack on the mortgage was confined to points of law, when a formal verdict was entered for the claimant, which was afterwards set aside in term by the county court Judge, and a verdict entered for the execution creditor. The execution creditor thereupon applied to the referee in chambers for the

usual order to enable him to obtain the money which was opposed on the ground that the court of Queen's bench had since decided against similar objections to this mortgage (42 U. C. R. 329), but the referee made the order as asked, and directed the money to be paid to the execution creditor. An appeal against this order was dismissed by the court of chancery on rehearing, but the claimant had leave to apply within a month for a new trial of the issue before a jury, which was subsequently granted; but before the order was made the sheriff, with whom the money remained, had paid it over in accordance with the order of the referee:—Held, that the court had no jurisdiction in the matter after the payment over of the money. *Wilson* v. *Wilson*, 3 A. R. 499.

Stakeholder — *Issue Sent from High Court to County Court—Appeal from Judgment on Issue.*]—The court of appeal has no jurisdiction to entertain an appeal from the decision of a county court upon an interpleader issue sent for trial by an order made in an action in the high court, upon the application of a stakeholder. Rule 1163 applies only to the case of an application by a sheriff, and not to a case coming within the first clause of rule 1141; and in the latter case the high court has no power by virtue of any of the consolidated rules to direct an interpleader issue, in or arising out of an action in the high court, to be tried in a county court; and, therefore, unless otherwise supportable, the proceedings under an order so directing are coram non judice. But if the high court has power to make such an order—and semble, it has—by force of s. 110 of the Judicature Act, irrespective of the consolidated rules, preserving the old jurisdiction of the court of chancery, the appeal from the decision upon the issue is, in the first instance at all events, to the high court, and not to the court of appeal. *Clancey* v. *Young*, 15 P. R. 248.

Summary Disposition in Chambers.]—Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff, and claimed by a brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under rule 1111, decided the question in favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure:—Held, that the execution creditors had the right to appeal against this order. *Rondot* v. *Monetary Times Printing Company of Canada*, 19 P. R. 25.

Transfer to County Court by Consent.]—In an action pending in the high court, an interpleader issue and all subsequent proceedings were transferred under 44 Vict. c. 7, s. 1 (O.), to the county court of Middlesex. By a subsequent order made on consent, the trial of such issue was withdrawn from Middlesex, and a special case was agreed on, and the venue changed from Middlesex to York, where the special case was argued:—Held, that in strictness the appeal should be quashed. The transfer to the Middlesex county court was final, and there was no jurisdiction under the statute or otherwise to transfer the issue or any part of it, or to change the venue to any other county court. The proceedings in the county court of York could therefore only be regarded as a summary trial by consent, from which no appeal lay. *Coyne* v. *Lee*, 14 A. R. 503.

Two Divisions.]—Where an interpleader order is intituled in two actions, in different divisions of the high court, there being two executions in the sheriff's hands, an appeal from the order may be entertained in either division, although one of the execution creditors has been barred by the order, from which there is no appeal on that ground. *Hogaboom* v. *Grundy*, 16 P. R. 47.

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3. *Costs.*

(a) *In General.*

Claimant Suing Sheriff.]—The claimant of goods seized under two executions brought trespass against the sheriff, and an interpleader was directed between the claimant as plaintiff and the two execution creditors as defendants. The claimant having succeeded in such issue:—Held, that the sheriff should be paid his costs of defence of the action against him and of the interpleader application, and that the execution creditors must pay the claimant's costs, which could not be apportioned between them. *Carter* v. *Stewart*, 7 P. R. 85.

Costs of Day.]—No costs of the day for not proceeding to trial pursuant to notice in an interpleader suit will be allowed till the termination of the proceedings. *Salter* v. *McLeod*, 10 L. J. 299.

Creditors' Relief Act.]—A sheriff had seized goods under writs of fi. fa. in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into court, which was done:—Held, upon a liberal construction of s. 35 of 49 Vict. c. 16 (O.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant. *Levy* v. *Davies*, 12 P. R. 93. But see also *Reid* v. *Gowans*, 13 A. R. 501.

Deducting Sheriff's Fees.]—The gross proceeds of a sale of goods in an interpleader matter, should be paid by the sheriff into court without deducting anything for his expenses. *Ontario Bank* v. *Revell*, 11 P. R. 249.

Defeat of Claimant.]—Where a feigned issue is directed upon an interpleader application, and is found against the claimant, the execution creditor will, on the production of the record, obtain an order of course for the payment by claimant of all costs incurred in consequence of his claim. *McPherson* v. *Norris*, 3 L. J. 49.

Discretion.]—Two interpleader actions having been twice tried, resulted in favour of

the plaintiff, the claimant, and on application to the Judge who granted the orders to dispose of the costs, the matter was referred to the full court:—Held, that the plaintiff was entitled as of right to the costs of the actions; and that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being new, each party was ordered to pay his own costs of the application. *Bellhouse* v. *Gunn*, 20 U. C. R. 555.

Execution Creditor Abandoning.]—A sheriff having made a seizure of goods under a writ of execution, which seizure the execution creditor had not specially directed, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the execution creditor abandoned his claim:—Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff. *Canadian Bank of Commerce* v. *Tasker*, 8 P. R. 351.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant, in the event of the latter not succeeding in the issue:—Held, that the corporation was not, under these circumstances, liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods. *Dundas* v. *Darvill*, 12 P. R. 347.

Failure to Establish Case.]—An interpleader suit must be dismissed with costs, if the plaintiff does not establish at the hearing a case making interpleader proper. *Bank of Montreal* v. *Little*, 17 Gr. 685.

Forum.] — Where an interpleader order has been granted by a Judge, an application for costs of the issue must also be made to a Judge, and not to the court: but semble, that it need not be to the Judge who granted the order. *Sewell* v. *Buffalo, Brantford and Goderich R. W. Co.*, 2 P. R. 56; 3 L. J. 29.

Fund in Court.]—Plaintiffs and defendants, being joint owners of a vessel, instituted a suit to have the partnership terminated. The vessel was sold under order of the court, and notes taken in part payment, and deposited with the registrar of the court. Subsequently these notes were sued on in the name of the registrar, and execution obtained, under which the vessel was seized as the property of the makers. Being claimed by certain persons, the sheriff obtained an interpleader order between them and the execution plaintiff, but without the leave of the court being asked by the execution plaintiff therefor, or for the litigation at law; and the claimant succeeded in the issue. On motion to have the costs of the issue paid out of the moneys in court:—Held, that the sanction of the court should have been obtained to the contest at law, if the parties meant to look to the fund in court for their costs; and that not having been obtained, applicant must make out a special case to get the costs out of the fund. Under the circumstances the costs at law were ordered to be paid, but only between party and party, and on terms. *Macdonald* v. *Carrodi*, 1 Ch. Ch. 145.

Judgment Appealed from.]—Upon the trial of an interpleader issue which the court of chancery, without objection by either party, directed to be tried in the county court, the bona fides of the claimants' mortgage was admitted, and a verdict was entered for the plaintiff on a point of law, which verdict was afterwards set aside in term:—Held, that the defendant (the execution creditor) was entitled to the usual order for costs of the trial, although notice of appeal had been served, and although the court of Queen's bench had, upon the same points being raised upon the mortgage in question, since decided in favour of its validity. *Wilson* v. *Wilson*, 7 P. R. 407.

Partial Failure.] — Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized, amounting to one-sixth of the total value, were not covered by the mortgage:—Semble, although the mortgagee was entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

Where the claimant established his right to all except a small portion of the goods:—Held, that he was entitled to the costs of the interpleader rule, and of the feigned issue and trial, from which defendant might deduct the costs incurred in proving his claim to those goods found to belong to him. *Dempsey* v. *Caspar*, 1 P. R. 134.

Party not Appearing.] — Where a sheriff obtains a rule under 7 Vict. c. 30, calling upon parties to sustain their claims to property seized, and one party fails to appear, his claim as against the sheriff is barred, and the party appearing is entitled to have his costs paid by the party failing to appear. *Johnson* v. *Baldwin*, 1 U. C. R. 280.

Representative Capacity.] — An interpleader suit, in which the trustees of this defendant and this plaintiff were respectively plaintiffs and defendants, was arranged on the understanding that all costs, including the sheriff's fees, &c., should be paid to the plaintiff's attorney. The costs, except sheriff's fees, were paid by an order on the trustees by their attorney, who stated that, as soon as the sheriff's fees were taxed, H., one of the trustees, would pay them. These trustees subsequently transferred all the property which this defendant had previously assigned to them to other trustees, the sheriff's fees still being unpaid; and H. swore that he was not aware of these fees being due until after the transfer. Plaintiff's attorney sued the trustees for the fees, but was nonsuited; and the Judge in chambers declined to order the trustees to pay them, considering he had no jurisdiction over them. *Dunn* v. *Boulton*, 2 C. L. Ch. 195.

Reservation.] — The costs of an interpleader issue should not be reserved by the

interpleader order to be disposed of in chambers, but should be left to be dealt with by the trial Judge. *Grothe* v. *Pearce*, 15 P. R. 432.

Sale—*Recovery of Sheriff's Charges.*]—After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the court under the Act relating to interpleader arises, by which the writ of execution as such ceases to operate, and the sheriff, in selling the goods seized thereunder, acts not for the execution creditor but for the court under the interpleader order. Where, therefore, a sheriff, under such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, and paid the proceeds into court less his charges for possession money and expenses of sale, &c.:—Held, that he was not liable to refund to the claimant the amount deducted for such charges. The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way. The decision below 12 P. R. 246, reversed. *Reid* v. *Murphy*, 12 P. R. 338.

Seizure under Instructions.]—When a writ of fi. fa. goods is placed in a sheriff's hands, and special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's and claimant's costs. *VanStaden* v. *VanStaden*, 10 P. R. 428.

Where the special directions were sworn to on one side and denied on the other, it was held, that the sheriff must be assumed to have acted only under the writ, without such directions, and an appeal from the master's order refusing costs to the sheriff was dismissed, but without costs, as the affidavit in denial contained impertinent and scandalous matter. *Ib.*

Sheriff—*Issue between Execution Creditors and Claimant — Divided Success.*]—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it:—Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, &c.: and that the execution creditors should have an order over against the claimant for one-half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

The sheriff before making application for an interpleader order should make some inquiry as to the nature of the claim, otherwise he will be ordered to pay costs. *Walker* v. *Nice*, 3 Ch. Ch. 59.

Sheriff's Costs of Final Order.]—A successful party in an interpleader issue moving for an order barring the execution creditors, having given the sheriff notice of the motion, was ordered to pay the sheriff's costs of appearing on the motion, for such notice is unnecessary. *O'Brien* v. *Bull*, 9 P. R. 494.

On appeal by a sheriff from the order of the master in chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant in an interpleader for a final order barring the execution creditor for default in giving security for costs, as directed by the order granting the interpleader:—Held, that the sheriff was properly served with notice of such motion, and was entitled to his costs thereof. *Gray* v. *Alexander*, 10 P. R. 358.

Special Facts.]—Held, on the facts stated in the special case, that the plaintiff and defendants should each pay their own costs of the interpleader, and each one moiety of the costs of the railway company and of the sheriff. *McLaren* v. *Canada Central R. W. Co.*, 10 P. R. 328.

(b) *Scale of Costs.*

High Court and County Court Writs.]—Several executions from different county courts having been placed in the sheriff's hands: — Held, on an interpleader application to the superior court, that all costs, including those of the sheriff, should be taxed on the county court scale. *Masuret* v. *Lansdell*, 8 P. R. 57.

In an interpleader matter where several writs were placed in the sheriff's hands, one from a county court, the others from the superior courts, a successful claimant was held entitled to superior court costs, as against the county court execution creditor. Held, also, that where all the writs are from county courts, the sheriff is entitled to county court costs only; but a successful party to the issue is entitled to superior court costs. Masuret v. Lansdell, 8 P. R. 57, remarked upon and modified. *Phipps* v. *Reamer*, 8 P. R. 181.

Issue in Inferior Court.]—An execution for $105 issued from the chancery division, and certain goods were seized, which the plaintiff herein claimed, but on an interpleader issue he failed to establish his claim:—Held, that costs on the lower scale only should be taxed by the successful party to the issue. The effect of rule 2, O. J. Act, is to apply to all divisions the practice which existed as to interpleader in the former common law courts, plus the special power conferred on these latter courts by 44 Vict. c. 7 (O.). And all interpleader issues involving under $400, in whatever division arising, are now to be disposed of by reference to county courts, and costs awarded according to 44 Vict. c. 7, s. 3 (O.). The Judge who settles the question of these interpleader costs may direct what scale shall be followed. *Beaty* v. *Bryce*, 9 P. R. 320.

Where execution issued out of the high court of justice, and the sheriff under R. S. O. 1877 c. 54, s. 10, obtained an interpleader order, under which an issue between the parties was directed to be tried in the county court, under 44 Vict. c. 7 (O.):—Held, that the sheriff was entitled to his costs under

the interpleader order to be taxed on the scale of the court out of which the process under which he seized the goods issued. Semble, that the parties to the issue should also have their costs prior to the order directing the issue on the superior court scale. Beaty v. Bryce, 9 P. R. 320, explained. *Arkell* v. *Geiger*, 9 P. R. 523.

Under an execution issued from the Queen's bench division, a sheriff seized certain goods, some of which, valued at $110, were claimed by the plaintiff. The master in chambers, on the application of the sheriff, directed an interpleader issue in the Queen's bench division, reserving the question of costs, which he subsequently directed to be taxed on the county court sale, following Beaty v. Bryce, 9 P. R. 320:—Held, (1) That the master's discretion, exercised under the jurisdiction derived from R. S. O. 1877 c. 39, s. 29, and rule 420, O. J. Act, is open to review by an appeal to a Judge in chambers, under rule 427 O. J. Act. (2) That the scale of costs after the issue on an interpleader, must be determined by the scale applicable to the forum in which the issue has to be tried, and before the issue, on the scale of the court to which the sheriff is compelled to resort to obtain relief. Beaty v. Bryce, 9 P. R. 320, not followed. *Christie* v. *Conway*, 9 P. R. 529.

(c) *Security for Costs.*

Defendant—*Delay.*]—An execution creditor made defendant in an interpleader issue, may be ordered to give security. *Lovell* v. *Wardroper*, 4 P. R. 265.

A delay in applying for security from the 2nd July until the 11th August is fatal to the application. *Ib.*

Insolvent Claimant.]—Section 10 of the Interpleader Act, R. S. O. 1877 c. 54, does not place a sheriff in a more advantageous position than an ordinary suitor, and the fact that a claimant is a married woman and in financial straits, is not a ground for ordering security for the sheriff's costs. *Sweetman* v. *Morrison*, 10 P. R. 446.

Party out of Jurisdiction.]—The claimant in an interpleader issue, if out of the jurisdiction, is bound to give security for costs. *Walker* v. *Niles*, 3 Ch. Ch. 108.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under rule 375 to order security for costs; but, semble, owing to there being no rule in Ontario similar to the English rule 864 (1883), there is no power to make such an order in an interpleader issue. Belmont v. Aynard, 4 C. P. D. 342, and Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539, discussed. *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121.

A party to an interpleader issue, may be ordered to give security for costs. The dictum in Canadian Bank of Commerce v. Middleton, 12 P. R. 121, not approved. Williams v. Crosling, 3 C. B. 956, followed. *Swain* v. *Stoddart*, 12 P. R. 490.

Security for costs may be ordered in interpleader proceedings. Swain v. Stoddart, 12 P. R. 490, approved and followed. Belmont v. Aynard, 4 C. P. D. 221, 352, distinguished. The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party. *Re Ancient Order of Foresters and Castner*, 14 P. R. 47.

In a sheriff's interpleader the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue. *Knickerbocker Trust Company of New York* v. *Webster*, 17 P. R. 189.

Surety—*Married Woman.*]—Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin* v. *Pascoe*, 8 P. R. 372.

III. Rights in Actions.

Assignments Act—"*Proceeding.*"]—See *Cole* v. *Porteous*, 19 A. R. 111.

Bond.]—Goods being seized under a fi. fa. as belonging to defendants, one C. claimed them, and an interpleader issue was directed. C., with two sureties, gave a bond to pay the execution creditor the appraised value of the goods seized, if they should get a verdict, or to produce them when called upon, according to any rule of court or Judge's order. The execution plaintiffs succeeded on the issue, and sued the sureties on their bond, and the goods, which had remained in possession of the sureties, were seized there under another execution against defendant. The court, under these circumstances, refused to order the bond to be given up on production of the goods, but made an order on the obligors to deliver up the goods, leaving them to plead performance to the action. Semble, that under the condition of the bond a tender of the goods, without any order made, would discharge them. *Talcott* v. *Sicklested*, 21 U. C. R. 43.

Claimant Adopting Sale.]—Held, that where the claimant, under an interpleader order, (after first directing a sale, and then countermanding it,) accepted part of the proceeds of the sale of the goods, he thereby adopted the sale, and could not hold the execution creditor liable for a conversion. *Appelby* v. *Withall*, 8 C. P. 397.

Claimant against Creditor.] — The claimant of goods seized, by accepting an interpleader order, does not waive his right to bring trespass against the execution creditor for seizing and selling his goods. But semble, that such suit should not be brought until the decision of the interpleader order, and that if so brought the defendant might obtain a stay of proceedings on application to the proper court. *Cotton* v. *Stokes*, 10 U. C. R. 262.

In an action of trespass against the plaintiff in a writ of fi. fa. for taking, &c., the goods of the present plaintiff, the defendant pleaded that he had committed the trespasses in aid of the sheriff's officer acting under the writ, and at his request, in the execution of the same, and then shewed an interpleader order of the Judge of the county court out of which the fi. fa. had issued, by which the present

plaintiff, who had claimed the goods when seized under the fi. fa., was barred from prosecuting any claim to the goods against the sheriff or his officer, or against any person acting under or in aid of them:—Held, that the order, though valid so far as respects the sheriff and his officer, could not be a protection to the execution creditor. *Park* v. *Tanner*, 1 C. P. 414.

The interpleader order being for the sheriff's protection only, an action would lie at the suit of the claimant to recover from the execution creditor the damages incident to, or arising out of, the seizure. *McCollum* v. *Kerr*, 8 L. J. 71.

Claimant's Title.] — Certain goods of B.'s were seized under an execution at the suit of defendant, and claimed by the plaintiff. The issue was decided in the plaintiff's favour, who then sued defendant for the seizure, which he had directed:—Held, that the action would lie, and that by the Interpleader Act (C. S. U. C. c. 30, s. 5,) the result of the issue was conclusive as to the plaintiff's right to the goods, though not replied as an estoppel to the defendant's plea that the goods were not the plaintiff's. *Harmer* v. *Gouinlock*, 21 U. C. R. 260.

Concurrent Proceedings.] — Goods seized by the sheriff under an execution from the court of common pleas as the goods of B., were claimed by C. An interpleader was then awarded, to which the claimant became a party. The sheriff sold the goods and paid the proceeds into court, to await the result of the interpleader issue. During the pendency of the interpleader the claimant brought trespass in the Queen's bench against the execution creditor for the same seizure, which action was tried at the same assizes with the interpleader issue. The claimant was successful in both cases. The proceeds of the sheriff's sale were then paid to him out of court. Upon application to the common pleas to stay proceedings in the Queen's bench suit, the rule was discharged, as the court has no such power. The court suggested that the plaintiff in the Queen's bench suit be called upon to deduct the amount received out of the common pleas from his verdict in the Queen's bench, and be left free to enforce the residue in that suit—costs of the interpleader issue to be refused him. *Stokes* v. *Eaton*, 3 C. P. 267.

Damages.]—Defendants caused plaintiff's goods to be seized under an execution against his father, believing them to belong to the latter. The goods in question consisted of some articles of machinery, metal, &c., in the upper portions of a shop, where the plaintiff carried on his business. The sheriff did not take possession before the 20th, and an interpleader order was made on the 29th January, and during part of this interval the plaintiff was allowed to continue his business. The jury gave the plaintiff $1,000 damages, which was held excessive, as no damages were recoverable after date of interpleader order, and a new trial was ordered on payment of costs. *Lister* v. *Northern R. W. Co.*, 19 C. P. 408.

An execution was issued from the division court on the 1st February, and received by the bailiff on the 3rd, when the horse in question was seized. The plaintiff having claimed it, an interpleader summons issued, and the trial was fixed for the 3rd March. It was only partly heard on that day, and adjourned on the plaintiff's application. The horse when seized was given by the bailiff, at the plaintiff's request, to one A., who kept it. On the adjournment it was ordered to be given to the plaintiff, on her giving security, and A. gave the security, but kept the horse in his own possession. The interpleader suit was tried on the 7th May, and the plaintiff succeeded in it—after which she brought this action of trespass:—Held, that she was entitled to recover damages for the detention of the horse down to the 3rd March, until which time A. held it for the bailiff; but not after that time, for the order then made that she should give security, as a condition of getting the horse back, was the act of the Judge, for which defendant was not responsible. *Henry* v. *Mitchell*, 37 U. C. R. 217.

On the 6th February, the defendant wrote to the bailiff instructing him not to seize a particular horse mentioned, and he contended that as on the receipt of this letter the bailiff should have given the horse up, he was not liable for its further detention. The evidence shewed that the horse seized was not the one mentioned in the letter; but semble, that if it had been, defendant would still have been liable for the continuance of the wrongful seizure which he had authorized. *Ib.*

Disobedience of Order.] — Action against sheriff for selling goods contrary to the terms of an interpleader order. See *Black* v. *Reynolds*, 43 U. C. R. 398.

Effect of Order.]—In an action against the execution creditors by the claimant of the goods sold after the decision of an interpleader issue in his favour:—Held, 1. That the accepting and contesting the interpleader issue formed no evidence to make defendants liable for the previous seizure by the sheriff; and this having been left to the jury as tending to establish their liability, in conjunction with defendants' evidence of a direct order to seize, a new trial was granted without costs. 2. That for any loss sustained after the date of the interpleader order, (that is, in this case for the sale of the goods by the sheriff under value,) defendants were not liable. *Kennedy* v. *Patterson*, 22 U. C. R. 556.

Held, following the last case, that accepting and contesting an interpleader issue, could not make an execution creditor a trespasser by relation, or liable for the original seizure. *Phillips* v. *Findlay*, 27 U. C. R. 32.

Pleading.] — The declaration complained that defendant, as sheriff under a fi. fa. at the plaintiff's suit, levied upon a certain quantity of bricks made by F., one of the defendants in the writ, whereupon one B. claimed them, and an interpleader issue was directed and that until payment into court of the value of the bricks, or security given therefor, defendant should continue in possession; yet that though the money was not paid, nor security given, defendant wrongfully allowed the bricks to be removed by B. Defendant pleaded that the interpleader order was duly set aside; to which the plaintiff replied that the order contained a clause protecting defendant against action, and that it was not set aside for informality, but at the plaintiff's instance, long after defendant had allowed the

removal, and to enable plaintiff to bring this action:—Held, on demurrer to the replication, that the declaration was bad for not averring that the bricks belonged to F., and that the replication was also bad, being no answer to the plea. *Dafoe* v. *Ruttan*, 19 U. C. R. 334.

Setting up New Title.]—Goods were seized under defendants' execution, and being claimed by the plaintiffs under an assignment from the execution debtors, an interpleader was directed, under which the plaintiffs gave their bond for payment of defendants' claim, or any less amount to be ordered, in case they should succeed on the issue. A judgment having been obtained for defendants, an order was made allowing defendants to enforce the bond, on which judgment was accordingly obtained. Defendants (plaintiffs in the interpleader) then applied to rescind or modify this order, on affidavits stating that before the assignment to them the sheriff held an execution against these goods for more than their value, which they had paid to prevent a sacrifice, and that the goods were subsequently sold to them for less than the sum so paid. It appeared, however, that this was the first occasion on which that execution had been mentioned, or any claim made on account of it, by defendants. The court refused to interfere. *Balkwell* v. *Beldome*, 18 U. C. R. 231.

Sheriff Withholding Goods.]—It is no part of the duty of a sheriff, under an ordinary interpleader issue, which has been determined in favour of the claimant, without tender of his costs for so doing, to restore the goods seized to the custody of the claimant in the same state as they were at the time of the seizure. The proper mode, however, of raising such a question would be in an action against the sheriff for withholding the goods, and not on application to a Judge for an order on him to restore them. *McCollum* v. *Kerr*, 8 L. J. 71.

See DIVISION COURTS, VIII.—NEW TRIAL, IX. 3—SHERIFF.

INTERPRETATION ACT.

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See WORDS AND TERMS.

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INTOXICATING LIQUORS.

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V. SPECIAL STATUTORY RESTRICTIONS.

1. *Elections*, 3588.
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VII. MISCELLANEOUS CASES, 3599.

I. AUTHORITY OF PARLIAMENT AND PROVINCIAL LEGISLATURES.

See CONSTITUTIONAL LAW, II.

II. CANADA TEMPERANCE ACT.

1. *Adoption and Application of the Act.*

Date of Adoption.]—On an application to quash a conviction under the Temperance Act, 1878:—Held, that the adoption of the Act is on the day of polling. *Regina* v. *Halpin*, *Regina* v. *Daly*, 12 O. R. 330.

Effect of Revision of the Statutes.]—The effect of the revision of the statutes of Canada, brought into force by Royal Proclamation, 1st March, 1887, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity, and the

adoption of the Canada Temperance Act, 1878, by municipalities prior to that revision, has not been changed or interfered with by it. The alterations made in the phraseology of the Act by the revision are not vital, and do not materially change its character or effect. *Licence Commissioners for Frontenac v. County of Frontenac*, 14 O. R. 741.

Indian Electors.]—Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880, and amendments thereto:—Held, under the eighth objection to the conviction—tht it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it—the present proceedings did not properly bring the matter before the court. *Regina* v. *Shardear*, 11 O. R. 727.

Held, that Indian electors resident in the township of Tuscarora, in the county of Brant, being an Indian reserve, had no right to vote upon the question of repeal of the Canada Temperance Act in that county. Semble, that R. S. O. 1887 *c.* 5, s. 3, is to be interpreted as meaning that the townships named shall be townships for municipal purposes, when it becomes possible to make them such as e. g., in such a case as the present, when the Indians become enfranchised. R. S. C. c. 106, s. 12, refers to white men, but not to Indians. *Re Metcalfe*, 17 O. R. 357.

Indian Reserve.]—The Canada Temperance Act can have no operation where the Indian Act is in force. *Re Metcalfe*, 17 O. R. 357.

Locality Affected.]—The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the Canada Temperance Act, 1878, for the county of Brant was taken. The townships of Oakland and Burford, in the county of Brant, had been for the purposes of Dominion elections separated from the county of Brant and annexed to the adjoining county:—Held, that the word "county," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes. *Regina* v. *Shardear*, 11 O. R. 727.

Defendant was, in the village of Parry Sound, convicted by the stipendiary magistrate for the district of Parry Sound for a sale in the township of Humphrey of intoxicating liquor contrary to the Canada Temperance Act, 1878:—Held, that the township of Humphrey was within the territorial limits of the county of Simcoe, and that the Canada Temperance Act being in force in the county of Simcoe, was in force in the township of Humphrey. Regina v. Shavelear, 11 O. R. 727, qualified. *Regina* v. *Monteith*, 15 O. R. 290.

Offence before Repeal of Act.]—The information and conviction were drawn up for an offence against the Canada Temperance Act, 1878, while the Revised Statutes of Canada were in force before and at the time the information and proceedings thereon were had. An offence was proved to have been committed both before and after the revised statutes came into force:—Held, that the charge as laid and proved must be treated as if under the original Act, which by 49 Vict. c. 4, s. 7 (D.), was not absolutely repealed so as to affect any penalty, &c., incurred before the time of such repeal. *Regina* v. *Durnion*, 14 O. R. 672.

Scrutiny.]—A Judge of the county court, in holding a scrutiny of the votes polled at an election under the Canada Temperance Act, 1878, has only to determine the majority of votes cast, on one side or the other, by inspection of the ballots used in the election, and has no power to inquire into offences against the Act, and allow or reject ballots as a result of such inquiry. *Chapman* v. *Rand*, 11 S. C. R. 312.

Held, affirming 9 O. R. 154, that a county court Judge will not be compelled by mandamus to inquire, on a scrutiny of ballot papers, under ss. 61, 62, 63 of the Canada Temperance Act, 1878, (1) as to personation; (2) bribery; (3) the status on the voters' list of persons voting. *Re Canada Temperance Act*, 12 A. R. 677.

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2. Jurisdiction of Magistrates.

Bias.]—It was alleged that the prosecution for offences against the Act were taken before the magistrates in this case because it "was notorious that they were thoroughgoing Scott Act men," and that they had said that in no case of conviction would they inflict a less fine than $50. It was also alleged that one of the justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county:—Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case. The cases relating to disqualification by reason of favour or interest in a Judge or magistrate discussed. *Regina* v. *Klemp*, 10 O. R. 143. Followed in *Regina* v. *Eli*, 10 O. R. 727.

Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act:—1. It was contended that the magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate, with an alleged bias in favour of the prosecution in cases under the Act. It was not shewn that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it:—Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting. *Regina* v. *Brown*, 16 O. R. 41.

At the hearing the defendant attempted to shew by witnesses that the magistrate had a disqualifying interest in the case, but the

magistrate refused to admit such evidence:—Held, that the evidence was inadmissible, and, even if admissible, the rejection of it would not afford ground for quashing the conviction. Regina v. Sproule, 14 O. R. 375, not followed. *Ib.*

Giving Evidence.]—The calling as a witness of a magistrate sitting on the case does not of itself disqualify him from further acting in the case. *Regina* v. *Sproule*, 14 O. R. 375.

Judicial Knowledge.]—An information was laid before K., who described himself as "one of Her Majesty's police magistrates in and for the county of Oxford;" and he was similarly described in the summons and conviction. K.'s commission was issued on the 12th January, and appointed him police magistrate in and for the county of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had, at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed was the case here, and therefore K. could not be police magistrate for the county which included these towns as there could not be more than one police magistrate for the same county. On motion to quash the conviction:—Held, that the application must be refused: that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise: that even if there were more than one police magistrate, the other might have been appointed subsequently to K.; and the appointment of such other, and not K., would be void; and under R. S. C. c. 106, s. 17, the conviction must be deemed sufficient. *Regina* v. *Atkinson*, 15 O. R. 110.

Parry Sound.]—Held, that the township of Humphrey formed part of the district of Parry Sound for certain judicial purposes, and that the stipendiary magistrate for the district of Parry Sound had jurisdiction to try offences against the Canada Temperance Act committed in that township. *Regina* v. *Montcith*, 15 O. R. 290.

Place of Hearing.]—A person having a commission as police magistrate for the county of H., such commission not excluding the town of W., and also having a separate commission as police magistrate for the towns of W., C., G., and S., respectively, all being in the county of H., convicted the defendant at W., of an offence against the Canada Temperance Act, committed at W., but upon an information taken and summons issued by him at the town of C.:—Held, that having regard to the provisions of s. 103b of the Canada Temperance Act, R. S. C. c. 106, and R. S. O. 1887 c. 72, s. 11, the magistrate had jurisdiction by virtue of his commission for the county over the offence committed at W., and had also jurisdiction by virtue thereof to take the information and issue the summons at C.; and the fact that he described himself in the information and summons as police magistrate for the town of W. did not deprive him of the jurisdiction which he had as police magistrate for the county. Regina v. Young, 13 O. R. 198, not followed. *Regina* v. *Roe*, 16 O. R. 1.

——— *Form of Commission.*]—On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate for the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st January, 1887, contrary to the Canada Temperance Act, 1878, did unlawfully sell intoxicating liquors, &c., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his (G.'s) office, "Court House, Brantford," before him, or such justices of the peace for the said county as may then be there, to answer said charge. On an application for a prohibition to prohibit G. from hearing the complaint:—Held, that under 41 Vict. c. 4, s. 9 (O.), G. had authority to hear, adjudicate, and determine the matter of the complaint at the city of Brantford. *Regina* v. *Lee*, 15 O. R. 353.

Held, that G.'s commission was properly issued during pleasure; and that it was not necessary under s.-s. b of s. 103 of the Canada Temperance Act, that the town of Paris should be excluded from the operation of the commission; but quære, whether the police magistrate could try an offence arising within the said town. *Ib.*

Held, that there was nothing in the statute which required the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor, and under 48 Vict. c. 17, s. 4 (O.), G. had the right to occupy the court-room. *Ib.*

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition. *Ib.*

The magistrate had a commission as a police magistrate for the county of Halton and an independent and subsequent commission for the town of Oakville; and he took the information and part of the evidence at Georgetown, and then adjourned to Oakville and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction:—Held, following Regina v. Riley, 12 P. R. 98, that the magistrate had jurisdiction to sit in Oakville under his commission as police magistrate for the county, and he consequently had jurisdiction to adjourn as he did. *Regina* v. *Clark*, 15 O. R. 49.

The police magistrate for the county of Brant, whose commission excluded the city of Brantford, convicted the defendant of an offence against the Canada Temperance Act, 1878, committed at a place in the county outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford:—Held, that the magistrate had no jurisdiction to adjudicate in the city of Brantford, and that what he did was not authorized by 41 Vict. c. 4, s. 9 (O.). *Regina* v. *Beemer*, 15 O. R. 266.

Time of Offence the Test.]—The words "being within the jurisdiction of such justice" in s. 13 of the Summary Convictions Act, R. S. C. c. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the

information was laid; and an order nisi to quash a conviction for an offence against the second part of the Canada Temperance Act, on the ground that the defendant not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information nor to summon the defendant from without his jurisdiction, was discharged with costs. *Regina* v. *Bachelor*, 15 O. R. 641.

Town—*County.*]—The defendant was convicted at the town of Perth by the police magistrate for the south riding of the county of Lanark, for selling, in the said town of Perth, intoxicating liquor contrary to the Canada Temperance Act, 1878. The authority of the police magistrate was derived from a commission appointing him for the south riding of Lanark, as constituted for purposes of representation in the Legislative Assembly of Ontario. The same magistrate had been a few weeks previously by a separate commission appointed for the north riding of Lanark. The town of Perth was situate wholly within the said south riding:—Held, that said magistrate was not a police magistrate for the town of Perth within the meaning of s. 103 of the Canada Temperance Act, 1878, and that Perth could not by virtue of the said commission appointing a police magistrate for the south riding of the county be held to be a town having a police magistrate. *Regina* v. *Young*, 13 O. R. 198.

The town of Paris is an incorporated town wholly within the county of Brant. The defendant was convicted before a police magistrate, whose commission was for the county of Brant, exclusive of the city of Brantford, for that she did at the town of Paris, in said county of Brant, unlawfully sell intoxicating liquor contrary to the Canada Temperance Act, 1878:—Held, that said magistrate was not, within the meaning of s. 103 of the Canada Temperance Act, 1878, a police magistrate for the town of Paris, and that the town of Paris could not, by virtue of the said commission appointing a police magistrate for the county of Brant, be held to be a town having a police magistrate. Regina v. Young, 13 O. R. 198, followed. *Regina* v. *Bradford*, 13 O. R. 755.

Union of Counties.]—Having regard to the provisions of s. 103 b of the Canada Temperance Act, R. S. O. c. 106, as interpreted by s. 2, a union of counties united for municipal purposes cannot be said to have a police magistrate by reason of one of the counties so united having one; and a conviction by a person commissioned as police magistrate for the county of Dundas for an offence against the Act, committed in that county, being one of the united counties of Stormont, Dundas and Glengarry, was quashed for want of jurisdiction. *Regina* v. *Abbott*, 15 O. R. 640.

Village Attached to County.]—The defendant was convicted by two justices of the peace of the district of M., for a breach of the second part of the Canada Temperance Act for selling liquor at the village of B., in the district of M. The Act was in force in the village of B. only by reason of its being for municipal purposes within the county of V., within which county the Act was in force, and there was no evidence to shew that the Act was in force in the district of M. within which B. was situated:—Held, that the justices of the peace of the M. district had no jurisdiction to convict the defendant, for he could only be convicted by justices of the peace whose commission ran into V. county. *Regina* v. *Higgins*, 18 O. R. 148.

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3. *Practice and Procedure.*

(a) *Information and Summons.*

Amendment — *Several Offences.*]—Held, that an information which includes the three distinct offences of keeping for sale, selling, and bartering, intoxicating liquors, which are prohibited by s. 90 of the Canada Temperance Act, 1878, contravenes 32 & 33 Vict. c. 31, s. 25, which provides that every information shall be for one offence only. Held, that such information may be amended by striking out all the offences charged except one; and that such an amendment may be made after the case has been closed and reserved for decision. *Regina* v. *Bennett*, 1 O. R. 445.

——— *New Offence.*]—An information was laid against the defendant on the 28th December, for having on the 25th December sold intoxicating liquor, in violation of the Canada Temperance Act, 1878. Upon a search made, intoxicating liquor was found on the premises on 1st January, 1883, in the bar of the hotel. On this evidence the information was amended at the hearing on the 5th January, so as to charge the keeping and not the selling. The defendant was present at the amendment, and objected to it, but waived an adjournment and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the clerk of the peace, and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction, the same in all respects as the first, with the exception that it was for keeping for sale intoxicating liquor. This was also returned and filed:—Held, that he had power to draw up and return the second conviction, which was warranted by the evidence set out in the report of the case. Held, also, that there was no variance between the evidence and the information to warrant an amendment, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him. Held, also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only. *Regina* v. *Bennett*, 3 O. R. 45.

Held, in this case that there was no variance between the information and conviction because the former used the expression "disposal," and the latter "sale," and that if there had been, an amendment of the information would have been made under ss. 116, 117, 118 of the Canada Temperance Act, 1878. *Regina* v. *Hodgins*, 12 O. R. 367.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd February, and the parties agreed that the evidence taken

should stand for the purposes of the amended charge instead of having a needless repetition of it:—Held, that this course was unobjectionable. The defendant's application for a certiorari was refused, with costs. *Regina* v. *Hall*, 12 P. R. 142.

Form.]—Informations should be drawn with care so as to specify that the offence is against the second part of the Canada Temperance Act. *Regina* v. *Edgar*, 15 O. R. 142.

Section 91 of the Liquor License Act, 1883, 46 Vict .c. 30 (D), amended by 47 Vict. c. 32, s. 16 (D.), applies only to localities in which the Canada Temperance Act, 1878, is not in force. In this case, the information was for selling liquor, and the conviction was for "selling intoxicating liquor and having hotel appliances in the bar-room and premises:"—Held, that even if two offences had been charged in the information the magistrate had power to drop one and proceed on the other; but that in this case a second offence under s. 118 of the Canada Temperance Act was not embraced in the words used. *Regina* v. *Klemp*, 10 O. R. 143.

An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken before the police magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction shewed that the Act was in force where the offence was alleged to have been committed:—Held, that it was no objection to the information that it did not state the particular date of the offence, or, under the above circumstances, that the Act was in force in the place where it was alleged to have been committed; in any case these defects in the information were mere irregularities and were cured by R. S. C. c. 178, s. 87. *Regina* v. *Collier*, 12 P. R. 316.

Forum.]—An information under the "Scott Act" can be laid before one justice, although two must try the case. *Regina* v. *Klemp*, 10 O. R. 143.

It is imperative, under s. 105 of the Canada Temperance Act, 1878, that an information thereunder be laid before two justices, and that they both be named in the summons. *Regina* v. *Ramsay*, 11 O. R. 210.

Held, following Regina v. Ramsay, 11 O. R. 210, that a conviction under the Canada Temperance Act, 1878, upon an information laid before one magistrate only, was bad, and must be quashed. *Regina* v. *Johnson*, 13 O. R. 1. But, see, *Regina* v. *Durnion*, 14 O. R. 172; *Regina* v. *Sproule*, 14 O. R. 375; *Regina* v. *Collins*, *Regina* v. *Goulais*, 14 O. R. 613.

Names of Justices.]—Where a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well:—Held, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. *Regina* v. *Ramsay*, 11 O. R. 210.

The omission of the names of the justices from the summons was held to be no objection as the complaint was tried before the justices before whom the information was laid. Regina v. Ramsay, 11 O. R. 210, distinguished. *Regina* v. *Sproule*, 14 O. R. 375.

A summons under the Canada Temperance Act, 1878, recited the information, which was taken by two justices, to have been "laid before the undersigned," who was one of the justices only, and required the defendant to appear before him, or before the justices who should be at the time and place named to hear the complaint:—Held, that the name of the justice who was not a party to the summons need not be stated in it. Regina v. Ramsay, 11 O. R. 210, not followed on this point. Held, also, that although the summons did not conform to the facts, yet, as the two justices who took the information were both present at the hearing, and the defendant was convicted on the merits, the objection to the summons was not entitled to prevail under R. S. C. c. 178, s. 28. *Regina* v. *Durnion*, 14 O. R. 672.

The summons for an offence under the Canada Temperance Act, 1878, stated that the defendant was charged with an offence before one justice. The information was laid before two justices, one of whom issued the summons. The defendant appeared on the summons, when two justices were present, and cross-examined the witnesses for the Crown, and called witnesses on his own behalf:—Held, that the fact of so issuing the summons was a mere irregularity, which was waived by appearing on the summons. Held, also, that the justices before whom the case was to be tried need not be named in the summons. *Regina* v. *Collins*, *Regina* v. *Goulais*, 14 O. R. 613.

No Time Allowed before Trial.]—Defendant was steward of a "social club" in Walkerton. The members were elected by ballot, and upon paying an entrance fee of $1 and subscription of 25c. per month, were entitled to use the club-room and buy from the steward spirituous liquors. The members were not responsible for goods ordered or for any general expenses. An information was laid against defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on the 21st September, 1885, he was, about 4 p.m., served with a summons to appear at 8.30 a.m. next day, before two magistrates. On the 22nd September informations were, in two other cases, laid against him for similar offences, and he was in each, at 8.15 a.m., served with a summons to appear before the magistrate at 9 a.m., that day. When the magistrates' court met, the first case was partially gone into, and before it was closed the prosecution asked the magistrates to take up the second and third cases. The defendant stated that he had not understood what the summonses meant, and by advice of counsel he refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both shewed that the offences charged in each case occurred on dates different from those laid in the information. The magistrates amended the dates in the information. The defendant and his counsel were in court all the time awaiting completion of the evidence in the first, but refused in any way to plead

or to take part in the second and third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of defendant, adjourned the first case, and in the second and third cases convicted the defendant of the offences as charged in the amended informations. It was shewn by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were also affidavits shewing that the magistrates had been before the "Scott Act" interested in promoting prohibition:—Held, that the proceedings were contrary to natural justice, as the summonses were served almost immediately before the sittings of the court which defendant was called to attend. The convictions were therefore quashed, with costs against the complainant. *Regina* v. *Eli*, 10 O. R. 727.

Service.] — For the offence of selling liquor contrary to the provisions of the Canada Temperance Act, 1878, a summons was issued under 32 & 33 Vict. c. 31 (D.), made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded ex parte and convicted him:—Held, that the conviction must be quashed; and, as it appeared that the defendant had attempted to tamper with the informant, without costs. *Regina* v. *Ryan*, 10 O. R. 254.

A summons was issued for selling liquor contrary to the Canada Temperance Act, which was served by leaving it with defendant's wife at his hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing, and on the constable proving on oath the manner in which the summons had been served, the police magistrate proceeded ex parte to hear and determine the case and convicted the defendant of the offence charged, and imposed a fine. At the time of the service of the summons the defendant was absent in the States as a witness at a trial there, and there was no evidence that his wife was informed by the constable of the purport of the summons, while defendant stated that he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrate's papers had been left for him at the hotel:—Held, that under s. 39 of R. S. C. c. 178, there must in such cases be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction and the conviction must be quashed. Regina v. Ryan, 10 O. R. 254, overruled. *Regina* v. *Mabee*, 17 O. R. 194.

Waiver.] — When the information was amended so as to become, in effect, a new one, the defendant, by appearing and entering upon his defence and giving evidence, waived the necessity for a summons. *Regina* v. *Bennett*, 3 O. R. 45.

Quære, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty. *Regina* v. *Roe*, 16 O. R. 1.

(b) *Evidence.*

Adoption of the Act.] — The Canada Temperance Act, 1878, does not per se make the selling of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction:—Held, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and therefore as the jurisdiction of the magistrate did not appear, the writ of certiorari was not taken away by s. 111 of the Act. *Regina* v. *Walsh*, 2 O. R. 206.

The fact that the Canada Temperance Act, 1878 (second part) is in force in any county, &c., must be proved like any other fact necessary to give jurisdiction. *Regina* v. *Elliott*, 12 O. R. 524.

Criminating Answers.]—Held, that under s. 123 of the Canada Temperance Act, 1878, by which the accused is made a competent and compellable witness, he is not bound to criminate himself. *Regina* v. *Halpin*, 12 O. R. 330.

Held, that under s. 123 of the Canada Temperance Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself. Review of legislation on the subject of such evidence. Regina v. Halpin, 12 O.R. 330, not followed. *Regina* v. *Fee*, 13 O. R. 590.

Illegal Search Warrant.]—Evidence obtained under a search warrant illegally issued. See *Regina* v. *Doyle*, 12 O. R. 347; *Regina* v. *Walker*, 13 O. R. 83.

Intoxicating Liquor.] — The defendant swore that he did not sell any intoxicating liquors on the day charged. The recipient of some liquor sold on that day named it in his evidence for the defence, but there was no evidence that it was an intoxicating drink, the evidence for the Crown only shewing that it resembled intoxicating liquor:—Held, that there was no reasonable evidence on which to found a conviction for selling intoxicating liquor. *Regina* v. *Bennett*, 1 O. R. 445.

Keeping Liquor.]—The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act, 1878. Evidence was given of the finding of certain of the appliances mentioned in s. 119:—Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge. *Regina* v. *Brady*, 12 O. R. 358.

Order in Council.]—Held, that a magistrate cannot take judicial notice of orders in council or their publication without proof

thereof by production of the Official Gazette, and therefore that a conviction was bad, which was made without such evidence that the Canada Temperance Act, 1878, was in force in the county pursuant to the terms of s. 96 thereof. *Regina* v. *Bennett*, 1 O. R. 445.

Prior Conviction.]—The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction. *Regina* v. *Wallace*, 4 O. R. 127.

The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against said Act, and that this was the third offence. The certificate produced to prove the prior convictions simply stated that Elias Clark was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act:—Held, that there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed. *Regina* v. *Clark*, 15 O. R. 49.

Semble, that if the conviction were well drawn the similarity of the name of the person mentioned in the certificate and the defendant would afford proof of identity. *Ib.*

Section 115 of the Canada Temperance Act, which provides for the case of a previous conviction, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted," &c.:—Held, that the language of the section is peremptory; and therefore to give a magistrate jurisdiction thereunder to inquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a second offence, this was not done; and the conviction was therefore quashed. *Regina* v. *Edgar*, 15 O. R. 142.

Quære, whether a certificate of a previous conviction is sufficient primâ facie evidence of identity of the accused with the person of the same name so previously convicted. *Ib.*

Held, that s. 122, s.-s. 2, of the Canada Temperance Act, 1878, does not dispense with strict proof by production of the original record or otherwise of previous convictions where it is sought to impose the increased penalty under s. 100, and that the certificate mentioned in the section can only be admitted as proof of the number of such convictions. *Regina* v. *Kennedy*, 10 O. R. 396.

Held, that the proof of the former convictions by the certificates in this case was sufficient. Regina v. Kennedy, 10 O. R. 396, at p. 402, not followed. *Regina* v. *Kennedy*, 17 O. R. 159.

The defendant was charged with selling liquor contrary to the provisions of the second part of the Canada Temperance Act, 1878. The information charged a previous conviction for an offence under the said Act, as follows: "The informant says that the said James Kennedy was previously convicted of an offence against the said Act." A certificate by the convicting magistrate of a prior conviction was put in at the trial under s. 122, s.-s. 2, of the Act, for the purpose of proving such previous conviction:—Held, that proof of the facts set out in the report constituted no evidence of any offence, and that the police magistrate had therefore no jurisdiction, and the right to certiorari was therefore not taken away by s. 111 of the Act. *Ib.*

The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the fact, but only the evidence of it:—Held, that the question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive. Held, also, that the provisions of s. 115 of the Canada Temperance Act are directory only. *Regina* v. *Brown*, 16 O. R. 41.

Source of Information — *Instigators of Prosecution—Bias.*] — On a prosecution under the Canada Temperance Act, 1878, for selling liquor, the information on its face purported to be laid before D. and A., two justices of the peace, and both signed the summons. The summons to the defendant was to appear before two justices of the peace for the county as may be there to answer the information. The hearing was before D. and A. It was claimed that C. and M. were members of an association for the enforcement of the Act, and that they were instrumental in laying the charge and in selecting the magistrates; and that A. was also a member of the association and had been present at a meeting thereof. At the hearing S., the license inspector who had laid the information, gave evidence in support of the charge. On cross-examination he was asked whether the license commissioners were consulted before laying the charge, whether he laid it of his own accord or had consulted with any person outside of the commissioners; his reasons for suspecting and believing that liquor was sold, &c.? Whom did he see before laying the information? Did he see A., C., or M.? Had C. and M. anything to do with the selection of the magistrates, &c.? The magistrates ruled that he was not bound to answer the questions, and he refused to do so. For the defence, with the alleged view of shewing the interest of A, he was called as a witness, but he refused to be sworn and give evidence. The defendant was convicted:—Held, that the justices properly refused to allow the disclosure of the source of information on which the complaint was founded, but by their refusal to allow the cross-examination of S. in reference to his communication with A. and the other alleged members of the association, and the refusing to allow A. to be sworn as a witness, the defendant was deprived of making a full defence as authorized by s. 30 of 32 & 33 Vict. c. 31 (D.); and the conviction therefore could not be maintained, and must be quashed. *Regina* v. *Sproule*, 14 O. R. 375.

Title.]—At the trial a lease from defendant to one J. was put in and the execution proved by a witness, of two rooms in defendant's hotel, being where the bar was kept and liquor sold, but neither defendant nor J. appeared as a witness at the trial, and there was

no evidence as to its bona fides:—Held, that this was a matter for the magistrate, and as he had found against it the court could not interfere. *Regina* v. *Alexander*, 17 O. R. 458.

(c) *Search Warrant.*

Before Charge Laid.]—Before any complaint or charge was made against the defendant, a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted:—Held, that a search warrant under the Canada Temperance Act, 1878, is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises. Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant. *Regina* v. *Doyle*, 12 O. R. 347.

Form—*Justification.*]—A search warrant issued under the Canada Temperance Act is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.—A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment inter partes only. *Sleeth* v. *Hurlbert*, 25 S. C. R. 620.

One Justice—*Procuring Evidence.*]—An information charging defendant with having sold intoxicating liquor was laid before two justices of the peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two justices. Thereupon a warrant to search the premises of defendant was issued under the hand and seal of one only of the two justices. Upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in defendant's house other bottles, some decanters and glasses, and a bar or counter. On the day following the search the complainant laid a new information before the same two justices of the peace, charging the defendant with keeping intoxicating liquor for sale. Upon the hearing the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted. Upon motion to quash the search warrant and conviction:—Held, that ss. 108 and 109 of the Act were intended to provide process in rem for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or support one already begun. Held, also, that the warrant in this case was illegal because issued by one justice of the peace only. *Regina* v. *Walker*, 13 O. R. 83.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the justices of the peace and the informant were ordered to pay the defendant's costs. *Ib.*

Held, that the presumption of keeping liquor for sale created by s. 119 of the Canada Temperance Act, 1878, arises only where the appliances for the sale of liquor, mentioned in the section, together with the liquor, are found in municipalities in which a prohibitory by-law passed under the provisions of the Canada Temperance Act is in force. *Ib.*

Pending Charge.]—Pending a prosecution for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878, an information was laid by the prosecutor to obtain a search warrant, and upon search a barrel of beer connected with a beer-pump, and all the usual appliances for a sale of liquor, were found on defendant's premises. An amendment of the charge was afterwards made altering it into an information for unlawfully keeping for sale; a new information was sworn, and defendant was convicted of the latter offence:—Held, that before a search warrant can issue under s. 108 of the Act some offence against the provisions of the Act must be shewn to have been committed, and that the information for a search warrant and the evidence in this case shewed such a previous offence to have taken place. *Regina* v. *Heffernan*, 13 O. R. 616.

Held, in this case that the evidence given before the police magistrate, shewed a keeping for sale, without reference to the special provisions of s. 119 of the Act. *Ib.*

The fact that the search warrant was executed by the informer who was also chief constable was held not to be ground for quashing the conviction. *Ib.*

(d) *Trial, Conviction, and Punishment.*

Absence of Defendant.]—The defendant, having been summoned for selling contrary to the second part of the Canada Temperance Act, appeared with his counsel at the hearing and pleaded not guilty, when evidence was given for the prosecution justifying a conviction; but, at the defendant's request, an adjournment was granted. At the adjourned hearing, at which neither the defendant nor his counsel appeared, evidence was given of the service of the summons and of the facts that transpired at the prior hearing, and certificates of two prior convictions were put in, and the identity of the defendant proved. The defendant was found guilty and convicted of a third offence against the said Act:—Held, that the defendant, having once had the opportunity to defend, could not, by his failure to appear at the adjourned hearing, defeat the administration of justice; and therefore he was properly found guilty in his absence. *Regina* v. *Kennedy*, 17 O. R. 159.

Absence of Evidence.]—There being no evidence that any beverage of an intoxicating character had been sold and therefore no evidence to support a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquors:—Held, that the magistrates had no jurisdiction, and the conviction

was therefore quashed, and, under the circumstances shewn, with costs against the prosecutor. *Regina* v. *Beard*, 13 O. R. 608.

Adjournment for Judgment.]—See JUSTICE OF THE PEACE, II. 1.

Agent Exceeding Authority.] — The defendant, who was summoned to appear before the police magistrate on 14th April at F. for unlawfully selling liquor contrary to the Canada Temperance Act, instructed C. to go to W., where the police magistrate resided, to try to arrange the matter by paying such sums as should be demanded by the magistrate. On 13th April C. went to W. and settled the case by paying $50, and at the same time C., without authority and without the paper having been read to him, signed in defendant's name, as his agent, an indorsement on the information, which stated that the information had been read over to the defendant, who pleaded guilty to the same. On 14th April the police magistrate at W., without holding any court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged and fined him $50 and costs, drawing up a formal conviction, which was returned. Subsequently he returned another conviction for the same offence, reciting that the conviction was made on 14th April at F. by defendant admitting the charge:—Held, that under the circumstances the conviction could not be supported, and must be quashed. *Regina* v. *Edgar*, 17 O. R. 188.

Amendment.] — Where a conviction did not on its face shew that the Canada Temperance Act, 1878, was in force, the court on the merits allowed the return to be amended so as to shew jurisdiction, and for this purpose allowed a further return of the Gazette produced as an exhibit, but not filed. *Regina* v. *Cameron*, 12 O. R. 524.

Amount of Penalty.]—Under the Canada Temperance Act, s. 100, convicting justices may inflict a reasonable penalty in excess of $50. Remarks as to their discretion in so doing. A penalty of $60 allowed to stand. *Regina* v. *Cameron*, 15 O. R. 115.

The words "not less than $50" and "not less than $100," in the Canada Temperance Act, R. S. C. c. 106, s. 100, should be construed as "$50 and no less" and "$100 and no less:" and a summary conviction by a police magistrate for a first offence against the Act was quashed because the penalty imposed, $75, was beyond the jurisdiction of the magistrate. Regina v. Cameron, 15 O. R. 115, not followed. Simpson qui tam v. Pond, 2 Curtis 502, referred to and approved. *Regina* v. *Smith*, 16 O. R. 454.

A conviction for a breach of the second part of the Canada Temperance Act, imposed a fine of $100, and directed distress on nonpayment of the fine, and in default of sufficient distress imprisonment in the common gaol for two months unless the fine and costs, including the costs of commitment and conveying to gaol, were sooner paid:—Held, there was no power under the Act to include the costs of commitment and conveying to gaol: and the conviction was therefore bad, and must be quashed. The reasoning in Regina v. Tucker, 16 O. R. 127, and Regina v. Good, 17 O. R. 725, followed. *Regina* v. *Ferris*, 18 O. R. 476.

Appeal.] — The defendant, who was convicted by two justices under the Canada Temperance Act, 1878, removed the conviction by certiorari, and it was quashed (10 O. R. 727):—Held, that there was no jurisdiction in the court of appeal to hear an appeal which was therefore quashed with costs to be paid by the informant. *Regina* v. *Ely*, 13 A. R. 526.

Application to Quash.]—Held, that under ss. 117 and 118 Canada Temperance Act, 1878, the court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the certiorari, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication amended so as to conform to it. *Regina* v. *Brady*, 12 O. R. 358.

Buyer of Liquor.]—The provisions of 32 & 33 Vict. c. 31 (D.), apply to the Canada Temperance Act, 1878, except in so far as the provisions of the latter Act shew that they were not intended to apply thereto:—Held, that a buyer of liquor cannot in respect of a sale thereof made to him, be regarded in point of law as an aider, abettor, counsellor, or procurer, so as to come within s. 15 of 32 & 33 Vict. c. 31 (D.), and render that section applicable to an offence under s. 99 of the Canada Temperance Act, 1878. A conviction of a buyer of liquor as such aider, &c., was therefore quashed. *Regina* v. *Heath*, 13 O. R. 471.

Certiorari.]—Quære, whether s. 111 of the Canada Temperance Act, 1878, takes away the certiorari in all cases, or only in cases coming under s. 110. *Regina* v. *Walsh*, 2 O. R. 206.

Held, that s. 111 of the Canada Temperance Act, 1878, 41 Vict. c. 16 (D.), taking away the right to certiorari, applies to convictions for all offences against the preceding sections of the Act, and does not relate merely to offences against s. 110. *Regina* v. *Wallace*, 4 O. R. 127.

Held, that the conviction not having been made by a stipendiary magistrate &c., under s. 111 Canada Temperance Act, 1878, was appealable or removable by certiorari. *Regina* v. *Klemp*, 10 O. R. 143.

In cases under the Canada Temperance Act, 1878, where a magistrate has jurisdiction, certiorari is absolutely taken away, but an appeal to the sessions still exists, which, however, is itself also taken away by s. 111 of the Canada Temperance Act, 1878, when the conviction is before the stipendiary magistrate. *Regina* v. *Ramsay*, 11 O. R. 210.

The operation of s. 111 of Canada Temperance Act, 1878, in taking away the right to certiorari, is confined to the case of convictions made by the special officials named in the section. *Regina* v. *Walker*, 13 O. R. 83.

A prisoner having been convicted of an offence under the Canada Temperance Act, 1878, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that the writ of certiorari must be superseded, and following Regina v. Wallace, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and

weighing the evidence taken before the magistrate. *Regina* v. *Sanderson*, 12 O. R. 178.

Held, that the defendants were not entitled to certiorari to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the certiorari they did not shew affirmatively that the Act was not in force there. *Regina* v. *Ambrose*, 16 O. R. 251.

Commitment after Part Payment.]—See *Sinden* v. *Brown*, 17 A. R. 173.

Commitment in Default of Distress.] —It is no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant. The commitment of the defendant to the gaoler of the common gaol of the county in which the defendant was convicted is proper. *Regina* v. *Collier*, 12 P. R. 316.

Costs.]—The magistrate ordered the defendant to pay $1 for the use of the hall for trying the case, and condemned the defendant, in default of distress, to imprisonment:—Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed. Regina v. Walsh, 2 O. R. 206, commented on. *Regina* v. *Elliott*, 12 O. R. 524.

Costs against Magistrates and Prosecutor.]—See *Regina* v. *Walker*, 13 O. R. 83; *Regina* v. *Beard*, 13 O. R. 608; *Regina* v. *Eli*, 13 A. R. 526.

Defective Information.] — Held, that the conviction in this case could not stand, inasmuch as it did not appear by the information on which it was founded what the nature of the previous offence was, or where it was committed, or that it was of a similar nature to the fresh offence charged by the information. *Regina* v. *Kennedy*, 10 O. R. 396.

Distress.]—When a distress warrant has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina* v. *Sanderson*, 12 O. R. 178.

It was alleged but denied, that the bailiff had refused to receive the penalty and costs:—Held, however, that his duty was to execute the warrant of commitment, and that he had no authority to receive such payment. *Ib.*

The warrant of commitment which was not issued until after the return of the distress warrant, was dated the 14th June, and the distress warrant was not returned before the 17th June:—Held, that the warrant of commitment need not be dated at all if not issued too soon. *Ib.*

——— *Imprisonment — Warrant of Commitment — Excess of Jurisdiction — Summary Conviction Drawn up After the Act Ceased to be in Force.*]—The defendant was the salaried police magistrate for the county of Ontario, in which the Canada Temperance Act was in force prior to the 11th May, 1889, when the order-in-council declaring it in force was revoked. On the 11th January, 1889, the plaintiff was convicted before the defendant of a second offence against the Act, and adjudged to pay a fine of $100 and $12.05 costs. On the 20th March, 1889, the defendant issued a warrant of commitment reciting the plaintiff's conviction before him and the imposition of the fine and costs; declaring that the plaintiff had no goods and chattels; and directing her committal to gaol for sixty days "unless the said several sums and all the costs and charges of the said distress and of the commitment and conveying of the said Nellie Mechiam to the said common gaol, amounting to the further sum of seventy-five cents and shall be sooner paid unto you." At the trial of an action for the arrest and imprisonment of the plaintiff under this commitment a conviction of the plaintiff was put in dated 11th January, 1889, but which was not drawn up till February, 1890. The conviction adjudged that the plaintiff should pay the penalty and costs according to adjudication, and if these sums were not paid forthwith, then, inasmuch as it has been made to appear that the plaintiff had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days unless these sums and the costs and charges of conveying to gaol should be sooner paid. The conviction had not been quashed. It appeared by the examination of the defendant that the seventy-five cents in the warrant was charged for the warrant, and that the blank was left for the constable to fill in the costs of conveying to gaol. The constable, however, did not fill in the costs, but indorsed a memorandum of them on the back of the warrant, making them $13.40:—Held, that the result of ss. 62, 64, 66, and 67 of R. S. O. 1887 c. 178, which are incorporated into the Canada Temperance Act, R. S. C. c. 106, by virtue of s. 107, is to enable the convicting magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months unless the penalty and costs, and also the costs and charges of the commitment and conveying to gaol, are sooner paid. Regina v. Doyle, 12 O. R. 347, followed. 2. That, although the warrant of commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained the plaintiff was the sum of seventy-five cents mentioned in the warrant, and the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant. 3. That, as the only evidence given at the trial with regard to the defendant's appointment as police magistrate was quite consistent with his being in office at a salary under an appointment which did not expire with the Canada Temperance Act, it could not be said that the conviction drawn up in February, 1890, was a nullity. 4. That if the plaintiff was detained on account of the charges of the constable indorsed on the warrant, it was not the act of the defendant, for he never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant. 5. That, as the conviction stated that it had been made to appear to the magistrate that there was no sufficient distress, and the conviction had not been quashed, evidence would not have been admissible to shew that there was sufficient distress. 6. That the commitment having been authorized by a lawful conviction, which had not been quashed, the plaintiff was properly nonsuited. 7. That at all events the defendant was entitled to the protection of R. S. O. 1887 c. 73. *Mechiam* v. *Horne*, 20 O. R. 267.

Erroneous Finding.] — An erroneous finding on the evidence by the magistrate, which was all that was shewn in this case, is

not such a want of jurisdiction as warrants the issue of a certiorari. *Regina* v. *Wallace*, 4 O. R. 127.

The defendants were convicted by the police magistrate of the town of Peterborough, of selling intoxicating liquor in that town, contrary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction:—Held, that the question where the sale took place was one of fact, and the magistrate having found, as shewn by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the court could not review his decision. *Regina* v. *Ambrose*, 16 O. R. 251.

Fine and Imprisonment.] — Quære, whether upon a conviction for a third offence under the Canada Temperance Act, 1878, a fine of $100 cannot also be imposed in addition to imprisonment. *Regina* v. *Doyle*, 12 O. R. 347.

Form of Conviction.]—The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards when drawing up the formal conviction, the magistrate adopted the form I. 1, in the schedule to the Summary Convictions Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress:—Held, (1) that the conviction in the form I. 1 was the proper conviction to be made under the combined provisions of s. 107 of the Canada Temperance Act, 1878, and ss. 42 and 57 of the Summary Convictions Act, and not the form I. 2, to which form the minute of adjudication apparently pointed. *Regina* v. *Brady*, 12 O. R. 358.

The convictions in this case were held bad for not alleging that the Canada Temperance Act, 1878, was in force within the county. *Regina* v. *Walsh*, 2 O. R. 206. See also *Regina* v. *Bennett*, 1 O. R. 445; *Regina* v. *Elliott*, 12 O. R. 524.

Held, that an objection that the conviction did not shew upon its face the absence of either of the justices before whom the information was laid, nor the assent of the other of them that another justice should act or take part in the prosecution, was one of form merely, against which ss. 117, 118 sufficiently provided; and, even without the aid of such sections, it was doubtful whether the objection could prevail. *Regina* v. *Collins*, *Regina* v. *Goulais*, 14 O. R. 613.

It is not necessary to charge that the offence was committed through the instrumentality of a clerk, servant, or agent, as the defendant is guilty under s. 100 of the Canada Temperance Act R. S. C. c. 106, and liable to the penalties imposed, if the offence is committed by himself or any one within the class of persons above mentioned. *Regina* v. *Alexander*, 17 O. R. 458.

Convictions should be drawn with care so as to specify that the offence is against the second part of the statute. *Regina* v. *Edgar*, 15 O. R. 142.

Hard Labour — *Variance.*]—The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, bartering, and otherwise unlawfully disposing of liquor. He was adjudged to pay a fine of $50, and $5.20 costs, and in default of payment and of sufficient distress, he was adjudged to be imprisoned in the common gaol at hard labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of $5.27 costs. The proceedings having been removed by certiorari:—Held, that the first conviction was bad for want of jurisdiction to impose hard labour, which was not authorized by the Act, and that the second was bad in not following the actual adjudication as to costs, which were, as shewn by the magistrate's minute, $5.20, and not $5.27. *Regina* v. *Walsh*, 2 O. R. 206.

Under the Canada Temperance Act there is no power to order imprisonment at hard labour. *Regina* v. *Tucker*, 16 O. R. 127.

Locality.]—The defendant was convicted before the police magistrate of the town of S., for unlawfully keeping for sale intoxicating liquor, &c., at the said town contrary to the Canada Temperance Act, 1878. The depositions were to that effect, and the evidence shewed that the liquor was found upon the premises of the defendant in the said town:—Held, that the local jurisdiction of the police magistrate sufficiently appeared. *Regina* v. *Doyle*, 12 O. R. 347.

Notice of Conviction—*Costs.*]—A prisoner having been convicted of an offence under the Canada Temperance Act, 1878, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that it was not necessary to serve a minute of the conviction on the defendant, as s. 52 of 32 & 33 Vict. c. 31 (D.), only requires such service in case of an order, and that defendant must take notice of the conviction at her peril. *Regina* v. *Sanderson*, 12 O. R. 178.

It was alleged that too large a sum had been charged for costs, but held, that the conviction being regular on its face, and not shewing any excess of jurisdiction, such an irregularity (even if it existed) could not be inquired into on an application for prisoner's release. The prisoner was therefore remanded. *Ib.*

Property Qualification of Magistrate.]—See *Regina* v. *Hodgins*, 12 O. R. 367.

Second Offence—*Default in Distress.*]—The conviction in this case was for a second offence and imposed imprisonment in default of payment of the fine and no distress:—Held, that ss. 57 and 62 of the Summary Convictions Act, which form a part of the Canada Temperance Act, 1878, authorize imprisonment not exceeding three months in default of sufficient distress. *Regina* v. *Doyle*, 12 O. R. 347. See also, *Mechiam* v. *Horne*, 20 O. R. 267.

Several Offences.]—Quære, whether the convictions in this case were not open to objection on the ground that the information embraced more than one offence, and whether the magistrate having, in this respect, disregarded the express directions of the Act, 32 & 33 Vict. c. 31, s. 25, made applicable by the Canada Temperance Act, 1878, he might not be said to have acted without jurisdiction. *Regina* v. *Walsh*, 2 O. R. 206.

Time.]—The allegation in the conviction that the offence was committed between the 30th June and the 31st July, was held a sufficiently certain statement of the time. *Regina* v. *Wallace*, 4 O. R. 127.

Two Defendants.]—Held, that the conviction in this case was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants, having paid his half of the fine and costs, might be imprisoned for the other's default: and this defect was not cured by ss. 87 and 88 of the Summary Convictions Act, R. S. C. c. 178. *Regina* v. *Ambrose*, 16 O. R. 251.

Variance.]—Held, that in this case it was no objection to the conviction that it was for keeping and selling while the information charged the keeping only. *Regina* v. *Bennett*, 3 O. R. 45.

Held, that the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. *Regina* v. *Brady*, 12 O. R. 358.

The adjudication and minute of conviction did not award distress, but provided, in default of payment forthwith of fine and costs, imprisonment, while the conviction ordered in default of payment forthwith, distress, and in default of sufficient distress, imprisonment:—Held, following Regina v. Brady, 12 O. R. 358, 360-1, that the conviction was bad. *Regina* v. *Higgins*, 18 O. R. 148.

See, also, *Regina* v. *Hartley*, 20 O. R. 481.

Witness Fees.]—It was contended that the magistrate acting under the Canada Temperance Act, exceeded his jurisdiction by ordering the defendant to pay $3 as inspector's fee, $2 for an interpreter, and $1 justice's costs:—Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under s. 58 of the Summary Convictions Act, as to the justice seems reasonable; and an interpreter may properly be treated as a witness. *Regina* v. *Brown*, 16 O. R. 41.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and certiorari would not therefore lie (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction. *Ib.*

Quære, whether there was power under the Canada Temperance Act to order defendant to pay a sum for two days' attendance of the inspector and his mileage. *Regina* v. *Tucker*, 16 O. R. 127.

4. Miscellaneous Cases.

Application of Fines.] — Semble, that notwithstanding Fitzgerald v. McKinlay, 21 C. L. J. 299, the informer, under Canada Temperance Act, 1878, may be entitled to half of the fine. *Regina* v. *Klemp*, 10 O. R. 143.

——— *Incorporated Town — Separated from County for Municipal Purposes.*]—By order in council made in September, 1886, it is provided that "all fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county . . shall be paid to the treasurer of the city, incorporated town, or county, &c.:—Held, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county. *Town of St. Stephen* v. *County of Charlotte*, 24 S. C. R. 329.

——— *Money Paid and Received.*] — The Canada Temperance Act came into force in the united counties of Leeds and Grenville on the 1st May, 1886. Section 2 of the Act declares that the word "county" includes every town, township, &c., within the territorial limits of the county, and also a union of counties. The town of Brockville was then an incorporated town separate from the counties for municipal purposes. An order-in-council passed pursuant to 49 Vict. c. 48 (D.), provided that all fines recovered under the Canada Temperance Act, 1878, within any city or county which had adopted the Act, should be paid to the treasurer of the city or county as the case might be. Subsequently another order-in-council was passed cancelling the former, and providing for payment of such fines to the treasurer of the city or incorporated town, separated for municipal purposes from the county, or county within which they were recovered:—Held, that fines imposed and recovered for offences against the Act committed within the town of Brockville, paid over by the police magistrate of Brockville to the treasurer of the united counties of Leeds and Grenville between the dates of the two orders-in-council, could not, after the passing of the second order-in-council, be recovered back by Brockville. Judgment below, 17 O. R. 261, reversed. *United Counties of Leeds and Grenville* v. *Town of Brockville*, 18 A. R. 548.

Enforcement of Act.]—Held, that the Ontario legislation, R. S. O. 1877 c. 181, ss. 92, 93, 105, 106; 41 Vict. c. 14, ss. 6, 8; 44 Vict. c. 27, ss. 11, 12, 13, 14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, which represent a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not ultra vires the local legislature; and that the plaintiffs were entitled to recover from the defendants the expenses of carrying out the provisions of the Temperance Act in the license district of F. formed out of a part of the county of F. *License Commissioners for Frontenac* v. *County of Frontenac*, 14 O. R. 741.

The general law as to prohibition respecting all Canada, which can only be enacted by the

Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province, within the meaning of B. N. A. Act, s. 92, item 16, and it may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation under B. N. A. Act, s. 92, item 4. The legislation in question might also fall within the scope of B. N. A. Act, s. 92, item 8, as pertaining to municipal institutions in the Province. License Commissioners of Prince Edward v. County of Prince Edward, 26 Gr. 432; License Commissioners of the North Riding of the County of Norfolk v. Corporation of Norfolk, 14 O. R. 749, concurred in. *Ib.*

A portion of the sum claimed in this action, was alleged to be a deficit brought forward from the previous year. It appeared, however, that the amount was the whole sum estimated for that year:—Held, that this was a matter of form only, as it could be sued for as a substantive debt upon the estimates of the former year. *Ib.*

Sale of Liquors for Use in County where Act in Force—*Avoidance of Contract—Repeal of Act.*]—In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to the vote for the repeal of the Act, and the remainder subsequent to a successful vote for its repeal, but before the order-in-council bringing the Act into force had been revoked:—Held, that the price of the liquors sold before were not, but that of those sold after the successful vote were, recoverable. Pearce v. Brooks, L. R. 1 Ex. 217, followed. *Smith* v. *Benton*, 20 O. R. 344.

III. Dominion License Act.

Salaries of License Inspectors — *Approval by Governor-General in Council.*]—On a claim brought by the board of license commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the department of inland revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by order-in-council under s. 6 of the said Liquor License Act, 1883:—Held, affirming 2 Ex. C. R. 293, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the governor-general in council. *Burroughs* v. *The Queen*, 20 S. C. R. 42.

IV. Ontario License Acts.

1. *Application.*

Brewer.]—A brewer licensed as such by the government of Canada, under 31 Vict. c. 8 (D.), requires no license under the Tavern and Shop License Act of Ontario, 32 Vict. c. 32, s. 1, as amended by 33 Vict. c. 28, for selling ale manufactured at his brewery. The clause allows the selling by wholesale only, "in casks or vessels containing not less than five gallons each." Quære, whether a sale of more than five gallons put up in quart bottles would contravene the Act. Semble, not, for that the object was to prevent sales of less than five gallons. Whether the statute, if applicable to licensed brewers, would have been within the power of the provincial legislature, was a question raised, but not decided. *Regina* v. *Scott*, 34 U. C. R. 20.

The defendant, a brewer licensed to manufacture ale, &c., at Palmerston, under a Dominion license, had a cellar or vault at Brantford, where he stored such ale, &c., and sold it in quantities not less than allowed to be sold by wholesale:—Held, that the sale was authorized under the Dominion license, and that a provincial license was not required. *Regina* v. *Young*, 8 O. R. 476.

See Constitutional Law, II., 16.

——— *Dominion Licenses—Wholesale License—Sale in License District to Unlicensed Persons.*]—A brewing company, holding the Dominion license referred to in s. 51, s.-s. 1, of the Liquor License Act, R. S. O. 1897 c. 245, and also a provincial wholesale license, as defined by s.-s. 4 of s. 2 of that Act, sold through their manager liquor in wholesale quantities to an unlicensed person in the district in which they had obtained their provincial wholesale license:—Held, that the sale was authorized under s.-s. 3 of s. 51 of the Act; and that it was not requisite for the company to take out another wholesale license in the form issuable under s. 34. *Regina* v. *Guittard*, 30 O. R. 283.

Indian Land—*Dickinson's Island.*]—Defendant was convicted for selling liquor without a license on Dickinson's Island, in Lake St. Francis:—Held, on an application for a certiorari: 1. That the island was part of the county of Glengarry, and therefore within the jurisdiction of the police magistrate. 2. That the Liquor License Act applies to Indian land under lease from the Crown to a private individual. *Regina* v. *Duquette*, 9 P. R. 29.

Warehouse.] — A cellar in a brewery where beer is stored is a "warehouse" within the meaning of s. 61 of the Liquor License Act, R. S. O. 1887 c. 194. *Regina* v. *Halliday*, 21 A. R. 42.

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2. *By-laws and Regulations.*

Approval of Electors.]—The court refused a rule nisi to quash a by-law passed eighteen months before, for licensing and regulating houses of public entertainment, the objection being that it was not, before the final passing, approved by the electors. *In re Shirley and Town of Windsor*, 23 U. C. R. 569.

Approval of Majority.]—By-laws for prohibiting the sale of spirituous liquors, &c., which, under 16 Vict. c. 184, s. 4, require to be submitted to the electors, must be adopted and approved of by a majority of all the qualified municipal electors of the municipality, not merely by a majority of those who may attend at the meeting called to consider such by-law. Where the by-law which provided for calling such meeting assumed that the approval of the majority of the voters present would be sufficient:—Held, that it was nevertheless proper to move against the then proposed by-law, after it had been passed on such approval, and not against that which laid down the improper course of proceeding. *In re McAvoy and Sarnia*, 12 U. C. R. 99.

Billiard Tables.]—A by-law fixing the sum to be paid for a license for billiard tables in a town at $300, and enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold:—Held, valid: that the sum charged was not excessive: that such a by-law was properly submitted to the electors under 37 Vict. c. 32, s. 23 (O.), which was not confined to tavern licenses; and that the enactment as to means of communication was within the power to regulate and govern, and was not unreasonable. *In re Scully and Town of Owen Sound*, 37 U. C. R. 289.

A provision in a town by-law, that no billiard table or bowling alley should be licensed or kept in any tavern, inn, or house of entertainment:—Held, authorized by the power given to corporations to regulate billiard tables and bowling alleys: 36 Vict. c. 48, s. 379, s.-ss. 3, 35, 36, (O.). *In re Arkell and Town of St. Thomas*, 38 U. C. R. 594.

Cancellation of License.]—A clause in a by-law which cancelled the license of a person convicted of the infringement of a by-law:—Held, beyond the authority of the corporation. *In re Bright and City of Toronto*, 12 C. P. 433; *Smith* v. *City of Toronto*, 11 C. P. 200.

Creating Special Forum.]—A by-law providing that if any dispute shall arise between the guests and the innkeeper, it shall be referred to any justice of the peace, whose decision by his oral order shall be final as to the quantum of the charge:—Held, unauthorized. *Baker* v. *Municipal Council of Paris*, 10 U. C. R. 621.

Discrimination.]—Held, that under 13 & 14 Vict. c. 65, municipal corporations had power to discriminate between the different kinds of public houses, and to charge differently for a saloon and a tavern license, and require different accommodations. *In re Grand and Town of Guelph*, 27 U. C. R. 46.

A township corporation cannot make the sum payable for tavern licenses vary according to the locality; as, in certain villages named $100, and elsewhere in the municipality $75. Such a distinction is contrary to the spirit, at least, of s. 24 of the Municipal Act, 36 Vict. c. 48 (O.). *In re Donelly and Township of Clarke*, 38 U. C. R. 599.

Disfranchisement of Class.]—A local option law carried by a vote of seventy-one to fifteen was quashed where it appeared that the returning officer had refused to accept the votes of tenant voters, seventy-four of whom were on the list and had the right to vote, though it was not shewn that more than a very small number of these voters had made any attempt to vote or had expressed any intention of voting, or had heard of the returning officer's refusal. The election doctrine that irregularities should not be held fatal unless they actually affect the result does not apply where a class is disfranchised in a by-law contest. In re Croft and Peterborough, 17 A. R. 21, applied. Woodward v. Sarsons, L. R. 10 C. P. 733, considered. *In re Pounder and Village of Winchester*, 19 A. R. 684.

Forfeiture of License.]—Action for illegally depriving plaintiff of his tavern license. The defendants pleaded, that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendants had no power to pass such a by-law:—Held, that no action can be brought for the infringement of a by-law till one month after it has been quashed. *Smith* v. *City of Toronto*, 11 C. P. 200.

Form of Bylaw—*Shop Licenses—Amount of License Fee.*]—Held, that a by-law passed by a city respecting saloon and shop licenses did not require to state the number of inhabitants of the city so as to shew on its face that the number of licenses fixed was within the statutory limit. *Re Croome and City of Brantford*, 6 O. R. 188.

A provision in the by-law limited the number of licenses "for the ensuing year, beginning on 1st May, 1884, or for any further license year until this by-law is altered or repealed:"—Held, valid. *Ib.*

A further provision was, being merely a re-enactment of the statute, that the by-law should remain in force until altered or repealed:—Held, unobjectionable. *Ib.*

An objection that the by-law provided for a duty in excess of $200, which, it was urged, should have been submitted to the electors by separate by-law, was overruled, because in fact the by-law contained no such provision. *Ib.*

The by-law did not state whether it was passed under the Dominion or local legislation:—Held, that as it stated no particular power as its basis it must be judicially regarded as emanating from that power which would authorize its passage. *Ib.*

Semble, if the Dominion legislation was in force, then, even if passed under the Ontario Act, under s. 146 of the Dominion Act, which provided that all local laws passed for regulating or restraining the traffic in liquors were to be in force until 1st May, 1884, it was in force when passed and until repealed by that section, and if so repealed was no longer in force and could not be quashed: if, however, the Ontario Act was in force then it was valid under that Act; and the sending a certified copy of the by-law to the inspector under s. 44, s.-s. 2, of the Dominion Act did not disentitle the applicant to invoke the aid of the Ontario Act in its support. *Ib.*

Another provision was, that "Every person receiving a shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor:"—Held, that this was not ultra vires and in restraint of trade. *Ib.*

It was also objected that s. 35 of the License Act of 1884, 47 Vict. c. 35 (O.), in effect repealed the by-law as it made the duty more than $200, and the council had not submitted the question to the electors:—Held, that if repealed it could not be quashed: but semble, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed unless the council saw fit prior to the 15th April, 1884, to amend the by-law as to the license duty payable thereunder. *Ib.*

Government Duty.]—A provision in the by-law of a town that the duties to be paid for a tavern license in the town should be $100, and for a shop license $200:—Held, to mean that the sums mentioned should include

the government duty, and therefore to be within the power of the council, under 39 Vict. c. 26, s. 16, s.-s. 2. *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

Hours of Closing.]—A by-law enacted that "Every innkeeper shall shut up his bar-room, the outer as well as the inner doors, each night at eleven o'clock and keep them closed during the night, except on Saturday night, when they shall be closed at the same hour and not opened again until four o'clock on Monday morning, except for the entrance of himself or servant—during which time no spirituous or intoxicating liquors are to be sold or furnished to any one:"—Held, bad. *Baker* v. *Town of Paris*, 10 U. C. R. 621.

That all tavern-keepers obtaining license under this by-law, should shut up their bar and bar-room at 10 p.m., and keep it closed on Sunday:—Held, good. *In re Greystock and Otonabee*, 12 U. C. R. 458.

That in all places in the town licensed to sell intoxicating liquors, no sale or other disposal thereof should take place therein after seven on Saturday night until six on Monday morning, nor on any other day between 10 p.m. and 6 a.m.; and that during these hours the bars of all taverns should be kept closed:—Held, beyond the jurisdiction of the council, as being an exercise of the powers transferred by the Act, 39 Vict. c. 26, s. 1, (O.), to the board of license commissioners. *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

A clause in a town by-law for the regulation of taverns and shops licensed to sell spirituous liquors, prescribing the hours during which liquors should not be sold, or the bar-rooms kept open:—Held, unauthorized, following the last case *In re Arkell and Town of St. Thomas*, 38 U. C. R. 594.

A provision that in all shops where liquor is sold no sale shall take place between 7 p.m. and 7 a.m.:—Held, valid, under 39 Vict. c. 26, s. 12 (O.). *Ib.*

Held, within the power of the corporation under C. S. U. C. c. 54, to compel by by-law, the closing of bar-rooms between certain hours of the night: and a by-law compelling their being closed between 12 p.m. and 5 a.m. was not deemed to be beyond their power. *In re Bright and City of Toronto*, 12 C. P. 433.

That no innkeeper shall be allowed to sell, give, loan, barter, or dispose of in any way, any intoxicating liquors after the hour of ten o'clock at night, or before five in the morning, travellers excepted:—Held, bad. *In re Barclay and Township of Darlington*, 12 U. C. R. 86.

Imprisonment.]—A by-law, after several provisions as to tavern licenses, and the conduct of taverns under them, enacted that persons wilfully neglecting, refusing, or failing to comply with the provisions of the preceding clauses of this by-law, or selling by retail without license, should be liable to a fine of £5, or failing to pay the same (saying nothing as to distress), to twenty days' imprisonment:—Held, that so much of the clause as related to the imprisonment of offenders on failing to pay must be quashed. *In re Greystock and Otonabee*, 12 U. C. R. 458.

Inns.]—Held, that under 13 & 14 Vict. c. 65, s. 4, municipal corporations could not prohibit altogether the licensing of inns for the sale of wines, or spirituous liquors by retail, or to be drunk therein; but that that section was intended to give authority either to prohibit the licensing of houses of public entertainment only, as distinct from inns (the one having a public bar-room and the other not), or to prevent any one or more particular inns from being licensed. *In re Barclay and Darlington*, 11 U. C. R. 470.

License Commissioners—*Resolution respecting Right to Sell.*]—The commissioners in good faith, intending to act within the scope of their powers, passed a resolution, "That no intoxicating liquors shall, under any pretence, be sold in any tavern, &c, to any person who has the habit of drinking intoxicating liquors to excess, or the wife, &c., of such person, or any person concerning whom notice had been given to the landlord by the husband, &c., of such person, or any justice of the peace or inspector, that such person is in the habit of drinking," &c. The licenses were issued to the persons to whom the notices were addressed, subject to the right of suspending them for breach of the resolution. The defendant justified upon information obtained respecting the plaintiff, upon which he followed the terms of the resolution:—Held, that the license commissioners had no power to pass the resolution. *Roberts* v. *Climie*, *Murphy* v. *Climie*, 46 U. C. R. 264.

——— *Resolutions Fixing Hours of Sale of Liquor.*]—License commissioners appointed under R. S. O. 1887 c. 194, on 17th April, passed a resolution providing that, after 1st May following, in all places where intoxicating liquors are or may be sold by wholesale or retail, &c., no such sale or disposal of the same shall take place therein, &c., between midnight and 5 a.m., which was subsequently amended by substituting 11 p.m. for midnight:—Held, that under s. 4, enabling the license commissioners to pass resolutions for regulating taverns and shops, there was power to pass the resolutions here; and that such power was not interfered with by ss. 32 and 54, no by-laws on the subject having been passed by the municipal council. Quære, whether there is power on notice of motion to quash resolutions of this kind. Daniels v. Burford, 10 U. C. R. 478; Cæsar v. Cartwright, 12 U. C. R. 341, commented on. *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665.

——— *Regulations.*]—A regulation by license commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable. Regina v. Belmont, 35 U. C. R. 298, questioned. *Regina* v. *Martin*, 21 A. R. 145.

Limiting Certificates.]—Held, that before 37 Vict. c. 32 (O.) a township municipality was not authorized to pass a by-law that in each and every year thereafter there should not be more than four certificates for obtaining tavern licenses issued in the municipality: for that there was no power to limit the number of such certificates, and there was a substantial difference between that and limiting the number of licenses. Quære, as to the necessity for an annual by-law before 37 Vict. c. 32 (O.). *In re Gifford and Township of Darlington*, 35 U. C. R. 285.

Limiting Licenses.]—A by-law was passed by a township on the 25th March, 1854, enacting: 1. That there should be a license

issued for one inn only, where spirituous liquors should be sold, and that such inn should be in Peterborough east. 2. That there should be one shop license, and no more, granted within the said municipality, and that such license should be granted to one of the store-keepers in the village of Keene. The peice of the township swore that the by-law was passed, because 244 out of the 480 electors had expressed themselves in favour of limiting as much as possible the sale of spirituous liquors; and that at the last election three councillors out of the five were returned on the understanding that they should support such a measure:—Held, that these facts could not affect the question, and that these sections of the by-law must be quashed. *In re Greystock and Otonabee*, 12 U. C. R. 458.

Local Option By-law—*Omission to Name Deputy Returning Officers.*]—When a by-law requires the assent of the electors, the deputy returning officers to take their votes must be named therein, and a by-law passed under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, which omitted their names, was quashed. *Re McCartee and Township of Mulmur*, 32 O. R. 69.

Quære, has a municipal council power, under 12 Vict. c. 81, s. 14, to pass a by-law declaring that there shall be "no new inn." *Regina ex rel. Gamble* v. *Burnside*, 8 U. C. R. 283.

By-laws passed by municipal corporations wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine:—Held, valid, as being within the power of the corporation, under 32 Vict. c. 32 (O.). *In re Slavin and Village of Orillia*, 36 U. C. R. 159.

The words "in any year" in s. 20 of the Liquor License Act mean "calendar year," and not "license year," and a by-law under that section, limiting the number of licenses for the ensuing or any future year, must be passed in the month of January or February in any year. *Re Goulden and City of Ottawa*, 28 O. R. 387.

Motion to Quash—*Delay.*]—A by-law requiring amounts to be paid for tavern license fees in excess of $200, directed, as required, the votes of the electors to be taken thereon. The by-law was passed on the 25th February, 1889, and on 8th April, 1890, a motion was made to quash it on the ground that the votes of all the duly qualified electors had not been taken thereon, but only those of freeholders. By reason of the by-law the number of licenses was decreased, and had the motion been allowed it would have been too late for the corporation to make any change, by increasing the number of licenses so as to make up the deficiency, or to submit a new by-law. The only evidence in support of the motion was very weak and no person whose vote had been rejected complained. The applicant himself was a tavern-keeper who obtained a license for the year 1889, under the by-law without any objection, and had applied again for the current year:—Held, the by-law being valid on its face, the court, under the circumstances, considering the lapse of time before motion made, in the exercise of its discretion would not interfere. *Bann* v. *Brockville*, 19 O. R. 409.

Municipal Authority—*Form of By-law.*]—Held, that the council of the corporation of the city of Toronto had the power under R. S. O. 1877 c. 181, s. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law [39 Vict. c. 26 (O.)] granting limited powers to the board of license commissioners. *Re Boylan and City of Toronto*, 15 O. R. 13.

Held, that though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the council of the city and could have had no operation elsewhere than in the city, shewed that it must, by reasonable intendment, be held operative there. *Ib.*

Held, that the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the legislature to the city to pass the same. *Ib.*

Naming Licensees.]—Municipal councils have no authority to appoint, by their by-laws, the persons who are to receive tavern licenses. *In re Coyne and Dunwich*, 9 U. C. R. 448.

A by-law directing licenses to be granted to sell spirituous liquors for the year to two parties named, and that no such licenses should be issued to any other persons:—Held, good, under the special circumstances set out in the case. *Terry* v. *Township of Haldimand*, 15 U. C. R. 380.

Police Commissioners — *Notice over Door.*]—By the first five sub-sections of s. 246 of C. S. U. C. c. 54, city councils could pass by-laws for granting tavern licenses, and declaring the conditions to be complied with by applicants, &c., and by s. 251 every person licensed was compelled to exhibit in large letters over the door the words, "Licensed to sell wine, beer, and other spirituous and fermented liquors," under a penalty of $1. By 25 Vict. c. 23, these sub-sections of s. 246 were repealed as regarded cities, and the same powers substantially given to the board of commissioners of police, but no express authority to pass by-laws:—Held, that even if all the powers of the city council were transferred to the commissioners, they clearly could not impose a higher penalty for not exhibiting the words prescribed, than provided for by s. 251; and a conviction under their by-law imposing a fine of $5 was therefore quashed. *Regina* v. *Lennox*, 26 U. C. R. 141.

——— *Hours of Closing.*]—32 Vict. c. 32, s. 6 (O.), enables the police commissioners to pass by-laws for "regulating" licensed taverns. A by-law under this authority provided that the bar-room should be closed and unoccupied, except by members of the keeper's family or his employees, and should have no light therein except the natural light of day, during the time prohibited by the by-law for the sale of liquors, i. e., from 12 at night to 5 a.m.:—Held, that the by-law was unauthorized, and a conviction under it was quashed. *Regina* v. *Belmont*, 35 U. C. R. 298.

Prohibition.]—A township municipality, under 13 & 14 Vict. c. 65, s. 4, and 16 Vict. c. 184, s. 4, enacted, 1, that the number of taverns which should receive license to sell spirituous liquors should not exceed one: 2.

that the person obtaining such license should pay £10 annually, above the duty imposed by the imperial or provincial statute for such license. It appeared by the affidavits that a by-law to prohibit absolutely the sale of spirituous liquors, &c., had been submitted to the electors but not passed, as a sufficient number did not attend the meeting; that this by-law had not been so submitted; and that the township contained a population of 6,000: —Held, that the first enactment was bad, as amounting in effect to a total prohibition, and being therefore an attempt to evade the provisions of 16 Vict. c. 184, s. 4, by which no such by-law can be passed without the assent of a majority of the electors; and that the second enactment was also bad, being inseparably connected with the first. *In re Barclay and Township of Darlington*, 12 U. C. R. 86.

A by-law of a town passed under 39 Vict. c. 26, s. 2, s.-s. 3 (O.), limiting the number of shop licenses to be issued in the town to one, and directing the holder of such license to confine the business of his shop exclusively to the keeping and selling of liquor: —Held, bad, as being in effect prohibitory and creating a monopoly. *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

Publication—*Polling Places.*]—Notice of intention to submit a local option by-law to the votes of the township electors was given in proper form and for the requisite number of times in a paper published in an incorporated village, the bounds of which did not actually touch, though they came close to those of the township in question. This paper was the nearest paper; it had a large circulation in the township and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the township in question. One of the polling places was described merely as being "at or near" a certain village. It was shewn that the village was a very small one, and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shewn that the poll was held in a house close to the house in which the poll had been held in the next preceding municipal election, that house itself having been moved away. Another polling place was specifically described by place, lot, and concession, but there was an error in the number of the concession. It was shewn that all the proceedings had been taken in good faith, that the poll was very large, and it did not appear that any one had been misled by any of these informalities:—Held, therefore, that the court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question. *In re Huson and Township of South Norwich*, 19 A. R. 343, 21 S. C. R. 669.

Removal of Signs.]—Held, that it was not an excess of authority of a committee of the corporation for the purpose of granting or refusing tavern licenses under s.-s. 1 of s. 246 of C. S. U. C. c. 54, to compel the removal from over the door of taverns not licensed to sell liquor of a sign board or other notice of such license being granted them. *In re Bright and City of Toronto*, 12 C. P. 433.

Removal to Other Premises.]—It was provided in the by-law that the holder of a tavern or shop license should not be permitted to sell intoxicating liquor at any other than the house for which he had received a license, except that in case of his removal to another house the inspector might indorse his permission on the license:—Held, beyond the jurisdiction of the council, as being an exercise of the powers transferred by the Act, 39 Vict. c. 26, s. 1 (O.), to the board of license commissioners. *Re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

Repeal.]—Held, that the corporation of a village incorporated in and separated from a township, in which before and at the time of said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, under 32 Vict. c. 32, s. 10 (O.), by a by-law not submitted for the approval of the electors of the village, repeal the prohibiting by-law so far as it affected the village. *In re Cunningham and Village of Almonte*, 21 C. P. 459.

Requiring Security and Certificate of Character.] — That persons applying for a license to keep an inn should produce a certificate from four municipal electors residing in the locality where such house was to be kept of his honesty and good moral character, and a certificate from the township treasurer that he had deposited a bond with such treasurer, made in favour of the reeve and his successors, approved by the councillors of the ward in which such tavern should be situated, binding him in £50, with two sufficient sureties in £25 each, to abide by all the by-laws of the township council for the regulation of such houses: —Held, good. *Re Greystock and Otonabee*, 12 U. C. R. 458.

Restraining Disorderly Conduct.]—A clause in a by-law of a town, that no gambling, profane swearing, blasphemous or grossly insulting language, or any indecency or disorderly conduct should be permitted in any licensed tavern or shop:—Held, valid, as being authorized by the Municipal Act, s. 379, s.-ss. 33, 36, and by the general police power of the council. It was held no objection that the by-law contained no limit to its duration, as that was determined by the statute 39 Vict. c. 26, ss. 2, 6, 12. *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

Sale by Retail — *Quantity — Locality— Days Named for Appointment of Agents and Declaring the Result of Polling — Notice— Christmas Day and New Year's Day.*]—A by-law passed by a township council under 53 Vict. c. 56, s. 18 (O.), was intituled a by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa; and enacted that "the sale by retail of spirituous liquors is and shall be prohibited in every tavern, inn, or other house or place of public entertainment; and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment:"—Held, that the last part of the clause must be read in connection with the previous part so as to limit the prohibition to a sale by retail, which is now put beyond question by 54 Vict. c. 46, s. 1 (O.) Slavin v. Corporation of Orillia, 36 U. C. R. 159, and In re Local Option Act, 18 A. R. 573, followed. Held, also, that the quantity of liquor to be deemed a sale by retail need not appear in the by-law, being defined by the statute; that the locality within which the liquor could be sold was sufficiently indicated;

and that the want of a penalty in the by-law did not invalidate it. The day named in the by-law for the appointment of agents to attend at the final summing up of the votes was nearly three weeks after the first publication of the by-law, and the day named for the clerk to declare the result of the polling was the second after said polling:—Held, both days sufficient. The notice at the foot of the by-law after certifying that the foregoing (i. e., the copy of the by-law published) was a true copy of the proposed by-law of the township of Mariposa which had been taken into consideration by the council thereof, and which would be finally passed in the event of the electors' assent being obtained thereto after one month's publication in a named paper, stated that all persons were required to take notice that on the 4th January, 1892, a poll will be opened, naming the statutory hours, at the several polling places named in the by-law for the purpose of receiving the votes of the electors on the same. Two of the days of publication were Christmas and New Year's Day:—Held, that the formal notice was sufficient; and the fact of publication on the days named did not render the publication invalid; publication not being a judicial act so as to prevent publication on those days. *Brunker* v. *Township of Mariposa*, 22 O. R. 120.

Sale to Idiots.] — A by-law prohibiting the sale of intoxicating liquors to idiots and insane persons:—Held, good, under C. S. U. C. c. 54. *In re Ross and United Counties of York and Peel*, 14 C. P. 171.

Sale to Intoxicated Person.] — That tavern-keepers licensed under this by-law should not give or sell liquors to any person in a state of intoxication:—Held, good. *In re Greystock and Otonabee*, 12 U. C. R. 458.

Sale to Minors.]—A provision that no sale, &c., of any intoxicating liquor should be made in any licensed tavern or shop to any child, servant, or apprentice, without the consent of a parent, master, or legal guardian:—Held, valid, for being authorized by the Municipal Act, 36 Vict. c. 48, s. 379, s.-s. 31, independently of 37 Vict. c. 32 (O.), the power was not transferred to the board of license commissioners, by 39 Vict. c. 26. *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580.

A prohibition law against the giving of liquor to any minor or apprentice without a written order from his guardian or master:—Held, good, for the statute authorizes the requirement of a consent, and the condition as to its being written was not open to objection. *In re Arkell and St. Thomas*, 38 U. C. R. 594.

Sale to Minors or Inebriates.]—That no innkeeper shall sell intoxicating drink to any apprentice or minor, without the permission of his legal protector; nor shall he sell to any habitual drunkard, after being forbidden so to do by any relative or friend of such drunkard:—Held, unauthorized by 13 & 14 Vict. c. 65. *In re Barclay and Darlington*, 12 U. C. R. 86.

Several Matters in one By-law.]—Quære, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Re Croome and City of Brantford*, 6 O. R. 188.

Submission to Electors.]—A by-law fixing the fee to be paid for a tavern license at £25:—Held, bad, as the fee imposed exceeded £10, and the by-law had not been submitted to the electors. *In re Barclay and Township of Darlington*, 12 U. C. R. 86.

A by-law requiring the payment of £10 for an inn license, over and above the Imperial duty of £2 5s. currency, need not be approved of by the electors under 16 Vict. c. 184, s. 4. *In re Harrison and Town of Owen Sound*, 16 U. C. R. 166.

Fees directed to be paid to the treasurer and inspector, are not to be considered as part of the duty on the license. *Ib.*

——— *Delay*]—A by-law passed in February, 1875, under 37 Vict. c. 32, enacting that the fees to be paid to the municipality for every certificate for a shop or tavern license under the by-law should be $130:—Held, valid, without approval of the electors, for under that Act the municipalities could exact up to $130 for their own use, without submission to the people. The by-law was not moved against until 14th March, 1876, and the licenses granted under it would expire on the 30th April, 1876:—Held, that on the ground of delay the court would have refused to quash. *In re Richardson and Toronto*, 38 U. C. R. 621.

——— *Voters' List — Omission of Classes of Voters—Saving Clause.*] — Farmers' sons and income voters should be included in the voters' lists prepared for the taking of the vote upon a municipal by-law prohibiting the sale of intoxicating liquors in a township under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, and their omission is an irregularity. In re Croft and Town of Peterborough, 17 A. R. 21, and In re Pounder and Village of Winchester, 19 A. R. 684, followed. Where all such voters had been omitted from the list by the clerk of the township under the honest supposition that they should not have been placed thereon, but the number of voters so left off was less than the majority by which the by-law was carried, and there was nothing to shew that the result of the error had in any way affected the votes that were cast, or that persons who would otherwise have voted had abstained from doing so on account of the error, or that there was any other good ground for believing that the result might probably have been different had the list been properly prepared, and it appearing that the election had been conducted in accordance with the principles laid down in the Municipal Act, in that the directions of the Act had not been intentionally violated, the court refused to quash the by-law. Woodward v. Carsons, L. R. 10 C. P. 733, followed. *Re Young and Township of Binbrook*, 31 O. R. 108.

Sunday Closing.] — That no innkeeper shall sell or permit the drinking of any intoxicating liquors on the Sabbath day, except in case of sickness, or to travellers:—Held, bad. *In re Barclay and Township of Darlington*, 12 U. C. R. 86.

A section of a by-law passed by a municipality prohibiting the sale of intoxicating liquors on Sunday to all persons, without excepting the sale thereof to travellers and boarders:—Held, invalid. *In re Ross and United Counties of York and Peel*, 14 C. P. 171.

Two-thirds' Vote—*Year of Application.*]—A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, and that no by-law for raising money, or which had a tendency to increase the burdens of the people, should be finally passed on the day on which it was introduced, except by a two-thirds' vote of the whole council. A by-law to fix the number of tavern licenses, and which, therefore, required such two-thirds' vote, was read three times on the same day, and was declared passed. It did not, however, receive the required two-thirds' vote. A special meeting of council was then called for the following evening, when the by-law was merely read a third time, receiving the required two-thirds' vote:—Held, that the by-law was bad, for having been defeated when first introduced by reason of not having received a two-thirds' vote, it was not validated by merely reading it a third time at the subsequent meeting. The by-law did not shew, as required by the Liquor License Act the year to which it was to be applicable:—Held, that it was bad for this reason, also. *Re Wilson and Town of Ingersoll*, 25 O. R. 439.

Voters.]—The electors entitled to vote upon a by-law under the Liquor License Act, R. S. O. 1887 c. 194, s. 42, to increase the amount payable for license duty, are those entitled to vote at municipal elections. Judgment below, 17 O. R. 522, affirmed on other grounds. *In re Croft and Town of Peterborough*, 17 A. R. 21.

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3. *Licenses.*

Agency.]—Under s. 12 of R. S. O. 1887 c. 194, the person receiving a tavern license is assumed to have satisfied the license commissioners that he is the true owner, but, notwithstanding, it can be shewn that the licensee was merely the agent of another who was the real owner of the business. *Huffman* v. *Walterhouse*, 19 O. R. 186.

Committee of Corporation.] — Held, that the appointment of a committee of the corporation for the purpose of granting or refusing tavern licenses was authorized by s.-s. 1 of s. 246 of C. S. U. C. c. 54. *In re Bright and City of Toronto*, 12 C. P. 433.

Issuing Certificate for License.] — 32 Vict. c. 32, as amended by 33 Vict. c. 28 (O.), repealed by 37 Vict. c. 32 (O.), enacted that no certificate for a license should be granted to any applicant until the inspector should have reported that the proper accommodation, &c., and any member of a municipal corporation who should, contrary to the Act, cause a certificate to be issued, was subject, on conviction thereof, to be fined. B. applied for a license at a meeting of the council on the 28th February, but the inspector reported that his premises were insufficient, the defect being the want of a step in the stairs. A minute was entered that the license should be granted as soon as he produced the inspector's certificate, and defendant, the reeve, signed a certificate and gave it to the clerk, instructing him not to hand it over until he had received the inspector's certificate; this was received on the 2nd March, and the certificate was then given to B:—Held, that there had been no breach of the statute, and a conviction of defendant was quashed. *Regina* v. *Paton*, 35 U. C. R. 442.

Issuing License Contrary to the Act.]—A certiorari will not lie to remove a conviction under the Liquor License Act, R. S. O. 1877 c. 181, s. 48, which has been affirmed and amended on appeal to the sessions, for issuing a license contrary to the Act, the procedure being regulated by 32 & 33 Vict. c. 31, s. 71 (D.), as amended by 33 Vict. c. 27, s. 2 (D.) *Regina* v. *Grainger*, 46 U. C. R. 196.

Mandamus to Compel Issue.] — The court refused to interfere by mandamus to compel the inspectors of licenses to examine a certain house, fitted up by the applicant as a saloon, and to grant him the proper certificate, if he should be found to have complied with the by-law of the municipality in that behalf. *In re Baxter and Hesson*, 12 U. C. R. 139.

A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued, by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in office. *Leeson* v. *Board of License Commissioners of County of Dufferin*, 19 O. R. 67.

Mandamus to Revoke Certificate.]—Mandamus refused to a magistrate, to revoke a certificate granted by him at an adjourned quarter sessions, authorizing the issue of a tavern license to A. B., for keeping a tavern in the township of Vaughan, the certificate having been granted in contravention of a by-law of the municipal council of Vaughan. *Regina ex rel. Gamble* v. *Burnside*, 8 U. C. R. 263.

——— *Rescission of Grant of License.*—An action for a mandamus to compel license inspectors and license commissioners to perform their respective duties, and for damages as subsidiary relief, is not within the terms of R. S. O. 1897 c. 88, the Act to protect justices of the peace and others from vexatious actions, and no notice of action is necessary. In an action to enforce the issue of a license which, by resolution of the commissioners, had been granted to the plaintiff, but which resolution was afterwards rescinded in order to grant the license to a subsequent applicant:—Held, that the license commissioners appointed under the Liquor License Act have, in the exercise of their functions, a wide discretion; but it must be exercised judicially, and the court has power to compel them to so exercise it; that the commissioners were not acting judicially, but unfairly and contrary to the spirit and intent of the Act, in rescinding their resolution in order to grant a license to a subsequent applicant; but, as such license had been issued to him and the ordering of the issue of a license to the plaintiff would be ordering the issue of a license in excess of the number limited by law, no relief could be granted, and the action was dismissed, but without costs. Leeson v. Board of License Commissioners of the County of Dufferin, 19 O. R. 67, not followed. *Haslem* v. *Schnarr*, 30 O. R. 89.

Mandamus to Inspect Premises.]—The issuers of licenses appointed under 37 Vict. c. 32 (O.), supersede the collector of inland revenue under the Temperance Act of 1864: and under that Act and 39 Vict. c. 26 (O.), it was held unnecessary to deliver a copy of a by-law passed on the 29th June, 1875, under the Temperance Act, to the collector of inland

revenue. Semble, that if it had been, the person to whom it was delivered in this case, was, under the facts stated, sufficiently shewn to be such collector. It was objected that the applicant for a mandamus to the inspector of licenses to inspect and report on his premises, so as to enable him to apply for a license, did not shew that he was a natural born or naturalized subject, as required by the by-law; but held, that such objection could not have prevailed, for he was shewn to have been duly licensed up to 1st May, 1876, and no exception had been made to him. *Re Lake and Blakeley*, 40 U. C. R. 102.

Payment of Fee—*Relation Back.*]—See *Regina* v. *Strachan*, 20 C. P. 182. sub-head 4, *post*.

Petition against Issue.] — The Liquor License Act, R. S. O. 1887 c. 194, s. 11, s.-s. 14, provides that "No license shall be granted to any applicant for premises not then under license or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the legislative assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds." More than one-half of the electors in a certain polling sub-division petitioned the license commissioners of the district "against the issue of any license within the bounds of said polling sub-division . . . for reasons specified in s. 11, s.-s. 8, of the Liquor License Act, R. S. O. 1887, or for one or more of such reasons"—not otherwise specifying any grounds or referring to any applicant or premises. The plaintiff was an applicant for a license for premises not under license situate in the sub-division, and the question stated for the opinion of the court was whether under s. 11, s.-s. 14, the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff:—Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in s.-s. 8 shall be set forth, or all of them specifically alleged; and, therefore, the defendants were not precluded from certifying for a license. *Pizer* v. *Fraser*, 17 O. R. 685.

Premises Covered by License.] — The defendant was licensed to sell "in and upon the premises known as the Palmer House." The Palmer House stood upon the front part of a deep lot owned by the defendant, the rear part of which had been for many years enclosed and used as a fair ground, immediately within which enclosure the defendant sold liquor, for which he was convicted:—Held, that as the fair ground, though part of the lot on which the hotel stood, was not used in connection with or for the enjoyment of the hotel, it was not covered by the license, and the conviction was right. *Regina* v. *Palmer*, 46 U. C. R. 262.

Prohibiting Issue—*Time for Application—Summer Resort.*]—A board of license commissioners under the Liquor License Act, R. S. O. 1887 c. 194, is not a body against which a writ of prohibition will be granted, prohibiting them from issuing a license. Regina v. Local Government Board, 10 Q. B. D., at p. 231, and Re Godson and City of Toronto, 16 A. R. 452, followed. Semble, an application under the latter part of s. 21, R. S. O. 1887 c. 194, for an additional tavern license in a locality largely resorted to in summer by visitors, may be made at any time so long as the license does not extend beyond the prescribed period of six months from the first of May. *In re Thomas's License*, 26 O. R. 448.

Shop License—*Certificate of Electors—County Judge — Jurisdiction to Revoke License.*]—Section 91 of the Liquor License Act, R. S. O. 1887 c. 194, is a penal enactment and is to be construed strictly; and, as it refers only to a "license issued" contrary to any of the provisions of the Act, and not to a "license transferred," and to the licensee and not to the transferee, a county Judge has no jurisdiction under it to entertain a complaint against a transferee that a license has been improperly transferred to him; and has no jurisdiction to revoke or cancel a license not already issued. The applicant was, in the month of March, 1891, the holder of a wholesale license to sell liquor in premises in polling sub-division 10 in a city. The holder of a shop license in polling sub-division 18 transferred his license to the applicant on the 26th March, 1891. On the same day the license commissioners, on the petition of the applicant, not accompanied by a certificate signed by a majority of the electors in polling sub-division 10, consented in writing to the transfer of the shop license and to its transfer to the premises in polling sub-division 10, and also cancelled the applicant's wholesale license:—Held, that the commissioners erred in consenting to the transfer of the shop license to the premises of the applicant in polling sub-division 10 without his petition therefor being accompanied by the certificate required by 53 Vict. c. 56, s. 1 (O.) *Re Dunlop*, 22 O. R. 22.

——— *Certificate of Electors.*]—On an application for a shop license under s.-s. 14 of s. 11 of the Liquor License Act, R. S. O. 1887 c. 194, as amended by 53 Vict. c. 56, s. 1 (O.), it is imperative that the petition which is to be filed with the inspector before 1st April, be accompanied by a properly signed certificate of the majority of the electors, and the Act does not authorize the granting of such a license contrary to the provisions of that section. Semble, it is otherwise as to a tavern license, in which case a discretion rests with the commissioners. Decision below, 24 O. R. 153, reversed. *In re Hunter's License*, 24 O. R. 522.

Transfer—*Municipal Election.*]—The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before:—Held, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. 1877 c. 181, s. 28, none of which had occurred here: that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a

license in his own name. *Regina ex rel. Brine* v. *Booth*, 3 O. R. 144, 9 P. R. 452.

See, also, *Regina ex rel. Clancy* v. *Conway*, 46 U. C. R. 85.

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4. *Offences.*

By-law Quashed after Issue of License.]—The quashing of a by-law under which a certificate has been granted and license issued for the sale of spirituous liquors, does not nullify the license; and a conviction for selling without license cannot, therefore, under these circumstances, be supported. *Regina* v. *Stafford*, 22 C. P. 177.

Chemist—*Allowing Liquor to be Consumed on the Premises.*]—It is an offence under the Liquor License Act, R. S. O. 1887 c. 194, and amendments thereto, for a chemist or druggist to allow liquor "sold by him or in his possession to be consumed within his shop by the purchaser thereof," and it is not essential that he should be registered. A conviction in the above form does not charge an alternative offence. The adjudication and conviction, besides imposing the money penalty under s. 70, further imposed imprisonment for three months, as provided by that section. The court differed as to the validity of the term of imprisonment imposed, but held that in any event the conviction could be amended under 53 Vict. c. 37, s. 27 (D.), so as to comply with s. 67 of the Summary Convictions Act. *Regina* v. *McCay*, 23 O. R. 442.

——— *Omission to Enter Sale in Book.*]—The non-entry in a book of a lawful sale of liquor by a chemist, pursuant to s. 52 of R. S. O. 1887 c. 194, does not constitute an absolute contravention of the Act; but merely throws on the defendant the onus of clearly rebutting the presumption which the statute has raised against him. *Regina* v. *Elborne*, 21 O. R. 504. Reversed in appeal, 19 A. R. 439.

Club.]—Held, that the meaning of s. 53, s.-s. 3, of the Liquor License Act (R. S. O. 1887 c. 194), is that where in a club or society incorporated under the Benevolent Societies' Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club, &c., but is merely an incident resulting from its principal object, there is no violation of the License Act, but it is otherwise if the sale or supplying the liquor is the main object of the incorporation. The question, however, is for the decision of the magistrate on the evidence, and there being evidence in this case, which was that of a club purporting to be a gun club, to support the finding of the magistrate that the sale of liquor was the special or main object of the club with the intent to evade the Liquor License Act, the court refused to interfere with the finding, and dismissed a motion to quash the conviction. *Regina* v. *Austin*, 17 O. R. 743.

A company was incorporated under the Joint Stock Letters Patent Act, R. S. O. 1887 c. 157, for establishing a driving park to improve the breed of horses, &c., and for such purposes to acquire a certain named property, with power to erect a club house, and, subject to the Liquor License Act, to maintain and rent or lease same, for social purposes, &c.; and generally to do all things incidental or conducive to the objects aforesaid:—Held, that the charter did not authorize the company to have a club house at any other place than that specified in the charter: and where, therefore, the defendant was found in possession of and selling liquor at another place, though claimed to be a club constituted under the charter, of which the defendant claimed to be the secretary, he was properly convicted under s. 50 of the Liquor License Act, R. S. O. 1887 c. 194, for unlawfully keeping liquor for sale, barter, or traffic, without a license. *Regina* v. *Charles*, 24 O. R. 432.

Section 50 of the Liquor License Act, R. S. O. 1887 c. 194, which forbids the keeping or having in any house, &c., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under the Ontario Joint Stock Companies' Letters Patent Act, who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, &c., being that of the club and not of the manager. Regina v. Charles, 24 O. R. 432, distinguished. *Regina* v. *Slattery*, 26 O. R. 148.

The steward of a club incorporated under R. S. O. 1887 c. 157, though having no license, supplied, at his own discretion, intoxicating liquors to members and others in exchange for tickets purchasable by members from the club secretary, in a part of the building in which the club were lessees. The liquors originally purchased belonged to the club, which by its charter was expressly forbidden to traffic in, sell or dispose of such liquors, or allow others to do so, in the club building:—Held, that the steward was rightly convicted of keeping or having liquors for sale without license under R. S. O. 1887 c. 194, s. 50. Graff v. Evans, 8 Q. B. D. 373, distinguished. Semble:—Though a conviction be good on its face, yet where there is no appeal to the general sessions the court will not refuse to go into the evidence on motion to quash. *Regina* v. *Hughes*, 29 O. R. 179.

Compromise.]—A prosecution for selling whiskey without a license cannot be compromised without leave of the court, and therefore cannot be referred. Where, although the offence was not submitted, it was tried by the arbitrator, in order to determine the liability of the parties as to costs, so much of the award was set aside. *In re Fraser and Escott*, 1 C. L. J. 324.

A conviction under 37 Vict. c. 32, s. 39 (O.), that one M., the defendant, did unlawfully attempt and offer to compound, and offer to compromise, compound, and settle with one R. a certain offence, with which the said R. had charged the said M., for selling spirituous and intoxicating liquors without a license, with a view of stopping or having the said charge dismissed for want of prosecution:—Held, bad, and quashed; 1, for not shewing that M. was a person who had violated any of the provisions of the Act; 2, for stating the charge in the alternative—with a view of stopping or having the charge dismissed; 3, for adjudging the defendant to pay a sum for costs, without saying to whom. *Regina* v. *Mabey*, 37 U. C. R. 248.

Lodger.]—Sections 54, 58, do not authorize the sale of liquor to a lodger in the licensee's house during prohibited hours; the most that can be said is that the sale to the lodger does not thereby make him an offender. *Regina* v. *Southwick*, 21 O. R. 670.

Necessity for License.] — A license to sell spirituous liquors, whether by wholesale or retail, is necessary under 32 Vict. c. 32 (O.), either in the case of a tavern or a shop, and in the case of a shop the liquor must not be consumed on the premises or sold in quantities less than a quart. Therefore, the sale of a bottle of gin without a license is contrary to law; and, semble, that even if a license be necessary only on a sale by retail, the sale of a bottle, value sixty cents, would be a sale by retail. *Regina* v. *Strachan*, 20 C. P. 182.

Per Gwynne, J.: That although no new by-law had been enacted by the municipality under s. 6, s-s. 6 of 32 Vict. c. 32 (O.), the applicant was bound to have paid for the license, which he had in fact obtained, the amount due under the by-law then in force under the previous Act, and that the payment, after complaint, but before judgment, of the sum fixed by the latter Act did not enure to make the license valid from its date. *Ib.*

Permitting Liquor to be Drunk on Premises—*Form of Conviction.*]—See *Regina* v. *Villeneuve*, 17 C. L. T. Occ. N. 374.

Purchase of Day's Receipts—*Costs.*]—The defendant purchased for $25, from a duly licensed hotel-keeper, the day's receipts of the bar, and at the close of the day had paid over to him such receipts:—Held, that a conviction against defendant for selling liquor without a license could not be maintained, and the conviction was quashed, but without costs. Remarks on the question of costs in such cases. *Regina* v. *Westlake*, 21 O. R. 619.

Refusal to Admit Officer.]—The right of search given by s. 130 of the Liquor License Act, R. S. O. 1887 c. 194, may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient. *Regina* v. *Sloan*, 18 A. R. 482.

——— *Liability of Licensee for Offence of Servant.*]—Per Hagarty, C.J.O., and Maclennan, J.A. Under s. 112 of the Liquor License Act, R. S. O. 1887 c. 194, the licensed hotel-keeper is personally responsible for the refusal of his servant to admit an officer claiming the right of search under s. 130. Per Burton, and Osler, JJ.A.—Section 112 does not apply to an offence of that kind, but is limited to offences connected with sale, barter, and traffic. *Regina* v. *Potter*, 20 A. R. 516.

Sale by Husband.]—A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. 1877 c. 181:—Held, that she was liable to be fined under s. 83 of the Act, although the sale of liquor took place in her absence. *Regina* v. *Campbell*, 8 P. R. 55.

Sale by Servant.]—The owner of the shop is criminally liable for any unlawful act done therein, in his absence by clerk or assistant; as, for instance, in this case, for the sale of liquor without a license by a female attendant. Secus, semble, if it appear that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business. *Regina* v. *King*, 20 C. P. 246. See *Hugill* v. *Merrifield*, 12 C. P. 269; *Austin* v. *Davis*, 7 A. R. 478.

The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted of selling liquor in her master's absence. The Judge held the conviction good, the case being undistinguishable in principle from Regina v. Williams, 42 U. C. R. 462, though he would otherwise have held the master alone responsible, under the Liquor License Act R. S. O. 1877 c. 181. *Regina* v. *Howard*, 45 U. C. R. 346.

See *Regina* v. *Breen*, 36 U. C. R. 84, subhead 5 (c.), *post*.

Sale by Wife.]—Where the husband, the occupant of the house in which the sale took place, was in gaol:—Held, that his wife might be convicted under 37 Vict. c. 32, s. 35 (O.), for selling liquor there without license. *Regina* v. *Williams*, 42 U. C. R. 462.

——— *Presumption—Rebuttal.*]—The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence shewed that she was the more active party, and she was the occupant of the house, in which the sale took place:—Held, having regard to R. S. O. 1887 c. 194, s. 112, s.-s. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by s. 13 of the Code, it would have been rebutted by the circumstances. Regina v. Williams, 42 U. C. R. 462, distinguished. *Regina* v. *McGregor*, 26 O. R. 115.

See *Regina* v. *McAuley*, 14 O. R. 643.

Sale on Prohibited Days.]—Only the holder of a license can be prosecuted under s. 43 of R. S. O. 1877 c. 181, for selling liquor on prohibited days. *Regina* v. *Duquette*, 9 P. R. 29.

Sale to Inebriates.]—The defendant, a licensed tavern-keeper in the city of C., in the county of K., was convicted under s. 124 of the Liquor License Act, R. S. O 1897 c. 245, of selling liquor at a specified time and place to a certain person, "knowing that the sale of liquor to the said J. H., a drunkard, was prohibited by an order in open court," made by the convicting magistrate. Upon this conviction being removed by certiorari, the "order" returned was a memorandum signed by the magistrate, as follows: "I make an order forbidding any licensed person giving liquor to J. H., in the county of K., for one year." It did not appear where and in what circumstances this was made; whether in open court; whether after summons to J. H.; whether excessive use of liquor by him was proved or admitted—or not:—Held, that the conviction was bad, and there was nothing in the evidence to justify an amendment. Semble, that if there were a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises. *Regina* v. *Mount*, 30 O. R. 303.

Search for Liquor—*Right of Inspector to Take Stranger with him—Proof of Liquor being Sold.*]—The right of entry under s. 130

of the License Act, R. S. O. 1897 c. 245, into any inn, tavern, &c., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable or inspector;" and it is only under s. 131, on the procuring of a warrant as therein provided, that the officer can take with him a person not being one of those so named. Where therefore a license inspector, in proceeding to search the defendant's premises for liquor took with him a person other than one of those so named, without having procured a warrant, his act was illegal, and the defendant was justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed. The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold, or reputed to be sold therein, was the statement of the inspector that defendant's bar-room remained the same as before, i. e., before the expiry of his license. Per Meredith, C.J.—This was not sufficient to satisfy the requirements of the section. Per Meredith, C.J., also.—Under the circumstances of this case an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place was not tenable. *Regina* v. *Ireland*, 31 O. R. 267.

Search Warrant — *Obstructing Officer.*]—The defendants were committed for trial for obstructing a peace officer acting under a search warrant issued on an information charging that there was reasonable ground for the belief that spirituous liquors were being unlawfully kept for sale contrary to the Liquor License Act in an unlicensed house:—Held, that the search warrant must be deemed to have been issued under s. 131 of the Act, and that section containing no provision for punishment in such case, the proceedings against the defendant must be by indictment for a misdemeanour under R. S. C. c. 162, s. 134. The court refused to determine the validity of the warrant on a motion to set aside the commitment, as it could be raised on the trial of the indictment if a true bill were found. *Regina* v. *Hodge*, 23 O. R. 450.

——— *Description of Place to be Searched, and Persons to Make it.*]—A search warrant issued under s. 131 of the Liquor License Act, R. S. O. 1887 c. 194, after reciting an information laid by a police inspector, that there was reasonable ground for the belief that spirituous liquor was being unlawfully kept for sale or disposal contrary to the said Act, in a certain unlicensed house or place, namely, in the house and premises of the Toronto Industrial Exhibition Association, directed the city license inspectors, city constables, or peace officers, or any of them, to search the said house and premises, and every part thereof, or of the premises connected therewith. In attempting to search defendant's booth, which was described as being under the old grand stand, on the exhibition premises, a police sergeant, who accompanied the inspector, was obstructed by defendant. The evidence did not shew there was any other booth on the premises:—Held, that the warrant was valid; that it was sufficiently definite as to the place to be searched and the persons directed to make it. *Regina* v. *McGarry*, 24 O. R. 52.

Shop License.]—Under the Municipal Act of 1866, ss. 249, 254, a person holding a shop license for the sale of liquors:—Held, punishable, for selling liquor at his shop in quantities less than a quart. *Regina* v. *Faulkner*, 26 U. C. R. 529.

Supplying to Minor by Stranger.]—The act of a stranger in supplying liquor to a minor, even if handed by him to the minor within the precincts of a licensed house, is not an offence against s. 76 of the Liquor License Act, R. S. O. 1887 c. 194, as amended by 53 Vict. c. 56, s. 8. *Regina* v. *Raynor*, 15 C. L. T. Occ. N. 403.

Treating on Sunday — *"Other Disposal."*]—Treating or giving liquor to friends by a landlord in a private room in his licensed premises on a Sunday is an offence under s. 54 of R. S. O. 1887 c. 194, and is covered by the words "other disposal" in that section. *Regina* v. *Walsh*, 29 O. R. 36.

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5. Practice and Procedure.

(a) In General.

Appeal—*Depositions.*]—Under 32 Vict. c. 32, s. 23 (O.), it is irregular for the Judge who tries the case to call a jury or to receive depositions of witnesses as evidence. *In re Brown and Wallace*, 6 P. R. 1; 8 C. L. J. 81.

——— *Prohibition.*]—After a conviction by a magistrate for selling liquor after seven o'clock on Saturday evening under 32 Vict. c. 32 s. 23, is confirmed, on appeal to the sessions, a prohibition to the sessions will not be granted. *In re Brown and Wallace*, 6 P. R. 1.

The defendant appealed to the general sessions, which was the proper appeal under the Temperance Act:—Held, that the appeal should have been to the Judge of the county court under the Licensing Acts, and that his appeal, therefore, formed no ground for discharge from imprisonment. *Regina* v. *Lake*, 7 P. R. 215.

F., a shopkeeper licensed to sell intoxicating liquors in quantities not less than a quart, was convicted before the police magistrate under 32 Vict. c. 32 (O.), for selling half a pint of whiskey contrary to the provisions of the Act, and "without the license therefor by law required." His appeal to the general sessions of the peace was dismissed, on the ground that by s. 25 the conviction was final and without appeal:—Held, that s. 25 only applied to persons who sold without any license; that F. came under s. 26; and that by s. 36, he had a right to appeal. *Regina v. Firmin*, 33 U. C. R. 523.

Certiorari.]—Two persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited under the Temperance Act of 1864, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused. An application for writs of certiorari to remove the conviction for the purpose of quashing it was refused; for even if the conviction should have been under the Temperance Act of 1864, and not

under 32 Vict. c. 32 (O.), it would have been amendable on appeal under 29 & 30 Vict. c. 50, if the appeal in this case had not been taken away. Quære, whether the conviction could not be supported as it stood. Semble, that although 27 & 28 Vict. c. 18, s. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justices, or a conviction on its face defective in substance, but not otherwise. *In re Watts, In re Emery*, 5 P. R. 267.

The defendant having been convicted for selling liquor without a license, the depositions returned to the court by a convicting magistrate under a certiorari shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash stated that the party had a license in fact, and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved or given in evidence:—Held, that the return to the certiorari was conclusive, and that the court could not go behind it. *Regina* v. *Strachan*, 20 C. P. 182.

Crown—*Information.*]—The Crown is not obliged under the Act relating to the sale of liquors, 37 Vict. c. 32, s. 44 (O.), to prosecute before two magistrates, as a private individual would be, but may proceed by information. *Regina* v. *Taylor*, 36 U. C. R. 183.

Remarks as to the form of the information in this case. *Ib.*

Form of Information—*Several Offences—Amending.*]—An information stated that the defendant "within the space of thirty days last past to wit on the 30th and 31st days of July, 1892, did unlawfully sell intoxicating liquor without the license therefor by law required:"—Per Hagarty, C.J.O., and Boyd, C.:—Such an information does not charge two offences but only the single offence of selling unlawfully within the thirty days. Per Osler, and Maclennan, JJ.A.:—Such an information does charge two offences and is in contravention of s. 845 (3) of the Criminal Code, 1892. But, per curiam, assuming that an information so worded does contravene the provisions of s. 845 (3) of the Criminal Code, 1892, the defect is one "in substance or in form" within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence. Judgment below, 23 O. R. 387, reversed. *Regina* v. *Hazen*, 20 A. R. 633.

——— *Several Offences—Objection Taken at Hearing.*]—When an information laid against the defendant, under the Indian Act, charged that he sold intoxicating liquor to two persons on the 5th July, and to two persons on the 8th July, and the justices, notwithstanding that the defendant's counsel objected to the information on this ground, proceeded and heard evidence in respect of all the offences so charged, then amended the information by substituting the 8th August for the 8th July, proceeded and heard evidence in respect of the substituted charge and dismissed it, and convicted the defendants for selling to two persons on the 5th July, the conviction was quashed. Regina v. Hazen, 20 A. R. 633, distinguished. It was the duty of the justices when the objection was taken to have amended the information by striking out one or other of the charges, and to have heard the evidence applicable to the remaining charge only. *Regina* v. *Alward*, 25 O. R. 519.

Police Magistrate—*Right to Try County Offences.*]—The defendant was charged with a breach of the Liquor License Act in the township of Barton, in the county of Wentworth; and was tried and convicted at the city of Hamilton, situated in the said county, before the police magistrate thereof:—Held, that under s. 18 of the Police Magistrates' Act, R. S. O. 1887 c. 72, the police magistrate had jurisdiction in the premises. *Regina* v. *Gully*, 21 O. R. 219.

Reeves in Unorganized Districts — *Ex Officio Justices of the Peace.*]—The reeves of municipalities in unorganized districts are, under the legislation relating thereto, ex officio justices of the peace in their respective municipalities, with power to try alone, and convict for, offences under the Liquor License Act, R. S. O. 1887 c. 194. *Regina* v. *McGowan*, 22 O. R. 497.

Summons—*Warrant — Costs.*] — Held, that, by the combined effect of ss. 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best, and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay, the costs of arresting and bringing her before the magistrate under the warrant. *Regina* v. *McGregor*, 26 O. R. 115.

Time for Prosecution.]—Laying the information is the commencement of a prosecution before a magistrate. Section 25 of 32 Vict. c. 32 (O.), provides that "all prosecutions under this section shall be commenced within twenty days after the commission of the offence or after the cause of action arose, and not afterwards." The information against defendant was taken on the 30th December, 1872, laying the offence on the 16th December. On the 15th January, 1873, a summons was issued on the information, and on the 30th the defendant was tried and convicted:—Held, that the prosecution was commenced in time. *Regina* v. *Lennox*, 34 U. C. R. 28.

(b) *Evidence.*

Defendant.]—An information under 37 Vict. c. 32, ss. 28 and 34 (O.), for selling intoxicating liquors on Sunday, was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself, under 36 Vict. c. 10, s. 4 (O.), which authorizes such evidence in any matter "not being a crime." A conviction for such offence obtained on defendant's evidence was therefore quashed. 36 Vict. c. 10, s. 4, is not repealed or affected, as regards proceedings under the Tavern and Shop Licenses Act, by 37 Vict. c. 32 (O.). *Regina* v. *Roddy*, 41 U. C. R. 291.

Disqualification of Magistrate.] — On a motion to quash a conviction, the only evidence offered in proof of the magistrate, before whom the recognizance in this case had been taken, not being properly qualified, was a certificate purporting to be under the

hand and seal of the clerk of the peace, that he did not find in his office any qualification filed by the magistrate: — Held, insufficient. *Regina* v. *White*, 21 C. P. 354.

Exclusion of Evidence.]—Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination; but her husband was examined, and gave evidence denying the sale of the liquor:—Held, that there was no denial of the right of the defendant, under s. 850 of the Code, to make her full answer and defence. *Regina* v. *McGregor*, 26 O. R. 115.

Former Conviction—*Proof by Parol.*]—Under s.-ss. 1 and 2 of s. 101 of the Liquor License Act, R. S. O. 1897 c. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient. Where, therefore, on a trial before a magistrate who was the same magistrate by whom the defendant had been previously convicted of a like offence,—the information alleging such prior conviction, and all that appeared with regard to it being the evidence of the license inspector, who proved that the defendant was the person previously convicted:—Held, it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant. *Regina* v. *McGarry*, 31 O. R. 486.

Informer.]—The informer is a competent witness in cases arising under 32 Vict. c. 32 (O.). *Regina* v. *Strachan*, 20 C. P. 182.

License Inspector—*Indian Reserve.*] — For an offence under the Liquor License Act, R. S. O. 1887 c. 194, the license inspector, who lays the information, is a competent witness. An objection that the conviction, which was for selling liquor without a license at the village of M., in the township of O., should have negatived that the place where the offence was committed was in an Indian reserve, which it was alleged formed part of such township, was overruled, as there was nothing to shew the fact alleged, and under s. 1 of R. S. O. 1887 c. 5, there was primâ facie jurisdiction. *Regina* v. *Fearman*, 22 O. R. 456.

Proof of License.]—On an application for a certiorari to remove a conviction of one J. B., for selling liquor without a license:—Held, that on such a charge, it was for defendant to shew his license, and not for the informant to negative its existence. *In re Barrett*, 28 U. C. R. 559.

In proof of defendant being a licensed hotel keeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged:—Held, sufficient, as the witness might have obtained his information from the defendant. *Regina* v. *Flynn*, 20 O. R. 638.

Quantity—*Judicial Notice.*]—The offence alleged was selling "a certain quantity, to wit, one pint:"—Held, sufficient, without negativing that it was a sale in the original packages, within the exemption in s. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

The defendant, the holder of a shop license under the Liquor License Act, R. S. O. 1887 c. 194, was convicted by a magistrate for selling liquor in less quantity than three half-pints, contrary to s. 2, s.-s. 3. The evidence shewed a sale of a bottle of ale and a flask of brandy, each containing less than three half-pints, the two together containing more than three half-pints:—Held, that it was within the jurisdiction of the magistrate to determine as a matter of fact whether the defendant had sold liquor in less quantity than three half-pints, and if a certiorari were granted, the court would have no power, upon a motion to quash the conviction, to review the magistrate's decision. Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, followed. *Regina* v. *Cunerty*, 26 O. R. 51.

Refusal to Answer Question—*Criminating Answer.*]—The refusal "to answer any question touching the case" in s. 115 of the Liquor License Act means any question which may be lawfully put, which the witness is otherwise bound to answer; and a witness on the prosecution of a hotel-keeper for selling liquor on Sunday, who declined to answer whether he, the witness, was at the hotel on the day in question, on the ground that his answer would tend to criminate him, and was committed to gaol by the magistrate until he consented to answer, was ordered to be discharged. Regina v. Nurse, 2 Can. Crim. Cas. 57, approved of. *Re Askwith*, 31 O. R. 150.

Sale during Prohibited Hours.]—On a charge of selling liquor during prohibited hours the defendant is a competent and compellable witness, and although denying the sale charged, can properly be convicted upon his own admission of a sale upon the day in respect of which an illegal or prohibited sale is charged to another person. *Regina* v. *Nurse*, 35 C. L. J. 35.

Witnesses Reading over and Signing Evidence—*Costs.*]—Under the power conferred on justices of the peace by s. 2 of R. S. O. 1887 c. 74, to order in and by the conviction the payment of reasonable costs, a charge of fifty cents for drawing up a conviction under the Liquor License Act, is authorized. On motion to quash a conviction, it was objected that the evidence taken before the magistrates and returned by them, was not shewn to have been read over and signed by the witness:—Held, that the maxim omnia præsumuntur esse rite acta applied, and as the contrary was not shewn it would be presumed to have been done. *Regina* v. *Excell*, 20 O. R. 633.

An objection that it did not appear that the evidence had been read over to the witness was overruled, following Regina v. Excell, 20 O. R. 633. The direction in s.-s. 2 of s. 96, as to the witnesses signing their evidence, is

not imperative, but directory merely. *Regina* v. *Scott*, 26 O. R. 646.

(c) *Trial, Conviction, and Punishment.*

Adjournment—*Waiver.*]—The provision of s. 857, that no adjournment shall be for more than eight days, is matter of procedure and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect. *Regina* v. *Hazen*, 20 A. R. 633.

Adjournment for Judgment.]—See JUSTICE OF THE PEACE, II. 1.

Admission of Guilt — *Imprisonment* — *Costs.*]—On an information charging that the defendant, in his premises, being a place where liquor might be sold, unlawfully did have his bar-room open after ten o'clock in the evening, contrary to the rules and regulations for license holders passed by the license commissioners, &c., the defendant signed an admission stating that, the information having been read over to him, he desired to plead guilty to the charge, which was the only evidence before the court, and on which the defendant was convicted. It did not appear that the municipality had passed any by-law on the subject:—Held, that this did not prevent the defendant from objecting to the power of the license commissioners to pass such rules and regulations, but on the authority of McGill v. License Commissioners of Brantford, 21 O. R. 665, the objection must be overruled. Regina v. Brown, 24 Q. B. D. 357, followed. By the conviction herein a fine and costs were imposed, and, in default of payment, distress, and in default of sufficient distress, imprisonment:—Held, under s. 98 of the Liquor License Act, R. S. O. 1887 c. 194, incorporating s. 427 of the Municipal Act, costs and imprisonment could properly be imposed. *Regina* v. *Farrell*, 23 O. R. 422.

Arrest—*Remand*—*Distress.*]—The defendant was convicted before two justices of the peace for selling liquor without a license, contrary to s. 49 of the Liquor License Act, R. S. O. 1887 c. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months unless the said several sums and the costs of conveying him to gaol should be sooner paid. Upon a motion to quash the convictions and warrant:—Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction; and semble, also, that it was not improper to arrest him instead of merely summoning him. *Regina* v. *Menary*, 19 O. R. 691.

Held, that the fact that the defendant was remanded by only one justice could not affect the conviction. *Ib.*

Semble, that the justices had no power under R. S. O. 1887 c. 194, s. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs; but as this objection was not taken by the defendant, no effect was given to it. *Ib.* See *Regina* v. *Clarke*, 19 O. R. 601.

Held, that the justices had the right to draw up and return an amended conviction in a proper case. *Ib.*

Held, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods was proper; and if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction. *Ib.*

Held, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment. *Ib.*

Held, that having regard to s. 105 of R. S. O. 1887 c. 194, and to the evidence before the justices, the convictions and warrant should not be quashed. *Ib.*

Chemist—*Sale by Retail.*]—A conviction of defendant, who was a registered chemist, made before 37 Vict. c. 32 (O.), for selling spirituous and intoxicating liquors by retail, to wit, one bottle of brandy, to one O. S. at and for the price of $1.25, without having a license so to do as by law required; the said spirituous and intoxicating liquor being so sold for other than strictly medical purposes only:—Held, valid, for he was not, as a chemist, authorized to sell without license, and it was unnecessary to shew that he was not licensed, or to negative any exemptions or exceptions. Semble, that selling a bottle of brandy is selling by retail. *Regina* v. *Denham*, 35 U. C. R. 505.

Conviction not in Accordance with Minute—*Distress.*]—A minute of conviction for selling liquor without a license in contravention of s. 70 of the Liquor License Act, R. S. O. 1887 c. 194, stated that in default of payment of the fine and costs imposed, the same were to be levied by distress, and in default of distress, imprisonment, and a formal conviction was drawn up following the minute:—Held, that under s. 70, distress was not authorized; but that the fact of the minute containing such provision, did not prevent a conviction omitting such provision being drawn up and returned in compliance with a certiorari granted. Regina v. Brady, 12 O. R. 358, and Regina v. Higgins, 18 O. R. 148, considered. Held, also, that the conviction was good under s. 105 of the said Act. *Regina* v. *Hartley*, 20 O. R. 481.

——— *Subterfuge—Chemist—Bias.*]— The defendant had been a licensed hotel-keeper, his hotel having a bar furnished with a counter and the usual appliances for the sale of liquor, his license having expired. On being asked by a couple of persons for whiskey, he said he could not sell it, and gave them temperance drinks, and on being paid therefor, treated to whiskey which he obtained from a bottle behind the counter. The defendant was convicted under s. 50, for permitting spirituous liquors to be drunk in his house, being a house of public entertainment, the minute of conviction providing for distress in default of payment of the fine and costs imposed; but the conviction drawn up and returned under a

writ of certiorari omitted the provision for distress. Neither under s. 50 nor s. 70 is distress authorized:—Held, that the conviction was valid as being in accordance with s. 50; and that under the circumstances, it need not follow the minute. Regina v. Hartley, 20 O. R. 481, followed. Held, also, that the conviction would have been good under s. 70, as the giving and being paid for the temperance drinks was a mere subterfuge, for disposing of and selling spirituous liquors; and further, the conviction could be supported under s. 105. Held, also, that the facts of one of the convicting magistrates being a chemist and druggist, and in such capacity filling medical prescriptions containing small quantities of spirituous liquors, did not incapacitate him from acting as a magistrate and adjudicating upon the case. *Regina* v. *Richardson*, 20 O. R. 514.

Distress.]—An objection that the adjudication did not provide for distress, while the conviction contained such a provision, was overruled, following Regina v. Hartley, 20 O. R. 481. *Regina* v. *Southwick*, 21 O. R. 670.

Form of Conviction—*Mentioning Statute.*]—It is not necessary, in a conviction for selling liquor without a license, to mention the statute under which the conviction took place, nor that it should appear on the face of the conviction that the prosecution commenced within twenty days of the commission of the offence, nor to specify that it is a first or second offence, nor to whom the liquor was sold; neither is it illegal to award imprisonment in default of distress, &c. *Regina* v. *Strachan*, 20 C. P. 182. See, also, *Reid* v. *McWhinnie*, 27 U. C. R. 289.

A conviction that one G. P. of, &c., innkeeper, after the hour of seven in the evening and before the hour of twelve o'clock of the night of Saturday, &c., in and at his tavern, &c., being a place where intoxicating liquors are allowed to be sold by retail, did unlawfully sell and otherwise dispose of, and permit and allow to be drunk, &c., one glassful of beer, &c.:—Held, bad, as not necessarily bringing the defendant within the class of persons designated by the statute 32 Vict. c. 32, s. 24 (O.), viz., "the person or persons who are the proprietors in occupancy, or tenants or agents in occupancy of the said place or places," for the word "innkeeper" only amounts to a mere description and not to an averment of his filling such a character; and the words "in and at his tavern" would not necessarily mean the proprietor in occupancy, &c., to whom the license is granted, and who alone is liable, but would also include the owner or proprietor, even if he were not the occupant. Quære, whether the conviction charged three distinct offences. *Regina* v. *Parlee*, 23 C. P. 359.

See, also, *Regina* v. *Cavanagh*, 27 C. P. 537.

A conviction, for that one H., on, &c., "did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law:"—Held, clearly bad, as shewing no offence. *Regina* v. *Hoggard*, 30 U. C. R. 152.

In a conviction under s. 73 of the Liquor License Act, R. S. O. 1887 c. 194, for delivering liquor to a person while intoxicated, imprisonment was directed without any provision for distress. On the conviction being brought before the court on certiorari, the court, under s. 87 of the Summary Convictions Act, R. S. C. c. 178, as amended by a 27 of 53 Vict. c. 37 (D.), amended the conviction by inserting a provision for distress. The amending Act came into force after the conviction was made and certiorari granted, but it being a matter of procedure, the court had power to act under it and make the amendment. *Regina* v. *Flynn*, 20 O. R. 638.

The adjudication did not state the amount of the costs imposed:—Held, following Regina v. Flynn, 20 O. R. 638, this did not invalidate the conviction; but, quære, whether apart from the amending Acts such would be the case. Under R. S. O. 1887 c. 194, ss. 60, 70, it is not a valid objection to the conviction that it did not state that the imprisonment was for the term specified, unless the costs and charges of conveying to gaol were sooner paid. *Regina* v. *Clarke*, 20 O. R. 642.

The defendant, holding a shop license, was convicted for allowing liquor to be drunk on the premises, contrary to s. 60 of the Liquor License Act. Quære, whether a conviction in such case need do more than impose the penalty and costs and the provisions of the Summary Convictions Act be called in aid for its enforcement, namely, by the issue of a warrant of distress under s. 62 in case of non-payment of the fine due, and in default thereof, a warrant under s. 67 for committal; or whether the forms provided for by s. 53 must be followed providing for distress and in default imprisonment, unless, &c.; but the question was immaterial, as the court, as a matter of precaution, amended the conviction so as to include these provisions. *Regina* v. *Scott*, 26 O. R. 646.

Forum.]—The defendant was convicted by the police magistrate of the city of Toronto for an offence committed at Toronto against the Liquor License Act, R. S. O. 1877 c. 181, s. 39. Section 68 of that Act makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace and remanded till the day on which he was convicted:—Held, that the information was properly taken before one justice under the provisions of s. 6 of the Summary Convictions Act, which is made applicable both by R. S. O. 1877 c. 181, s. 68, and R. S. O. 1877 c. 74, s. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 Vict. c. 4, s. 7, the defendant was legally convicted. *Regina* v. *Gordon*, 16 O. R. 64.

General Verdict— *Inconsistent Specific Questions.*]—The court refused to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina* v. *Grainger*, 46 U. C. R. 282.

Hard Labour—*Amending.*]—The conviction and warrant of commitment for selling liquor without license contrary to 37 Vict. c. 32, s. 24 (O.), in a county where the Temperance Act was in force, imposed hard

labour, in addition to the imprisonment, which was not authorized by either the Temperance Act or 37 Vict. c. 32 for the first offence; but it was awarded for the first offence by the forms in the schedule of 40 Vict. c. 18, although there was no mention of it in any part of the statutes, and s. 36 of that Act enacts that the forms in the schedules shall be sufficient in all cases thereby respectively provided for:—Held, that the imposition of hard labour was not warranted by its mere insertion in the schedules; but that the conviction and warrant could be amended by striking out these words under 40 Vict. c. 18, s. 23 (O.). It was objected also that the warrant did not negative the exceptions in the section of the Act under which the defendant was convicted; but held, that this also might be amended. *Regina* v. *Lake*, 7 P. R. 215.

Quære, whether under s. 77 a conviction imposing an unauthorized sentence, such as imprisonment at hard labour, could be amended on motion to quash by striking out the words "with hard labour." *Regina* v. *Lawrence*, 43 U. C. R. 164.

A conviction for selling liquor during the time prohibited by the License Act, alleging that it was for a second offence, imposed upon defendant a penalty of $40, and in default of sufficient distress ordered the defendant to be imprisoned in the county gaol at hard labour for ten days:—Held, that under 37 Vict. c. 32, s. 33, R. S. O. 1877 c. 181, s. 52, the previous offence need not be during the currency of the same license, but may be during the currency of a license granted for a previous year; but held, also, that the conviction was invalid, as the Act only authorized the alternative of fine or imprisonment as a substantive punishment for the second offence, but gave no power to imprison at hard labour for non-payment of the fine. Held, also, that the court would not amend the conviction under 40 Vict. c. 18, s. 23, R. S. O. 1877 c. 181, s. 77, as it could not, under the circumstances, say that any other punishment was intended by the justices. Quære, as to the meaning of a power to fine "not less than $40." *Regina* v. *Black*, 43 U. C. R. 180.

Defendant was convicted for a third time of having sold liquor without a license, and was sentenced to three months' imprisonment with hard labour:—Held, following Regina v. Frawley, 46 U. C. R. 153, that the magistrate had not power to impose hard labour, and the conviction was therefore invalid. *Regina* v. *Allbright*, 9 P. R. 25.

But see *Hodge* v. *The Queen*, 9 App. Cas. 117.

Semble, that in such a case a Judge has no power to amend the conviction under R. S. O. 1877 c. 181, s. 77, as amended by 44 Vict. c. 27, by striking out the part imposing hard labour. *Regina* v. *Allbright*, 9 P. R. 25.

Held, that the punishment for offences against s. 43 of R. S. O. 1877 c. 181, must be either imprisonment with hard labour or a fine; and that such imprisonment in the event of non-payment of the fine could not be awarded, but only imprisonment without hard labour. *Regina* v. *Rodwell*, 5 O. R. 186.

Imprisonment.] — A penalty of thirty days' imprisonment in default of sufficient distress for the fine was imposed:—Held, good under R. S. O. 1877 c. 181, ss. 51 and 59. *Regina* v. *Young*, 7 O. R. 88.

The adjudication on a second offence under the Liquor License Act, R. S. O. 1887 c. 194, without providing for distress, directed immediate imprisonment in default of the payment of the fine and costs; and the conviction drawn up under it was in similar terms. After the issue of a writ of certiorari, but before its return, an amended conviction was returned providing for distress being first made:—Held, that the adjudication and conviction made under it were void for not providing for distress; and that the amended conviction could not be supported because it did not follow the adjudication. Semble, that had the amended conviction been in other respects good, it would not have been void under the Liquor License Act for including the costs of conveying to gaol. *Regina* v. *Cantillon*, 19 O. R. 197.

Held, that the conviction in this case in awarding imprisonment in default of payment, was properly drawn, for by s. 70 of R. S. O. 1887 c. 194, under which the conviction was made, there is no power to direct distress. *Regina* v. *Clarke*, 19 O. R. 601.

A conviction for a first offence under s. 70 of the Liquor License Act, R. S. O. 1887 c. 194, properly awards imprisonment in default of payment of the fine and not in default of sufficient distress. Regina v. Smith, 46 U. C. R. 442, and Regina v. Hartley, 29 O. R. 481, approved. Judgment below, 23 O. R. 387, reversed. *Regina* v. *Hazen*, 20 A. R. 633.

Keeping Liquor for Sale.]—A conviction under s. 25 of 37 Vict. c. 32 (O.), for unlawfully having spirituous, &c., liquors for the purpose of selling, without being first duly licensed thereto, need not negative the exceptions contained in ss. 26 and 27. The penalty enacted by s. 52 applies to cases where the act complained of was done either by the applicant or by some other person. *Regina* v. *Breen*, 36 U. C. R. 84.

Kind and Quantity.] — The conviction was under 32 Vict. c. 32 (O.), and set out that defendant sold spirituous liquor by retail without license, stating time and place:—Held, sufficient, and that it was not necessary to specify kind and quantity. *Regina* v. *King*, 20 C. P. 246.

License Commissioner Taking Part in Trial.]—During the trial of an offence under the Liquor License Act, the license commissioner, who was sitting at the counsel's table, went and sat in the constable's chair a few feet distant from the desk at which the magistrate was sitting, but there was no evidence to shew that he in any way improperly interfered in the trial:—Held, that the license commissioner could not be deemed, under the circumstances, to have been sitting on the bench and taking part in the trial, &c., contrary to s. 95 of the Act. *Regina* v. *Southwick*, 21 O. R. 670.

Magistrate not Signing.]—A conviction under R. S. O. 1877 c. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a certiorari:—Held, if an objection at all, a ground for sending back

the writ that the third magistrate might sign the conviction, but not a ground for quashing it. *Regina* v. *Young*, 7 O. R. 88.

One Penalty for Two Offences.]—The defendant was convicted under s. 41 of the Liquor License Act, R. S. O. 1877 c. 181, for selling liquor without a license, and under s. 46 for allowing liquor sold by him to be consumed on the premises; and one penalty was inflicted "for his said offence:"—Held, bad, in not shewing for which offence the penalty was imposed. *Regina* v. *Young*, 5 O. R. 184a.

Partners—*Amending.*]—A conviction of S. & D., under 37 Vict. c. 32 (O.), as amended, for that they, trading under the name and firm of S. & D., in their house of public entertainment, did unlawfully keep liquor for the purpose of sale, barter, and traffic therein, without the license by law required, and adjudging them for their said offence to pay $40 and costs:—Held, bad, for that the defendants could not be jointly convicted, nor one penalty awarded against them jointly. Held, also, that such conviction could not be amended. *Regina* v. *Sutton*, 42 U. C. R. 220.

Place of Sale—*Name of Purchaser.*]—An information stated that defendant, "a licensed hotel-keeper in the town of Peterborough, did, on Sunday, the 2nd July, 1876, at the hotel occupied by him in the said town, dispose of intoxicating liquor to a person who had not a certificate therefor," &c.; and the conviction thereunder stated that the defendant was convicted "upon the information and complaint of J. R., the above named complainant, and another, before the undersigned," &c., "for that the said defendant," &c., in the words of the information:—Held, that the person to whom the liquor was sold should have been named or described: but that such an objection, under 32 & 33 Vict. c. 29, s. 32 (D.), which applies to informations, was only tenable on motion to quash the information when before the magistrate. Quære, whether 32 & 33 Vict. c. 31, s. 5 (D.), which enacts that no objection to any information for any defect in substance or form therein, should be allowed, would not be a sufficient answer to the objection. Held, also, that it sufficiently appeared that the hotel was a licensed hotel at which liquor was allowed to be sold; that a sale "at" the hotel was equivalent to a sale "therein, or on the premises thereof;" and that it sufficiently appeared that the defendant was "the proprietor in occupancy or tenant or agent in occupancy." Held, also, that the words "and another" could be treated as surplusage, it appearing in fact that J. R. was the only complainant. *Regina* v. *Cavanagh*, 27 C. P. 537.

See, also, *Regina* v. *Parlee*, 23 C. P. 359.

Conviction held bad for not shewing the place where the offence was committed. *Regina* v. *Young*, 5 O. R. 184a.

Sale on Sunday.]—A conviction for selling liquor on a Sunday, in contravention of 32 Vict. c. 32, s. 23 (O.), omitted to state that the liquor was not supplied upon a requisition for medicinal purposes:—Held, bad, and the conviction was quashed. *Regina* v. *White*, 21 C. P. 354.

F. was convicted on the 5th February before W. R., a justice of the peace, "for that he did on Sunday, the 19th of January, sell and receive pay for intoxicating liquor at his hotel," and was fined $40 and costs, to be paid forthwith, and in default of distress to be imprisoned for twenty days at hard labour. On the 12th February, F. was convicted before D. S. and J. L., two justices of the peace, for that he did "on Sunday, the 26th January, sell and receive pay for intoxicating liquors," &c., "the same being the third offence," &c., and was fined $100 and costs, and in default of distress to be imprisoned for fifty days. A certificate of the first mentioned conviction was before the magistrates on the second conviction. There was also evidence of the sale of liquor by defendant on three Sundays, but the informations did not allege the previous offence. It was not shewn whether defendant was licensed:—Held, that the first conviction was bad, for it did not shew whether it was for selling without a license, or, having a license, for selling on Sunday; and if for selling without a license it was bad, because it awarded imprisonment at hard labour; and if for selling on Sunday, then because it was not alleged to be a second offence. Held, also, that the second conviction was bad, because, if for selling without a license, the fine was beyond what the statute warrants, and if for selling on Sunday, it was not shewn or charged that defendant was licensed; and because the information did not charge the two previous offences. *Regina* v. *French*, 34 U. C. R. 403.

In proceedings for selling liquor on Sundays, it was not shewn that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to s. 48 of the Liquor License Act:—Held, that the conviction was bad. *Regina* v. *Rodwell*, 5 O. R. 186.

Second and Third Offences.]—Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, R. S. O. 1877 c. 181, s. 52, are bad unless proceedings have been taken for the first offence. *Regina* v. *Rodwell*, 5 O. R. 186.

Statement as to Want of License.]—By R. S. O. 1877 c. 181, s. 86, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant:—Held, no objection to a conviction that it did not shew defendant was not licensed. *Regina* v. *Young*, 7 O. R. 88.

Territorial Jurisdiction.]—Upon a motion for a rule nisi to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without a license:—Held, that although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon certiorari, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the court that

an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to s. 889 of the Criminal Code, 1892, be held invalid. Regina v. Young, 5 O. R. 184a, distinguished. *Regina* v. *McGregor*, 26 O. R. 115.

Third Offence.] — Section 51 of the Liquor License Act, R. S. O. 1877 c. 181, which imposes the penalties, omits all reference to a third offence (which was provided for in the enactments of which it is a consolidation), though such an offence is referred to in s. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction for a third offence was therefore quashed, although the penalty imposed thereby might have been inflicted for a second offence. *Regina* v. *Frawley*, 45 U. C. R. 227.

Uncertainty.]—A conviction, for that the said H. "did sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law:"—Held, bad, for uncertainty, as not shewing whether the offence was for selling without a license or during illegal hours. *Regina* v. *Hoggard*, 30 U. C. R. 152.

Waiver of Summons or Information.]—On the trial of a misdemeanour before magistrates, the taking of an information or issue of a summons may be waived. On a charge for selling liquor without a license, contrary to s. 70 of R. S. O. 1887 c. 194, the defendant appeared before the magistrates, pleaded to the charge, and the evidence was gone into and the case closed without objection, the defendant convicted, and a fine of $50 and costs imposed. An objection taken on a motion to quash the conviction, that the information was taken before only one justice of the peace, was overruled, it being, under the circumstances, held to be waived; but, semble, the information was apparently taken before two justices. *Regina* v. *Clarke*, 20 O. R. 642.

See CRIMINAL LAW—JUSTICE OF THE PEACE.

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6. *Miscellaneous Cases.*

Action against Commissioners.] — A notice of action is necessary in an action for damages against a board of license commissioners acting under R. S. O. 1887 c. 194. *Lesson* v. *Board of License Commissioners of the County of Dufferin*, 19 O. R. 67.

Action against Innkeeper.]—R. S. O. 1887 c. 194, s. 122, which imposes a liability in certain eventualities on innkeepers who give liquor to persons who thereby become intoxicated, is a remedial measure and should receive a liberal construction. *Trice* v. *Robinson*, 16 O. R. 433.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed innkeeper, forbidding him to supply liquor to her husband; in consequence of which the defendant forbade his barkeeper (his son) furnishing liquor to the husband, but the barkeeper notwithstanding did serve the plaintiff's husband with liquor in the tavern kept by defendant. R. S. O. 1877 c. 181, s. 90, enacts that if the person so notified delivers or suffers to be delivered any such liquors to the person named in the notice, the person giving such notice, may recover from him not less than $20, nor more than $200, to be assessed by the court or jury as damages: —Held, that defendant was liable. Hugill v. Merrifield, 12 C. P. 264, overruled. *Austin* v. *Davis*, 7 A. R. 478.

In an action by a married woman against an innkeeper, under R. S. O. 1877 c. 181, s. 90, for having supplied liquor to her husband, after a notice, as follows: "I hereby forbid you or any one in your house, giving my husband William Northcote any liquor of any kind from this day, . . " the jury found that the husband was an habitual drunkard, and that intoxicating liquor had been furnished to him after such notice by the defendant, who knew the husband well, as also the reason for giving the notice, and rendered a verdict in favour of the plaintiff for $20. In the following term the defendant moved to set aside that verdict, and to enter a nonsuit or for a new trial. After argument the Judge ordered the verdict to be set aside and a nonsuit entered, which, on appeal to the court of appeal, by reason of an equal division of the Judges, was affirmed. *Northcote* v. *Brunker*, 14 A. R. 364.

The plaintiff, a married woman, brought an action under R. S. O. 1887 c. 194, s. 125, to recover from the defendant, an hotel-keeper, damages because of the sale by him to her husband of intoxicating liquor after notice not to sell. The notice was signed by the plaintiff and served by her agent. Upon appeal from the judgment of the county court of York (26 C. L. J. 26, 9 C. L. T. Occ. N. 491) in favour of plaintiff, the court was divided:—Per Hagarty, C. J. O., and Burton, J. A. The right of action for damages depends on the notice being given by the person filling the public position of inspector, though the liability as far as the penalties are concerned, will be incurred upon notice being given by the private individual. Per Osler, and Maclennan, JJ.A. The notice must in all cases be signed by the private individual, and whether served by the inspector or not, the private individual gives the notice, so that the words may fairly be construed to mean "person requiring to give notice," and there is a right of action, whether the notice is served in one way or the other. *Thornley* v. *Reilly*, 17 A. R. 204.

——— *Liquor Supplied by Two Tavern-keepers—Joint Liability.*]—Where a person comes to his death while intoxicated and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. 1887 c. 194, s. 122, they cannot be sued jointly. The jury having in such an action, in which tavern-keepers had been jointly sued, assessed the damages at the trial at different sums against the two defendants, upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a nolle prosequi against the other. *Crane* v. *Hunt*, 26 O. R. 641.

See sub-title VI., 2, *post*.

Appointing Officer to Enforce the Act.]—A by-law, passed on the 21st July, 1874, appointed an officer under 36 Vict. c. 34, s. 8 (O.), to enforce the provisions of said Act, and the Acts therein recited, and the by-laws of the corporation respecting shop and tavern licenses. This by-law was passed to fill a vacancy in the office caused by the resignation of the person appointed under a by-law passed in February previous. 36 Vict. c. 34 had been repealed when the by-law was passed, by 37 Vict. c. 32 (O.), which gave power to fill a vacancy in such office:—Held, that the by-law was not invalid, because not passed in February, under s. 9 of the last mentioned Act, nor for not defining the duties, &c., of the officer appointed, which might be done by another by-law. Held, also, upon the facts stated in the case, that it was not invalid as not having been passed at a legal meeting of the council, or signed by the reeve. *In re Slavin and Village of Orillia*, 36 U. C. R. 159.

Effect of Temperance Act of 1864.]—40 Vict. c. 13 must be construed either as providing that a wholesale license must be taken out in municipalities where the Temperance Act of 1864 is in force, for the quantities to be sold therein under that Act, and making a sale thereof without license, a contravention of ss. 24 and 25 of 37 Vict. c. 32 (O.), as a selling by wholesale without license; or as providing in addition that a sale in such municipalities of the quantities prohibited by the Temperance Act should be a contravention of the said ss. 24 and 25 as a selling by retail without license. Where, therefore, the defendant was convicted for selling liquor by retail without a license in a municipality where the Temperance Act was in force:—Held, reversing 7 P. R. 215, that the conviction was invalid, and must be quashed, for if the former were the intention of the Legislature, then the conviction was bad, as it was for selling by retail under a provision of the License Act not in force where the conviction was made; and if the latter, the Legislature were exceeding their powers in directly legislating on criminal law, and enacting criminal procedure for the punishment of offences against the Temperance Act. *Regina* v. *Lake*, 43 U. C. R. 515.

Sale to Unlicensed Dealer.] — In an action to recover the price of ale sold to the defendant by the plaintiffs, duly licensed brewers, it appeared that immediately after the order was booked, the plaintiffs were informed by her purchasing agent that the defendant had no license to sell, and it was then arranged that she should have the benefit of the plaintiffs' wholesale license and sell as their agent. The defendant pleaded that the ale was supplied to her for the purpose of its being sold by her in contravention of the Ontario Liquor License Act:—Held, that the delivery of the ale having taken place with the knowledge of the purpose of the defendant, which was illegal, and having been made for the purpose of enabling her to carry that out, the plaintiffs could not recover. *Bowie* v. *Gilmour*, 24 A. R. 254.

——— *Pleading.*]—To an action on the common counts for goods sold and delivered defendant pleaded, as to so much of the plaintiff's claim as is for intoxicating liquors, &c., that defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell such liquors without license, and the plaintiff well-knowing this, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which are part of the goods for which the plaintiff seeks to recover. The arbitrator to whom it was referred to find the facts for the opinion of the court, found that while the defendant was accustomed to and did sell such liquors without a license, the plaintiff knowing this sold to the defendant intoxicating liquors, &c.:—Held, that the plea was bad, because by the License Act and other enactments, there was a class of persons, to wit, chemists, &c., who might sell without license, and the plea did not allege that defendant was not one of such class; and that the finding of the arbitrator did not go as far as the plea, for that it was quite consistent with the finding that the liquor was sold to defendant for his own consumption. *Kelly* v. *Earl*, 29 C. P. 477.

V. Special Statutory Restrictions.

1. *Elections.*

Construction of the Act.] — Semble, per Draper, C.J., contrary to the opinion expressed by Gwynne, J., at the trial, that s. 66 of 32 Vict. c. 21 (O.), must be construed distributively, and that under it the penalty may be inflicted, 1. on a tavern keeper, &c., who does not keep his tavern closed during the hours of polling, and 2. on any person, whether a tavern keeper, &c., or not, who sells or gives drink to another within the time and place specified. *Re Lincoln Election, Rykert* v. *Nesbon*, 12 C. L. J. 161.

Held, 1. That s. 66 of 32 Vict. c. 21 (O.), is limited in its effect to tavern keepers, &c., who alone can sell or give liquor so as to avoid the election. 2. That the words of the section "municipalities in which the polls are held," and "within the limits of such municipality," are not confined to the municipality in which are held the polls at which the voters who are treated are entitled to vote. The prohibition extends to the selling or giving liquor within the limits of any municipality of the riding in which a poll is being held, irrespective of the person to whom the liquor is sold or given. *Farewell* v. *Brown, South Ontario Election*, 12 C. L. J. 216.

County Court Jurisdiction.] — The county court has jurisdiction in an action for the penalty imposed by s. 81 of C. S. C. c. 6, for selling spirituous or fermented liquors on polling days. *In re Medcalfe* v. *Widdifield*, 12 C. P. 411.

Extent of Prohibition.]—C. S. C. c. 6, s. 81, enacts that every hotel, tavern, and shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the two days appointed for polling, "in the same manner as it should be on Sunday during divine service," and that no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of $100 for either offence. In an action for penalties under this Act for both offences, claiming $100 for each in

separate counts:—Held, that the prohibition is absolute, not restricted by any saving in other statutes; and that a plea to the whole declaration, that the liquors were supplied to travellers, would be bad also as an answer only to the second count. Held, also, that a plea that there was not when the Act was passed any law of the land requiring taverns or hotels to be closed on Sunday during divine service was bad, for the Municipal Act, C. S. C. c. 54, s. 254, does so require in Upper Canada; and if true the absence of such a law would form no defence. In such an action the declaration should not be in the disjunctive, for not keeping the hotel or tavern closed, and giving or selling spirituous or fermented liquors, &c. *Widderfield* v. *Metcalfe*, 21 U. C. R. 247.

The judgment appealed from is reported 8 L. J. 74.

Sale by Servant.]—In an action for penalties under the statute, C. S. C. c. 6, s. 81, prohibiting the selling of liquor on polling days, the Judge having told the jury that the defendant was responsible for his agent's (bar-keeper) acts, although done in direct contravention of his command, and the question of connivance on defendant's part, notwithstanding his command to his bar-keeper, not having been left to the jury, a new trial was ordered without costs. *Hugill* v. *Merrifield*, 12 C. P. 269. See *Austin* v. *Davis*, 7 A. R. 478.

See PARLIAMENT.

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2. *Indians.*

Appeal.]—The words "appeal brought" in s. 108 of the Indian Act, R. S. C. c. 43, are satisfied by the giving of notice and perfecting the appeal by the giving of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant from a conviction under that Act to bring his appeal to a hearing within the time limited by s. 108. In re Hunter v. Griffiths, 7 P. R. 86, not followed. Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute. *Regina* v. *McGauley*, 12 P. R. 259.

Date of Offence.]—A summary conviction by the police magistrate of the county of Brant, for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. c. 43, stated that the offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887:—Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake, and that s. 87 of R. S. C. c. 43, operated to cure this irregularity, as also certain other irregularities complained of, the offence having been clearly proved, the police magistrate having express jurisdiction by s. 96 of the Act, and the punishment imposed being within the power conferred upon him. *Regina* v. *Greca*, 12 P. R. 373.

Imprisonment in Default of Payment.]—A conviction under the Indian Act, 1880, for giving intoxicating liquor to an Indian imposed a fine and costs, and in default of immediate payment, imprisonment:—Held, that the conviction was invalid and must be quashed, for while s. 90 provides as punishment for the offence, imprisonment or fine, or fine and imprisonment, it does not authorize a fine, and in default of payment imprisonment; and that the defect was not remedied by s. 98, which enacts that no prosecution, conviction, &c., under the Act shall be invalid on account of want of form, so long as the same is according to the true meaning of the Act. Held, also, that the conviction was invalid because it did not negative that the liquor was made use of under the sanction of a medical man or minister of religion. *Regina* v. *MacKenzie*, 6 O. R. 165.

Offence under Liquor License Act.]—The offence was selling liquor to an Indian:—Held, no objection to a conviction under R. S. O. 1877 c. 181, for if so the defendant was guilty of two offences, one under the latter Act, and one under the Indian Act. *Regina* v. *Young*, 7 O. R. 88.

Procedure—*Jurisdiction* — *Restraining Action.*]—An information for selling liquor to certain named Indians, but without describing them as of any particular tribe or locality, was laid by R., of the township of Rama, before D. M., described as "an Indian agent by royal authority duly appointed," and alleged that defendant and Fanny, his wife, or one of them, did on, &c., sell, &c., to the said Indians spirituous liquors contrary to the statute, &c. The summons issued thereon described D. M. as Indian agent, and shewed it was issued at Rama township. It was directed to the defendant and his wife, described as of Rama township, and was personally served on the wife and a copy left with her for her husband at their most usual place of abode. This was proved by affidavit of service. The inquiry was held at Rama before D. M. as Indian agent, and he subscribed the different depositions as "Indian agent of the Chippewas of Rama," ex officio justice of the peace. The conviction was that on, &c., "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D. M., Indian agent for the Chippewas at Rama, ex officio justice of the peace for the purpose and under the Indian Act, 1880, for that he did on, &c., at the township of Rama, unlawfully sell to certain Indians, &c." The warrant of commitment recited that the conviction was before D. M., as Indian agent of the county of Ontario. The liquor was sold at defendant's hotel, in the township of Rama, by the defendant's wife, the husband being away at the time and for some time afterwards. There was nothing said to D. M. to shew why defendant was not present at the inquiry; and D. M. had no reason to believe that the case was other than a neglect or refusal to attend. In support of this application, defendant stated that he knew nothing of the summons having been issued, or of the proceedings thereon, and never authorized any one to act for him:—Held, per Wilson, C.J., that the service was regularly made, and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefor. Quære, whether D. M.'s appointment was as an Indian agent of the Chippewas of Rama, or for the county of Ontario, but the latter might include the former and so give jurisdiction.

Held, however, the conviction could not be supported, for none of the proceedings shewed that the Indians to whom the liquor was sold were Indians over whom the agent had jurisdiction, as it did not appear that they were Chippewa Indians, or Indians residing within the township, or even in the county. The discharge of the defendant was granted, but the Chief Justice directed that, so far as necessary, and he had power to do so, no action should be brought against the Indian agent. A substantive motion was made before a single Judge, to quash the conviction, which was granted, he also directing that no action be brought against the Indian agent. On appeal to the divisional court against so much of the judgments as prevented an action being brought, the appeals were quashed. *Regina* v. *McAuley*, 14 O. R. 643.

3. *Public Works.*

Village—*Action — Quashing Conviction.*]—The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway on the north shore of Lake Superior, fifty miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the village of Michipicoten River. At this place the defendant C. and his co-contractors had their headquarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them there. The defendant C. and his co-defendant R., who were justices of the peace, having jurisdiction in the district of Algoma, assuming to act under R. S. O. 1877 c. 32, "An Act Respecting the Sale of Intoxicating Liquor near Public Works," caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined, and imprisoned:—Held, that this was a village within the meaning of R. S. O. 1877 c. 32, s. 1, and therefore the prohibition contained in the Act did not apply and that the justices had no jurisdiction. The plaintiff was discharged upon a writ of habeas corpus, the justices having returned to the certiorari issued in aid of the habeas corpus, a paper purporting to be the conviction signed by them but not under their seal. The conviction was not quashed:—Held, that after the return to the certiorari, a new conviction could not be returned, and that as the conviction returned was not sealed, it was a nullity and need not be quashed before an action was brought. *Bond* v. *Connee*, 15 O. R. 716, 16 A. R. 398. Affirmed by the supreme court. *Cassels' Dig.*, 511.

VI. Temperance Act of 1864.

1. *Adoption and Validity of By-laws.*

Under the Act a requisition for the by-law must be published by the clerk for four consecutive weeks in some newspaper published weekly or oftener within the municipality, with a notice that on some day within the week next after such four weeks, a poll will be taken. The notice in this case, first published on Thursday, 12th January, appointed Tuesday, 7th February, for the poll:—Held, too soon, and the by-law was quashed. It was contended that the four weeks must be computed from the first day of the week in which the first publication takes place, not from the day of such publication; but held, clearly not. Quære, whether on motion to quash such by-laws, it was intended that the court, in term, should enter into a scrutiny of votes. *In re Coe and Township of Pickering*, 24 U. C. R. 439.

The by-law was first published on the 2nd October, 1868, with a notice for a meeting of the electors on the 4th November, at two p.m. On the 9th, 16th, and 23rd, it was again published, with a notice for the meeting at ten a.m., on the 4th, when the poll was held:—Held, that the first notice was bad, for the statute requires the meeting to be at ten a.m., and the meeting in consequence was not held within the week next after the fourth week of publication, as directed by the Act. The by-law was therefore quashed. *In re Miles and Township of Richmond*, 28 U. C. R. 333.

Where the by-law had been adopted by the electors under a requisition, but had only been published, and not the requisition for adoption of it, as the statute requires, and it was sworn and not denied that this omission prevented many from voting, the by-law was quashed. *In re Day and Township of Storrington*, 38 U. C. R. 528.

The requisition for the adoption of the by-law was first published on the 21st January, 1876, the next publication was on the 3rd February, and the last on the 10th February—so that there was no publication for the week beginning 28th January, though the statute requires publication "for four consecutive weeks." The court refused to quash the by-law on this objection, it having been carried by a majority of 240, and there being no allegation that the irregularity prejudiced the voting. *In re Wycott and Township of Ernestown*, 38 U. C. R. 533.

It is not necessary that the notice of taking a poll to decide upon the by-law, should state the number of days during which the poll will be kept open. *In re Hamilton and County of Brant*, 41 U. C. R. 253; *In re Malone and County of Grey*, 41 U. C. R. 159.

A county by-law under the Act passed on the 27th September, 1876, and voted on on the 6th November following, was quashed, upon motion made on the 25th May, 1877, on the ground that in several of the municipalities notice of taking the poll was not given in time, and was not put up in four public places, as required by the statute; it appearing that but for these irregularities the result might have been different. *Re Mace and County of Frontenac*, 42 U. C. R. 70.

A petition having been presented to defendants for the submission of a by-law under that Act for prohibiting the sale of liquors and the issue of licenses therefor, on the 27th June, 1875, a by-law was introduced, read three times and passed, and a resolution adopted for its submission to the ratepayers under the said Act. On the 30th June the clerk published a notice under the Act that the voting would take place on the 6th August, but on the 28th July the clerk advertised that the by-law was withdrawn for

the present, but that notice would be given as to when the voting would take place. On the 11th August the by-law was again published, and notice given that the voting would take place on 10th September. It did not appear why the first notice was not acted upon, but there was no charge of bad faith, or that the change made any difference in the result, or that the ratepayers were misled:—Held, that there was a sufficient compliance with s. 5 of the Act, which directs that the clerk shall forthwith cause the by-law to be published. *In re Lake and County of Prince Edward*, 26 C. P. 173.

The requisition for a by-law was not published in the municipality for four consecutive weeks, as required by the Act, and on this ground it was quashed, in deference to the decided cases, although three-fourths of the electors had voted, and there was no reason to suppose that any one had been prejudiced by the omission. The misnomer of the corporation in the rule, as "the municipality of the incorporated village of Gananoque," was held immaterial. *Re Brophy and Village of Gananoque*, 26 C. P. 290.

Where a by-law was passed under this Act, having been adopted by the electors at a meeting at which the township clerk took the poll, and conducted all the proceedings, no person presiding thereat as directed by s. 3, s.-s. 3:—Held, that the provision was imperative; that in the absence of the person appointed to preside no poll could be legally taken; and the by-law therefore was quashed, with costs. *In re Hartley and Township of Emily*, 25 U. C. R. 12.

Upon the affidavits in this case, substantially stated in the report, the court refused to set aside the by-law on the ground that the reeve did not "preside" at the meeting at which it was adopted, but the clerk. There was no doubt that he opened and closed the poll, but the affidavits were contradictory as to the length of and reason for his absence in the meantime. *In re McLean and Township of Bruce*, 25 U. C. R. 619.

The clerk was not present at the meeting, and the reeve acted both as presiding officer and poll clerk, certifying the proceedings in both capacities:—Quare, whether the by-law would have been bad on this ground. *Re Miles and Township of Richmond*, 28 U. C. R. 393.

The reeve of one of the townships was present at the commencement of the meeting, and presided during the first day, but was absent during the second day when the clerk was in attendance:—Held, that this, in the absence of anything improperly done or omitted in consequence, or of any effect on the result in that township, was not a fatal objection. Quære, whether it would have been different had the by-law been one of that township only. *In re Malone and County of Grey*, 41 U. C. R. 159.

The assessment rolls used in this case were verified as required by 32 Vict. c. 36, s. 48 (O.), without the addition required by 36 Vict. c. 2, s. 4 (O.), stating that the ratepayers were not entered at too high or low a rate so as to give or deprive them of votes:—Held, no ground for quashing the by-law, the correctness of the roll or the right of any person to vote not being impugned. *In re Lake and County of Prince Edward*, 26 C. P. 173.

Held, that the by-law may be passed and the vote taken in the manner prescribed by the Temperance Act, and that the machinery provided by s. 231 of the Municipal Act of 1873, need not be resorted to. *In re Lake and County of Prince Edward*, 26 C. P. 173.

An application was made to quash a by-law passed under the Act by the united counties of Northumberland and Durham, by a majority of 2,752, on the ground that the assessment rolls and not the voters' lists were used throughout the counties, and that in four municipalities the assessment rolls of 1877 were used instead of those of 1876. It was not attempted to be shewn, however, that the result of the voting would otherwise have been different; and the rule, therefore, was discharged, with costs. Quære, whether the objection was valid, or whether, notwithstanding 40 Vict. c. 12 (O.), making the voters' list applicable to municipal elections, the vote, according to the last case, should not still be taken as prescribed by the Temperance Act. *In re Reubottom and United Counties of Northumberland and Durham*, 42 U. C. R. 358.

Where a rule asks to quash a by-law on the ground that the poll was illegally taken, and there was no valid poll taken, and that the assessment rolls were used instead of the voters' list, and the rolls of the wrong year, the applicant is confined to the specific illegality pointed out as regards the poll. *Ib.*

Where a by-law had been carried in a county by 193 majority, but it appeared that in one township, where the names of the qualified municipal electors on the assessment roll were more than 800, the poll was left open only two days, leaving 250 votes unpolled there, the by-law was set aside. *In re Johnson and County of Lambton*, 40 U. C. R. 297.

The names of owners appearing in the sixth column of the roll, under the heading "owners and address," should be counted in order to ascertain the number of electors, although not appearing in the second column, "name of occupant or other taxable party," and not bracketed or numbered in the first column. *Ib.*

A by-law having been carried in a county by a majority of 794, it appeared that in one township, where there were over 800 names of qualified electors on the roll, only two days' polling were allowed, leaving 399 votes unpolled in that township. On the second day more than half an hour elapsed without a vote being tendered, but the poll was not closed on that account:—Held, no ground for setting aside the by-law, for the votes left unpolled were not sufficient to have affected the result of the election. *In re Malone and County of Grey*, 41 U. C. R. 159.

It was argued that the premature closing of the poll in this township caused those opposed to the by-law in two other townships, in which over 600 votes were left unpolled, to relax their efforts, and so that the result was or might have been affected by it; but held, that this was a consequence too remote to be considered. *Ib.*

There must be three days' polling where the names on the roll exceed 800, though they may be less than 1,200. *Ib.*

It is not necessary that the notice of taking the vote should specify the number of days' polling to be allowed, though it would be more convenient. *Ib.*; see also *In re Hamilton and County of Brant*, 41 U. C. R. 253.

The number of days polling must be decided by the number of names of qualified municipal electors upon the roll. All those on the roll who are not qualified, such as minors, women, &c., must be excluded. *Ib.*

A polling booth was kept open beyond the first day under the Temperance Act of 1864, on the ground of there being more than 400 voters:—Held, that even if this were illegal under the present mode of taking votes, the court would not under the circumstances interfere with the by-law. *In re Lake and County of Prince Edward*, 26 C. P. 173.

A by-law, after having been submitted to the electors, enacted,—1. That the sale of intoxicating liquors and the issue of licenses therefor is by this by-law prohibited within the county of Halton, under authority and for enforcement of the Temperance Act of 1864. 2. That by-law No. 41 is hereby repealed. By-law 41 recited a petition from the ratepayers for it, and enacted that from its passing and approval by the electors, "the sale of intoxicating liquors, and the issue of licenses therefor is hereby prohibited." The court refused to quash this by-law on account of the second clause, for though its insertion was contrary to the letter of s. 2 of the statute, it could have no effect, the prohibition in both by-laws being identical, and the approval of the electors having been obtained; so that the defect was "a defect of procedure or form," within s. 37. *In re Boon and County of Halton*, 24 U. C. R. 361.

Although no one appeared to shew cause, the court, having regard to the evident intention of the Legislature to sustain such by-laws unless clearly bad, would not make the rule absolute without seeing that the objections were fatal. *In re Hartley and Township of Emily*, 25 U. C. R. 12.

Where the corporation did not support the by-law, but the warden wrote to the representative of a class interested in doing so to take such measures as they might think proper, counsel instructed by them was heard to shew cause. Semble, that any of the electors might be heard to support such a by-law if the council should fail to appear. *Re Mace and County of Frontenac*, 42 U. C. R. 70.

On an application to quash a by-law passed on the 21st December, 1869, under the Act of 1864, and submitted to the electors on the 2nd February, 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870:—Held, that being no by-law, it could not be quashed; but the rule to quash it was discharged, without costs. *In re Mottashed and County of Prince Edward*, 30 U. C. R. 74.

A by-law to prohibit the sale of intoxicating liquors and the issue of licenses therefor within a county, provided that it should come into force on the first day of May:—Held, illegal, as being contrary to the Act, which declares that such by-laws shall come into force from 1st March next after the communication thereof to the collector of inland revenue, and shall contain only the simple declaration of prohibition. *In re O'Neil and County of Oxford*, 41 U. C. R. 170.

Held, that the description of the defendants in the by-law as the corporation of the county of Prince Edward was sufficient. Held, also, that a certificate of the returning officer under s. 8 of the Act of 1864 was sufficient, and that it need not be under oath under the Municipal Act. The omission to comply with s. 166 of that Act was also held immaterial. *In re Lake and County of Prince Edward*, 26 C. P. 173.

Remarks as to the effect of the Tavern and Shop License Act of 1868, 32 Vict. c. 32 (O.), upon the Temperance Act of 1864. *In re Mottashed and County of Prince Edward*, 30 U. C. R. 74.

Held, that the Temperance Act of 1864 is still in force, and has not been impliedly repealed by subsequent legislation, and that the defendants therefore had power to pass a by-law under it. *In re Lake and County of Prince Edward*, 26 C. P. 173.

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2. *Liability of Innkeeper.*

Declaration under C. S. C. c. 78, by the administratrix, M., that defendant by his servant wrongfully and in violation of the Temperance Act of 1864, in the township of A., then and there being fully in force, furnished and gave one W., while in defendant's inn, intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault the intestate, whereby he was immediately killed:—Held, on demurrer, that it was not necessary to allege a by-law of any municipal body as in operation in A. under the Temperance Act; but that the declaration was defective, in not shewing that W. drank to excess in the inn, which was necessary to fix the innkeeper with liability under s. 49. Held, also, 1. That the Act gives the civil remedy, at any rate against the innkeeper, notwithstanding a felony may have been committed which has not been prosecuted for. 2. That under s. 41 the action might be brought for the assault, though such assault had resulted in death. 3. That this case was within C. S. C. c. 78, so that the plaintiff might under that statute maintain the action for the benefit of herself, as the wife of deceased, and that of their infant children. *McCurdy* v. *Swift*, 17 C. P. 126.

Section 40 makes a tavern-keeper liable in case any person, while in a state of intoxication from excessive drinking in his tavern, has come to his death "by suicide or drowning, or perishing from cold, or other accident caused by such intoxication." The deceased in this case, being intoxicated, fell off a bench in the bar-room, and was placed upon the floor in a small room adjoining, with nothing under his head. While there he died from apoplexy, or congestion of the brain, brought on, as the plaintiff alleged, by placing him in an improper position while intoxicated:—Held, not a case of death by "accident" within the statute, but of death from natural causes induced by intoxication. Whether under this Act proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the Act at not

less than $100, was a question raised, but not decided. *Bobier* v. *Clay*, 27 U. C. R. 438.

In an action under s. 42, by a wife against a tavern-keeper for supplying her husband with liquor after service of a "notice in writing signed by her," in accordance with the statute, there was no evidence to shew that she in fact signed the notice served, but merely that she signed a notice a copy of which was served:—Held, insufficient. Held, also, under the statute no proof of actual damage is necessary to the maintenance of the action. *Gleason* v. *Williams*, 27 C. P. 93.

See sub-title IV., 6, *ante*.

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3. *Practice and Procedure.*

If the collector of inland revenue prosecutes under the Temperance Act of 1864, two-thirds of the penalty belong to and may be retained by the collector, but he must pay one-third to the person on whose information he instituted the prosecution, and the remaining one-third must be paid by the collector to the receiver-general. If a municipal corporation or some person authorized by them prosecutes, the whole penalty belongs to the corporation, and the council of the municipality may pay over not more than half to any other person upon whose information the prosecution was instituted. If a person not so authorized prosecutes, the penalty belongs to the corporation of the municipality whose by-law is thereby enforced, and the council may pay over to any other person upon whose information the prosecution was instituted, not more than half the penalty. In the two last cases, where the corporation is not the prosecutor, the statute does not give them costs, but only the penalty. *In re McCall*, 2 C. L. J. 16.

The conviction must adjudge that the penalty enforced shall be paid to the party entitled according to one of the provisions of the Act to receive it. Where, instead thereof, it was, according to the conviction as stated in the warrant of commitment, adjudged that the penalty be paid to one J., who was not shewn to be the collector of inland revenue, in which character alone he would be entitled to it, the warrant of commitment was held bad, and the prisoner discharged from custody. *Ib.*

This Act and 28 Vict. c. 22, for the punishment of persons selling liquor without license, are intended to stand together. The first is limited to municipalities where a temperance by-law is in force, and suspends the second there during the continuance of such by-law, leaving it to apply elsewhere in Upper Canada. Therefore, where defendant sitting alone as a magistrate convicted the plaintiff for selling liquor without a license in a township where such a by-law was in operation:—Held, that he was liable in trespass, for the Temperance Act gives jurisdiction only to two justices. Held, also, however, that the conviction, though void, must be quashed, under C. S. U. C. c. 126, s. 3, before such action would lie. The warrant of commitment directed the plaintiff to be kept at hard labour, which the Temperance Act did not authorize. The turnkey swore that the plaintiff "did no hard work in gaol." Held, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within the protection of s. 17 of the last mentioned Act. *Graham* v. *McArthur*, 25 U. C. R. 478.

Two persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited under the Temperance Act of 1864, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justice to the accused. An application for a writ of certiorari to remove the conviction for the purpose of quashing it was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vict. c. 32 (O.), it was amendable. Quære, whether the conviction could not be supported as it stood. Semble, that although 27 & 28 Vict. c. 18 s. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise. *In re Watts*, *In re Emery*, 5 P. R. 267.

In a municipality where the Temperance Act of 1864 was in force, defendant was convicted for unlawfully keeping in his house of public entertainment, known as the Queen's Hotel, liquor for the purpose of sale, &c., without the license therefor by law required:—Held, that the conviction was bad, for that the only conviction that could be valid would be for keeping liquor for sale contrary to s. 12 of that Act, which forbade its being kept, and while in force no license to keep liquors in an hotel could issue. Semble, that it is ultra vires of the legislature of Ontario to enact that the provisions of the licensing Acts of Ontario shall have full force and effect in a municipality where the Temperance Act is in force, so as to make the offence against the one an offence against the other. *Regina* v. *Prittie*, 42 U. C. R. 612.

See, also, *Regina* v. *Lake*, 43 U. C. R. 515; 7 P. R. 215.

The conviction and warrant of commitment imposed hard labour, in addition to the imprisonment, which was not authorized by either the Temperance Act or 37 Vict. c. 32, for the first offence; but it was awarded for the first offence by the forms in the schedule of 40 Vict. c. 18, although there was no mention of it in any part of that statute, and s. 36 of that Act enacts that the forms in the schedule shall be sufficient in all cases thereby respectively provided for:—Held, that the imposition of hard labour was not warranted by its mere insertion in the schedules; but that the conviction and warrant could be amended by striking out these words under 40 Vict. c. 18 s. 23 (O.). It was objected also that the warrant did not negative the exceptions in the section of the Act under which the defendant was convicted; but, held, that this also might be amended. The defendant appealed to the general sessions, which was the proper appeal under the Temperance Act. Held, that the appeal should have been to the Judge of the county court under the Licensing Act, and that his appeal therefore formed no ground for discharge from imprisonment. Quære, whether the Legislature of Ontario had power to enact that an offence against the Temperance Act, for which there are special proceedings and punishments provided by that Act, might be prosecuted as an offence against

the Licensing Acts, and punished under them. *Regina* v. *Lake*, 7 P. R. 215.

Notice to the collector of inland revenue of the passing of a by-law under the Act:—Held, sufficient, and that the by-law was in force, notwithstanding that the inspector of licenses had not been notified under R. S. O. 1877 c. 182, s. 8. *Regina* v. *Roddy*, 44 U. C. R. 605.

An affidavit was allowed to be used, after conviction, to prove proper notices to the inspector of inland revenue, and to support the conviction. *Ib.*

The omission to indorse upon the notice of passing of the by-law the certificates under s. 6 and s.-ss. of the Act of 1864:—Held, immaterial, and that copies of such certificates were sufficient, objection to the same not appearing to have been taken before the police magistrate; and although the by-law was then put in issue, objections to proof of the same were overruled on the ground that the objections were not urged before the police magistrate and the defects pointed out, and that they were of a technical nature, and if taken might have been cured. *Ib.*

Held, also, that the statement of there being seven distinct offences and only one whole fine or penalty for the whole, and the omission to negative the exceptions in the enacting clauses, were not fatal to the conviction under the Temperance Act. The by-law being held to have been proved, and the form of conviction not being defective:—Held, that the application to quash the conviction must fail. *Ib.*

The court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him, under the Temperance Act of 1864, where the by-law and conviction were open to grave objections, which had been taken on the trial before him. *Regina* v. *Ray*, 44 U. C. R. 17.

Under s. 17 of the Canada Temperance Act of 1864 a separate penalty may be imposed for each of several offences, the power under that section to include two or more offences in one complaint being permissive and not imperative. *Wentworth* v. *Mathieu*, [1900] A. C. 212.

See sub-title IV., 5, *ante*.

VII. Miscellaneous Cases.

Act of 1836.]—The court refused to grant a mandamus to compel two justices of the peace to issue execution upon a conviction under 6 Wm. IV. c. 4, s. 2, for selling liquors without license, the conviction having been founded upon the written statement of the informer, and the oath of one other witness, there being a doubt under the statutes whether the information ought not also to be on oath. *Regina* v. *McConnell*, 6 O. S. 629.

Application of Fees.] — Mandamus granted to the board of police of Niagara to pay over to the inspector of licenses £240, received by the clerk of the board for tavern licenses, for 1846 and 1847; the court deciding that, under 8 Vict. cc. 62 and 72, the government, and not the town of Niagara, were entitled to the dues upon such licenses. *Regina* v. *Board of Police of Niagara*, 4 U. C. R. 141.

Disorderly House.]—One R. laid an information before G., a police magistrate, stating that one P. G., the keeper of a tavern duly licensed, kept a disorderly house, &c., and prayed that a warrant might issue against the said P. G., and all others found and concerned in her house. A warrant was accordingly granted by G. directed to the chief constable and all other constables of the city of Toronto, &c., commanding them to apprehend Mrs. G., "and all others found and concerned in her house, to answer," &c. Under this warrant the defendants, except R. & G., went to the said house at nine o'clock of a certain evening and arrested P. G. and several other persons, among whom was the plaintiff, a traveller, who went to the house as a guest. There was no disturbance whatever in the house that evening. On motion to set aside a nonsuit:—Held, that defendant R. having been in no way connected with the arrest of plaintiff, the nonsuit should stand as regards him, but should be set aside and a new trial granted as to all the other defendants. *Cleland* v. *Robinson*, 11 C. P. 416.

Drunkenness in a Public Street.]—A person was convicted of being drunk in a public street, contrary to law, and adjudged to pay a fine of $50 and costs, or to be imprisoned for six months at hard labour. There was power given by by-law 478 of the city of Toronto, to imprison an offender for the above offence, but in the warrant of commitment no reference whatever was made to the by-law:—Held, that there is no common law right to imprison any one for being drunk in a public street, and that the by-law not having been referred to, the conviction was bad. *In re Livingstone*, 6 P. R. 17.

Drunkenness in Private House.]—A person cannot legally be arrested for drunkenness in his own house, even at the request of his own family, unless he is creating a disturbance of the peace. *Regina* v. *Blakeley*, 6 P. R. 244.

Form of Conviction.]—A conviction under 40 Geo. III. c. 4, for selling spirituous liquors without license, was quashed because the information stated that "the defendant was in the habit of selling spirituous liquors without license," without charging any specific offence, or shewing time or place, nor that the liquors were sold by retail; and also, because the conviction directed defendant to pay the costs of the execution, without specifying the amount. *Rex* v. *Ferguson*, 3 O. S. 220.

A conviction "that A. of, &c., merchant and shop-keeper, did, within the space of six calendar months now last past, in the year aforesaid, at, &c., vend and sell a certain quantity of spirituous liquors in less quantity than one quart, to wit, one pint, &c., without license for that purpose previously obtained, contrary to the form of the statute in such case made and provided":—Held, bad in substance, in leaving it doubtful under what statute, and for what offence, it was made. *Wilson* v. *Graybiel*, 5 U. C. R. 227.

On demurrer to an avowry justifying under a conviction for selling spirituous liquors without a license, and a distress warrant issued thereon:—Held, 1. that it was sufficient to state the offence in the conviction as selling "a certain spiritous liquor called whiskey," though the clause, 29 & 30 Vict. c. 5, s. 254,

creating the offence, says, "intoxicating liquor of any kind;" for intoxicating liquors and spirituous liquors are used in the Act as convertible terms; and in the Customs Act of the same session whiskey is recognized as a spirituous liquor. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

Imperial Act.] — 24 Geo. II. c. 46, disallowing the sale of spirituous liquors at one time of quantities of less value than twenty shillings, to be consumed out of the shop, is not in force in this Province. *Leith* v. *Willis*, 5 O. S. 101; *Heartly* v. *Hearns*, 6 O. S. 452.

See Andrew v. *White*, 18 U. C. R. 170.

Insolvent Act.] — An innkeeper held not a trader within the meaning of the Insolvent Act of 1869. *Harman* v. *Clarkson*, 22 C. P. 294.

Lease—*Allowance for License Fees.*] — The plaintiff leased a tavern to defendant for three years at a rent of $400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was $85; but in the following year it was raised to $200:—Held, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being only bound to allow the fee provided it did not exceed such rent. *Writt* v. *Sharman*, 41 U. C. R. 249.

Negligence—*Injury to Drunken Man.*]—When a waggon is left standing in the highway, the owner cannot exempt himself from liability by shewing that the person injured thereby was drunk at the time of the accident. *Ridley* v. *Lamb*, 10 U. C. R. 354.

Possessing Distilling Apparatus.]—See *Re Lucas and McGlashan*, 29 U. C. R. 81; *Regina* v. *Carter*, 5 O. R. 651.

Quebec Law—*Sale on Sunday.*] — See *Poulin* v. *Corporation of Quebec*, 9 S. C. R. 185.

——— *Municipal Corporation—Refusal to Confirm Certificate — Liability of Corporation.*]—In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquors in his hotel:—Held, affirming Q. R. 8 Q. B. 276, that the municipal council had a discretion under the provisions of the Quebec License Law, R. S. Q., art. 889, to be exercised in the matter of the confirmation of such certificates for the exercise of which no action could lie, and further, that even if the members of the council had acted maliciously in refusing to confirm the certificate, there could be no right of action for damages against the corporation on that account. *Beach* v. *Township of Stanstead*, 29 S. C. R. 736.

Quebec License Act — *Municipal rights.*]—See *Sulte* v. *City of Three Rivers*, 11 S. C. R. 25.

Railway Company—*Employee Drinking on Duty.*]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved to have drunk while on duty intoxicating liquor with other employees; and, although only a recipient of the intoxicating liquor, such conduct constitutes a participation in a criminal offence under s. 293 of the Railway Act, 51 Vict. c. 29 (D.), which prohibits any one selling, giving, or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *Central Ontario R. W. Co.*, 28 O. R. 241.

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I. Amending or Setting Aside.

1. *Before the Judicature Act.*

(a) *At Law.*

Amending.]—See *Wright* v. *Audell*, Tay. 304; *Willard* v. *Woolcott*, Dra. 201; *Douglass* v. *Powell*, 2 O. S. 87; *Rochleau* v. *Bidwell*, 2 O. S. 319; *Hamilton* v. *Holcomb*, 12 C. P. 229; *Purdie* v. *Watson*, 3 P. R. 23; *Nicholls* v. *Nicholls*, 3 P. R. 201; *Mein* v. *Short*, 11 C. P. 430; *Averill* v. *Powell*, M. T. 2 Vict. R. & J. Dig. 92; *Edison* v. *Hogadone*, M. T. 3 Vict. R. & J. Dig. 92; *Whitelaw* v. *Davidson*, 6 U. C. R. 534; *Watts* v. *Little*, *Watts* v. *Lowry*, 6 L. J. 233; *Ritchie* v. *Worthington*, 7 L. J. 208; *McKenzie* v. *McNaughton*, 8 L. J. 329; *Robinson* v. *Grange*, 20 U. C. R. 270.

Setting aside.]—See *Popplewell d. Capreol* v. *Abbott*, 5 O. S. 245; *Hart* v. *Boyle*, 6 O. S. 168; *Richmond* v. *Proctor*, 3 L. J. 202; *Dexter* v. *Fitzgibbon*, 4 L. J. 43; *Mearns* v. *Grand Trunk R. W. Co.*, 6 L. J. 62; *Ross* v. *Grange*, 27 U. C. R. 306; *Escott* v. *Escott*, 6 P. R. 10; *Monroe* v. *King*, *White* v. *King*, 4 O. S. 189; *Billings* v. *Rapelje*, E. T. 3 Vict. R. & J. Dig. 74; *Ketchum* v. *McDonnell*, 2 U. C. R. 378; *Huff* v. *Cameron*, 1 P. R. 255; *Kerr* v. *Bowes*, 3 L. J. 150; *Richmond* v. *Proctor*, 3 L. J. 202; *Bank of Upper Canada* v. *Vanvoorish*, 4 L. J. 232; *Dunn* v. *Dunn*, 1 C. L. J. 239; *McKenzie* v. *McNaughton*, 3 P. R. 35; *Herr* v. *Douglass*, 4 P. R. 102; *McGill* v. *McLean*, 1 C. L. Ch. 6; *Doe d. King's College* v. *Roe*, 1 C. L. Ch. 111; *Perry* v. *Lawless*, 1 C. L. Ch. 168; *Bouchier* v. *Patton*, 3 L. J. 48; *Anderton* v. *Johnson*, 8 L. J. 46; *Wooster Coal Co.* v. *Nelson*, 4 P. R. 343; *Wilson* v. *Town of Port Hope*, 10 U. C. R. 405; *Every* v. *Wheeler*, 3 L. J. 11; *McDonald* v. *Burton*, 2 C. L. J. 190; *Allanson* v. *Johnson*, 4 O. S. 323; *Bird* v. *Macaulay*, 1 U. C. R. 411; *McPherson* v. *Dickson*, 5 U. C. R. 476; *Risch* v. *Hall*, 11 U. C. R. 356; *Morrison* v. *Rees*, 1 P. R. 25; *Balfour* v. *Ellison*, 8 L. J. 330; *Gore District Mutual Fire Ins. Co.* v. *Webster*, 10 L. J. 190; *Brown* v. *Cline*, 27 U. C. R. 87; *Lees* v. *Wilson*, 9 C. L. J. 191; *Tait* v. *Harrison*, 17 Gr. 458; *Wynn* v. *Palmer*, E. T. 3 Vict. R. & J. Dig. 1914; *Watkins* v. *Fenton*, 8 C. P. 289; *Kerr* v. *Hereford*, 17 U. C. R. 158; *Caird* v. *Fitzell*, 2 P. R. 262; *Moberly* v. *Baines*, 2 L. J. 212; *Schofield* v. *Ball*, 3 L. J. 204; *Westlake* v. *Abbott*, 4 L. J. 46; *Arnold* v. *Robertson*, 4 L. J. 69; *English* v. *Real Guarantee Co.*, 7 P. R. 108; *Cavanagh* v. *Hastings Mutual Fire Ins. Co.*, 7 P. R. 111.

(b) *In Chancery.*

Amending.]—See *Merchants Bank* v. *Grant*, 3 Ch. Ch. 64; *Eadie* v. *McEwen*, 14 Gr. 404; *Thompson* v. *Dodd*, 26 Gr. 381; *Lapp* v. *Lapp*, 3 Ch. Ch. 234; *Lapp* v. *Lapp*, 4 Ch. Ch. 3; *Robertson* v. *Meyers*, 1 Gr. 600; *Radenhurst* v. *Reynolds*, 11 Gr. 521; *Moffatt* v. *Hyde*, 6 L. J. 94; *Watson* v. *Henderson*, 2 Ch. Ch. 370; *Wilson* v. *Robertson*, 3 Ch. Ch. 100; *Ross* v. *Vader*, 3 Ch. Ch. 236; *O'Donoghue* v. *Hembroff*, 19 Gr. 95.

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2. *Since the Judicature Act.*

Accidental Slip or Omission—*Carelessness—Delay.*]—One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the trial. A divisional court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendant not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued:—Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the court, being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally. Held, also, that he was entitled

to relief under rule 536 as amended by rule 1454, as a party who through mistake had not been represented upon the argument of the appeal. Held, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment. *Cousins* v. *Cronk*, 17 P. R. 348.

Agreement.]—Where in 1875 in an action of ejectment the parties agreed in writing that a verdict be entered for the plaintiff, but not enforced until defendant be paid $50 for costs and the value of his improvements, said value to be fixed by arbitration; and though the $50 had not been paid nor the said value so ascertained, plaintiff entered judgment on the verdict and ejected the defendant, whose devisee now filed this bill claiming possession, damages or reference as to improvements, and an order for the payment of the amount found due and of the $50 for costs:—Held, that though the judgment could not be set aside and possession given to plaintiff the plaintiff was entitled to a reference as prayed with costs. *Watson* v. *Ketchum*, 2 O. R. 237.

Application by Plaintiffs to Vacate their Own Judgment—*Fraud—Mistake—Merger.*]—Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant. Under execution issued upon the judgment, the goods sold were seized and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent:—Held, upon the evidence, that fraudulent collusion between the husband and wife to defeat the plaintiff's claim was not established; and in the absence of fraud or mistake the court would not grant the plaintiffs the extraordinary relief of vacating the judgment against the defendant in order to allow them to proceed against the wife. Held, also, that so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged. *Toronto Dental Manufacturing Co.* v. *McLaren*, 14 P. R. 89.

Before Entry.] — At any time before formal judgment is issued by the court the judgment or part of it may be recalled and a term imposed or a change made. *Canadian Land and Emigration Co.* v. *Municipality of Dysart*, 9 O. R. 495, 512.

Consent.]—Objection to application that judgment was obtained by consent. See *Sweeney* v. *Sweeney*, 16 O. R. 92.

Costs.]—The judgment of the trial Judge, not drawn up or entered, but indorsed upon the record, was in favour of the plaintiffs against all the defendants with costs, but was afterwards reversed as to two defendants by a divisional court. Subsequently, the other defendants moved the trial Judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment, had it been against them alone, and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment, as pronounced, expressed precisely what the trial Judge intended; there was no clerical error, inadvertence, or oversight:—Held, that the Judge had no power to vary his judgment. *Port Elgin Public School Board* v. *Eby*, 17 P. R. 58.

Amendment of judgment as to costs. See *Truax* v. *Dixon*, 13 P. R. 279; *Macdonell* v. *Baird*, 13 P. R. 331; *Brundage* v. *Howard*, 13 A. R. 337.

Court of Appeal—*Mistake in Certificate.*]—See *Sherk* v. *Evans*, 22 A. R. 242; *St. John* v. *Rykert*, 3 C. L. T. 119.

Default of Appearance at Trial.]—Where judgment for defendant was given at a trial in consequence of the plaintiff's absence, and an application was afterwards made to the Judge at the sittings to reinstate the case, which he refused to entertain:—Held, that the plaintiff might nevertheless apply under rule 270 O. J. Act, to the divisional court at its next sittings to set aside the judgment, and for a new trial. *Wilson* v. *Irwin*, 10 P. R. 598.

The plaintiff not appearing at the trial, judgment was directed to be entered for the defendant, with costs. Application was subsequently made to the Judge at the same assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master in chambers, under rule 270 O. J. Act to set aside the judgment entered at the trial. This motion was enlarged into chambers:—Held, that rule 270, O. J. Act, does not give jurisdiction to the master or a Judge in chambers in such cases. *Hilliard* v. *Arthur*, 10 P. R. 281, 426.

The Judge who presides at the trial, and pronounces judgment by default for the defendant in the absence of the plaintiff, has power, under rule 270 O. J. Act, when afterwards sitting as the court at Toronto, to set aside such judgment. Hilliard v. Arthur, 10 P. R. 281, distinguished. *Rose* v. *Carscallen*, 11 P. R. 104.

Default of Appearance—*Slip—Terms.*]—The plaintiff claimed $923.13, the balance of an account, and interest thereon, and signed judgment for default of an appearance upon the special indorsement of his writ of summons for $1,273. The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying positively that he owed the plaintiff anything, and alleging that he at one time owed him $250, but that it had been satisfied by the plaintiff taking one A. as his debtor, instead of the defendant, and further, that if the debt had not been satisfied by A., it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local Judge set aside the judgment, but only on the terms that the defendant should give security for or pay into court the sum of $250:—Held, that if upon an application by the plaintiff, under rule 80, or rule 324, for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into court or security would not have been exacted from the defendant as a condition of his being allowed to defend. There is no

substantial difference between the case where a party seeks the right to defend before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution after the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him. Runnacles v. Mesquita, 1 Q. B. D. 418, followed. Semble, if the defendant's statements were true, the plaintiff would not have been entitled to interest on the amount of his claim, and the judgment would have been irregular. *Dobie* v. *Lemon*, 12 P. R. 64.

Default of Pleading.]—An order of the 4th October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that notwithstanding the dismissal of the action, an order could properly be made under rule 462 vacating the judgment, and further extending the time for delivering the statement, and the master in chambers had jurisdiction to make such an order. *Newcombe* v. *McLuhan*, 11 P. R. 461.

Default—*Discretion — Merits.*] — Under rule 796 the court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the court is not in a position to exercise a discretion, unless the defendant shews at least some such plausible defence as he would have to shew on resisting a motion for judgment under rule 739. The court will not try the defence so asserted, but affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the court to determine how far there is a bonâ fide defence of the nature of that set up; and, a fortiori, his application may be met by documents under his own hand, not explained or answered, shewing that such defence is non-existent. *Bourne* v. *O'Donohoe*, 17 P. R. 522.

Delay.]—Twenty-two months after judgment had been signed in an action on promissory notes for want of a plea and execution issued, and the defendant examined as a judgment debtor, leave was refused to set aside the judgment, and amend the declaration by charging the defendant with fraud within the meaning of the Insolvent Act of 1875. *Lightbound* v. *Hill*, 9 P. R. 295.

See McVicar v. *McLaughlin*, 16 P. R. 450, sub-title VI. *post*.

Application to set aside judgment against husband and wife upon application of the wife refused, owing to long delay in making application. See *McLean* v. *Smith*, 10 P. R. 145.

An order to set aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned. And where final judgment was cut down to interlocutory judgment by order of a master, granted on the 9th July, but not issued or served till the 19th November:—Held, that the delay was fatal, and the master was wrong in allowing the stale order to be used against the judgment as originally signed. *Molsons Bank* v. *Dillabaugh*, 13 P. R. 312.

Divisional Court.]—A divisional court has no jurisdiction to hear an appeal direct from the master in chambers, or a substantive motion to set aside a judgment by default of appearance. *Ball* v. *Cathcart*, 16 O. R. 525.

Fraud—*Division Court.*]—A Judge of the division court, apart from the jurisdiction conferred by s. 152 of the Division Courts Act to grant a new trial within fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial. *Re Nilick* v. *Marks*, 31 O. R. 677.

——— *Procedure.*]—In this action the plaintiff alleged a wrongful interference with his property under a judgment obtained against him by the defendant by fraud in a former action in the high court of justice for Ontario, and his claim was to have the judgment set aside and to recover damages for the wrong. Rule 642 provides that a party entitled to impeach a judgment on the ground of fraud shall proceed by petition in the cause:—Held, that the provisions of the rule were not applicable to this case, and were only applicable and imperative, if imperative at all, in a simple case where no consequential relief is sought, or, if sought, where it may be granted upon the petition in the original action. *Leeming* v. *Armitage*, 18 P. R. 486.

Mistake.]—A Judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order will be corrected even after the lapse of a year. *McMaster* v. *Radford*, 16 P. R. 20.

Mistake—*Discretion.*]—In an action for dower and damages for detention of dower, defendants appeared under R. S. O. 1877 c. 55, s. 20, and filed acknowledgment of tenancy, consent to dower, &c. Plaintiff's solicitor thereupon entered judgment of seisin, issued writ of assignment of dower, and proceeded for damages. The judgment of seisin was held at the hearing to be final, and to preclude any proceedings for damages, but leave was given to plaintiff to move in chambers to vacate it. The master in chambers made an order vacating the judgment:—Held, on appeal, that the order was one in the discretion of the master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor. *Ryan* v. *Fish*, 9 P. R. 458.

Mistake as to Consent.]—An order was made by the master in chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally; and also amending the writs of fi. fa. in the sheriff's hands so as to be conformable with the judgment as amended. The order was made nunc pro tunc upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force, and that the

effect of the amendment was to give plaintiff's writ priority, the master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out. On motion by way of appeal to the divisional court to rescind the last named order:—Held, that the motion must be refused: for that though the M. Co. were strangers to the action in which the amendments were made, they had a locus standi to apply to have the same set aside. *Glass* v. *Cameron*, 9 O. R. 712.

Mistake of Vendor as to Identity of Vendee—*Fraud—Vacating Judgment against Supposed Vendee.*]—A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time ignorant of the circumstances above mentioned. About a week prior to the judgment, a winding-up order was obtained against the company, hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained ex parte an order vacating the judgment against the company:—Held, that the plaintiff was entitled to recover from the syndicate the price of the goods. Held, also, per Robertson, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the court. Per Meredith, J., the judgment was at any rate irregularly entered, and when set aside, was as if it had never existed. *Keating* v. *Graham*, 26 O. R. 361.

Mortgage Action—*Ignorance of Incumbrance.*]—Where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under con. rules 780, 781, so as to convert it into a judgment under con. rule 776 with a reference to the master-in-ordinary to add incumbrancers, take the accounts, &c. *Widgress* v. *Crawford*, 12 P. R. 658.

——— *Omission of Part of the Mortgaged Lands.*]—Under the liberal powers of amendment now given by rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment. And where the plaintiff by mistake omitted from the description of lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

Order—*Extending Time for Service—Statute of Limitations.*]—An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October, 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the ex parte application of the plaintiff, under rule 238 (a), that service should be good if made within twelve months. The writ together with this order and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant who had been served moved before the local Judge who made the order of 28th October, 1892, to set it aside, which he refused to do:—Held, that the local Judge was right; for the time for moving under rule 536 had expired and had not been extended; and certain correspondence relied on as shewing an agreement to extend the time, had not that effect. The validity of the ex parte order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it; the motion to set it aside was a substantive motion supported by affidavits; and the plaintiff was at liberty to answer the motion by shewing new matter in support of the original order. And upon the material before the local Judge his refusal to set aside his order was right upon the merits. *Cairns* v. *Airth*, 16 P. R. 100.

——— *Power of Judge or Master in Chambers to Rescind.*]—A Judge or the master in chambers has power to reconsider a matter which has been brought before him ex parte, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to shew cause, if he is satisfied that opposition was intended and that any injustice has arisen. Semble, that if necessary the words "ex parte order" in rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shewn. *Fleit* v. *Way*, 14 P. R. 123.

Petition to Open up—*New Evidence—Forum.*]—An application to open up a judgment on the ground of newly discovered material evidence is provided for by rule 782, and is properly made in court to the Judge who tried the action, and is a proceeding in the cause. *Armour* v. *Merchants Bank of Canada*, 17 P. R. 108.

See Bank of British North America v. *Western Assurance Co.*, 11 P. R. 434.

Security—*Reference.*]—The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was afterwards, upon application to a local Judge, let in to defend upon the merits, upon certain conditions, one of which was, "the judgment and execution (fi. fa. goods) now in force to stand as security to the plaintiffs unless and until the defendant pays into court the amount of the plaintiffs' claim, or gives security therefor." The defendant did not pay into court or give security. The action was tried and a verdict given for the plaintiff, subject to a reference to ascertain the proper amount due to the plaintiffs; and the referee found a less amount due than that

for which judgment had originally been entered. After verdict and before the finding of the referee, the plaintiffs issued and delivered to the sheriff a fi. fa. against the lands of the defendant on the original judgment. Semble, the original judgment could not stand when the case was reopened, and the defendant let in to defend; but as the parties had treated the judgment as standing:—Held, that it and the fi. fa. goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of fi. fa. lands was quite unwarranted. *Hillyard* v. *Swan*, 12 P. R. 226.

II. Arrest of Judgment.

See Moffat v. *McCrae*, Dra. 11; *Wragg* v. *Jarvis*, 5 O. S. 290; *Shuberg* v. *Cornwall*, 6 O. S. 253; *Smith* v. *Carder*, 11 U. C. R. 77; *Manning* v. *Rossin*, 3 C. P. 89; *Owens* v. *Purcell*, 11 U. C. R. 390; *Stephens* v. *Stephens*, 24 C. P. 424; *Campbell* v. *Great Western R. W. Co.*, 20 C. P. 345; *Bacchus* v. *McCann*, T. T. 3 & 4 Vict. R. & J. Dig. 1925; *Regina ex rel. Attorney-General* v. *Brunskill*, 8 U. C. R. 546; *Hogle* v. *Hogle*, 16 U. C. R. 518; *Kirchoffer* v. *Ross*, 11 C. P. 467; *Edmunds q. t.* v. *Hoey*, 35 U. C. R. 495; *Irwin* v. *Corporation of Bradford*, 22 C. P. 18.

III. Assignment of Judgment.

Circuity of Action.] — M. being seised in fee of land mortgaged to the plaintiff, and then sold to D. expressly subject to the mortgage. D. sold to one Maybe in the same manner, and Maybe sold to defendant, who had notice of the title, covenanting against incumbrances. The plaintiff proceeded against M. and the defendant and obtained judgment for sale on non-payment and costs, whereupon defendant paid the plaintiff's claim for debt, interest, and costs, and took an assignment of the judgment and mortgage:—Held, that the defendant had no right under such judgment to levy from M. any portion of the costs so paid, for if he were allowed to do so, M. by the effect of the conveyances would have a remedy over for them against the land, defendant's property, and could then force defendant to pay them back. *Kempt* v. *Macauley*, 9 P. R. 582.

Co-contractors.]—An action having been brought and a judgment recovered against two defendants on a contract by them to carry certain lumber, the verdict and costs were paid by one defendant, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in the plaintiff's name against the other defendant for one-half of the debt and costs:—Held, clearly not warranted by 26 Vict. c. 45, and the execution was set aside. *Potts* v. *Leask*, 36 U. C. R. 476.

Covenant—*Part Payment.*]—One D. had recovered three judgments against different persons, one in the county court and two in the Queen's bench. The defendants being the assignees of these judgments, received payment of and discharged the county court judgment, and afterwards by deed assigned to one F. the said several judgments, covenanting that they had received no payment thereon, and had not released any part thereof. F. assigned to M. "the said several judgments," and said assignment to him, "and all benefit to be derived therefrom, either at law or in equity." And M. by deed, indorsed on the assignment to himself, assigned to the plaintiff "all his right, title, interest, and claim to and in the said several judgments referred to in the within assignment thereof:"—Held, that the plaintiff could in his own name sue defendants on their covenant, either as assignee of the covenant under 35 Vict. c. 12 (O.), or as having an equitable right to enforce the covenant against defendants for a "purely money demand," under s. 2 of the A. J. Act, 1873; and that it could not be said that there being no judgment to assign the covenant could not be assigned as incident to it, for defendants by their deed and covenant were estopped from asserting that the judgment had then been paid. Held, also, that there was clearly no champerty or maintenance in the assignment from F. to M., or from M. to the plaintiff. *Cole* v. *Bank of Montreal*, 39 U. C. R. 54.

Indorsers.]—G. made a note to S., who indorsed it. DeG., D. and W., also indorsed it. B. discounted the note, which was sued on, and judgment and execution obtained against all the parties to it. W. satisfied the execution, whereupon G. and D. paid him (he having been a mere accommodation indorser), S. and DeG. contributing nothing towards the payment. G. and D. thereupon applied to B., under 26 Vict. c. 45, ss. 2, 3, for an assignment to them of the judgment so obtained by him, in order to levy from S. and DeG. their share of the liability. This B. refused, S. and DeG. having informed him that by agreement they were to be relieved of liability:—Held, on application by G. and D. for an order to compel B. to assign to them the judgment, that on the authority of Phillips v. Dickson, 29 L. J. C. P. 223, decided under the Imperial Act, 19 & 20 Vict. c. 97, s. 5, which in this respect is the same as 26 Vict. c. 45, ss. 2, 3 (C.), the court had no power to grant the order. *Brown* v. *Gossage*, 15 C. P. 20.

Mortgagor and Mortgagee.] — Where one having obtained an assignment of a judgment against a mortgagor, brought an action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled to sue, and that such assignment was not in contravention of the law respecting champerty and maintenance. *Harper* v. *Culbert*, 5 O. R. 152.

Partners.] — The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the court, was that the defendant should have paid one-half of the judgment:—Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant. The Mercantile Amendment Act, R. S. O. 1887 c. 122, ss. 2, 3, 4, applies to the case of

partners. Small v. Riddel, 31 C. P. 373; Potts v. Leask, 36 U. C. R. 376; and Scripture v. Gordon, 7 P. R. 164, not followed, in view of the opinions expressed in London and Canadian L. & A. Co. v. Morphy, 14 A. R. 577. *Honsinger* v. *Love*, 16 O. R. 170.

Principal and Surety.]—Right of surety against principal upon assignment of judgment. See *Victoria Mutual Ins. Co.* v. *Freel*, 10 P. R. 45.

Security for Costs.] — Where the assignee of one of the plaintiffs, who had obtained his discharge in insolvency, brought an action in the name of the plaintiffs on an old judgment which had been assigned to the insolvent by the other plaintiffs, and to the benefit of which the assignee was entitled, he was ordered to give security for costs. *Boice* v. *O'Loane*, 7 P. R. 359.

Surety.]—An assignment of a judgment to a trustee for one of the defendants who has paid the debt, such defendant being surety for another defendant, is valid, notwithstanding it was made six years after such payment and when the surety's direct cause of action against the principal debtor has been barred by the Statute of Limitations. *Smith* v. *Barn*, 30 C. P. 630.

Semble, that any defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless such defendant or surety has paid the whole of the debt. *In re McLean* v. *Jones*, 2 C. L. J. 206.

Under 26 Vict. c. 45, ss. 2 and 3, the absence of a formal assignment will not prevent a surety from enforcing a remedy which he would have if an assignment had been executed. *Chichester* v. *Gordon*, 4 P. R. 92.

Where a surety pays a debt, and claims an assignment of a judgment recovered by the creditor against the debtor, and it is doubtful whether the payment is a satisfaction of the judgment, the creditor may properly make the assignment, and leave the debtor to set up that defence if proceedings are taken on the judgment. *Cockburn* v. *Gillespie*, 11 Gr. 465.

To a suit by a surety against the creditor for an assignment by him of a judgment against the debtor, the debtor is a necessary party. *Ib.*

IV. Consent Judgment.

Alteration in Time for Payment.]—At the trial the defendant's counsel raised the objection that the amount, if any, due the plaintiff for maintenance, was only payable at the end of the year. The trial Judge overruled the objection, and decreed that plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount made payable monthly, to which the Judge assented, and gave judgment accordingly:—Held, that the judgment could not be deemed to be by consent so as to preclude the defendant from afterwards moving against it. *Sweeney* v. *Sweeney*, 16 O. R. 92.

Giving Consent.]—After an order has been pronounced, the initialling of it, as drawn up by the solicitor for the party opposed to the party having the carriage of it, does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the Judge. *McMaster* v. *Radford*, 16 P. R. 20.

Withdrawing Consent.] — Much time having elapsed since the consent judgment, and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not already been presented and dismissed. Upon a petition by the defendant for leave to withdraw his consent and to vacate the judgment entered thereon, the petitioner alleged that there was a mistake in the consent; that it was intended that the mortgage should be ordered to be discharged as to any interest which the plaintiff might have over and above a life estate; and he contended that the plaintiff had no such interest:—Held, that the petition could be dealt with on no other grounds than any other matter of practice, although the petitioner was in custody; and that the matters alleged were not sufficient to induce the court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications. Elsas v. Williams, 54 L. J. Ch. 336, and Peed v. Cussen, 4 Dr. & War. 199, followed. *Roberts* v. *Donovan*, 16 P. R. 456.

V. Declaratory Judgment.

Before Damage Sustained — *Oral Agreement as to Party Wall.*] — The plaintiff set up an oral agreement made in 1873, between himself and the defendant C., they being adjoining proprietors of land, to the effect that C. should build a house with its southern wall encroaching nine inches upon the plaintiff's land, and the plaintiff should be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C.; and the plaintiff alleged that shortly afterwards C. erected his building as agreed upon, and the plaintiff claimed to have the agreement put into writing, and executed by C., so as to enable him to register it; and he asked a judgment declaring him entitled to all the rights and privileges contained in the oral agreement. C. in his pleadings conceded the rights and privileges demanded by the plaintiff under the agreement:—Held, nevertheless, that the action must be dismissed, for there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. *Brooks* v. *Conley*, 8 O. R. 549.

Inchoate Right to Dower — *Incidental to Present Relief.*]—Where the sole object of an action was to obtain a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands, all other questions raised in the pleadings having been settled by agreement before trial:—Held, that, notwithstanding R. S. O. 1887 c. 44, s. 52, s.-s. 5, no such declaration should be made, for it would be solely as to a claim which might or might not be made, under circumstances which might or might not happen, and was not required in any way as incidental to any present relief whatever. R. S. O. 1887 c. 44, s. 52, s.-s. 5, was not intended to make any radical change

in the rules and practice of the court. *Bunnell* v. *Gordon*, 20 O. R. 281.

Injuria sine Damno.]—Action will lie for injury to a right, though no appreciable damage. *Mitchell* v. *Barry*, 26 U. C. R. 416; *Plumb* v. *McGannon*, 32 U. C. R. 8; *Warren* v. *Deslippes*, 33 U. C. R. 59.

Interest in Land.]—The testatrix bequeathed to her executors a sum of money to be expended in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged, or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. She also directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, "the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable." The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared that they stood seised of it upon the trust and for the purposes and subject to the provisions contained in the will. In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment or for a receiver to receive the rents and profits:—Held, that the plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without having a fi. fa. lands in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action. Held, also, that if the directions of the will were effectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable. Held, also, that the plaintiff had no locus standi to claim a declaration as to the right of the judgment debtor in the lands. Bunnell v. Gordon, 20 O. R. 281, followed. *Thomson* v. *Cushing*, 30 O. R. 123. See the next case.

In an action by a judgment creditor for a declaration of the judgment debtor's interest in certain lands held by trustees for him under the provisions of his mother's will and for equitable execution or equitable relief:—Held, that the plaintiff could not succeed, as his execution was not in the sheriff's hands when this action was commenced, and leave to amend so as to claim "on behalf of himself and all other creditors" was refused as his action was not a class action. Decision below, 30 O. R. 123, affirmed. *Thomson* v. *Cushing*, 30 O. R. 388.

Public Highway — *Obstruction by Private Person.*]—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same. And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway. Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed. Gooderham v. City of Toronto, 21 O. R. 120; 19 A. R. 641, applied and followed. *City of Toronto* v. *Lorsch*, 24 O. R. 227.

Surety.]—The plaintiff indorsed a note in the defendants' favour as security for part of a larger debt due to them for work done on their debtor's property. The note was discounted by the defendants and was dishonoured, and the holders obtained a judgment against the plaintiff which remained unpaid. subsequently the defendants received in mechanics' lien proceedings a dividend of eighty-one cents on the dollar on their whole debt, including the portion secured by the note:—Held, that they were not bound to apply the dividend first in satisfaction of the secured portion of their debt nor entitled to apply it first in satisfaction of the unsecured portion, but were bound to apply it pro rata on each part of the debt. Held, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment. *Hood* v. *Coleman Planing Mill and Lumber Co.*, 27 A. R. 203.

VI. Default Judgment.

Amending Writ.]—The writ of summons was specially indorsed with a money demand, beside which the indorsement claimed damages for waste, &c. The plaintiff obtained an ex parte order amending the indorsement by striking out the claim for damages:—Held, that judgment by default could not be entered after the amendment without re-serving the writ on the defendant. *Guess* v. *Perry*, 12 P. R. 460.

Award—*Costs.*]—Costs of an arbitration incurred by a party thereto, if untaxed, do not form a liquidated amount, and cannot be the subject of a special indorsement upon a writ of summons. Judgment for default of appearance upon a specially indorsed writ in an action upon an award (of which notice had not been given to the defendant) allowed to stand to the extent of the amount awarded and the amount paid as fees to the arbitrators, without prejudice to any motion by the defendant against the award. Rule 575 applied. *Huyck* v. *Wilson*, 18 P. R. 44.

Bond—*Penalty—Assessment of Damages.*]—In an action upon a bond with a penalty conditioned for the payment of a sum of money by instalments, with interest in the meantime on the unpaid principal, by rule 580, the provisions of 8 & 9 Wm. III. c. 11 as to the assignment or suggestion of breaches, and as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario; but in all other respects the practice and proceedings are the same as in an ordinary action, and subject to the rules. The claim in such an action is not the subject of a special indorsement under rules 138 and 603, but is in the nature of a claim for damages. Upon the defendant in such an action making default in delivering a defence, judgment is to be obtained by the plaintiffs by motion under rule 593, and should be for the penalty, and for assessment of damages for the breaches assigned, or to be suggested, in such way as may be thought proper under rules 578, 579. Where the action comes for assessment of damages before a Judge sitting for the trial of actions, he can do no more

than assess the damages in respect of the breaches of the bond for which execution is to be issued. *Star Life Assurance Society* v. *Southgate*, 18 P. R. 151.

——— *Statement of Claim — Service by Posting—Assessment of Damages.*]—An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence. The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—Held, that the posting of the statement could not, having regard to rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. Star Life Assurance Society v. Southgate, 18 P. R. 151, followed. *Appleby* v. *Turner*, 19 P. R. 145.

Default of Appearance — *Money Demand — Leave to Proceed upon Another Claim.*]—Where the writ of summons was specially indorsed to recover a money demand, and was also indorsed with a claim to set aside a conveyance, the plaintiff was allowed, upon default of appearance, to sign judgment for the money demand, and to proceed in the ordinary way upon the other claim. Huffman v. Doner, 12 P. R. 492; Hay v. Johnston, ib. 506, followed. *Mackenzie* v. *Ross*, 14 P. R. 266.

——— *Tender — Notice—Irregularity.*]—Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered. Where an appearance, though tendered before, is not entered by the officer until after judgment, it cannot become an effective appearance until after the judgment has been set aside; and therefore the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to rule 281. Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under rule 739, treating the appearance as regular. Where an appearance is entered after the last day for appearance but before judgment, the defendant has the whole of the day on which it is entered to give notice of the appearance under rule 281. Decision below, 17 P. R. 121, reversed. *Smith* v. *Logan*, 17 P. R. 219.

——— *Time for Appearance Shortened.*]—See *Bank of British North America* v. *Hughes*, 16 P. R. 61.

Default of Defence—*Defence Filed after Default Note.*]—A statement of defence filed after the pleadings have been noted as closed for default of defence under rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by rule 586, a motion for judgment upon the statement of claim is made ex parte, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular. In this case judgment having been granted ex parte, it was ordered that there should be no costs of the defendant's motion for relief under rule 358, which was granted. *Jackson* v. *Gardiner*, 19 P. R. 137.

Foreign Judgment — *Costs.*] — The plaintiff sued the defendant on a foreign judgment for $240, and especially indorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. 1877 c. 50, s. 153, and that the plaintiff was entitled to superior court costs. *Davidson* v. *Cameron*, 8 P. R. 61, and see sub-title X., *post*.

Guarantee.]—Semble, that where in an action on a guarantee the writ of summons is not specially indorsed, but full particulars are set out in the statement of claim, final judgment may be signed upon default of defence. *Molsons Bank* v. *Dillabaugh*, 13 P. R. 312.

Injunction.] — The indorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendants from disposing of certain goods:—Held, that interlocutory judgment signed by the plaintiff for default of appearance was irregular, and should be set aside. *McCallum* v. *McCallum*, 11 P. R. 16.

Interest—*Account.*]—In an action on a merchant's account, where the writ was specially indorsed, claiming interest, and defendant did not appear:—Held, that his non-appearance was an admission of the charge of interest. *Standing* v. *Torrance*, 4 L. J. 235.

——— *Goods Sold.*]—A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons is good, and cannot be disputed after judgment signed in default of appearance, but if a claim for interest is indorsed in order to gain an improper advantage and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside. *Mearns* v. *Grand Trunk R. W. Co.*, 6 L. J. 62.

Semble, the indorsement for interest on a specially indorsed writ, is in general a matter of claim only. If it be correct, judgment goes rightly for it without any inquiry where the plaintiff claims it and defendant does not dispute it. *McKenzie* v. *Harris*, 10 L. J. 213.

——— *Promissory Note—Protest Fees.*]—A writ of summons was specially indorsed for interest on the balance of an account, and for protest charges on an unaccepted draft:—Held, that the indorsement was right as to the interest, but not as to protest charges. Bank of Montreal v. Harrison, 4 P. R. 351, explained. *Sinclair* v. *Chisholm*, 5 P. R. 270.

——— *Promissory Note.*]—In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent., without shewing any legal right to more than six per cent. The statement of defence having been held bad

on demurrer, and leave to amend not having been asked or granted, the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed:—Held, that it was the duty of the deputy clerk at the office where judgment was signed not to permit judgment to be entered for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. on signing judgment. *Bank* of *Hamilton* v. *Harvey*, 11 P. R. 145.

——— *Promissory Note—Liquidated Damages — Application to Set aside Judgment—Laches.*]—By ss. 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate. And where, in an action upon two promissory notes, the plaintiff, by the indorsement on the writ of summons, claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity:—Held, a good special indorsement. London, &c., Bank v. Clancarty, [1892] 1 Q. B. 689, and Lawrence v. Willcocks, ib. 696, followed. Ryley v. Master, ib. 674, and Wilks v. Wood, ib. 684, distinguished. Held, also, that the indorsement being regular, the defendant's non-appearance was equivalent to an admission that the claim was correct, and that he was bound to pay the whole demand; and a judgment signed for default of apearance was, therefore, regular. Rodway v. Lucas, 10 Ex. 667, followed. Semble, that had the indorsement lacked the essentials of a special indorsement, such a judgment would have been a nullity. Rogers v. Hunt, 10 Ex. 474, and Smurthwaite v. Hannay, [1894] A. C., at p. 501, specially referred to. Held, also, that an application to set aside the judgment (unless upon terms) was too late when made twelve days after a seizure by the sheriff under execution issued pursuant thereto, and after the defendant's wife had claimed the goods seized and an interpleader order had been made on the application of the sheriff, to the knowledge of the defendant. Bank of Upper Canada v. Yanvochis, 2 P. R. 382; Dunn v. Dunn, 1 C. L. J. 239; and McKenzie v. McNaughton, 3 P. R. 35, specially referred to. If the defendant desired to contest the whole action, it was not unreasonable that as a condition of his being allowed to do so he should bring into court the amount of principal claimed; but if his only objection was to the interest, the judgment might, at the option of the plaintiff, have been amended by reducing it by the amount claimed for interest, or limiting the defence accordingly. Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the court of appeal. *McVicar* v. *McLaughlin*, 16 P. R. 450.

See, also, Motion for Judgment, sub-title X., *post*.

Interlocutory Judgment — *Subsequent Delivery of Statement of Claim—Assessment of Damages.*]—The writ of summons was indorsed with a claim for specific performance of an agreement "and for damages for breach of the said agreement." The defendant not appearing, interlocutory judgment was signed against him on the 16th April, 1898, for damages to be assessed. On the 12th May following a statement of claim was delivered, and on the 16th May the damages were assessed by a Judge of the high court at a sittings for the trial of actions:—Held, that the interlocutory judgment was irregular; the plaintiffs, upon default of appearance, should have delivered a statement of claim, and, if no defence delivered, proceeded to judgment by motion. Held, also, that the plaintiffs had no right to treat the statement of claim delivered by them as nugatory, and proceed to assessment of damages on the writ of summons as forming the record. Semble, that the plaintiffs could properly claim specific performance, and in the alternative, damages for breach of the agreement. *Stuart* v. *McVicar*, 18 P. R. 250.

——— *Assessment of Damages—Slander.*]—The action was commenced by a writ of summons indorsed, "the plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at a sittings of the high court:—Held, that there being nothing to shew that the action was brought under s. 5 of the Act respecting Libel and Slander, R. S. O. 1897 c. 68, it must be treated as an ordinary action of slander; rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had the right to sign interlocutory judgment and have the damages assessed as she proposed. Origin of rule 578. *Stanley* v. *Litt*, 19 P. R. 101.

Joint Contractors.]—The writ of summons was indorsed with a claim for $404 for services rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items:—Held, not a special indorsement, and that there was no right to sign final judgments thereon for non-appearance of certain of the defendants, and the judgments which the plaintiff purported to sign were nullities, and the plaintiff, by proceeding against the other defendants without taking any warranted proceedings against the defendants who did not appear, must be taken to have abandoned his action against them. *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15.

Liquidated and Unliquidated Demands.]—Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; rules 72 and 75 may be combined in a proper case, and justify such a judgment. Bissett v. Jones, 32 Ch. D. 635, followed in preference to Standard Bank v. Wills, 10 P. R. 150. *Huffman* v. *Doner*, 12 P. R. 492.

Married Woman — *Costs—Retainer.*]—Summary proceedings upon specially indorsed writs do not apply where, the defendant being a married woman, the judgment can only be of a proprietary nature. Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill and interest:—Held, that the judgment was irregular and might have been set aside with costs if the defendants had applied promptly; and, under the circumstances, the judgment

was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer. *Cameron* v. *Heighs*, 14 P. R. 56.

Mortgage Action.]—An action for foreclosure of a mortgage is governed by rule 78 and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe according to the former practice in chancery. *Chamberlain* v. *Armstrong*, 9 P. R. 212.

In an action for foreclosure the defendant entered an appearance under Rule 68 O. J. Act limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim:—Held, that after such appearance a statement of claim was unnecessary and a judgment signed upon it for default of a statement of defence was set aside with costs. *Peel* v. *White*, 11 P. R. 177.

By analogy to rule 393, where, in a mortgage action for foreclosure or sale, some of the defendants do not appear to the writ of summons, and others do appear, against whom judgment cannot then be obtained, the officer may note the pleadings closed as against the former, and the action may be brought on for judgment against them without further notice to them. *Morse* v. *Lambe*, 15 P. R. 9.

Notice of Appearance.]—Judgment may be signed under con. rule 281, for default of an appearance where an appearance has been entered after the time limited, if notice, which means notice in writing, has not been given as required by the rule. Knowledge of the fact that an appearance has been entered does not constitute such notice as the rule requires. Smith v. Dobbin, 3 Ex. D. 358, followed. Lanark and Drummond Plank Road Co. v. Bothwell, 2 L. J. 229, not followed. *Hudson Bay Co.* v. *Hamilton*, 13 P. R. 461.

Office for Entry.]—When an action is commenced in a local office, judgment for default of appearance or pleading must be entered in the local office. *Chamberlain* v. *Armstrong*, 9 P. R. 212.

VII. Enforcing Judgment.

Action—*Administration—Period of Limitation.*]—The rule in equity is that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action. Trice v. Robinson, 16 O. R. 433, distinguished. *Chard* v. *Rae*, 18 O. R. 571.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the court to ascertain whether an action was begun in time by a properly constituted plaintiff. *Ib.*

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At the time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R., by his statement of defence, put the plaintiff to the proof of his position and title to sue on the judgment, and set up amongst other defences, the Statute of Limitations, R. S. O. 1887 c. 60, s. 1:—Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed. Semble, that an objection raised at the trial that L. was not before the court, was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors. *Ib.*

Notwithstanding R. S. O. 1877 c. 108, s. 23 (see R. S. O. 1897 c. 133, s. 23), twenty years is the period of limitation applicable to an action on a judgment of a court of record. Boice v. O'Loane, 3 A. R. 167, and cases following it, followed in preference to Jay v. Johnston, [1893] 1 Q. B. 25, 189. *Butler* v. *McMicken*, 32 O. R. 422.

——— *Irregularity.*]—In an action on a judgment granted under con. rule 744, it was held that the objection that the order for judgment should have been made in court instead of in chambers could not be given effect to. *Martin* v. *Evans*, 6 O. R. 238.

——— *Perjury.*]—See *Stewart* v. *Sutton*, 8 O. R. 341.

Action to Enforce against Land.]—When a judgment creditor files a bill to enforce his judgment against lands, it must be shewn that he has sued out execution. *Bank of Upper Canada* v. *Beatty*, 9 Gr. 321.

When a judgment has been recovered pendentae lite it is not necessary to make the judgment creditor a party. *Wallbridge* v. *Martin*, 2 Ch. Ch. 275.

Where a conveyance absolute in form was executed as a security only, upon an oral undertaking of the grantee to reconvey upon payment of his demand:—Held, that a judgment creditor of such grantee could not enforce his judgment beyond the amount of principal and interest due the grantee. *Glass* v. *Freeckleton*, 10 Gr. 470.

A. obtained a judgment against B. and registered same, and issued fi. fas. against lands, kept them in force, and filed a bill on the judgment before the Act abolishing registration of judgments. C. had obtained judgment against B. and registered it, but subsequently to A. C. filed his bill to set aside a prior sale made by B. to D. not making A. a party. A decree was pronounced in his favour, sustaining the sale, but giving him a lien on the purchase money. A. applied by

petition to be made a party and have his priority declared in such suit:—Held, that he could not by petition make himself a party to that suit, and that his remedy if at all, was by bill. Quære, had he any remedy at all. *City Bank* v. *McConkey*, 3 C. L. J. 125.

A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money, in pursuance of the report therein:—Held, that, the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in the court of chancery. *Bank of Elgin* v. *Hutchinson*, 13 Gr. 59.

In this country a judgment creditor is entitled, at his option, to a decree either to sell or foreclose the estate in his debtor. *McMaster* v. *Noble*, 6 Gr. 581.

In suits by judgment creditors for the sale of the debtor's property, the debtor is entitled, like a mortgagor, to six months to redeem before the sale. The rule prescribed by 43 Geo. III. c. 1 is not applicable to the practice of the court of chancery. *White* v. *Beasley*, 2 Gr. 660.

The court will not decree a foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out, and the value of them stated in the bill. *Glass* v. *Freckelton*, 8 Gr. 522.

The court refused plaintiff costs in an action on a judgment, where it apeared that after execution he had proceeded under the Absconding Debtors Act. *Keeler* v. *Brouse*, 1 U. C. R. 348.

Appeal—*Joint Liability—Release.*]—The cause of action was a joint one against thirty-one defendants. Twelve of them did not appear, and judgment was signed against these for the full amount claimed. The other nineteen appealed, and as against them the action proceeded to trial, and judgment was given for the plaintiff against these defendants for $116. An appeal by these nineteen defendants was allowed as to eleven of them, but dismissed as to eight. After this the plaintiff made an agreement with the twelve defendants against whom judgment had been signed for default, that upon each defendant paying to the plaintiff the sum of $10, such defendant should be released from all liability in respect of the plaintiff's cause of action against him:—Held, that, as the release occurred after judgment against the defendants who had appeared, it could not be pleaded in the action; but as the action was for a joint liability of the defendants who did not appear and of those who failed in appeal, and the plaintiff never had any claim against these defendants for any sum but $116, and the plaintiff had been paid by or had agreed to accept from the defendants who failed to appear a larger sum, $120, it would be inequitable that the plaintiff should be permitted to enforce his judgment against the defendants who failed in appeal. Held, also, that the plaintiff, after the judgment in appeal, should have amended the judgment below in accordance with the certificate of the court of appeal, and that the costs in the court of appeal should have been added to the costs of the action, and only one execution issued thereon. *Hoffman* v. *Crerar*, 18 P. R. 473, 19 P. R. 15.

Division Court.]—An action is not maintainable in the court of Queen's bench on a judgment obtained in the division court under 13 & 14 Vict. c. 53. *McPherson* v. *Forrester*, 11 U. C. R. 362; *Donnelly* v. *Stewart*, 25 U. C. R. 398.

——— *Action on Judgment of High Court — Final Judgment — Abandoning Excess.*]—In an action for alimony the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and for alimony at the rate of $226 per year, payable quarterly. After two instalments of alimony had fallen due and were unpaid, she entered suit for $100 in the division court in respect to the costs, which were also unpaid, abandoning the balance of the costs and the overdue alimony:—Held, affirming 23 O. R. 374, that the division court had jurisdiction under R. S. O. 1887 c. 51, s. 70 (b). *Aldrich* v. *Aldrich*, 24 O. R. 124.

Enforcing Judgment by Execution.]—See EXECUTION.

Enforcing Judgment by Garnishee Proceedings.] — See ATTACHMENT OF DEBTS.

Lien on Land.]—A judgment is not a lien upon lands for the purpose of an elegit, so as to avoid the effect of a fi. fa. against lands issued on a subsequent judgment, but placed in the sheriff's hands prior to the elegit. *Doe d. Henderson* v. *Burtch*, 2 O. S. 514.

Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. *Doe d Auldjo* v. *Hollister*, 5 O. S. 739.

Marshalling Assets.]—H. obtained from his debtor an assignment of his books of account, notes, bills, and other evidences of debt by way of security against the consequences of his becoming a party to notes for the accommodation of the debtor, and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum of money by reason of his being a party to such notes, H. recovered judgment against the debtor, and sued out execution thereon, which was the first placed in the hands of the sheriff against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff; upon which sale sufficient was realized to satisfy the execution of H. and leave a balance in the hands of the sheriff, and H.'s claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor after notice from a later judgment creditor not to part with them; and the father's land was re-conveyed to him. The execution creditor who gave the notice, claimed in consequence priority over intermediate execution creditors, and also a right to compel H. to make good the amount of his claim in consequence of having parted with the securities:—Held, that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions, nor had he any

right to call upon H. to assign the lands conveyed to him by the debtor's father; that H. was not rendered personally liable in the first instance to the subsequent execution creditors, but that he had no right to deliver up the securities held by him to the debtor, on being paid the amount of his execution, and was therefore liable for any loss thereby occasioned. *Joseph* v. *Heaton*, 5 Gr. 636.

Mode of Testing Validity.]—Semble, the question of the validity of a judgment should not be argued upon the return of a garnishee summons, but should be raised on an application to set aside the execution. *Elliott* v. *Capell*, 9 P. R. 35.

Mortgagee's Power of Sale.]—Where a mortgagee against whom judgments are registered exercises a power of sale his judgment creditors have such an interest in the due exercise of the power that the court will grant them relief against the mortgagee exercising it to their disadvantage. *Commercial Bank* v. *Watson*, 5 L. J. 163.

Partnership.] — Judgments recovered against two out of three members of a firm for a partnership debt, are available only against what may appear upon winding up the partnership to belong to the two judgment debtors. *Stanbury* v. *Milliken*, 8 L. J. 134.

——— *Judgment against Firm.*]—The latter part of rule 876, providing for an application for leave to issue, upon a judgment against a firm, execution against some person as a member of the firm other than those mentioned in s.-ss. (b) and (c) of the rule, applies only where there is in truth a partnership which is bound by the judgment obtained against the firm in consequence of the service of the writ of summons upon one of its members or its manager. Where there is in fact no partnership, no one can be bound by a judgment against an abstraction called "a firm," except the person who has been served under the provisions of rule 266, and who has appeared or pleaded in the action. And where the wife of the manager of the business of a so-called firm, who has been shewn by the subsequent proceedings to have been merely a trustee for him of the profits, was personally served as a defendant with process in an action against the firm upon a bill of exchange and defended:—Held, that as there was in fact no partnership, an issue directed to determine whether the husband was liable to have execution issued against him as a member of a firm upon a judgment recovered in the action against the firm, must be found in favour of the husband; and no amendment could be made which would enable the court to determine otherwise. *Standard Bank of Canada* v. *Frind*, 15 P. R. 438.

——— *Judgment against Firm—Action against Alleged Partner.*]—See *Ray* v. *Isbister*, 24 O. R. 497; 22 A. R. 12; 26 S. C. R. 79.

See EXECUTION—PARTNERSHIP.

Proof of Judgment.]—See EVIDENCE, XV. 5.

Purchase Subject to Lien.]—Where a party purchases land upon which a judgment has attached, he holds the land subject to right of sale under a fi. fa. by the judgment creditor. *Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449.

Purchaser for Value.]—A judgment creditor is not a purchaser for value within the meaning of 27 Eliz. c. 4. *Goodwin* v. *Williams*, 5 Gr. 539; *Gillespie* v. *VanEgmondt*, 6 Gr. 533.

Redeeming Mortgagee.]—A judgment creditor coming in to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. *Gilmour* v. *Cameron*, 6 Gr. 290.

Redeeming Prior Judgment Creditor.]—A judgment creditor offered to redeem a prior judgment creditor whose ven. ex. was in the sheriff's hands, and tendered an assignment of the judgment; but the prior judgment creditor (who was also the holder of a mortgage subsequent to the second judgment creditor) refused to receive the money otherwise than in satisfaction of the judgment, and refused to assign, whereupon the second judgment creditor filed his bill to redeem and for an injunction to restrain the sale:—Held, that he was entitled to redeem and to an assignment of the judgment, and an injunction was accordingly granted. *Bank of British North America* v. *Moore*, 6 L. J. 255; 8 Gr. 461.

Registered Judgment.]—The provisions of 13 & 14 Vict. c. 63, apply only to judgment creditors whose judgments have been entered since the 1st January, 1851. Where, therefore, creditors whose judgment was entered in the year 1836, and registered in 1854, filed a bill in 1856 to set aside a deed executed by their debtor to his son in the year 1835, as having been made to defraud creditors, or as being voluntary and therefore void as against purchasers for value, the court refused this relief but gave the plaintiffs liberty to amend by making the bill on behalf of all creditors and praying for an administration of the debtor's estate. *Gillespie* v. *Van Egmondt*, 6 Gr. 533.

——— *Priority.*]—By R. S. N. S. 5th ser. c. 84, s. 21, a registered judgment binds the lands of a judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed, but not registered, are void against the judgment creditor who first registers his judgment. A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure judgment was registered against the mortgagor, and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditors from levying:—Held, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage which, by the statute, was void as against the registered judgment of the creditor. Grindley v. Blakie, 19 N. S. Rep. 27, approved and followed. *Miller* v. *Duggan*, 21 S. C. R. 33.

Relation back.]—C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage,

in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiff took formal possession of the land. On the 17th July, 1882, the defendant having obtained judgment against C., placed a fi. fa. in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August. The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year. The plaintiffs claimed the crops, and an interpleader issue was tried:—Held, affirming 5 O. R. 371, that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops as C.'s property. The seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs. *Hamilton Provident and Loan Society* v. *Campbell*, 12 A. R. 250.

Revivor.] — See SCIRE FACIAS AND REVIVOR.

Set-off.]—The plaintiff had recovered a verdict for $600 against defendant for malicious prosecution, but judgment had not been signed thereon. At the same assizes the defendant recovered a verdict against the plaintiff for $380 on promissory notes, and signed judgment. The plaintiff almost immediately after its recovery assigned his verdict to his brother, but the court held this to be a device to prevent a set-off:—Held, that the defendant was entitled to have the plaintiff's verdict set off pro tanto by entering satisfaction upon his judgment to the extent of the verdict, and paying the costs of suit; and it made no difference that the judgment had not been entered by the plaintiff. *Grant* v. *McAlpine*, 46 U. C. R. 284.

Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counterclaim with costs thereof, such claim and counterclaim arising out of the same subject matter, the judgment for counterclaim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counterclaim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff. Quære, when a judgment, as in this case, has been framed without directing a set-off, whether a Judge in chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the court. *Brown* v. *Nelson*, 11 P. R. 121.

The plaintiffs sued for freight for the carriage of timber, and the defendants pleaded a counterclaim for neglect and delay in the carriage of the timber. The judgment at the trial was as follows: "The verdict will be for the plaintiffs for $2,122, and the defendants upon their counterclaim for $1,420, and each party will be entitled to costs against the other, as if the statement of claim and counterclaim were separate actions, and I direct that judgment be entered accordingly:"—Held, that the judgments recovered by plaintiffs and defendants must be treated as judgments in separate actions, and therefore, that in setting off the judgments the claim for costs of the defendants' solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co.* v. *Grant*, 11 P. R. 208.

The plaintiff recovered judgment against the defendant with costs upon a claim for the value of goods sold under a distress for rent, of which the defendant, the landlord, himself became the purchaser; and the defendant recovered judgment against the plaintiff with costs upon a counterclaim for rent and damages to the demised premises. The judgment did not direct any set-off, and the plaintiff's solicitors having asserted a lien for costs upon the judgment against the defendant, the taxing officer refused to allow a set-off of the costs awarded to plaintiff and defendant respectively:—Held, that the claim and counterclaim were separate and distinct, and the judgments must be treated as judgments in separate actions; and con. rule 1204 did not apply to enable the taxing officer to deduct or set off costs. Under the circumstances of this case, the court deprived the plaintiff, who was finally successful upon the appeals as to costs, of the costs of the appeals. *Link* v. *Bush*, 13 P. R. 425.

G. and H. brought counter-actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which were granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to L. all his interest in his suit against H., and gave notice of such assignment in May, 1884. In February, 1885, H. signed judgment against G. on confession:—Held, reversing 25 N. B. Rep. 451, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to L. *Greene* v. *Harris*, 16 S. C. R. 714.

See COSTS, V. 2.

Statute of Limitations.]—See LIMITATION OF ACTIONS.

Staying Proceedings—*Motion to Set aside Judgment.*] — When a motion to a divisional court to set aside the judgment pronounced at the trial, but not yet entered, has been set down for hearing, there is a stay of proceedings upon such judgment ipso facto, unless it should be otherwise ordered. *Western Bank of Canada* v. *Courtemanche*, 16 P. R. 513.

Subsequent Order to Take Accounts.]—After judgment had been pronounced in an action therefor, declaring the estate the plaintiff took under a will in certain lands which he had mortgaged to the defendants, and refusing to restrain the sale thereof under the mortgage, the sale was proceeded with and the lands sold. Subsequently, on the plaintiff's application, a Judge's order was obtained directing a reference to the clerk in chambers to take the mortgage accounts, and to the taxing officer to tax the defendants' costs; and, while this application was pending, the defendants obtained an ex parte order to pay the surplus proceeds of the sale into court:—Held, that under rule 551 the order to take the accounts, &c., was properly made. *Meyers* v. *Hamilton Provident and Loan Society*, 15 P. R. 39.

See also sub-title XVI., *post*.

VIII. Estoppel by Judgment.

See Estoppel, II.

IX. Foreign Judgment.

Definition.]—All judgments are foreign judgments which are given by courts whose jurisdiction does not extend to the territories governed by our laws. *McFarlane* v. *Derbishire*, 8 U. C. R. 12.

Action on Foreign Judgment—*Judgment by Default—Special Indorsement—Scale of Costs.*]—See *Davidson* v. *Cameron*, 8 P. R. 61, sub-title VI., *ante*.

——— *Motion for Judgment—Proof of Foreign Judgment.*]—See *Henebery* v. *Turner*, 2 O. R. 284, sub-title, X. 3, *post*.

Appearance in Foreign Court.]—Held, in an action on a judgment recovered in the province of Quebec, that an appearance entered by an attorney for defendant to the action in which the judgment was recovered, must be deemed either as an admission of or a dispensation with personal service, so as to preclude the merits of the original cause of action being entered into. Where, after the entry of such appearance, the plaintiff accepts from defendant a mortgage in satisfaction and discharge of his claim, &c., and then without any notice to or knowledge by defendant proceeds with the action and recovers judgment, quære, whether, although precluded from entering into the merits, evidence of such circumstances may not be given, as shewing that the judgment so recovered is contrary to natural justice and a fraud on defendant; and a new trial was granted to afford defendant the opportunity of thus questioning the recovery. Where, also, a co-defendant in the original action in said Province had appealed therein from said judgment, which appeal was still pending; quære, whether, during the pendency of such appeal, an action could be maintained on said judgment against a defendant who had not appealed. The evidence on this point being conflicting, the new trial was also granted thereon, to enable further evidence to be adduced. *Turcotte* v. *Dawson*, 30 C. P. 23.

——— *Interest.*] — The defendant in an action in a foreign country, though not resident therein, appeared and delivered a defence. He was not represented at the trial, and judgment was given against him, which was afterwards varied on his motion:—Held, in an action on the foreign judgment, that he could not dispute its validity. McLean v. Shields, 9 O. R. 699, distinguished. The amount of a foreign judgment is a liquidated demand, which may be the subject of a special indorsement on a writ of summons. Hodsoll v. Baxter, E. B. & E. 884, and Grant v. Easton, 13 Q. B. D. 302, followed. Interest included in the amount of such a judgment is an integral part thereof. Johnson v. Bland, 2 Burr. at p. 1083, followed. Interest upon the amount of such a judgment cannot under ss. 85 and 86 of the Judicature Act, R. S. O. 1887 c. 44, be recovered except as unliquidated damages. If a writ of summons is indorsed to recover a liquidated demand and also unliquidated damages, it is not specially indorsed within rule 245, and will not support a summary judgment under rule 739. Wilks v. Wood, [1892] 1 Q. B. 684, and Sheba Gold Mining Co. v. Trubshawe, ib. 674, followed. Nor can the writ be amended after (though it may be before) motion for judgment by striking out the claim for unliquidated damages. Gurney v. Small, [1891] 2 Q. B. 584, and Paxton v. Baird, [1893] 1 Q. B. 139, followed. A foreign judgment was varied and the amount reduced by the foreign court after action begun thereon by specially indorsed writ:—Held, that an order for summary judgment for the amount of the foreign judgment as varied could not be supported, because it was for a debt not claimed by the indorsement. But the court under rule 757 permitted the appeal to be turned into a motion for judgment, and gave judgment for the plaintiff, no defence being shewn. *Solmes* v. *Stafford*, 16 P. R. 78. See this case in appeal, 16 P. R. 264.

Assignee.]—A foreign judgment is primâ facie a debt, and conclusive on its merits, and as such is assignable under 35 Vict. c. 12 (O.), so as to enable the assignee to sue thereon in his own name. *Fowler* v. *Vail*, 27 C. P. 417.

Concealment of Facts.]—The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant: — Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action:—Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt shewed no defence, but a mere oral agreement without consideration. Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of fi. fa. against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, shewed no fraud, and was no answer to the action. The defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause. *Paisley* v. *Broddy*, 11 P. R. 202.

Condition Precedent—*New Defence.*]—In an action on a judgment recovered in Scotland for breach of the defendant's agreement to deliver sewing machines to the plaintiffs, the defendant pleaded that by virtue of the agreement made between the parties the plaintiffs were to be the defendant's sole agents for the sale of his sewing machines in Great Britain, and the defendant was to be paid for all machines sent to the plaintiffs after the plaintiffs had sold and received payment for the same; that the defendant was to furnish a specified number of machines per month, and the plaintiffs were to furnish the defendant with a monthly statement of the machines sold by them, and to remit therewith the price of the machines so sold and paid for, at a certain rate, which the defendant guaranteed. And the defendant averred that he delivered the machines in accordance with the agreement, and in all

things performed it, until the plaintiffs neglected and refused to furnish such statement and remit the moneys received by them as aforesaid; and that the defendant's refusal to send any further machines was caused solely by reason of the plaintiffs' said breach of the agreement:—Held, plea bad, as not shewing either that the performance of the plaintiffs' covenant was a condition precedent to performance by the defendant, or shewing any facts from which it might be inferred that the plaintiffs' breach entitled the defendant to consider the contract as abandoned and to rescind it; and that the defendant's remedy was by cross action. Per A. Wilson, J.:—There was no necessity to aver in the plea that the defence was one which might have been set up to the original suit, so long as it formed a good defence according to our law. *Auchterlonie* v. *Arms*, 25 C. P. 403.

Costs in Foreign Court.]—Where a foreign judgment awards a certain debt and costs to be taxed:—Held, that such costs were recoverable in an action on the judgment, on proving the amount at which they were afterwards taxed. *Hall* v. *Armour*, 5 O. S. 3.

Denial of Jurisdiction.]—To debt on a judgment of the superior court of Lower Canada, defendant pleaded want of service of process, &c., want of knowledge of the proceedings of the plaintiffs in the said suit, and that at the commencement of the action in which the judgment was obtained he, the defendant, was and from thence hitherto hath been and still is resident without the jurisdiction of said court, to wit, at Toronto, in Upper Canada:—Held, bad, on demurrer, on the ground that by the plea the defendant should have denied his being formerly resident or domiciled within the jurisdiction of the court in Lower Canada, and his having real or personal property therein. *Gauthier* v. *Blight*, 5 C. P. 122.

Discharge in Bankruptcy.] — Plea of discharge in bankruptcy in a foreign court to an action on a foreign judgment. See *Ohlemacher* v. *Brown*, 44 U. C. R. 366.

See BANKRUPTCY AND INSOLVENCY, III.

Divorce by Foreign Court.]—See HUSBAND AND WIFE, I. 4.

Fraud—*Perjury.*]—In an action upon a foreign judgment, the defence was that the same had been recovered by reason of the plaintiff fraudulently misleading the court at the trial, by swearing to what he knew to be untrue. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a written contract, and the contest was upon the question whether the services were or were not within the terms of that contract. On this question the evidence of the plaintiff and of one of the defendants, and of other witnesses, was given at the trial in the foreign court, when the contract and certain letters were put in, and the Judge's charge to the jury shewed that the whole evidence had been clearly brought to the attention of the court, and it was now sought to establish the falsehood of the plaintiff's evidence with regard to the claim for extra services:—Held, that evidence under the defence was properly rejected at the trial; for what the defendants proposed to do was to try over again the very question which was in issue in the original action. The charge of fraud was superadded, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of scienter was reached, a conclusion of fact adverse to that which had been arrived at by the foreign jury would have to be adopted. The authority of decisions of the English court of appeal, and the case of Abouloff v. Oppenheimer, 10 Q. B. D. 297, discussed. *Woodruff* v. *McLennan*, 14 A. R. 242.

To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit and that the plaintiffs obtained the judgment by fraudulently concealing from the court the true nature of the transactions between them and the defendant:—Held, a good defence. Abouloff v. Oppenheimer, 10 Q. B. D. 295, and Vadala v. Lawes, 25 Q. B. D. 310, followed in preference to the decision of the court of appeal for Ontario in Woodruff v. McLennan, 14 A. R. 242, in accordance with the expression of opinion of the judicial committee of the privy council in Trimble v. Hill, 5 App. Cas. 342, that a colonial court should follow the decisions of the court of appeal in England. To the above defence, the plaintiffs, after the coming into force of rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum:—Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence; and to such a replication rule 403 had no application. *Hollender* v. *Fowlkes*, 26 O. R. 61. See *S. C.*, on motion for judgment under rule 739, 16 P. R. 175.

Form of Declaration.] — A declaration on a foreign judgment, alleging the recovery of £20 13s. 8d debt, and £38 1s. 2d costs, amounting in all to £58 14s. 10d. sterling, or $286.41 lawful money of Canada; that the court was a superior court of record, and that the judgment was in full force and unpaid:—Held, sufficient, and not open to the objection taken in Place v. Potts, 8 Ex. 704. *Kelly* v. *McDermott*, 10 C. P. 490.

General Issue.] — In assumpsit on a foreign judgment, the judgment cannot be impeached for any alleged defect in the proceedings prior to judgment, under the general issue. *McPherson* v. *McMillan*, 3 U. C. R. 34.

Grounds of Decision.]—In an action on a foreign judgment reference may be made to the evidence filed of record with the judgment according to the course of the foreign court, on proof by examined copies, to shew the grounds of the judgment; but where the cause in the foreign court was undefended, and the plaintiff admitted a set-off there, the defendant here is not bound by such admission. *Brewster* v. *Thomas*, E. T. 3 Vict.

Imperial Winding-up Order — *Calls.*]—An action will lie in this country, on an order made under the Companies Act, 1862, in England, in the winding up of a company, making a call upon defendant in respect of his shares, and directing payment thereof to one of the two official liquidators appointed; and such action may be brought in the name of the company. The statute

enacts that such order, subject to the provisions in the Act contained for appealing against it, shall be conclusive evidence that the moneys thereby ordered to be paid are due, and that all other pertinent matters stated in such order shall be taken to be truly stated, &c.:—Held, that the provision for appeal did not prevent the order from being final so long as it remained unaltered; and that an allegation that the order was still in force sufficiently negatived an appeal. Held, also unnecessary to allege in the declaration that the shares were not paid up, or that defendant was a member when the call was made. A plea alleging that the order was not final, but could be varied, rescinded, or set aside, was held good; and a replication thereto, that by the Act there could be no appeal from the order, except on notice given within three weeks after it had been made, and that no such notice was given, was also held good. The statute makes the liability a debt, "in England and Ireland of the nature of a specialty debt in this country; and that pleas of never indebted, and that the debt did not accrue within six years, were therefore good. Held, also, that under our Act 23 Vict. c. 24, the order, notwithstanding the enactment above mentioned, was not conclusive, but that defendant might plead to this action on the order any defence which he might have set up to the original proceedings. Pleas denying, 1. that defendant was the holder of shares or a member of the company; 2. that the company was unable to pay its debts; 3. that the court making the order was of opinion that the company should be wound up; and pleas setting up that the defendant was only a past member, and that the call was made in respect of debts contracted after he ceased to be a member—that the existing members were able to satisfy the contributions required—and that no amount was unpaid on the shares—were therefore held good. Held, also, that the general averment that all things happened, &c., necessary to render defendant liable to pay and entitle the plaintiffs to maintain this action, sufficiently alleged, if defendant could be considered as being charged as a past member, that the court was of opinion the present members were unable to pay, and that the call was for a debt accrued before defendant ceased to be a member; but, held, also, that the declaration charging him as a member must be construed as charging him as a present member; that a plea shewing him to be a past member only was a traverse of his being a member as alleged; and that there would be a variance therefore if such plea were proved. *Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256.

Inferior Court.]—In an action upon a foreign judgment rendered in an inferior court, it is not necessary to aver that the cause of action arose within the jurisdiction of that court. *Prentiss* v. *Beemer*, 3 U. C. R. 270.

In Rem.]—A steamboat said to belong to one M., in this country, against whom defendant had obtained an execution, was sold at Detroit while the writ was in the sheriff's hands, under a judgment of condemnation and sale in the admiralty court there, for certain claims, which by the foreign law formed a lien upon her. In an interpleader issue between the plaintiff, claiming under that sale, and defendant, the jury found that the vessel was not the property of M., the execution debtor. The court held that the evidence supported their verdict; and held, also, that at all events the plaintiff's title under the sale made upon the judgment in rem must have prevailed. *VanEvery* v. *Grant*, 21 U. C. R. 542.

Insurance—*Breach of Conditions.*]—To an action on a judgment recovered in the supreme court of the State of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B. not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do:—Held, a good replication, for defendants by their Acts of incorporation being evidently designed to carry on the business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in New York the law there would govern. Per Hagarty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs by the foreign law to sue in their own name was a question of procedure, on which that law must govern. In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made. The plaintiffs replied, that when called upon to pay defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing; that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered upon proof of such waiver without any evidence of proof or adjustment:—Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit it might, under 23 Vict. c. 24, be set up here; and whether the condition was waived or performed was a matter of evidence only, on which our law must prevail. *Waydell* v. *Provincial Ins. Co.*, 21 U. C. R. 612.

Judgment not Final.]—An action will not lie upon a decree or judgment of a foreign court which is not final in its nature, but merely to do some act, as to save a party harmless and indemnified. *Gauthier* v. *Routh*, 6 O. S. 602.

Merger—*Right to Sue on Original Cause of Action.*]—A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in this Province. *Trevelyan* v. *Myers*, 26 O. R. 430.

Merits.]—In an action on a foreign judgment, the defendant cannot go into evidence to shew that on the merits in the foreign court,

the judgment should have been for a less amount than the sum decreed. *Racy* v. *Goodman*, E. T. 3 Vict.

Note Payable in Quebec.]—A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C. *c.* 57, s. 4, is payable at the place named therein, C. S. U. C. c. 42 requiring the use of the restrictive words, "not otherwise or elsewhere," applying only to notes made and payable in Ontario. The note in this case was made in Toronto, payable at the Mechanics Bank, Montreal, and was sent to Montreal, and there held until maturity, when it was presented for payment and dishonoured::—Held, that the contract being performable in Quebec, and the breach occurring there, the cause of action arose there, so as to bring the defendant within the operation of 22 Vict. c. 5, s. 58, and to make a judgment recovered against him in Quebec on a personal service in Ontario, conclusive on the merits; and the defendant was therefore precluded from setting up a defence on the merits, and was allowed to except to the jurisdiction only. Quære, whether the personal service referred to in R. S. O. 1877 c. 50, s. 145, refers to personal service in Quebec. *Court* v. *Scott*, 32 C. P. 148.

Penal Action—*Distinction between Public and Private Penalties.*]—To an action by the appellant in an Ontario court upon a judgment of a New York court against the respondent under s. 21 of New York State Laws of 1875, *c.* 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign court:—Held, reversing 18 A. R. 136, and 17 O. R. 245, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial and not penal in the sense pleaded. It was not within the rule of international law which prohibits the courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the State. Held, further, that it was the duty of the Ontario court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction, and that such court was not bound by the interpretation thereof adopted by the courts of New York. *Huntington* v. *Attrill*, [1893] A. C. 150; 20 A. R. (Appendix.)

Pleading.]—A plea of a foreign judgment pleaded puis darrein continuance, must shew that the cause arose since the last continuance, and that the judgment was on the merits and conclusive between the parties where it was given; and semble, such a judgment properly pleaded would be a bar. *McPhedran* v. *Lusher*, 3 O. S. 602.

Prima Facie Case.]—In an action on a foreign judgment, if the judgment is not impeached or denied, it is prima facie evidence against the defendant. *Manning* v. *Thompson*, 17 C. P. 606.

In an action on a judgment obtained by plaintiff against defendant in the United States, defendant pleaded, 1. that the judgment had been recovered for money alleged to have been paid by plaintiff for the use of defendant; and that he was never indebted as alleged; 2. payment before judgment:—Held, that the onus probandi was upon defendant. *Ib.*

Process not Served.] — In debt on a judgment of the court of Queen's bench at Montreal, defendant pleaded that that court had no jurisdiction in the matter in which the judgment was rendered; and also that defendant was never served with any process whereby he could be or was notified of the action, and that the judgment was obtained without his knowledge and contrary to reason and justice:—Held, bad on demurrer. *McPherson* v. *McMillan*, 3 U. C. R. 30.

Declaration on a judgment of the superior court of Montreal. Plea, that defendant was not at any time served with any process issuing out of the said court at the suit of the plaintiffs for the causes of action for which the said judgment was obtained; nor had he at any time notice of any such process; nor did he appear in the said court to answer the said plaintiffs:—Held, bad, on demurrer, for not shewing that the proceedings were so conducted as to deprive defendant of the opportunity of defending himself. *Montreal Mining Co.* v. *Cuthbertson*, 9 U. C. R. 78.

——— *Assets in Foreign Country.*] — Replevin for a schooner. The defendant avowed that the vessel was his; to which the plaintiff pleaded that one M. owning an interest in the schooner, which was a Canadian vessel registered here, assigned his interest by bill duly registered to the plaintiff, who bought for value, without notice of defendant's claim or proceedings: that the vessel had been laid up for the winter at Cleveland, in the State of Ohio, where defendant sued M. in a local court of limited jurisdiction, not an admiralty court, to recover an alleged debt, the said suit being a personal action and not a proceeding in rem: that M. not being within the jurisdiction, defendant caused the vessel to be attached, and by virtue of such attachment alone got judgment and execution, under which he purchased the vessel, and took a bill of sale from the officer of the court. The plaintiff then stated certain facts shewing, as he also averred to be the fact, that M. was in truth not indebted to defendant when the judgment was obtained, which was after the plaintiff had registered his bill of sale; and he alleged that neither M. nor defendant was an American citizen, or resident in the States; that M. had never been within the jurisdiction of the Ohio court, and that no process was ever served on him, nor had he any knowledge of the proceedings there—wherefore he alleged that such court had no jurisdiction, and that the proceedings were void, contrary to natural justice, and fraudulent. Defendant, besides demurring, replied, that before M. assigned to the plaintiff defendant attached the vessel in the Ohio court for a debt which M. owed him, and afterwards recovered judgment and execution in the suit, under which the vessel was sold according to the law of that State to defendant; that by such law the property of any person within the State might be seized for any debt due, whether either debtor or creditor was or ever had been resident in the State or not, and seizure under an attachment was made equivalent to service of process on the debtor. To this the plaintiff demurred:—Held, plea good, for the

action being in personam, the mere fact that the schooner was laid up for the winter in Ohio could not give jurisdiction over a British subject, not resident there, who had no notice of the proceedings; but held, also, that the replication was good, for it shewed such jurisdiction according to the law of Ohio, so far at least as to sustain the judgment with regard to M.'s property within the State, whether it could be given effect to here for all purposes or not; that such law so limited could not be held to be contrary to natural justice; and that the sale there must prevail against the plaintiff's title acquired while the vessel was attached. *Burn* v. *Bletcher*, 23 U. C. R. 28.

To an action on a foreign judgment, the defendant pleaded that he was not at the time of the commencement of the action or previously resident or domiciled within the jurisdiction of the foreign court, or a subject of that country, and that he was not served with process in the action, and had no notice of it or opportunity of defending himself. On motion to strike out such defence as false defendant admitted in his examination that he had heard of some claim being made by the plaintiff, through a letter from his brother living in the United States, that he wrote to his brother to employ some one to attend to it, and sent a statement of the matter to him, but that he never heard of the action or trial until after judgment, when he was informed of it, and that his property in the United States had been attached to pay it. It appeared that an appearance had been entered for him there by a firm of lawyers. The application was refused. Schibsby v. Westenholz, L. R. 6 Q. B. 155, followed. *Beaty* v. *Cromwell*, 9 P. R. 547.

A plea averred that defendant was not at the commencement of the action, nor down to the judgment, resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment have any notice or knowledge of any process or proceedings in the action, nor have any opportunity of defending himself therein:—Held, affirming 27 C. P. 417, that the plea was bad, for not averring that the defendant was not a subject of the foreign country, and not amenable to its jurisdiction. *Fowler* v. *Vail*, 4 A. R. 267.

A further plea averred that defendant was not at the commencement of the action, nor down to the judgment, resident or domiciled in, or a subject of the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment have any notice or knowledge of any process or proceedings in the action, nor any opportunity of defending himself therein:—Held, plea good. *Ib.*

——— *Moving in Foreign Court.*]—To an action on a judgment recovered in the court of Queen's bench, Manitoba, the defendant set up as a defence that he was not at or during the time proceedings were taken to recover the said alleged judgment, nor had he since been a resident of or domiciled within the said Province of Manitoba, and was not served with any process or notice of the said action, nor had he any opportunity of appearing in said action and defending same; and the said judgment was obtained in his absence and without his knowledge:—Held, following Schibsby v. Westenholz, L. R. 6 Q. B. 155, a good defence. *McLean* v. *Shields*, 9 O. R. 699.

The defendant on hearing of the judgment having been entered against him in the court of Queen's bench of Manitoba, instructed counsel to move to set the same aside; but the application was refused on the ground that it was too late:—Held, that this did not preclude defendant from disputing the validity of the judgment in the action thereon in this Province. *Ib.*

Repeal of Act.]—23 Vict. *c.* 24, s. 1, under which such defences were permitted as had been pleaded, or could have been pleaded, to the original order by the court of chancery in England, sued on in this case, was repealed by 39 Vict. c. 7 (O.) Such repeal, under the Interpretation Act, 31 Vict. c. 1, s. 7, s.-s. 34 (O.), would not affect the pleas. *Barned's Banking Co.* v. *Reynolds*, 40 U. C. R. 435.

In action on a foreign judgment commenced previous to the repeal by 39 Vict. c. 7 (O.), of 23 Vict. c. 24, s. 1 (which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit), the defendant, after the passing of the repealing Act, pleaded several pleas, setting up such defences:—Held, reversing 27 C. P. 417, that they could be pleaded, as the right to plead was an "existing right" within the meaning of s. 7, s.-s. 34, of the Interpretation Act, 31 Vict. c. 1 (O.) *Fowler* v. *Vail*, 4 A. R. 267.

Scale of Costs.]—The plaintiff sued the defendant on a foreign judgment for $240, and specially indorsed this amount upon the writ of summons. He obtained judgment in default of appearance:—Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. 1877 c. 50, s. 153, and that the plaintiff was entitled to superior court costs. *Davidson* v. *Cameron*, 8 P. R. 61.

Statute of Limitations.]—Held, that a plea setting up the Statute of Limitations as a bar to the cause of action on which the judgment was recovered, was bad, in not stating that it was the period of limitation according to the foreign law. *Fowler* v. *Vail*, 27 C. P. 417.

To an action on a foreign judgment recovered in the supreme court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof:—Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the lex fori, and not by the lex loci contractus. *North* v. *Fisher*, 6 O. R. 206.

See LIMITATION OF ACTIONS.

Staying Proceedings.]—An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in statu quo were annexed to the order. *Huntington* v. *Attrill*, 12 P. R. 36.

Trespass against Court's Officer—*Merits.*]—The respondents obtained a verdict against the appellants in a foreign court in the United States, in trespass de bonis asportatis,

and sued on such judgment in assumpsit in this country. The alleged trespass was committed in this country by K., one of the defendants below, in his capacity of sheriff, and in execution of a writ of attachment sued out against one T., an absconding debtor. The eighth plea set out that defendant K. was such sheriff, &c., the warrant of attachment under which, &c., that the plaintiffs below claimed, &c., by virtue of a sale made to them after issuing and delivery of said writ, &c. Averment, that at the time of attaching and seizing, &c., the property was by the law of Canada in said T., and subject to the said attachment; that defendant was then and always since has been, &c., a British subject; never resided, &c., in the United States; was never subject to the laws of the United States for or on account of said cause of action; that by the laws of Canada the plaintiffs had no right of action against the defendants, and that the judgment of the foreign court was contrary to natural justice, &c.:—Held, on demurrer, plea bad. *Kingsmill* v. *Warrener*, 13 U. C. R. 18.

Two Defendants.] — If a foreign judgment against two defendants be several in its terms, the court here will hold it good as according to the law of the foreign country until the contrary be shewn; and the executor of one defendant may be sued, although the other defendant survive. *Racy* v. *Goodman*, E. T. 3 Vict.

Assumpsit on a foreign judgment against two defendants. Defendants pleaded that one of them had never been served with process, and had no notice of the proceedings in the foreign court:—Held, bad, as setting up a defence for both defendants, which applied only to one. *Bacon* v. *McBean*, 3 U. C. R. 305.

Want of Jurisdiction—*Statute of Limitations.*]—To debt on a judgment rendered in an inferior court in the United States, defendants, executors of the judgment debtor, pleaded that the testator at the time of and for twenty years before the recovery against him, and until his death, resided only in this Province; and that the cause of action, if any, for which the judgment was obtained, arose here, and not within the jurisdiction of the foreign court; and that the said alleged cause of action did not accrue within six years before such recovery, or the commencement of that suit:—Held, bad in substance. *Kirby* v. *Elliott*, 13 U. C. R. 367.

Want of Notice of Foreign Action—*Limitation of Actions.*]—A creditor who has obtained judgment in a foreign country for the amount of his debt, may, if entitled to sue at all in this Province, sue either upon the foreign judgment or upon the original consideration. An action upon a foreign judgment must fail if it be proved that the judgment has been obtained without notice to the defendant, actual or constructive. By the indorsement of his writ the plaintiff claimed upon the foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration, a promissory note:—Held, that it was too late to object to this at the trial, and that as the period of limitation upon the note had not expired at the time of the issue of the writ the plaintiff was entitled to recover although that period had expired before the filing and delivery of the statement of claim. Held, also, that even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the Statute of Limitations was of no avail, because the statute began to run in favour of the defendant, a foreigner, only when he came within the Province, a short time before the issue of the writ in this Province. *Bugbee* v. *Clergue*, 27 A. R. 96.

Warrant of Attorney — *Confession.*]—The general rule is, that a judgment valid by the laws and practice of the state where it is rendered or confessed, may be sued upon as a ground of action in any other state. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the court whereby competence is acquired to deal with the matter submitted. Held, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to reside in that State, upon a warrant of attorney in favour of any attorney of a court of record, executed while the defendant was a resident of the State, was valid, and that the courts there had jurisdiction to deal with the matter, and over the person of the defendant. *Ritter* v. *Fairfield*, 32 O. R. 350.

X. Motion for Judgment.

1. *Before Appearance.*

General Rule.]—In order to obtain under con. rule 744 a speedy judgment before the time for appearance in an action has expired, a plaintiff must shew that some injury or injustice is likely to happen or to be done to him if he is not awarded immediate relief. *Greene* v. *Wright*, 12 P. R. 426.

Where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shewn was that the defendant was in financial straits, and had refused to submit his affairs to investigation or to make an assignment:—Held, that a motion under con. rule 744 for judgment before appearance must be refused. *Ib.*

In order to obtain the very extraordinary relief provided for by rule 744, the plaintiff must not only make out as strong a case as he would under rule 739, but, in addition, establish some special ground for relief. And where the special indorsement upon the writ of summons shewed the plaintiff's claim to be for an amount paid as surety for the defendant, and also a sum for costs paid and interest on costs; and the plaintiff on his application shewed that the defendant was a married woman, and that, owing to her financial affairs, the only way in which he could recover his claim was by recourse to a certain fund coming to the defendant under a mortgage held by her; and the defendant set up a partnership between the plaintiff and herself and claimed that, on the accounts being taken, the balance would be in her favour:—Held, without saying that any clear legal defence to the action had been shewn, enough appeared of the dealings and transactions between the parties to make it not unreasonable that the plaintiff should be left to his ordinary remedies for the recovery of his claim. Quære, as to the effect of the

items in the special indorsement for costs and interest on costs; and also as to the application of rule 744 to actions between creditor and debtor. Remarks on the origin and application of the rule. *Leslie* v. *Poulton*, 15 P. R. 332.

Chambers.]—A Judge sitting in chambers has no jurisdiction to order judgment to be signed under con. rule 744, but a motion for judgment thereunder must be made to the court. *Morrison* v. *Taylor*, 46 U. C. R. 492.

Where an order for the signing of a judgment under con. rule 744, is made in chambers instead of in court, it must be taken advantage of by a summary application, and its invalidity cannot be set up in an action founded on it. *Martin* v. *Evans*, 6 O. R. 238.

Conflicting Affidavits.] — Where there were cross-actions, in one of which a sum had been reported due and a claim of set-off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was held entitled to move for judgment under con. rule 744. But the affidavits filed on the motion being conflicting:—Held, the action must be entered for trial at the sittings for the examination of witnesses, but the amount found due in the first action was ordered to be paid into court, to abide the result of the second action. *Francis* v. *Francis*, 9 P. R. 209.

Costs—*Wrong Person Served.*]—A person of the same name as the defendant served by mistake with the writ in the action was held entitled to his costs of opposing a motion for judgment under con. rule 744. *Lucas* v. *Fraser*, 9 P. R. 319.

Covenant.]—Leave was given to the plaintiff under con. rule 744 to sign final judgment, where the claim was upon a covenant by the defendant with the plaintiff upon lands sold by him to the defendant, and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them. It was directed that the judgment to be entered should be for the amount of the four mortgages and interest (to be computed by the registrar), and costs. Leave was reserved to the defendant to apply to be relieved from the judgment upon his satisfying the claim of the holder of the mortgages. *Clendennan* v. *Grant*, 10 P. R. 593.

Creditors' Relief Act.]—In two actions to recover the amounts of overdue promissory notes, motions were made by the plaintiffs, at an early stage, under rule 744, for summary judgments, upon the ground that the sheriff had seized and sold certain property of the defendants under execution, and that in order to share in the distribution of the proceeds of sale under the Creditors' Relief Act, it was necessary for the plaintiffs to have immediate judgments:—Held, not a sufficient special ground for the application of the rule. In answer to the motions, the defendants set up in affidavits the defence that there was an agreement between them and the plaintiffs that moneys collected on collaterals should be applied in discharge of the notes sued on, among others, and moneys were so collected and applied; but the agreement was denied by the plaintiffs:—Held, that this was a substantial defence and ought not to be tried summarily upon affidavits. Leslie v. Poulton, 15 P. R. 332, followed. Remarks on the origin and application of rule 744. *Molsons Bank* v. *Cooper*, 16 P. R. 195.

Fraudulent Disposition of Property.]—Where it appears that defendant has no defence, and has made, or is intending to make a fraudulent disposition of his property, or is so dealing with it as to embarrass the plaintiff in reaching it by execution, the court will, on motion, under con. rule 744, upon a proper case being made, order judgment and immediate execution. In the event of other executions being obtained against the debtor's property before the time at which the plaintiff would be entitled to issue execution as on a judgment in default of appearance, and the amount realized being insufficient to satisfy all parties, a ratable division should be made. *Kinloch* v. *Morton*, 9 P. R. 38.

Fraudulent Preference.]—An unopposed application for summary judgment under rule 744, made the day after service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the court considered that the plaintiffs would not be prejudiced by the action being allowed to proceed in the ordinary way. Leslie v. Poulton, 15 P. R. 332, and Molsons Bank v. Cooper, 16 P. R. 195, applied and followed. *Lake of the Woods Milling Co.* v. *Apps*, 17 P. R. 496.

Notice of Sale—*Abandonment—Action on Covenant.*]—After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R. S. O. 1887 c. 102, s. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof:—Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of R. S. O. 1887 c. 102, s. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice. *Lyon* v. *Ryerson*, 17 P. R. 516.

Promissory Note—*Renewal.*] — During the currency of a promissory note it was agreed between the indorsee and indorser that the note should be renewed at maturity, and from time to time on payment of a named sum, "if the renewal notes are continued in the same firm or names as at present." Before the maturity of the note the maker died. After its maturity in an action on the note against the indorser the defendant set up such agreement as a defence, and alleged that he duly offered to perform it so far as it lay in his power, by leaving the said note and liability of the maker and giving his note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out. A motion for immediate judgment under con. rule 744, was dismissed, the Judge

refusing to decide as to the legality of the defence on such motion. *Federal Bank* v. *Hope*, 6 O. R. 209.

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2. *For Want of Bonâ Fide Defence.*

General Rule.]—The power given by con. rule 739, to sign judgment should be most carefully and sparingly exercised in cases where the defendant makes an affidavit of merits, and disputes the claim, and should never be exercised unless it is shewn that the plaintiff may be seriously prejudiced by the delay in awaiting the ordinary modes of trial, nor in any case in which, under the old practice, final judgment could not have been signed for want of appearance. On the facts stated in the report, an order of the master in chambers, directing the entry of final judgment under such rule was set aside on appeal. *Barber* v. *Russell*, 9 P. R. 433.

Leave to sign judgment under con. rule 739 should not be granted save where the case is clear and free from doubt, and under the circumstances of this case an order for such leave was reversed. *Bank of Minnesota* v. *Page*, 14 A. R. 347.

When the facts are not clear and free from doubt leave to sign judgment under con. rule 739 should not be granted. Bank of Minnesota v. Page, 14 A. R. 347, followed. But where a distinct defence is not made out, terms should be imposed upon the defendant upon his being allowed to defend, as a pledge of his bona fides; and in this case the defendant was required to pay into court or secure one-half of the amount claimed. *Stephenson* v. *Dallas*, 13, P. R. 450.

After Statement of Claim.]—The practice of moving under con. rule 739, for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in cases of necessity it may be allowable. Under the circumstances of this case, motion for judgment was refused. *Woodruff* v. *McLennan*, 11 P. R. 22.

Appeal.]—An order for leave to sign judgment under con. rule 739, is in its nature final and not merely interlocutory, and therefore such an order if made in a county court, would be appealable by virtue of 45 Vict. c. 6, s. 4 (O.), and is also appealable when made in a district court. *Bank of Minnesota* v. *Page*, 14 A. R. 347.

Balance of Account.]—The writ of summons was indorsed as follows: "The plaintiff's claim is for $213.90, balance due for sawing wood by the plaintiff for the defendant:"—Held, not a sufficient special indorsement to admit of the plaintiff moving for judgment under con. rule 739. *Villeneuve* v. *Wait*, 12 P. R. 505.

Covenant in Mortgage—*Interest.*]—In an action to recover the amount due under a mortgage, the plaintiff indorsed upon his writ of summons particulars of his claim, shewing the date of the mortgage, the parties, the amount of principal and interest claimed, and the date when the interest fell due; also a statement that, by the terms of the mortgage, on default in payment of interest the principal became due, and that default in payment of interest had been made. Interest on overdue interest was also claimed, but no contract therefor was alleged:—Held, that the indorsement was not a sufficient special indorsement to support a summary judgment under rule 739, in that it omitted the dates from which interest was claimed, and did not state a contract to pay interest upon interest; and that the affidavit in support of the motion could not be read with the indorsement so as to make it good. Gold Ores Reduction Co. v. Parr, [1892] 2 Q. B. 14, followed. *Munro* v. *Pike*, 15 P. R. 164.

Disclosure of Facts—*Appeal.*]—In answer to a motion by the plaintiffs for summary judgment under rule 739 in an action upon a promissory note made by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any other notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up:—Held, that the defendant had not shewn satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend. An order of a Judge in chambers, made upon appeal from an order of the master in chambers, allowing summary judgment under rule 739 to be entered, is an interlocutory order, but an appeal lies from it to a divisional court. *Bank of Toronto* v. *Keilty*, 17 P. R. 250.

English Company.]—Leave was given to sign final judgment under con. rule 739, against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario. *Plummer* v. *Lake Superior Native Copper Co.*, 10 P. R. 527.

Foreign Judgment—*Variance by Foreign Court after Action—Amendment—Interest.*]—Where the plaintiff indorsed his writ of summons with a claim for the amount of a foreign judgment and interest, and after the issue of such writ and while a motion for summary judgment under rule 739 was pending, the foreign judgment was varied on appeal by reducing the amount:—Held, that, even if the claim for interest did not stand in the way, the indorsement could not be amended upon the motion for summary judgment so as to accord with the foreign judgment as varied, and the plaintiff's proper course was to abandon

his motion and move for leave to amend the indorsement, or to discontinue the action altogether. Gurney v. Small, [1891] 2 Q. B. 584, and Paxton v. Baird, [1893] 1 Q. B. 139, followed. Interest upon the amount of a foreign judgment from the date of its entry is not payable by contract nor by statute, but is recoverable only as unliquidated damages, and cannot be the subject of a special indorsement. And while, for the purpose of obtaining judgment by default, the plaintiff may indorse his writ specially for a liquidated demand and also for a further claim under rule 711, yet if he wishes to be in a position to move for summary judgment under rule 739, he must bring himself strictly within rule 245, as having indorsed his writ only with a claim which is the subject of a special indorsement under that rule. Judgment below, 16 P. R. 78, affirmed on these three points. Hollender v. Ffoulkes, 16 P. R. 175, and Munro v. Pike, 15 P. R. 164, approved. Hay v. Johnston, 12 P. R. 596, overruled. Huffman v. Doner, ib. 492, and Mackenzie v. Ross, 14 P. R. 299, commented on. Sheba Gold Mining Co. v. Trubshawe, [1892] 1 Q. B. 674, and Wilks v. Wood, ib. 684, followed. Where an order for summary judgment under rule 739 is set aside on appeal, rule 757 cannot be made available for the purpose of turning the appeal into a motion for judgment and granting a yet more summary judgment. Judgment below, 16 P. R. 78, reversed on this point. *Solmes* v. *Stafford*, 16 P. R. 264.

Where a writ of summons was indorsed to recover the amount of a foreign judgment, together with interest from the date thereof until judgment:—Held, that the claim for interest was for an unliquidated amount, and the two claims together did not constitute a good special indorsement within rule 245. Held, also, that the plaintiff was not entitled upon such indorsement to a summary judgment under rule 739 for the amount of the foreign judgment only, with liberty to proceed for the interest; for that rule is not applicable where there is a claim for a liquidated demand joined to one for unliquidated damages. Rules 245, 705, 711, and 739, considered. Solmes v. Stafford, 16 P. R. 78, followed. Hay v. Johnston, 12 P. R. 596, not followed. *Hollender* v. *Ffoulkes*, 16 P. R. 175.

——— *Defence of Want of Jurisdiction—Absence of Defence on the Merits.*]—Action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction; neither of them was a British subject; and the cause of action upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, to sue in this Province depended upon s. 124 of the Judicature Act, 1895. The defendant entered a special appearance, and raised, by pleading, the question of jurisdiction. Upon an appeal from an order affirming an order refusing summary judgment under rule 739:—Held, that, although the defendant failed to shew that he had a good defence to the action on the merits, and disclosed no facts that would have entitled him to defend in an ordinary action, yet the discretion exercised below should not be interfered with, having regard to the special nature of the jurisdiction conferred by s. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment. *Campau* v. *Randall*, 17 P. R. 243.

General Denial.]—Where on moving for immediate judgment under con. rule 739, the plaintiff makes out a primâ facie case for granting an order therefor, it is not sufficient for the defendant, in opposing the application, to swear that he has a good defence on the merits, he must shew the nature of his defence, and give some reason for thinking that such defence exists in fact. *Collins* v. *Hickok*, 11 A. R. 620.

Goods Sold.] — A writ was indorsed as follows:—"The plaintiffs' claim is for the price of goods supplied. The following are the particulars:—$621.06 for money payable by the defendant to the plaintiffs for goods bargained and sold, and sold and delivered by the plaintiffs to the defendant, and interest thereon from the 25th July, 1882:"—Held, that the indorsement was not a sufficient special indorsement to entitle the plaintiffs to ask for judgment under con. rule 739. *Lucas* v. *Ross*, 9 P. R. 251.

——— *Leave to Defend — Payment into Court.*]—Where no defence has been made to appear upon a motion for judgment under rule 739, the defendant will not be allowed to defend unconditionally. In an action for the price of goods sold and delivered to a partnership, brought after the dissolution thereof, against the two members of the partnership, one of them set up as a defence upon a motion for judgment that upon the dissolution he retired and his co-partner agreed to continue the business and pay the debts, including that of the plaintiffs, and that the plaintiffs had taken securities from the co-partner after the dissolution and given him time, and so had relieved the other; but all those who knew of the dealings negatived any such course of dealing, and shewed that all that was done was with a reservation of rights against the retiring partner:—Held, that the latter could not succeed in the action unless the jury disbelieved all this evidence; and he should be allowed to defend only upon payment into court of the amount claimed. *Dunnet* v. *Harris*, 14 P. R. 437.

In an action to recover $1,547.47 the plaintiffs moved for summary judgment under rule 739, and the defendant set up as a defence that the plaintiffs had agreed to discharge him upon his making an assignment for the benefit of creditors to their nominee. The weight of testimony upon the motion was against the existence of such an agreement:—Held, that it was a proper exercise of discretion to require the defendant to pay $300 into court as a condition of being allowed to defend. Dunnet v. Harris, 14 P. R. 437, followed. *Adams* v. *Anderson*, 16 P. R. 157.

——— *Status of Plaintiffs — Amendment—Compound Judgment.*] — It appeared by the writ of summons that one of the two plaintiffs sued as liquidator of a company, the other plaintiff being a company:—Held, that an indorsement "for goods sold and delivered during the year 1894 to the defendant by the O. C. Co., whereof the plaintiff C. is liquidator, $353," was a good specially indorsed claim on the part of C.; and an indorsement on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding, "and assigned to the L. H. C. Co., one of the plaintiffs herein," was a good claim specially indorsed as to the L. H. C. Co., though the way in which

that company became assignee was not detailed, there being no suggestion that they were not the legal holders. Upon a motion for summary judgment under rule 739 it appeared by affidavits that the plaintiff company were mortgagees of the claims, and the liquidator transferee subject to the co-plaintiffs' claims:—Held, that the affidavits shewed that the special indorsement was not in conformity with the facts, and therefore failed to verify it, and no amendment could be permitted upon the motion; nor could judgment be given, in accordance with the special indorsement, as to one part in favour of the liquidator, and as to the other in favour of the company. *Clarkson* v. *Dwan*, 17 P. R. 92.

Implied Covenant — *Land Titles Act.*]—In an action by the assignee of a charge registered against land under the Land Titles Act, R. S. O. 1887 c. 116, to recover money due under the covenant for payment implied by virtue of s. 29, there being no entry on the register negativing the implication, the defendant in answer to an application for summary judgment under rule 739, swore that it was clearly understood between him and the original chargees that the land only was to be liable, and this was corroborated by one of the original chargees; the plaintiff, however, swearing that she was a bonâ fide purchaser for value without notice of this understanding:—Held, that there was a bonâ fide contest of a question to some extent novel, which ought to be fairly litigated in the usual way, without hampering conditions being imposed on the defence. Jones v. Stone, [1894] A. C. 124, followed. *Wilkes* v. *Kennedy*, 16 P. R. 204.

Imposing Terms.]—See *Dobie* v. *Lemon*, 12 P. R. 64.

Indemnity—*Amendment — Implied Covenant.*]—The plaintiffs sued the defendant for moneys alleged to have been paid by them for interest upon certain mortgages, and for the principal due under certain other mortgages. The writ of summons was specially indorsed, and contained a statement that the defendant was liable to pay the mortgages by virtue of a certain covenant made by him with one T. on a certain date and assigned by T. to the plaintiffs. Upon a motion by the plaintiffs for summary judgment under rule 739, it appeared that the deed alleged to contain the covenant made by the defendant with T. did not, in fact, contain any express covenant to pay the mortgages, but by it T. conveyed the lands in question to the defendant "subject to all mortgages registered against the lands," and the deed was not executed by the defendant. The plaintiffs, however, sought to support the indorsement by reference to the preliminary contract between the defendant and T., which contained an offer to assume and to covenant to pay off the mortgages:—Held, that, although the deed expressed an equitable obligation by the defendant to indemnify T., there was no covenant in any sense; and the plaintiffs could not invoke the benefit of the preliminary contract, for the indorsement must be complete in itself, containing everything which entitles the plaintiffs to recover; and the court will not encourage an amendment for the purpose of upholding a summary judgment. Frauhauf v. Grosvenor, 8 Times L. R. 744, followed. Held, also, that rule 245, specifying the different kinds of actions in which writs may be specially indorsed, does not extend to the case of an action upon an implied covenant. *Davidson* v. *Gurd*, 15 P. R. 31.

Indian.]—On an application which was granted under con. rule 739, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve:—Held, that since the repeal of C. S. C. c. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, s. 77 (D.), the judgment will not bind any property of the Indian except that described in s. 75. *Bryce* v. *Salt*, 11 P. R. 112.

Interest.]—The writ of summons was indorsed with a money claim for the value of a certain quantity of logs at certain prices, and an additional claim for interest on the price:—Held, that as interest was not claimed as arising under a statute or by contract, the writ was not specially indorsed under rule 245, and an order for summary judgment could not be made under rule 739. Wilks v. Wood, [1892] 1 Q. B. 684, followed. Mackenzie v. Ross, 14 P. R. 299, and Hay v. Johnston, 12 P. R. 596, distinguished. Semble, if the plaintiff abandoned all claim to interest he might be entitled to judgment in a proper case. *Casselman* v. *Barrie*, 14 P. R. 507.

——— *Promissory Notes—Amendment.*]—The indorsement of a writ of summons by which sums were claimed for interest upon promissory notes largely in excess of anything which could possibly be due except by virtue of some special contract, which was not alleged:—Held, not a good special indorsement. McVicar v. McLaughlin, 16 P. R. 450, distinguished. Held, also, that the special indorsement was bad, and no amendment could be permitted. *Clarkson* v. *Dwan*, 17 P. R. 92, 206.

Liquidated and Unliquidated Demands.]—An order for judgment under con. rule 739, cannot be made except in an action where the plaintiff merely seeks to recover a debt or liquidated demand in money. *Standard Bank* v. *Wills*, 10 P. R. 159.

There may be two judgments in one action. Leave was given to the plaintiff to sign judgment under con. rule 739, for the amount of a money demand, and to proceed upon another claim in the same action. *Hay* v. *Johnston*, 12 P. R. 596.

Local Master.]—Rule 422 O. J. Act and its sub-section (a) must be read together, and hence the limitation in the sub-section of the jurisdiction of the county Judge in certain cases curtails that of local masters in similar cases. The local master at Hamilton, in the county of Wentworth, gave leave to sign final judgment under con. rule 739, in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton:—Held, that under rule 422 O. J. Act, the local master had no jurisdiction to make the order. *Freel* v. *Macdonald*, 10 P. R. 170.

Married Woman.]—Judgment may be obtained against a married woman under con. rule 739, but execution thereunder must issue

against her separate estate only. *Kinnear* v. *Blue*, 10 P. R. 465.

Judgment was granted under con. rule 739, in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Woman's Property Act, 1884, 47 Vict. c. 19 (O.), and where there was no allegation that the married woman was possessed of separate estate. The order provided that the judgment should be levied out of the defendant's separate property (if any) which she was possessed of or entitled to at the time of the making of the note, or which she may thereafter acquire or have acquired, and which she was not restrained from anticipating. *Quebec Bank* v. *Radford*, 10 P. R. 619.

Judgment was granted under con. rule 739, in an action on a note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the Married Woman's Property Act, 1884, following Bursill v. Tanner, 13 Q. B. D. 691. *Cameron* v. *Rutherford*, 10 P. R. 620.

Held, that the Married Woman's Property Act, 1884 is not retrospective. A motion under con. rule 739, for judgment upon a note against a married woman was dismissed in April, 1883, and was renewed fourteen months after the passing of the Act:—Held, that the Act made no change in the law which could assist the plaintiff, even if the matter were res integra. Turnbull v. Forman, 15 Q. B. D. 234, followed. *Scott* v. *Wye*, 11 P. R. 93.

A primâ facie case for judgment under con. rule 739, was made by the plaintiff in an action upon two bills of exchange accepted by a married woman who, in her defence, alleged, amongst other things, that she accepted the bills as agent of her husband, but there being evidence on which the jury might have been justified in finding that the business, in which such acceptances were given, was hers, the court refused to interfere with the discretion of the Judge in directing judgment to be entered for the plaintiff, the defendant having declined to comply with the condition of paying the amount of the claim into court to abide the result of a trial. *Nelson* v. *Thorner*, 11 A. R. 616.

Upon a motion by the plaintiffs for summary judgment against a married woman under con. rule 739, an officer of the plaintiffs swore that the married woman was made a party to the note sued on because he, the deponent, was informed by her husband and believed, and had no doubt, that she had separate estate of her own, and that there was no doubt, so far as she was concerned, that she contracted with respect to her separate estate when she indorsed the note. The note was made and matured and all the material facts occurred before the passing of the Married Woman's Property Act, 1884:—Held, following Moore v. Jackson, 16 A. R. 431, that the plaintiffs were bound to prove the existence of some separate property at the time of entering into the alleged contract, and that this was not shewn by the affidavit; and the motion for judgment was refused. *Canadian Bank of Commerce* v. *Woodcock*, 13 P. R. 242.

Summary proceedings upon specially indorsed writs do not apply where, the defendant being a married woman, the judgment can be only of a proprietary nature. *Cameron* v. *Heighs*, 14 P. R. 56.

In an action upon a covenant in an agreement, made subsequently to the coming into force of the Married Woman's Property Act, 1884, whereby the defendants, husband and wife, covenanted to pay the plaintiff the moneys then owing to him, and other moneys thereafter to be advanced, the writ of summons was specially indorsed with particulars shewing the amounts and dates of the various advances:—Held, a sufficient special indorsement. Where it is shewn that a married woman defendant has separate estate, judgment may be entered against her as to such separate estate, upon default or by order under rule 739. And where the writ of summons did not shew that one of the defendants was a married woman having separate estate, but the plaintiff's affidavit, filed on a motion for summary judgment under rule 739, did shew it, the plaintiff was allowed to amend his writ, and to enter a proprietary judgment against her. *Nesbitt* v. *Armstrong*, 14 P. R. 366.

Money Lent.]—A writ of summons was specially indorsed under rule 14, O. J. Act "the plaintiff's claim is $1,702.72 for money lent by the plaintiffs to the defendants, the same being the amount due to the plaintiffs' branch or agency office at P., and interest thereon from the 1st December, 1884, until judgment." On motion for judgment under con. rule 739:—Held, that it was necessary for defendant's information to state the date at which his account was overdrawn to the amount specified, and that this indorsement was therefore insufficient. *Ontario Bank* v. *Burk*, 10 P. R. 648.

Order for Security.]—The order for security for costs under rule 431, O. J. Act is a stay of proceedings, and a Judge has no power to set it aside when once properly issued and sign final judgment under con. rule 739. *Bank of Nova Scotia* v. *LaRoche*, 9 P. R. 503; *Doer* v. *Rand*, 10 P. R. 165.

But the plaintiff may move at the same time to set aside the order and for judgment. *Doer* v. *Rand*, 10 P. R. 165; *Anglo-American Casings Co.* v. *Rowlin*, 10 P. R. 391.

Since the passing of con. rule 1251, the practice sanctioned by Doer v. Rand, 10 P. R. 165, and Anglo American Casings Co. v. Rowlin, ib. 391, is no longer applicable, and where a plaintiff against whom a præcipe order for security for costs had been obtained, moved to set it aside and for judgment under con. rule 739, without paying $50 into court under con. rule 1251, his motion was dismissed. *Payne* v. *Newberry*, 13 P. R. 354.

——— *Second Application.*]—Where the plaintiff's motion for judgment under con. rule 739 was dismissed because he had not observed the practice under con. rule 1251 of partly complying with an order upon him for security for costs by paying $50 into court, and he subsequently paid the money in and renewed the application upon the same material:—Held, that the dismissal of his first application was no bar to the second one. Semble, it would have been otherwise had the plaintiff

failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects. *Payne* v. *Newberry* (No. 2), 13 P. R. 392.

Where there was an admission by the defendant of the debt sued for, sworn to and not contradicted, and the writ of summons was specially indorsed so as to enable the plaintiffs to move for judgment under rule 739, an order for security for costs obtained by the defendant on præcipe, after appearance, the plaintiffs being out of the jurisdiction, was set aside notwithstanding that the plaintiffs might have paid $50 into court under rule 1251 and proceeded to move for judgment. Doer v. Rand, 10 P. R. 165, followed. Payne v. Newberry, 13 P. R. 354, not followed. *Thibaudeau* v. *Herbert*, 16 P. R. 420.

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

Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive. Carter v. Stubbs, 7 Q. B. D. 116, followed. Rule 1251 does not give a plaintiff any further time for or relieve him from the obligation of putting in his security for costs; it only enables him to remove the stay effected by the order, for the sole purpose of making a motion for judgment under rule 739; and if he does not succeed in that motion, he must obey the order by putting in the full security. But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under rule 739, and appealed to a Judge in chambers, and afterwards to a divisional court, from the order made upon such motion, without taking the objection that the action was at an end:—Held, that he had waived the objection; and a bond filed after the time limited was allowed. *Hollender* v. *Ffoulkes*, 16 P. R. 225.

Upon appeal to the divisional court the decision was varied by extending, pursuant to rule 485, the time for giving security. *Hollender* v. *Ffoulkes*, 16 P. R. 315.

Overdraft.]—The indorsement on the writ was as follows:—"The plaintiffs claim $2,000 being the amount of the defendant's overdrawn account with the plaintiffs' bank on the 18th September, 1882:"—Held, sufficient. *Imperial Bank* v. *Britton*, 9 P. R. 274.

Price of Land.]—The writ was indorsed for the price of land which the plaintiff had agreed to sell to the defendant. A motion for judgment under con. rule 739 was refused. Such a claim cannot be specially indorsed. *Hood* v. *Martin*, 9 P. R. 313.

Promissory Note—*Notice of Dishonour.*]—In an action against the maker and indorsers of a promissory note, in answer to a motion under con. rule 739, for judgment, the defendants, the indorsers of the note, who it was said were accommodation indorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion:—Held, that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should have been refused. The protest having been produced after an enlargement:—Held, that being only presumptive evidence of the posting of the notice, it was not sufficient in the face of the denial. The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the indorsers, C. C. B., resided at Bowmanville:—Held, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered. *Ontario Bank* v. *Burk*, 10 P. R. 561.

——— *Accommodation.*]—On a motion for judgment under con. rule 739, in an action on a promissory note, the defendant filed an affidavit shewing that he was an accommodation maker, and stating his information and belief to be that the plaintiffs were aware of the fact, that they held the note as collateral security, and that they never gave any value for it, and further that since the making of the note M., the payee, had become insolvent and made an assignment, and that there was litigation pending between the plaintiffs and his assignee in respect of certain securities alleged to be held by the plaintiffs on account of his indebtedness. An affidavit of the plaintiffs' manager was filed denying knowledge that the note was an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to M.'s credit:—Held, not a case in which judgment could be ordered. *Hughson* v. *Gordon*, 10 P. R. 565.

——— *Agreement to Renew.*]—At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due, and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque:—Held, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it, stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewal notes were drawn. Held, on appeal, that on the state of facts presented, the plaintiffs were not entitled to the indulgence of a speedy judgment and execution. *Lowden* v. *Martin*, 12 P. R. 496.

——— *Information and Belief — Married Woman—Separate Estate—Foreign Law.*]—In an action upon a promissory note made in the State of New York, the defendants, who

were husband and wife, in answer to an application for summary judgment under rule 603, swore that the note was given upon a certain condition which had not been fulfilled by the payees; that the defendants were informed and believed that the plaintiffs, the indorsees of the note, were suing for the benefit of the payees, and were not holders for value, or took it after maturity. The source of the information was not given, and the plaintiffs positively denied that there was any notice of any condition. There was no proof that the wife had separate estate in Ontario, but the plaintiffs filed an affidavit made by a counsellor-at-law in the State of New York, who stated that by the laws there in force it was not necessary that a married woman should be possessed of any property, either real or personal, to enable her to contract or to make her contracts binding in law, her right to contract being the same as if she were unmarried. This affidavit was not contradicted:—Held, that no valid defence was shewn, and the plaintiffs were entitled to summary judgment against both defendants. Bank of Toronto v. Keilty, 17 P. R. 250, followed. Munro v. Orr, 17 P. R. 53, distinguished. *Jones* v. *Mason*, 18 P. R. 442.

——— *Incorporated Company—Accommodation Note.*]—In an action upon a promissory note the only fact shewn by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not shew that the plaintiffs were not holders for value in due course without notice; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business; and it was admitted that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar, which the undoubted creditors were accepting:—Held, upon a motion for summary judgment under rule 739, that the defence alleged was not founded upon any known facts, but was mere guess work, and unless the defendants paid into court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted. The presumption that value has been given may be done away with in the case of notes which have had their origin in actual fraud, but not in the case of notes made for the accommodation of others; and even where accommodation notes are made by an incorporated company, the onus of shewing value is not shifted over to the plaintiffs. Re Peruvian Railways Co., L. R. 2 Ch. 617, followed. Millard v. Baddeley, W. N. 1884, 98, and Fuller v. Alexander, 47 L. T. N. S. 443, distinguished. *Merchants National Bank* v. *Ontario Coal Co.*, 16 P. R. 87.

Recovery of Land.]—A writ of summons was indorsed under rule 141 with claims for foreclosure of a mortgage, and for immediate recovery of possession of the mortgaged premises, and for immediate payment of the mortgage money:—Held, that it could not be said to be specially indorsed under rule 138 so as to entitle the plaintiffs to move under rule 603 for summary judgment for recovery of land. *Supreme Court of the Independent Order of Foresters* v. *Pegg*, 19 P. R. 80.

——— *Money Claim — Counterclaim.*] — The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment under rule 603, the defendant set up that he had been induced to enter into the contract, and to make the purchase of certain chattels out of which the money demand arose, by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendants' counterclaim, which he allowed to go to trial:—Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action. *Spears* v. *Fleming*, 19 P. R. 127.

Right to Cross-examine.]—Where the defendant was sued as administratrix of her late husband upon a promissory note made by him, and upon a motion by the plaintiff for judgment under con. rule 739 filed an affidavit in which she did not set up any defence:—Held, nevertheless, that there was no discretion to refuse her an opportunity of cross-examining the plaintiff; and upon an appeal from the decision of a local Judge refusing an enlargement for such purpose and allowing the plaintiff to sign judgment, a direction was given that the plaintiff attend at his own expense for cross-examination; and although upon such cross-examination the defendant could not shew that she had any defence, and the order for judgment was affirmed, she was allowed a portion of the costs of a successful appeal. *Kingsley* v. *Dunn*, 13 P. R. 300.

Upon a motion for judgment under con. rule 739, the defendant may satisfy the Judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examination of the plaintiff on his affidavit filed in support of the motion. *Ib.*

Unconditional Leave to Defend.] — Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shews a good defence, he should be allowed to defend unconditionally. Upon a motion for summary judgment under that rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up:—Held, that the defendant should have unconditional leave to defend. *Munro* v. *Orr*, 17 P. R. 53.

On a motion for summary judgment under rule 739 in an action upon a promissory note, one of the defendants gave facts on affidavit shewing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that

the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note, but stated no facts as to such notice:—Held, that the defendant should have unconditional leave to defend. *Farmers Bank* v. *Sargant*, 17 P. R. 67.

See sub-title VI., *ante*.

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3. *Upon Pleadings or Admissions.*

Admissions—*Former Motion.*]—The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vict. c. 20, s. 7 (O.). The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge; and the defendants moved for a mandamus to compel him to execute an assignment. This motion having been dismissed a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and the refusal were set up. The plaintiff then joined issue. There was no reference in the pleadings to the second mortgage. On motion for judgment under con. rule 756:—Held, that the admissions in the affidavit of the defendant filed on the former motion, could be used upon this motion; and that in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit. *Rogers* v. *Wilson*, 12 P. R. 322, 545.

Conclusive Case.]—In an action for the recovery of land the plaintiff moved under con. rule 756, for final judgment upon the pleadings, the depositions of the defendant, taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant:—Held, that much care must be taken in such cases not to take away the right of trial on viva voce evidence; and that as the plaintiff's case was not conclusively made out, the motion was properly refused. *Cook* v. *Lemieux*, 10 P. R. 577.

Quære, whether the lease in question was a document that under con. rule 756, could be proved on this motion by an adverse affidavit without cross-examination. *Ib.*

Creditor's Action.] — Where the only property the defendant owned was the equity of redemption in certain lands, on motion for judgment for the amount of the plaintiff's claim and for a decree for sale of the equity of redemption:—Held, on the authority of Kerr v. Styles, 26 Gr. 309, that the plaintiff could have judgment as asked notwithstanding that in this case there were no fi. fas. in the sheriff's hands. *Johnson* v. *Bennett*, 9 P. R. 337.

Default of Appearance.]—Where a defendant does not appear, notice of motion for judgment must nevertheless be served or posted in the proper office under rule 131, O. J. Act. *Burritt* v. *Murdock*, 9 P. R. 191.

Demurrer.]—A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence, enter it for argument and give notice, nor serve an order for leave to amend, as required by rule 195, O. J. Act:—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a Judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston* v. *Trout*, 10 P. R. 493.

Dismissal of Action — *Examination for Discovery—Disclosing Case.*]—The court or a Judge has power, in a proper case, to dismiss the action on an application under rule 616. In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying on an entry made in a book belonging to her father that he had lent the defendant money on a certain day:—Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call; she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle* v. *Coyle*, 19 P. R. 97.

Dispensing with Notice.]—Upon a motion to the court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under con. rule 467. It was not shewn that the defendant could not be served. The order was refused:—Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the rule. *Dominion Bank* v. *Doddridge*, 12 P. R. 655.

Foreign Judgment.]—The defendant in an action on a judgment obtained in Iowa, U.S.A., pleaded denying the recovery of the judgment. Upon a motion for judgment under con. rule 756, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment:—Held, that judgment could not be ordered on these materials under con. rule 756, the defendant having put the judgment distinctly in issue. *Henchery* v. *Turner*, 2 O. R. 284.

In proceeding under con. rule 756 it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or to support its genuineness. *Ib.*

Forum.]—Held, that the motion is properly a court motion. *Rogers* v. *Wilson*, 12 P. R. 322, 545.

Notice.]—G. O. Chy. 418 is controlled by the conflicting provisions of rule 406, O. J. Act; hence two clear days' notice of motion for judgment under rule 324, O. J. Act, is sufficient. *Martens* v. *Birney*, 10 P. R. 358.

Recovery of Land.]—In an action for the recovery of land the plaintiff may obtain an order to sign final judgment under con. rule 756, upon an admission of the defendant in his examination. *Trust and Loan Co. v. Hill*, 9 P. R. 8.

——— *Ancillary Claim—Joinder of Causes of Action.*]—The plaintiff, without leave, indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was personally served, and the defendant not appearing, the plaintiff delivered a statement of claim, and, on default of defence, moved the court for judgment. It appeared from the statement of claim that the setting aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—Held, following Gledhill v. Hunter, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely, in which judgment for default of appearance could have been entered without a motion; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave; and in either case the motion must fail. *May* v. *Drummond*, 17 P. R. 21.

Rectification of Deed.] — In an action for the rectification of a deed and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith, the indorsement stated the relief claimed. The defendant, who did not appear within the time limited, subsequently entered an appearance, but did not serve any notice thereof:—Held, on motion for judgment under con. rule 744, that a statement of claim must be filed. *Hunter* v. *Wilcockson*, 9 P. R. 305.

Time—*Admissions in Letters.*]—An application for judgment under con. rule 756 cannot be made until the right of the party applying for the relief claimed has appeared from the pleadings. *McLeod* v. *Sexsmith*, 12 P. R. 606.

An order made under con. rule 756, before the delivery of any pleading in the action, based on admissions in letters, was set aside. *Ib.*

Wages—*Mining Companies Act — Directors' Liability.*]—The plaintiff, the manager of a mining company, paid out of his own moneys the amount due for wages by the company to certain labourers, and having obtained assignments of their claims, recovered a judgment against the company for the amount, together with a sum of money owed to him by the company for services. After an execution against the company had been returned unsatisfied, he brought this action on behalf of himself and the labourers against two of the directors under s. 8 of R. S. O. 1897 c. 197, the Ontario Mining Companies Incorporation Act, to make them personally liable for the amount due on the execution:—Held, that the action brought against the company was not such a one as is contemplated under the section, and there being no dispute as to the facts, this action was dismissed on a motion under con. rule 616. The manager of a mining company is not a "labourer, servant, or apprentice" within the meaning of s. 8. *Herman* v. *Wilson*, 32 O. R. 60.

Withdrawal of Admissions—*Leave.*]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed:—Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the defendant to get judgment on the statement of facts; and if the sanction of the court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East* v. *O'Connor*, 19 P. R. 301.

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4. Upon Report or after Trial.

All Material before the Court.]—Under con. rule 755, the court may, upon motion for judgment or for a new trial, if satisfied that it has before it all the materials necessary for finally determining the question in dispute give judgment accordingly, but unquestionably that power must be most sparingly and cautiously exercised. *Stewart* v. *Rounds*, 7 A. R. 515.

Semble, if the evidence given will not warrant the granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under con. rule 755. *Hislop* v. *Township of McGillivray*, 12 O. R. 749.

County Court.]—At the trial the jury answered all the questions left to them in favour of the plaintiff, and judgment was entered for him, which the county court Judge subsequently set aside, and entered judgment for the defendants:—Held, that under rule 490, O. J. Act, the same power is extended to the county courts as is possessed by the high court under con. rule 755, and that the Judge of the county court was right in giving judgment in favour of the defendants instead of submitting the question to another jury. See, also, on the same point, Stewart v. Rounds, 7 A. R. 575, and Williams v. Crow, 10 A. R. 301. *McConnell* v. *Wilkins*, 13 A. R. 438.

Reference.]—Where the court at the trial of a partnership action, after declaring that a partnership existed and adjudging that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a master under s. 101 of the Judicature Act:—Held, that the report of the master under such reference was not subject to the provisions of con. rule 848 as to confirmation by filing and lapse of time; but that any time after it was made, a motion for judgment upon it was in order under con. rule 753, and upon such motion the court could adopt it wholly or in part, and any party dissatisfied with it might before or on the return of the motion for judgment move to set it aside or vary it. *Raymond* v. *Little*, 13 P. R. 364.

Unsatisfactory Verdict.] — Held, that the business in this case was not one protected by R. S. O. 1877 c. 125, s. 7; that the verdict could not be sustained; and under con. rule 755, and R. S. O. 1877 c. 50, s. 283, it was set aside and judgment entered for the defendant. Murray v. McCallum, 8 A. R. 277, referred to and distinguished. *Campbell* v. *Cole*, 7 O. R. 127.

Verdict.] — The court may upon motion enter judgment upon the verdict given at the trial, where the trial Judge has not done so. Quære, whether such motion should be to the divisional court. "The court," in rules 315, 321, means the high court of justice; whether as distinguished from its divisions or not. *Wellbanks* v. *Conger*, 12 P. R. 354.

Where a verdict only is taken at the trial, and the Judge does not pronounce judgment or direct findings of fact to be entered, a motion for judgment is necessary. *Blair* v. *Asselstine*, 15 P. R. 211.

See PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, IX. 5.

XI. NON OBSTANTE VEREDICTO.

See Evans v. *Kingsmill*, 3 U. C. R. 118; *Perry* v. *Richmond*, 6 U. C. R. 285; *Lynett* v. *Parkinson*, 1 C. P. 144; *Vidal* v. *Ford*, 19 U. C. R. 88; *Dougall* v. *Moodie*, 19 U. C. R. 568; *Britton* v. *Fisher*, 26 U. C. R. 338; *Kerr* v. *Straat*, 8 U. C. R. 82; *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451.

XII. NON PROSEQUITUR.

See Markland v. *Dalton*, Tay. 125; *Lyman* v. *Cotter*, *Lyman* v. *Lovejoy*, 4 O. S. 15; *Hart* v. *Boyle*, 6 O. S. 168; *Shore* v. *Bradley*, 1 U. C. R. 393; *Williams* v. *Smith*, 1 C. L. Ch. 12; *Bain* v. *Bolton*, 1 P. R. 14; *Culver* v. *Moore*, Tay. 451; *Caspar* v. *Herschberg*, 1 P. R. 175; *McDonell* v. *Ketchum*, 2 P. R. 326; *Rowe* v. *Jarvis*, 14 C. P. 244; *Miller* v. *Corporation of Hamilton*, 17 C. P. 514; *McClenaghan* v. *McLeod*, 3 P. R. 13; *Herr* v. *Douglas*, 4 P. R. 102; *S. C.*, 26 U. C. R. 357; *Page* v. *Foster*, 12 L. J. 183.

XIII. NONSUIT.

See Bank of Upper Canada v. *Covert*, 4 O. S. 324; *Bank of Upper Canada* v. *Bethune*, *sb.* 330; *Warren* v. *Smith*, 5 O. S. 728; *Archibald* v. *Cameron*, 1 P. R. 138; *Hodson* v. *Stevens*, 5 U. C. R. 625; *Watson* v. *Strong*, 8 U. C. R. 180; *Jones* v. *Green*, 1 P. R. 19; *Arnold* v. *Higgins*, 1 P. R. 139; *Brown* v. *Simmons*, 1 U. C. R. 336; *Doe d. Dodge* v. *Rose*, 4 U. C. R. 174; *Rea* v. *Miller*, 2 P. R. 67; *Wilson* v. *Westbrooke*, E. T. 4 Vict. R. & H. Dig. 255; *McLellan* v. *Smith*, T. T. 4 Vict. R. & H. Dig. 255; *Davidson* v. *Lowry*, 1 P. R. 3; *Gibson* v. *Washington*, 1 U. C. R. 410; *McCague* v. *Clothier*, 1 U. C. R. 517; *Price* v. *Brown*, 3 U. C. R. 127; *Jones* v. *Martin*, 2 P. R. 68; *Bank of Upper Canada* v. *Ward*, 2 P. R. 206; *Wilkes* v. *Wilkins*, 1 P. R. 90; *Elvige* v. *Boynton*, 1 U. C. R. 279; *Clute* v. *Badgely*, 1 U. C. R. 417; *Spafford* v. *Buchanan*, 4 O. S. 326; *Dunn* v. *McDougall*, 5 O. S. 342; *Doe d. Wilcox* v. *Jacobs*, 5 U. C. R. 1; *Taylor* v. *Smith*, 2 P. R. 213; *Doe d. Rees* v. *Dick*, 6 U. C. R. 621; *Leach* v. *Dulmage*, E. T. 3 Vict. R. & J. Dig. 1920; *Doe d. Burnside* v. *Hector*, T. T. 4 & 5 Vict. R. & J. Dig. 1920; *Start* v. *Bullen*, E. T. 2 Vict. R. & J. Dig. 1920; *Brown* v. *Taggart*, 1 P. R. 122; *Warren* v. *Grant*, E. T. 2 Vict. R. & J. Dig. 1921; *Bradbury* v. *Flint*, M. T. 4 Vict. R. & J. Dig. 1921; *Brunskill* v. *Chumasero*, 5 U. C. R. 270; *Curillier* v. *Privat*, 5 U. C. R. 643; *McLaughlin* v. *McDougal*, Tay. 199; *Brown* v. *Stuart*, Tay. 144; *Smith* v. *Kennett*, Tay. 463; *Skae* v. *Ackland*, H. T. 4 Vict. R. & J. Dig. 1921; *Gibb* v. *Keegan*, 2 C. L. Ch. 4; *McCormick* v. *McCrea*, 1 P. R. 358; *Hollister* v. *Barnhart*, 5 O. S. 719; *Burr* v. *Barnard*, T. T. 3 & 4 Vict. R. & J. Dig. 1922; *Ross* v. *Meyers*, 6 U. C. R. 622; *Penniman* v. *Wince*, 4 O. S. 335; *Doe d. Anderson* v. *Todd*, 1 U. C. R. 279; *Bates* v. *O'Donahoe*, 3 U. C. R. 178; *Doe d. De Reimer* v. *Glass*, 4 U. C. R. 255; *Finn* v. *Perry*, 1 P. R. 126; *White* v. *Brown*, 1 P. R. 270; *Ketchum* v. *Vollick*, 1 P. R. 262; *Gooderham* v. *Taylor*, 1 P. R. 376; *Armstrong* v. *Benjamin*, 1 U. C. R. 414; *Bergin* v. *Whitehead*, Dra. 508; *Benham* v. *Shaw*, Dra. 113; *Mastin* v. *Garrow*, M. T. 2 Vict. R. & H. Dig. 258; *Matthewson* v. *Glass*, 1 U. C. R. 516; *Doe d. McMillan* v. *Brock*, 1 U. C. R. 482; *Maddock* v. *Corbet*, 4 U. C. R. 257; *Ross* q. t. v. *Meyers*, 7 U. C. R. 374; *Proudfoot* v. *Holden*, 1 C. L. Ch. 22; *Doe Meyers* v. *Robertson*, 1 C. L. Ch. 150; *Coldman* v. *Brown*, 1 P. R. 383; *Maitland* v. *Brown*, 3 L. J. 48; *Caspar* v. *McDonald*, 2 P. R. 71.

XIV. NUL TIEL RECORD.

See Burns v. *Grier*, 5 O. S. 500; *McDonald* v. *Clarke*, 1 U. C. R. 527; *Hamilton* v. *Shears*, 5 U. C. R. 306; *McFarlane* v. *Allen*, 6 C. P. 143; *Grantham* v. *Jarvis*, 6 U. C. R. 511; *Jones* v. *Ruttan*, 12 U. C. R. 202; *Thompson* v. *Leslie*, 9 U. C. R. 360; *Bain* v. *Bain*, 10 U. C. R. 572; *Caughell* v. *Teal*, 14 U. C. R. 494; *Dusolme* v. *Hamilton*, 15 U. C. R. 183; *Tyre* v. *Wilkes*, 18 U. C. R. 46.

XV. REGISTRATION OF JUDGMENT.

See Brogden v. *Collins*, 7 C. P. 61; *Bank of Montreal* v. *Thompson*, 9 Gr. 51; *Proudfoot* v. *Lount*, 9 Gr. 70; *McDonald* v. *Rodger*, 9 Gr. 75; *Gardiner* v. *Juson*, 2 E. & A. 188; *Commercial Bank of Canada* v. *Bank of Upper Canada*, 21 U. C. R. 91; *Rowe* v. *Jarvis*, 13 C. P. 495; *Morland* v. *Monro*, 12 C. P. 252; *Cauch* v. *Monro*, 23 U. C. R. 439; *Bank of Montreal* v. *Taylor*, 15 C. P. 107; *Moffatt* v. *March*, 3 Gr. 623; *Kerr* v. *Amsden*, 2 E. & A. 446; *Buckley* v. *Ryan*, 7 L. J. 322; *Shaw* v. *Cunningham*, 12 Gr. 101; *McDonald* v. *Wright*, 14 Gr. 284; *Juson* v. *Gardiner*, 11 Gr. 23; *Doe d. McIntosh* v. *McDonnell*, 4 O. S. 195; *Doe d. Dougall* v. *Fanning*, 8 U. C. R. 166; *Ruttan* v. *Levisconte*, 16 U. C. R. 495; *Galt* v. *Bush*, 8 Gr. 360; *McQuestion* v. *Campbell*, 8 Gr. 242; *McIntyre* v. *Shaw*, 12 Gr. 295; *Crawford* v. *Bingle*, 12 Gr. 450; *Chesley* v. *Coupe*, 15 Gr. 214; *Morrison* v. *Steer*, 32 U. C. R. 182; *Commercial Bank of Canada* v. *Bank of Upper Canada*, 21 U. C. R. 91; *Hamilton* v. *Beardmore*, 7 Gr. 286; *Bank of Montreal* v. *Taylor*, 15 C. P. 107;

Gillespie v. *VanEgmondt*, 6 Gr. 533; *Proudfoot* v. *Bush*, *Bush* v. *Proudfoot*, 7 Gr. 518; *Lewis* v. *Jones*, 8 Gr. 571; *In re Canada Trade Assn.*, 17 U. C. R. 542; *Meyers* v. *Meyers*, 21 Gr. 214; *Doe d. Dempsey* v. *Boulton*, 9 U. C. R. 532; *Thirkell* v. *Patterson*, 18 U. C. R. 75; *Wales* v. *Bullock*, 10 C. P. 155; *Fraser* v. *Anderson*, 21 U. C. R. 634; *Chambers* v. *Dollar*, 20 U. C. R. 599; *Bethune* v. *Caulcutt*, 1 Gr. 81; *McMaster* v. *Phipps*, 5 Gr. 253; *Pegge* v. *Metcalfe*, 5 Gr. 628; *Bank of Montreal* v. *Thompson*, 9 Gr. 51; *S. C.*, 3 E. & A. 239; *Dunovan* v. *Lee*, 5 Gr. 345; *Warren* v. *Taylor*, 9 Gr. 59; *Ferrie* v. *Kelly*, 9 Gr. 262; *Bank of Upper Canada* v. *Beatty*, 9 Gr. 321; *Freeman* v. *Bank of Upper Canada*, 2 E. & A. 362; *Montgomery* v. *Shortis*, 3 Ch. Ch. 69; *Meyers* v. *Meyers*, 19 Gr. 541.

XVI. Satisfaction and Discharge.

1. *In General.*

Accepting Conveyance.]—Where the assignee of a judgment against the defendant accepted and retained a conveyance of a piece of land, for which £55 was the stated consideration, although he represented that he allowed this sum for the land, in consideration and as part of the general settlement between them, still, having elected to take the benefit of the conveyance, he must allow the consideration money in reduction of the execution. *Morrison* v. *Rees*, 1 P. R. 25.

Sci. fa. upon a judgment for $2,000, against defendant as administrator of M., on a bond in that sum, conditioned for the payment of $1,200 by instalments, with a suggestion that two instalments were due and unpaid. Plea, on equitable grounds, that before the sci. fa. issued, it was agreed between the plaintiff and the defendant, with several others, the heirs-at-law of M., that they should convey to the plaintiff their interest in certain land, of which as such heirs they were seised in fee; that the consideration therefor should be $2,000, and their interest should be treated as so much in cash, which sum should be applied as a payment by the estate of M. to the plaintiff; that the defendant and the others accordingly conveyed their interest in the land to the plaintiff, and the plaintiff accepted such conveyance as representing $2,000, and credited the estate of M. with that sum; that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amount then due and accruing due was less than $2,000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance:—Held, on demurrer, that the plea shewed a good defence. *Whiteford* v. *McLeod*, 28 U. C. R. 349.

Accord and Satisfaction—*Part Performance of Obligation.*]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. 1887 c. 60, s. 1. In view of the amendment made in R. S. O. 1877 c. 108, s. 23, by the revision of 1887, R. S. O. 1887 c. 111, s. 23, the English authorities, such as Jay v. Johnston, [1893] 1 Q. B. 189, and cases there cited, do not apply. Boice v. O'Loane, 3 A. R. 167, followed. Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor indorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance. Day v. McLea, 22 Q. B. D. 610, applied. Section 53, s.-s. 7, Judicature Act, as to part performance of an obligation in satisfaction, considered. *Mason* v. *Johnston*, 20 A. R. 412.

Arrest—*Discharge.*]—The arrest of one of several defendants under a ca. sa. and his subsequent discharge, with the consent of plaintiff, operates as a satisfaction of the judgment by all the defendants; and this, although the plaintiff at the time of the discharge expressly stipulates that his other remedies on the judgment are not to be impaired by the discharge. *Hamilton* v. *Holcomb*, 7 L. J. 40.

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

Cognovit for too Large Amount.]—Debt on judgment. Plea, in effect, that the judgment was entered upon a cognovit, in which, though the nominal debt was admitted to be £200 as sued for, the true debt was only £79, which sum was paid in satisfaction of the judgment:—Held, bad. *Crooks* v. *Wilson*, 8 U. C. R. 114.

Defendant in such a case should apply to have satisfaction entered on the judgment, or to stay proceedings. *Ib.*

Creditor's Action — *Settlement.*]—Before judgment in an action by a creditor, on behalf of himself and all other creditors, to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but where judgment has been obtained by the plaintiff, it enures to the benefit of all creditors, and the defendants cannot get rid of it by settling with the actual plaintiff alone. If they do so, any other creditor will be entitled to obtain the carriage of the judgment and to enforce it; and if, upon appeal from the judgment, the actual plaintiff refuses to support it, the court will give the other creditors an opportunity of doing so before reversing it. *Canadian Bank of Commerce* v. *Tinning*, 15 P. R. 401.

Mortgage.]—A judgment creditor having accepted a mortgage, does not lose his rights as a judgment creditor. *Warren* v. *Taylor*, 9 Gr. 59.

Payment by Sheriff.]—The sheriff held an execution against A., B., and C., upon a note on which C. was the last indorser, and the others therefore liable over to him. Goods belonging to A. having been seized, C. paid the bailiff £100, part of the debt, and the sheriff accepted and paid a draft by the plaintiffs' attorney for the whole. On the same day that this draft was accepted, the bailiff took an assignment of the judgment, and afterwards sold the goods under a ven. ex., when they were

bought by C., and out of the purchase money the bailiff paid the balance due to the sheriff:—Held, that the payment made by the sheriff had satisfied the judgment, and that the sale therefore was illegal. *McLeod* v. *Fortune*, 19 U. C. R. 100.

See sub-title VII., *ante*.

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2. *Satisfaction Piece.*

The court will not order satisfaction to be entered upon a judgment, without payment of interest. *Logan* v. *Secord*, Tay. 225.

Plaintiff's signature to the satisfaction piece, as required by rule 64 T. T. 1856, will be dispensed with, and his attorney in the cause be authorized to acknowledge satisfaction, upon it being shewn that the attorney is authorized by plaintiff to arrange the claim, and that the delay in obtaining plaintiff's signature will be prejudicial. *Rudall* v. *Hurd*, 3 L. J. 14; *Pawson* v. *Wightman*, 2 L. J. 184.

So also where the amount of the judgment is small and plaintiff resides without the jurisdiction. *Bank of Montreal* v. *Cronk*, 3 L. J. 32.

So also where plaintiff resides abroad, and has given a written authority to an attorney to acknowledge satisfaction for him. *Darling* v. *Wright*, 3 L. J. 90.

Where the satisfaction piece has been executed before an attorney of Lower Canada a certificate of his due admission as an attorney must be produced, and his signature duly verified. *Moss* v. *Dayly*, 3 L. J. 74.

Held, that signing a satisfaction piece before a practising attorney in the United States, as attorney for the party signing, is a sufficient compliance with the rule of court, No. 64. *Abernethy* v. *Beddome*, 6 P. R. 162.

An order to enter satisfaction on a judgment roll will not be granted, though defendant swears that the judgment is satisfied, if plaintiffs deny it, and it be not otherwise clear. *Lewine* v. *Savage*, 3 L. J. 89.

The plaintiff's attorney, after the judgment has been paid, cannot be called upon by defendant to procure a certificate of satisfaction for registry, or a satisfaction piece to be entered; but he may be ordered to disclose the plaintiff's place of residence, so that defendant may tender such satisfaction piece for execution, and the court will order it to be executed. *Carr* v. *Coulter*, 2 P. R. 226.

XVII. SIGNING AND ENTRY.

1. *Before the Judicature Act.*

See Frazer v. *Boulton*, 2 O. S. 210; *Mackinson* v. *Johnson*, 3 O. S. 169; *Allanson* v. *Johnson*, 4 O. S. 323; *Hall* v. *Hunter*, 5 O. S. 705; *Wynn* v. *Palmer*, E. T. 3 Vict. R. & J. Dig. 1914; *Strathy* v. *Crooks*, 1 U. C. R. 400; *Pace* v. *Meyers*, 8 U. C. R. 70; *Johnstone* v. *Johnstone*, 8 L. J. 46; *Anderton* v. *Johnston*, 8 L. J. 46; *McNamee* v. *Reilly*, 13 U. C. R. 197; *Scadding* v. *Welch*, 2 C. L. Ch. 105; *Corbett* v. *Shepard*, 4 C. P. 68; *Felton* v. *Executors of Conley*, 1 P. R. 319; *Sinclair* v. *Barrow*, 3 L. J. 49; *Overholt* v. *Paris and Dundas Road Co.*, 7 C. P. 293; *Trust and Loan Co.* v. *Dickson*, 2 C. L. J. 166; *Jones* v. *Smith*, 23 U. C. R. 485; *Clissold* v. *Machell*, 26 U. C. R. 422; 25 U. C. R. 80; *Brown* v. *Cline*, 27 U. C. R. 87; *Cousins* v. *Bullen*, 6 P. R. 72; *Eakins* v. *Fraser*, 6 P. R. 297; *Powell* v. *Boulton*, 3 U. C. R. 53; *Swan* v. *Clelland*, 13 U. C. R. 335; *Stafford* v. *Trueman*, 2 P. R. 154; *Davy* v. *Cameron*, 14 U. C. R. 483; *S. C.*, 15 U. C. R. 175; *Neil* v. *McMillan*, 27 U. C. R. 257, 4 P. R. 145; *McIntosh* v. *Pollock*, 2 C. L. Ch. 209; *Watkins* v. *Fenton*, 8 C. P. 289; *McKay* v. *McDearmid*, 2 C. L. Ch. 1; *Eakins* v. *Fraser*, 6 P. R. 297; *Eberts* v. *Traveller*, 9 U. C. R. 355; *Gillespie* v. *Marsh*, 2 C. L. Ch. 5; *Hutchison* v. *Sideaways*, 14 U. C. R. 472; *Chapman* v. *DeLorme*, 5 L. J. 138; *Crooks* v. *Dickson*, 15 C. P. 523 *Cummings* v. *Usher*, 1 P. R. 15.

Cognovit.]—*See* FRAUD AND MISREPRESENTATION, IV., 2.

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2. *In General.*

Assessment of Damages.]—Held, that in an action commenced by a writ not specially indorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages. *Fenwick* v. *Donohue*, 8 P. R. 116.

Since the O. J. Act damages should be assessed up to the date of judgment. *Stalker* v. *Township of Dunwich*, 15 O. R. 342.

Death of Judge.]—Where, after a verdict, the Judge presiding at the trial died before giving judgment thereon, it was directed that an order for judgment should be drawn up in the high court before the three Judges who composed the divisional court of the common pleas division as Judges of the high court. *Wellbanks* v. *Conger*, 12 P. R. 354.

Death of Party—*Entry Nunc pro Tunc.*]—Where the losing party in a suit died after verdict and before judgment on a rule for a new trial, and judgment nunc pro tunc was entered, by order of the Judge, as of a day prior to such death and a suggestion of the death entered on the record, the court refused to quash an appeal by his executors. *Muirhead* v. *Sherreff*, 14 S. C. R. 735.

Executors and Administrators.]—In an action of seduction, continued against the administratrix of the original defendant, who died before the trial, the administratrix denied the plaintiff's right to recover, but did not set up plene administravit, and a verdict for $500 was recovered by the plaintiff:—Held, that the judgment should be that the debt and costs should be levied de bonis testatoris; et si non, de bonis propriis as to the costs only. The Judicature Act has not altered the form of the judgment in such cases. *Lince* v. *Faircloth*, 14 P. R. 253.

See DEATH.

The practice in force before the Judicature Act, under which a plaintiff taking issue on

and failing on an executor's plea of plene administravit, could not have judgment of assets quando, no longer exists, and it is now proper to give a plaintiff judgment of assets quando, if his debt be established, and such a judgment be desired. *McKibbon* v. *Feegan*, 21 A. R. 87.

See EXECUTORS AND ADMINISTRATORS, VIII.

Interest.]—Section 43 of the Court of Appeal Act, which provides "when on an appeal against a judgment in any action personal, the court of appeal gives judgment for respondent, interest shall be allowed by the court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the court below is in favour of the defendant, and is reversed on appeal. In such case the court, on reversing the judgment, gave liberty to the appellant, the plaintiff in the court below, to move to be at liberty to enter judgment as directed by the appellate court, nunc pro tunc, whereby he would be enabled to recover interest on the amount of the verdict rendered in his favour. *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376.

Where an appeal is brought against a judgment in any personal action which is affirmed on appeal, interest on the judgment is by force of the statute allowed for such time as execution has been stayed by the appeal: but where the plaintiff refrained from entering up his judgment until after the decision in appeal, the court refused to order interest to be allowed on the amount of the verdict; leaving the plaintiff to apply to the court below for relief by entering the judgment nunc pro tunc. *McEwan* v. *McLeod*, 10 A. R. 96.

In indorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof. Rules 326 O. J. Act and 351 O. J. Act, are not inconsistent. *Kelcher* v. *McGibbon*, 10 P. R. 89.

On the 23rd January, 1882, the following judgment was pronounced in court. "I direct judgment to be entered for the plaintiff against the within named defendants after the fifth day of next Hilary Sittings for $100,000." Hilary Sittings ended on the 25th February, and judgment was formally entered with the clerk of the court on the 24th March as of the 23rd January.—Held, that rule 326 did not apply to this case; that the judgment should be dated on the day of its entry with the clerk, and from that date only, under rule 327, interest should run. Keleher v. McGibbon, 10 P. R. 89, explained. *McLaren* v. *Canada Central R. W. Co.*, 10 P. R. 328.

Jury.]—Although by rule 527 (b) O. J. Act, judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet, when signed, the entry of it, if the divisional court pronounces no different judgment from that of the trial Judge, ought to be dated as of the day on which it was pronounced by the trial Judge. *Beckett* v. *Grand Trunk R. W. Co.*, 12 P. R. 377.

Rule 326 applies to all cases, whether tried by a Judge, jury, or otherwise, in which the judgment is pronounced by the court or a Judge in court, and rule 327 applies to cases in which the judgment has not been pronounced by the court or a Judge in court. *Ib.*

Where the judgment pronounced by the trial Judge upon the verdict of a jury was varied by a divisional court:—Held, that judgment should be entered as of the date on which the divisional court pronounced judgment. *Ib.*

Mortgage Action.]—See MORTGAGE.

Order of Court — *Abandonment.*] — Where an order was in June, 1889, pronounced by a divisional court, upon the application of the defendants, setting aside a judgment recovered by the plaintiff and directing a new trial, but was never issued:—Held, that the original judgment must be considered to be still in force; and a motion to set aside execution issued thereon was refused. *Kelly* v. *Wade*, 14 P. R. 13. See the next case.

——— *Abandonment — Effect of Pronouncing Judgment on Merits.*] — The plaintiff, in an action of tort, recovered a verdict which was set aside and a new trial was granted by the order of a divisional court in June, 1889. The plaintiff died in the spring of 1890, and at the time of her death the order had not been issued:—Held, upon an application in December, 1890, that the defendants were entitled to issue the order, the delay affording no evidence of an intention to abandon it. A judgment pronounced by the court, affecting the merits, is an effective judgment from the day it is pronounced; the formal signature of the judgment is merely the record that it has been pronounced. *Kelly* v. *Wade (No. 2)*, 14 P. R. 66.

——— *Delay in Issuing — Application for Leave to Issue — Discretion.*] — In 1880 a bill was filed by the plaintiff for an account in respect of a mortgage, which had been assigned to the defendant as a security for advances. A decree was pronounced in June, 1880, directing that the plaintiff might have an account if he desired it, and that the defendant should have his costs to the hearing; the decree was not then drawn up and issued, and in December, 1892, the plaintiff applied for leave to issue it. The delay was not explained except by saying that the plaintiff had been out of the jurisdiction, and no details were given of when he went away or when he returned. It appeared that the plaintiff had no beneficial interest upon the footing of the accounts, as shewn by the assignment and the answer. The defendant swore to the loss of one material witness through death:—Held, that the decree meant that the plaintiff should, within some reasonable time, exercise the option given him of having a reference to take the accounts, at the peril of losing it if changed circumstances worked any prejudice to the defendant; and that, under all the circumstances, the application should, in the exercise of a sound discretion, be refused. Finkle v. Lutz, 14 P. R. 446, and Kelly v. Wade, ib. 66, distinguished. *Eaton* v. *Dorland*, 15 P. R. 138.

Partners.]—A judgment recovered against one or more partners or other joint debtors under consolidated rules 587, 603, and 605, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants. McLeod v. Power [1898] 2 Ch. 295, distinguished. *Dueber Watch Case Manufacturing Co.* v. *Taggart*, 26 A. R. 295.

Settling Minutes.]—The entry of judgment, the minutes of which have been settled by a local registrar, does not preclude a party who, at the time of such settlement has given notice that he desires the minutes settled at Toronto, from afterwards obtaining a reference under rule 416, O. J. Act. The court will rather encourage (at all events for some time) the settling at the head office of such judgments as are not included in the forms, because of the well understood phraseology in use by the two officers whose function it is to frame the terms of such judgments. *Holden* v. *Smith*, 10 P. R. 369.

Transfer of Action.]—An action was transferred from the chancery division to the common pleas division by an order of the Judges, but the plaintiff not having notice of the transfer, signed judgment in the chancery division. An order was made retransferring the case to the chancery division, and allowing the judgment entered to stand and be in force from its entry, without costs. *Patterson* v. *Murphy*, 9 P. R. 306.

See ESTOPPEL, II.—LIMITATION OF ACTIONS, IV. 7—PRIVY COUNCIL, II.—SUPREME COURT OF CANADA, IV. 7.

JUDGMENT DEBTOR.

I. IN WHAT CASES EXAMINATION MAY BE HAD, 3667.

II. SCOPE OF EXAMINATION AND MOTION TO COMMIT, 3671.

III. MISCELLANEOUS CASES, 3681.

I. IN WHAT CASES EXAMINATION MAY BE HAD.

Assignment for Benefit of Creditors.]—The making of an assignment for the benefit of creditors under R. S. O. 1897 c. 147, does not deprive a judgment creditor of the assignor of his right to examine him, although it may in some cases furnish a reason why an order for such examination should not be made. *McEachern* v. *Gordon*, 18 P. R. 459.

Attaching Debts.]—The court will order the examination of the defendant to ascertain what debts are due to him, under 22 Vict. c. 33, s. 12, with a view of garnishing such debts. *Bostwick* v. *Shortis*, 1 Ch. Ch. 69.

Company — *Examination of Officer.*]—A summons having been granted calling upon a corporation to shew cause why the president or secretary should not be examined as to the debts due to the company, an order was refused: 1. Because it is doubtful whether 22 Vict. c. 33, s. 12, applies to corporations. 2. Because the summons should have been directed to the officers mentioned, and not to the company. *Cameron* v. *Brantford Gas Co.*, 2 P. R. 58; 2 L. J. 209.

The object of the examination under rule 927 of an officer of a body corporate, after judgment against it, is to discover assets of the company or to follow assets wrongfully disposed of, and within this limit a judgment creditor is entitled to full disclosure of the company's concerns, and as a consequence to have access to its books pertinent to that inquiry. The person examined is to facilitate the examination by procuring all information in the possession of the company which he himself has not as an officer of the company. There is no right to examine as to dealings with stock which were had after it was fully paid up. *Charlebois* v. *Great North-West R. W. Co.*, 15 P. R. 10.

Costs.]—A plaintiff against whom a defendant has recovered judgment for costs only, in either of the superior courts of common law or a county court, is not liable to be examined or committed under s. 41 of C. S. U. C. c. 24. *In re Hawkins*, 3 P. R. 239; *Hawkins* v. *Paterson*, 23 U. C. R. 197.

Held, that a defendant cannot, notwithstanding 27 & 28 Vict. c. 25, on a judgment against a plaintiff for costs in ejectment, obtain an order to examine the plaintiff, *Herr* v. *Douglass*, 4 P. R. 124.

An order had been obtained directing a defendant to pay to the plaintiff certain costs:—Held, that the order was a judgment and the defendant a judgment debtor, within the meaning of C. S. U. C. c. 24, s. 41, as extended by 27 & 28 Vict. c. 25, and an examination of the defendant touching her ability to pay the costs was allowed. *Lovell* v. *Gibson*, 6 P. R. 132.

A judgment debtor may be examined under s. 17 of R. S. O. 1877 c. 49, although the judgment is for costs only. *McLachlin* v. *Blackburn*, 7 P. R. 287.

A judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. 1877 c. 50, s. 304, nor garnish debts due to him. *Ghent* v. *McColl*, 8 P. R. 428.

A judgment creditor in such a case may examine his judgment debtor under R. S. O. 1877 c. 49, s. 17. *Ib.*

The defendant recovered judgment against the plaintiff in the action for his costs of defence, on a judgment of nonsuit:—Held, that the plaintiff was not a judgment debtor, examinable under s. 17, R. S. O. 1877 c. 49, or s. 304, R. S. O. 1877 c. 50, or rule 366 O. J. Act. McLachlin v. Blackburn, 7 P. R. 287, dissented from; Lovell v. Gibson, 6 P. R. 132, commented upon. *Meyers* v. *Kendrick*, 9 P. R. 363.

A person against whom a judgment has been recovered for costs only, cannot be examined as a judgment debtor. Con. rules 926 and 934 considered. Meyers v. Kendrick, 9 P. R. 363, has not been affected by the introduction of con. rule 934, and is still the law. *Troutman* v. *Fisken*, 13 P. R. 153.

A married woman under a judgment against her for costs, is liable to examination as a judgment debtor. *Pearson* v. *Essery*, 12 P. R. 466.

Debtor Temporarily in Ontario.]—An order will not be made for the examination of a judgment debtor whose home is in Quebec, though temporarily in Ontario as a member of Parliament. *Regan* v. *McGreevy*, 5 P. R. 94.

Disputed Accounts.] — Defendant had borrowed £500 from the plaintiff on mortgage, at a rate exceeding legal interest, and the time for payment had been extended at a higher rate. Disputes arose as to this extension. The plaintiff sued defendant on the covenant, and an award was made in his favour for £644 15s. 11d., on which he entered judgment, and the defendant filed a bill in chancery to redeem, and for an account, allowing all excess above legal interest to go in reduction of principal. The defendant had a demand against a third person for £500, which the plaintiff desired to garnish, and with that object had the defendant examined, but in the meantime the defendant obtained payment of that sum from the debtor. This money he offered to pay to the plaintiff upon the original mortgage, but refused to pay upon the judgment. A summons having been obtained on defendant to shew cause why he should not pay to the plaintiff the £500, or in default be committed to close custody, or why a ca. sa. should not issue against him, or why he should not be again examined as to his effects:—Held, that there was no ground for interference. *Boswell* v. *Pomeroy*, 2 P. R. 310.

Married Woman.] — See the next subtitle.

Return of Nulla Bona Necessary.]—Notwithstanding changes made in the practice as to examining judgment debtors, embodied in con. rule 926, a judgment debtor is not under the new, any more than under the old, practice, examinable until the judgment creditor has placed a fi. fa. in the sheriff's hands, and it has been returned nulla bona, or the sheriff has notified the judgment creditor that, if called upon to make a return, it would be nulla bona. *Ontario Bank* v. *Trowern*, 13 P. R. 422.

Set-off.] — Quære, whether a defendant who recovers on a plea of set-off an excess above the plaintiff's demand, is entitled to examine the plaintiff. *Hawkins* v. *Paterson*, 23 U. C. R. 197.

Solicitor.]—A solicitor whose costs have been taxed on the application of the client, and not paid, a fi. fa. having been returned nulla bona, is entitled to an order for an examination of the client, touching his estate and effects. *Re Blain*, 1 Ch. Ch. 345.

Transcript from Division Court.] — Declaration for false imprisonment, to which the defendant B. pleaded, that having recovered judgment in the division court against the now plaintiff for the sum of $60 odd, and the execution issued thereupon having been returned nulla bona, a transcript of the judgment was obtained and filed in the county court; that upon this a writ of execution was issued, which being returned nulla bona, an order was made by the Judge of the county court, under C. S. U. C. c. 24, s. 41, calling on the now plaintiff to appear before the clerk of the court and be examined, &c., and a report and return were made in compliance with the order; that upon reading such report, &c., the Judge of the county court issued a summons calling upon the plaintiff to shew cause why he should not be committed, &c., and on return thereof, the plaintiff not appearing and no cause being shewn to the contrary, the Judge ordered that a writ of ca. sa. should issue within five days, which was issued accordingly, whereupon plaintiff was imprisoned. To this plea, the plaintiff demurred: 1. Because the judgment and amount for which the ca. sa. issued, was less than $100. 2. That the judgment on which the ca. sa. issued, was founded on a judgment of the division court; that the plaintiff was not bound by the statute to attend to be orally examined; and even if he did so, he could not be arrested on such examination being unsatisfactory: — Held, 1. That though under s. 12 the plaintiff could not sue out a ca. sa. for less than $100, still, under s. 41, there is no such limitation; that the process awarded is not obtained by the plaintiff, but is given by the court or Judge, and under C. S. U. C. c. 19, s. 143, by the filing and entry of the transcript the judgment of the now defendant became a judgment of the county court, and he was entitled to pursue the same remedy upon it as if it had been originally obtained in the county court; and hence defendant was bound to appear and be examined, &c. *Kehoe* v. *Brown*, 13 C. P. 549.

Transferee.]—The solicitor of a judgment debtor who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, $4,000. Upon an application to examine the solicitor under 49 Vict. c. 16, s. 12 (O.):—Held, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word "transfer" in the expression, "any person to whom the debtor has made a transfer of his property or effects," should not be limited to the transfer of the title to the property or effects, but should be regarded as equally applicable to the transfer of the possession; and therefore the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of $4,000 had been made, for the possession of that sum had been transferred to him by his debtor. The solicitor was also an employee of the judgment debtor within the meaning of the section. *Gowans* v. *Barnet*, 12 P. R. 330.

An order under 49 Vict. c. 16, s. 12 (O.), for examination of the transferee of a judgment debtor, should not be made without notice to the transferee; nor should an order under that section be made without proof that the transfer was made since the date when the liability of the judgment debtor was incurred. *Blakeley* v. *Blause*, 12 P. R. 565.

A chattel mortgage is a transfer of property and effects within the meaning of 49 Vict. c. 16, s. 12. *Ib.*

"Transfer" used in con. rule 928 is not intended to cover an "assignment" for the general benefit of creditors, valid and sufficient under R. S. O. 1887 c. 124, and an assignee under that Act is not one of the persons to be subjected to examination under that rule. *British Canadian Loan and Investment Co.* v. *Britnell*, 13 P. R. 310.

Upon an application under rule 928 for an order for the examination of the wife of the judgment debtor as a person to whom he had made the transfer of his property, the affidavit of the applicant, the judgment creditor, stated that the action arose out of the sale of a stock

of goods by the plaintiff to the defendant, and, referring to a verified copy of the judgment debtor's examination, taken under rule 926, that on such examination the latter admitted that he had transferred to his wife a sum of money, part of the proceeds of the sale of the same stock of goods. In the examination the judgment debtor stated that in buying the stock from the plaintiff he was acting as agent for his wife, and that when he sold it he gave the purchase money to her, as it was her own property:—Held, that, upon this material, an order for the examination of the wife was properly made. Per Osler, J.A.—On such an application the real title of the debtor should not be inquired into or tried; nor can the transferee resist it merely by asserting that the debtor held the property as agent or trustee; standing in his name and being dealt with as his own, it was primâ facie his. Per Maclennan, J.A.—The case intended by the rule is a transfer of the debtor's own property, and not of property which he has dealt with as agent or trustee for another. But where it is a disputed question whether the property was not the property of the debtor or property in which he had an interest, the rule ought to be applied. *Goodeve* v. *White*, 15 P. R. 433.

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

II. Scope of Examination and Motion to Commit.

Close Custody.]—Where, upon application to commit a defendant to gaol, under 22 Vict. c. 96, s. 13, the Judge ordered a ca. sa. to be issued instead, as allowed by that section, and the defendant thereupon gave bail to the limits:—Held, that he could not again be committed to close custody under the first alternative of the same clause. *Perrin* v. *Bowes*, 2 P. R. 348.

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

Conditional Order.]—An order to commit must be absolute, not conditional. *Chichester* v. *Gordon*, 25 U. C. R. 527.

A county court Judge, being dissatisfied with the answers of a judgment debtor on his examination, ordered that he should be committed for six months unless he should forthwith give a negotiable note for the debt, made by himself and indorsed by one C.:—Held, that the order was bad, as being conditional. *Ib.*

Costs.]—Where a judgment debtor disobeyed an order for his examination, he was directed to pay the costs of an application for a ca. sa., although the motion was dismissed upon his giving a sufficient excuse for his disobedience. *Imperial Bank* v. *Dickey*, 8 P. R. 246.

Debtor's Duty to Give Information.]—It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out, as best they may, what it is the business of the debtor to make clear. Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he have the means at hand to qualify himself to explain. *Foster* v. *Van Wormer*, 12 P. R. 597.

Disposition of Goods—*Advice of Counsel—Examiner's Ruling.*]—Where the defendant had, before judgment against him, executed a bill of sale of his stock-in-trade, which had been registered:—Held, that upon his examination as a judgment debtor he was compellable to answer questions in respect to his dealings with such property after the date of the bill of sale; and that he could not shelter himself behind the advice of counsel. Held, also, that notwithstanding that the examiner had ruled that the judgment debtor was not obliged to answer certain questions, and that the ruling had not been appealed against, the usual order might be made directing the defendant to attend again for examination. *Bank of Hamilton* v. *Essery*, 15 P. R. 202.

Enlargement of Motion — *Waiver—Conditional Discharge.*]—A county court Judge, on the 4th September, granted a summons calling on a judgment debtor to shew cause why he should not be committed to the county gaol of Middlesex for not satisfactorily answering as to his estate and effects, &c., on an examination before a commissioner appointed by the Judge. This summons having been enlarged until the 26th September, and no one attending on either side on that day, the Judge on the following day, on the plaintiff's application, enlarged it by indorsement until the 11th October, of which defendant had no notice. On the 11th September the Judge had made another order for the debtor to attend before him and be further examined on the 11th October, but defendant having lost his order and believing it to be only a summons for further examination, on which an order would be afterwards made, did not attend upon it. On the 11th October the Judge made an order upon the summons of the 4th September for defendant's committal to the county gaol of Lambton, where he had resided since before the date of that summons. Defendant having been committed, applied for his discharge to the Judge of the county court, who refused, unless he would undertake to bring no action; and an order was signed for his discharge on these terms, which he declined to accept. The prisoner having been brought

up by habeas corpus, it was objected, 1. That the summons having lapsed on the 26th, could not be enlarged; 2. that the summons was to commit to the county gaol of Middlesex, and the order to that of Lambton; 3. that the order of the 11th September, for further examination, was a waiver of the previous summons to commit:—Held, that such enlargement could not entitle defendant to his discharge; that the second objection could have been available only on the return of the summons; and that the order was no abandonment of the previous summons. The defendant was therefore remanded. *In re Munn*, 25 U. C. R. 24.

The rule for defendant's discharge, as above mentioned, was returned to the writ of certiorari, with a certificate by the Judge that it had been refused by the defendant's attorney:—Held, that being so refused, it was as if it had not been granted. Quære, as to the validity and effect of the words in such rule restraining defendant from bringing any action. *Ib.*

Evidence on Motion — *Refusal to Answer.*]—If a question or series of questions be put which the judgment debtor refuses to answer, there should be some statement to this effect in the certificate of the examiner, either general—that questions of such a purport were put, which the defendant refused to answer—or, better still, that some specific question or questions were put, setting them forth in substance, and that defendant would not answer them—or that defendant's answers to such and such questions were not satisfactory—or giving questions and answers, so that it might be determined whether they were satisfactory or not. Refusing to answer, or answering questions unsatisfactorily, are matters which, if not certified by the examiner, must be made specially to appear, either in the report of examiner, or in an affidavit setting forth questions which were put and were wholly unanswered, or that an answer given (stating it) was unsatisfactory. Semble, the former is the better course. The examiner should require answers to his question, and the defendant's refusal to answer, or his unsatisfactory answer, should be entered in the report of the examination. *McInnes* v. *Hardy*, 7 L. J. 235.

Exhibiting Original Order.] — When serving a defendant with an order to examine him as a judgment debtor, it is not necessary to exhibit the original order, unless demanded, in order to entitle the plaintiff to move for a ca. sa. against him, under R. S. O. 1877 c. 50, s. 305. *Imperial Bank* v. *Dickey*, 8 P. R. 246.

If the original order is not shewn at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it. Meyers v. Kendrick, 9 P. R. at p. 399, followed. *Blakeley* v. *Blaase*, 12 P. R. 565.

Failure to Attend—*Evasive Answers.*]—Where the debtor without excuse fails to attend, or refuses to answer when properly interrogated, or answers equivocally or evasively, the proper way is to punish him as for a contempt of the order, or to compel him to obey it by directing him to be imprisoned for a period within the discretion of the Judge, not exceeding twelve months; but if, when attending, his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property, or made away with it, in order to defeat or defraud his creditors, the proper course is to allow a ca. sa. to issue. *Wallis* v. *Harper*, 7 L. J. 72.

Forum.]—An application to commit a defendant for refusing to attend for examination under C. S. U. C. c. 24, s. 41, is properly made in chambers; and it is unnecessary first to make the order for the examination a rule of court. *Royal Canadian Bank* v. *Lockman*, 7 P. R. 102.

Gambling Transactions.]—Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. *Harvey* v. *Aikine*, 17 P. R. 71.

General Warrant — *Second Order.*]—A county Judge ordered an execution debtor to be committed for ten weeks, but the Judge died before the order was enforced. The deputy Judge then, upon the same examination, ordered a commitment for three months, and directed his warrant to all sheriffs, &c. Defendant was arrested and lodged in the gaol of a county in which he did not reside:—Held, 1. That the committal to any county other than that in which debtor resided, was irregular; and, semble, that the order or warrant should shew the debtor's residence, and that he is to suffer imprisonment there. 2. That the deputy Judge could not make a different order from that which had been made by the county Judge. The prisoner, who was brought up on a writ of habeas corpus, was discharged. *In re Weatherly*, 4 P. R. 28.

Habeas Corpus.] — See *Re Anderson* v. *Vanstone*, 16 P. R. 243.

Junior Judge.]—Quære, must an order of committal made by a junior Judge of a county court under s. 41, on the face of it shew the death, illness, unavoidable absence, or absence on leave of the senior Judge? Semble, not; for the maxim omnia præsumuntur recte esse acta applies. *Re Hawkins*, 3 P. R. 239.

Lapsed Appointment.] — Upon the return of a habeas corpus, an order was made by a Judge of the high court for the discharge of the defendant from custody under a writ of attachment issued by order of a county Judge in an action in a county court:—Held, that an order to examine the defendant as a judgment debtor, and an appointment under it, together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent and the power of the examiner under it at an end; to obtain a fresh appointment, a fresh order was necessary. Jarvis v. Jones, 4 P. R. 341; McGregor v. Stuart, 5 P. R. 56, referred to. *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666.

Married Woman.]—A married woman, a judgment debtor, who refuses to attend and be examined as to her estate and effects, or refuses to disclose her property, or to give satisfactory answers to questions under R. S. O.

1877 c. 50, ss. 304, 305, may be committed for disobedience of the statute, notwithstanding R. S. O. 1877 c. 67, s. 3. *Metropolitan Loan and Savings Co.* v. *Mara*, 8 P. R. 355.

The order for commitment in such case is not mesne or final process, but punishment for disobedience of the statute. *Ib.*

Quære, as to the liability of a married woman to arrest. *Ib.*

Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for non-payment of costs. *Pearson* v. *Essery*, 12 P. R. 466.

An order may be made for the commitment of a married woman to gaol for refusal to attend for examination as a judgment debtor. Rules 926 and 932, and R. S. O. 1887 c. 67, s. 7, considered. Metropolitan L. and S. Co. v. Mara, 8 P. R. 355, followed. *Watson* v. *Ontario Supply Co.*, 14 P. R. 96.

Necessity for Precision—*Costs.*]—Precision should be used on the examination in ascertaining the exact state of facts, as shewn in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the Judge can only look at what is proved or admitted. *Foster* v. *Van Wormer*, 12 P. R. 597.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense and to pay the costs of a motion to commit him for unsatisfactory answers. Ex parte Bradbury, 14 C. B. 15, and Ex parte Moir, 21 Ch. D. 61, followed. Crooks v. Stroud, 10 P. R. 131; Lemon v. Lemon, 6 P. R. 184; and Hobbs v. Scott, 23 U. C. R. 619, discussed. *Ib.*

Non-production of Books — *Gaol for Commitment.*]—The Judge of the county court can direct the examination to take place outside of the county where the debtor resides; but the committal must be to the gaol of that county. The plea justified the arrest and imprisonment of plaintiff under an order made by the county Judge, embracing the enactments of the garnishment clauses for the attachment of debts and production of books, &c., and those of s. 41 C. S. U. C. c. 24, and also under an order of commitment by such Judge, which recited that it appeared from the examination that the plaintiff had made away with his property in order to defeat or defraud creditors, especially the plaintiff, and had not made satisfactory answers respecting same, and had not produced his books, as required by the order under which he was examined; with an averment that plaintiff did not on examination make satisfactory answers as to his property, &c., and it appeared to the Judge that plaintiff had made away with his property (specifying certain effects,) in order to defeat, &c.:—Held, on demurrer, that inasmuch as if the proceeding had been under above s. 41 alone, the plaintiff could have been properly required to produce his books, the court would not be warranted in presuming that their non-production was only a default under the garnishment branch of the order (for which there could be no commitment), but would, on the principle of Bullen v. Moodie, 13 C. P. 137, intend that the Judge acted on that part within his jurisdiction, unless it appeared clearly the other way. *Switzer* v. *Brown*, 20 C. P. 193.

Non-production of Papers.]—If a defendant, under an order for examination, &c., refuse to produce promissory notes, though under the advice of his attorney, a ca. sa. may be issued. *Davidson* v. *Gordon*, 5 L. J. 279.

Particularizing Answers.]—A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of. *Foster* v. *Van Wormer*, 12 P. R. 597.

Place for Commitment — *Husband Working for Wife.*]—It appeared that the judgment debtor's wife had mortgaged her farm for the purpose of paying some of his debts, and that after the mortgage, instead of his continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he had agreed that until the mortgage was paid off he would work it for his wife alone:—Held, that this arrangement was not illegal or unreasonable, and on no principle could it be said that it was a making away with property in order to defeat or defraud creditors. The order directed that the defendant should be committed to the county gaol of L. or of any other county in which he might be found:—Held, that this was wrong and not warranted by rule 932; but it was not a ground for setting the order aside altogether. *Baby* v. *Ross*, 14 P. R. 440.

Refusal to Commit—*Appeal—Costs.*]—An appeal lies to a divisional court from an order in chambers refusing an application under rule 932 to commit a judgment debtor for unsatisfactory answers; but, as the liberty of the subject is at stake, the appellate court will not reverse the order unless the Judge below has erred in principle, or is almost "overwhelmingly" wrong. And under the circumstances of this case, the court refused to interfere. Graham v. Devlin, 13 P. R. 415, approved and followed. The judgment debtor appeared in person and argued his own case on appeal:—Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument. *Millar* v. *Macdonald*, 14 P. R. 499.

Refusal to Pay.] — The defendant, a widow, upon her examination as a judgment debtor, admitted having lent her brother $300, and having in her house at the time of the examination $100, which she refused to hand over to apply on the judgment, because she had no other property with which to support herself and three children. The Judge to whom an application to commit the defendant for unsatisfactory answers was made, held that the facts of the case did not bring it within the decisions in Metropolitan L. and S. Co. v. Mara, 8 P. R. 355, and Crooks v. Stroud, 10 P. R. 131, and without laying down any rule, declined in the exercise of his discretion, to order a committal without further information than was afforded by the examination. *McKay* v. *Atherton*, 12 P. R. 464.

Refusal to be Sworn.]—Where a judgment debtor attends for examination, but refuses to be sworn, he will be ordered to attend and take the oath and submit to be examined

at his own expense; if he makes default, process of contempt may issue on further proof. *Uhrig* v. *Uhrig*, 15 P. R. 53.

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

Scope of Examination.]—In examination of a judgment debtor under R. S. O. 1877 c. 50 s. 304, the object of the inquiry is to shew what property or means the debtor has at the time of the examination which can be made available to the creditor, and the inquiry is not restricted to the period of the contracting of the debt, but it may be shewn that at some anterior time, no matter how far back, the debtor had property, as to which he may be required to give an account; and it is not a sufficient answer to the inquiry merely to say that it had all been disposed of before the debt was incurred. *Ontario Bank* v. *Mitchell*, 32 C. P. 73.

——— *Re-Examination.*]—The examination of a judgment debtor in aid of execution under rule 926 may be made of the most searching character—a cross-examination of the severest kind; and very strong special grounds must be shewn to justify further examination of a debtor who has fully and fairly answered on two former examinations. And where it did not appear that any change in the circumstances of the judgment debtor had taken place since her last examination, and the affidavit on which an application for a third examination was based did not shew the grounds for the deponent's belief that she had property concealed, and did not negative the ability to obtain information as to details, the application was refused. *Re Central Bank of Canada, Watson's case*, 15 P. R. 427, 16 P. R. 55.

Service of Appointment—*Certificate of Examiner.*]—Where, upon a motion to commit a party for unsatisfactory answers upon his examination as a judgment debtor, it is shewn that he attended and submitted to be sworn and examined, it is not necessary to prove service of an appointment or payment of conduct money. And where the depositions returned by the examiner shew on their face that the party was being examined as a judgment debtor, there need be no other proof of the fact. The certificate of an examiner is good evidence of the proceedings before him, notwithstanding that it was settled ex parte. Re Ryan v. Simonton, 13 P. R. 299, commented on. *Jones* v. *Macdonald*, 14 P. R. 109.

Serving Original Appointment.] — Under rule 369, O. J. Act, an appointment signed by the examiner, and not a copy, must be served on the person to be examined. *Meyers* v. *Kendrick*, 9 P. R. 363.

An examination under A. J. Act, ss. 17, 18, or C. L. P. Act, s. 304, can only be taken under a rule of court or Judge's order. *Ib.*

Substituted Service.]—If an order for substituted service of a summons or notice of motion to commit can be made at all, even under the wide language of con. rule 467, it should not be made except in a case where no doubt exists that the notice has come to the knowledge of the person against whom the application is made. *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666.

Summons to Shew Cause — *Justification.*]—Held, affirming Bullen v. Moodie, 13 C. P. 126, that in proceeding to arrest and imprison a party for the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the Judge who orders the arrest, it is necessary that a summons to shew cause should, in the first instance, be issued. Held, also, that the fact of the Judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient justification for the attorney of the party suing out such order, in an action brought against the attorney and his clients for assault and false imprisonment. *Ponton* v. *Bullen*, 2 E. & A. 379.

Unsatisfactory Answers.]—Although a debtor in close custody assigns what purports to be all his debts and effects to the plaintiff, yet his answers may be so unsatisfactory as to warrant his further detention. *McLean* v. *Maitland*, 5 L. J. 279.

The court, under the circumstances of this case, refused to order the commitment of defendant. *Hobbs* v. *Scott*, 23 U. C. R. 619.

Answers are not unsatisfactory, within the meaning of the Act, merely because they do not account for the application of defendant's assets in a proper manner. *Ib.*

Quære, whether a refusal to deliver property to the sheriff, that it might be taken in execution, when it is afterwards applied in satisfaction of another creditor, is a refusal to disclose such property, within the statute. *Ib.*

Remarks as to the difficulty of the court arriving at any satisfactory conclusion upon a defendant's examination. *Ib.*

A county court Judge, having himself examined a defendant, informed him at the close of the examination that his answers were unsatisfactory, and that unless he assigned to the plaintiff certain property mentioned, if the plaintiff's attorney applied for his committal, it would be ordered. Ten days afterwards, without any further notice to defendant or summons, an order of commitment issued, under which the defendant was arrested:—Held, that the order was valid: that the Judge having himself heard the examination, and having the defendant before him, had a right then to adjudicate as he did: that it was unnecessary to issue the order at once; and though he had no power to compel execution of assignment, yet the opportunity afforded to defendant to escape arrest by doing so could not vitiate the order. *Baird* v. *Story*, 23 U. C. R. 624.

Order made for the committal of a judgment debtor for unsatisfactory answers in her examination as such, although she had left the jurisdiction. Bloomfield v. Brown, 6 P. R. 264, followed. *Trout* v. *Loney*, 13 C. L. T. Occ. N. 64.

The admission by a defendant on his examination as a judgment debtor that he had lost money betting on horse races is not "an

unsatisfactory answer" within the meaning of R. S. O. 1877 c. 50, s. 305. *Gananoque Carriage Co.* v. *Bincett*, 8 C. L. T. Occ. N. 411.

When a debtor has been examined under C. S. U. C. c. 24, s. 41, and an order for his committal is applied for, the proceedings being of a penal nature, a clear offence under the Act must be shewn to warrant the order. The debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all, before he can be said to have given "unsatisfactory" answers. In this case the order was refused. *Lemon* v. *Lemon*, 6 P. R. 184.

The judgment was against a husband and his wife. They were examined as to their estate and effects under the statute. It appeared from the wife's statement that she had at one time mortgages which, if still held by her, would have been applicable to the satisfaction of the judgment. She had not now the means of satisfying the judgment, the reason of her inability being that she gave to her husband the mortgages and proceeds of mortgages which she owned to enable him, as she said, to enter into business, or for some other purpose. The husband refused to answer the question as to who bought the mortgages, or whether he negotiated the sale of the mortgages. He admitted that he lately had money in his possession to a considerable amount: may have had over $1,000, but could not tell if he had $2,000, or how much he had; could not say when he got the money. He gave some of the money, he could not say how much, to another person, but kept no account of it; the rest of it he could give no information about:—Held, that the husband had not made satisfactory answers respecting property which was liable, as his property, to satisfy the judgment. An order was accordingly made to commit him to the common gaol of the county for three months. The law on this subject discussed, and the authorities reviewed. *Schneider* v. *Agnew*, 6 P. R. 338.

A satisfactory answer, upon examination as a judgment debtor, according to the statute R. S. O. 1877 c. 50, s. 305, means more than that the answer shall be a full, appropriate, and pertinent answer to the question: it means that the answer shall shew a satisfactory disposition of the property. *Crooks* v. *Stroud*, 10 P. R. 131.

The defendant in his examination said he had no real estate nor any personal estate. In the fall of 1882 he had about $300 in money; he paid his bills with it, and lost the balance at horse-races at Buffalo. Since the fall of 1882 he had been in his father's employ; he got nothing but his board and clothing. When asked as to the conveyance of a certain lot to his father, which he held in trust for him, he said: "I could not say what the consideration was, or whether I was paid anything or not; I forget; I can't think of it, I forget whether I received any money for that then or since; it was before judgment. . . My father wanted me to get it fixed:"—Held, that the defendant, in his examination, had disclosed his property and his transactions respecting the same; and had not concealed or made away with his property in order to defeat or defraud his creditors. Held, however, that the defendant had not answered fully or truthfully with respect to the fact of receiving or not receiving money or other consideration; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise. Defendant was allowed to appear for further examination; and ordered to pay the costs of the first examination and this application forthwith. *Ib*

Upon a motion to commit the defendant for unsatisfactory answers upon his examination as a judgment debtor:—Held, that the examination should not be so conducted as to try to entrap the debtor, but it should be full, fair, and searching. 2. That the broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is: Having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that full and true disclosure has been made? 3. That where the particulars wherein dissatisfaction is felt have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions or supplying what may appear to be omissions. 4. That the ordinary rules for dealing with evidence in litigated matters, where money or money's worth only is involved, are not to be applied, without more, to cases where the liberty of the person is at stake. And in the present case, where the examination was protracted and ranged over a period of more than two years, during which the defendant had had two lines of business going on, he was allowed an opportunity to protect himself by explanations, upon various parts of his examination, relied upon as shewing that a considerable sum of money had not been accounted for, being brought to his notice; and having been thus further examined, and it not having been shewn that he had any means available to satisfy the judgment, and his answers as a whole being reasonably satisfactory, in view of the rules above laid down, a motion to commit was refused. History of the enactments contained in con. rules 928 and 932. *Graham* v. *Devlin*, 13 P. R. 245.

See Foster v. *VanWormer*, 12 P. R. 597; *People's Loan and Deposit Co.* v. *Dale*, 18 P. R. 338.

Waiver by Plaintiff.]—A commitment under this Act is in the nature of a commitment for contempt, or as a punishment for fraud upon creditors; and as such the plaintiff has no such control over it, nor can he waive it in such way as was alleged in this case. *Ward* v. *Armstrong*, 4 P. R. 58.

Where a judgment debtor was imprisoned under an order directing his committal for three months for a contumacious refusal to answer questions put to him upon his examination as such judgment debtor:—Held, that an application to the indulgence and discretion of the court for his discharge from custody before the expiry of the term of imprisonment could not be granted, even upon the consent of the judgment creditor upon whose motion the order for committal had been made. *Jones* v. *Macdonald*, 15 P. R. 345.

Writ of Attachment—*Order not Asked in Summons.*]—The order asked for by the summons, viz., for the committal of the defendant to the common gaol, was the appropriate punishment authorized by R. S. O. 1877 c. 50, s. 305, for disobedience to an order

to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate a different order from that indicated in the summons should not have been made in the absence of the debtor. The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by con. rule 879; and it made no difference that it was in lieu of one which had expired. *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666.

III. Miscellaneous Cases.

Affidavit for Order.]—See *Irvine* v. *Mercer*, 3 L. J. 49; *Smith* v. *McGill*, 3 L. J. 134; *Nimmo* v. *Welland*, 2 L. J. 213.

Appeal.]—A transferee was allowed to appeal from an order for his examination after the time for appealing had expired, his delay being satisfactorily explained. *Blakeley* v. *Blaase*, 12 P. R. 565.

Common Law Procedure Act.]—The proceedings for the oral examination of a judgment debtor, under s. 193 of C. L. P. Act, 1856, (C. S. U. C. c. 22, s. 287) should be by summons and order; not by order in the first instance. *Carter* v. *Carey*, 3 L. J. 49.

Costs.]—On an application for that purpose merely, a judgment debtor cannot be ordered to pay the costs of his examination. Semble, that such an order can be made only on an application to commit, and then only by way of punishment. *Ginty* v. *Rich*, 7 P. R. 319.

Under rule 1180, the costs of proceedings to examine a judgment debtor may be allowed, in the discretion of the court or a Judge, where the examination has not actually taken place. And where the judgment debtor attended upon an appointment for his examination, procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt, he was ordered to pay the costs of the proceedings. *Popham* v. *Flynn*, 15 P. R. 286.

Creditor's Negligence in not Collecting Notes.]—The declaration set out that the plaintiff, being a judgment debtor of the defendants, admitted on his examination before a county court Judge that he had in his possession several promissory notes, which the Judge, on the defendants' application, ordered him to deliver to the defendants, to be collected by them and applied upon the judgment; that afterwards the Judge, on defendants' application, issued a summons to commit the plaintiff for not having done this, whereupon, on the demand of the now defendants, in obedience to the Judge's direction and to avoid committal, the plaintiff delivered such notes to the clerk of the county court for the use of the defendants, to be so collected and applied, and the surplus, if any, to be paid to the plaintiff. It was then alleged that it thereupon became the defendants' duty to use reasonable care and diligence in collecting these notes, but that they wholly neglected to do so, whereby several of the notes were barred by the Statute of Limitations, some of the parties became insolvent, and the plaintiff lost the amount thereof:—Held, on demurrer, that a good cause of action was shewn, for the delivery to the clerk was under the circumstances a delivery to the defendants themselves, and the inference from the facts was that they undertook the duty charged. *Hall* v. *Moss*, 25 U. C. R. 263.

Examiner's Fees.]—The fees on a reference to a county Judge from the superior court, such as an examination of a judgment debtor, must be paid in the proper stamps and not in cash. *James* v. *Jones*, 4 P. R. 194.

Form of Order.]—Semble, the common form of order for examination, blending the provisions of C. S. U. C. c. 22, s. 287, and c. 24, s. 41, is not proper. These Acts have very different objects. The affidavit applicable to the one by no means necessarily will be suitable to the other. *McInnes* v. *Hardy*, 7 L. J. 295. See, also, *Bullen* v. *Moodie*, 13 C. P. 126; *Baird* v. *Story*, 23 U. C. R. 624; *Switzer* v. *Brown*, 20 C. P. 193.

Order Once Acted on.]—An order once acted upon by the attendance and examination of the debtor before the examiner under it, cannot be again used for the same purpose; it is spent. *Jarvis* v. *Jones*, 4 P. R. 341.

Stale Order.]—Nor can a stale order which has been partially acted upon. *McGregor* v. *Small*, 5 P. R. 56.

Two Orders.]—Separate orders should issue for the examination of a judgment debtor under the C. L. P. Act, s. 287, and C. S. U. C. c. 24, s. 41. *Buchan* v. *McCord*, 7 P. R. 94.

Will—*Proceedings to Ascertain Interest of Judgment Debtor.*]—See *McLean* v. *Bruce*, 14 P. R. 190.

See Arrest.

JUDGMENT SUMMONS.

See Division Courts, X.

JUDICIAL CONFLICT OF OPINION.

See Courts—Court of Appeal, II. 4.

JURISDICTION.

See Appeal, IX. 5—Company, X. 6 (d)—County Court, III.—Court of Appeal, I.—Court of Chancery—Court of Queen's Bench—Division Courts, XI.—Exchequer Court, I.—Foreign Law—High Court of Justice, I.—Intoxicating Liquors, II. 2—Justice of the Peace, II., III.—Master and Servant, IV.—Municipal Corporations, XIX. 5 (e), (f)—Patent for Invention, V.—Police Magistrate, III.—Practice—Practice at Law before the Judicature Act, III. 1 (b), 2 (b)—Practice in Equity before the Judicature Act, XIII. 2, XIV. 2—Practice since the Judicature Act, VIII. 2 (b), 4 (b), 6 (b), IX. 1 (b), 2—Prohibition, I.—Recorders Courts—Revenue, I.—Sessions, I.—Supreme Court of Canada, II., VII.—Surrogate Courts, IV.

JURISDICTION (OF FOREIGN COURTS).

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Fines.]—By a liberal construction of the Estreat Act, 7 Wm. IV. c. 10, the court will in certain cases, relieve jurors from fines imposed on them at nisi prius, after the fine has been levied by the sheriff. *In re Cole*, 6 O. S. 425.

Selectors.]—It was held that a deputy reeve might act as one of the selectors of jurors under s. 49, 22 Vict. c. 100, but not the deputy sheriff. *Regina* v. *F. J. L.*, 5 L. J. 19.

See CONSTITUTIONAL LAW — CRIMINAL LAW, VIII. 5 — DEFAMATION, IV., XV. — MUNICIPAL CORPORATIONS—NEW TRIAL, VI. —SESSIONS, II. 6—SHERIFF, VIII. 5, XIII.—TRIAL, III. 1, V.

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JUSTICE OF THE PEACE.

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I. APPOINTMENT AND QUALIFICATION.

Alderman—*Oath.*]—Under the Municipal Act of 1866, as amended by 31 Vict. c. 30 (O.), an alderman is not ex officio authorized to act as a justice of the peace until he has taken the oath of qualification as such. *Regina* v. *Boyle*, 4 P. R. 256.

Interest.]—Attachment lies against commissioners of courts of requests who try causes in which they have an interest, though remote. *Rex* v. *McIntyre*, Tay. 22.

Disqualification of magistrate giving a certificate of loss under fire policy, as being concerned in the loss. See *McRossie* v. *Provincial Ins. Co.*, 34 U. C. R. 55.

The solicitor of the husband being city recorder, was held not to be disqualified to take as a magistrate the examination of a married woman for the conveyance of her lands. *Romanes* v. *Fraser*, 17 Gr. 267; *S. C.*, 16 Gr. 97.

Magistrates interested in the transaction, are not competent to take the examination of a married woman for the conveyance of her land. *Ib.*

The solicitor of the husband is not as such disqualified. *Ib.*

Two of the four convicting justices were licensed auctioneers for the county, and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice:—Held, that they were disqualified, and in quashing the conviction on that ground, the court ordered them to pay the costs. *Regina* v. *Chapman*, 1 O. R. 582.

The cases relating to disqualification by reason of favour or interest in a Judge or magistrate discussed. *Regina* v. *Klemp*, 10 O. R. 143.

The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one Spragge, gone to the complainant's house, at about the hour of ten o'clock p.m., and Spragge had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning:—Held, that it was improper for the justice to sit and try the case, the complainant being his daughter; and that this was a good ground for quashing the conviction. *Regina* v. *Langford*, 15 O. R. 52.

The justice of the peace before whom the information was laid, and who issued the summons, was alleged to be interested. The hearing, however, took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a certiorari:—Held, that the conviction could not be impugned. *Regina* v. *Stone*, 23 O. R. 46.

Where the convicting justice was the son of the complainant, and the latter was entitled to one-half the penalty imposed, a summary conviction was quashed, on the ground that the justice had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

Regina v. Huggins, [1895] 1 Q. B. 563, followed. Dictum in Regina v. Langford, 15 O. R. 52, approved. Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina* v. *Steele*, 26 O. R. 540.

Magistrate Giving Evidence.] — The calling of a magistrate sitting on a case as a witness does not of itself disqualify him from further acting in the case. *Regina* v. *Sproule*, 14 O. R. 375.

Oath.]—Under C. S. U. C. c. 100, s. 3, the oath of qualification by a justice of the peace must be taken before some justice of the peace of the county for which he intends to act. It cannot be administered by the clerk of the peace for such county, under the writ of dedimus potestatem issued with the commission of the peace. *Herbert* q. t. v. *Dowswell* 24 U. C. R. 427.

Presumption of Legality of Appointment.]—See *Regina* v. *Atkinson*, 15 O. R. 110; *Regina* v. *White*, 21 C. P. 354.

Property.]—C. S. U. C. c. 100, s. 3, prescribing the qualification of justices, does not require them to have a legal estate; it is sufficient if the land, though mortgaged in fee, exceed by $1,200 the amount of the mortgage money. *Fraser* q. t. v. *McKenzie*, 28 U. C. R. 255.

In a qui tam action against the defendant for acting as a justice of the peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises on which defendant qualified was vague, speculative, and inconclusive, one of the witnesses, in fact, having afterwards recalled his testimony as to the value of a portion of the premises, and placed a higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data:—Held, that the jury were rightly directed, "that they ought to be fully satisfied as to the value of defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant." Observations on the principle of the valuation of land with a view to determining the property qualification of justices. *Squire* q. t. v. *Wilson*, 15 C. P. 284.

In a qui tam action against defendant for acting as a justice of the peace without the necessary property qualification required by R. S. O. 1877 c. 71, s. 7, the defendant was called as a witness on his own behalf and gave evidence as to the value of the property on which he qualified, and the learned Judge in charging the jury told them that, generally speaking, the owner of property had the best opinion of its value:—Held, there was no misdirection; for that the jury were not told that they were to be guided by such opinion, or that it was most likely to be correct. *Crandell* q. t. v. *Nott*, 20 C. P. 63.

In a penal action, where the jury find for the defendant, a new trial will not be granted merely because the verdict may be deemed to be against the evidence or weight of evidence; but it is otherwise where the verdict is in contravention of the law, arising either from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the law in their own hands. Where, therefore, in such qui tam action, which is looked upon as a penal action, the jury, though greatly overvaluing the property, found for defendant, but none of the above considerations arose, a new trial was refused. *Ib.*

Semble, that the ownership of an equitable estate in land is sufficient to enable the owner to qualify thereon under the statute. *Ib.*

Where, however, a husband caused certain land to be conveyed to his wife by deed, absolute as between them, and without any declaration of trust in his favour:—Held, that though the conveyance might be void as against his creditors, yet that the husband could not qualify on the land, for, as far as he was concerned, the absolute property therein was, by his own act, vested in his wife. *Ib.*

It was urged in term that the jury in the finding had treated defendant as the sole owner of a certain part of the property, whereas it was owned by himself and son as tenants in common, and that his moiety was not of sufficient value. At the trial the deed to the father and son was produced, without the point as to the tenancy in common being taken, and it was proved that the son had afterwards joined with the father in a mortgage of the land:—Held, that the objection could not be entertained, for if taken at the trial, such an explanation might have been given as would have shewn there was no foundation for it; but, even if such ownership did exist, the question of value being for the jury, it could not be assumed that in estimating such value they had disregarded the point. *Ib.*

The interest of a justice of the peace in property in respect of which he qualifies as such, as required by R. S. O. 1887 c. 71, s. 9, need not be in itself of the value of $1,200. It is sufficient if he has in lands which are of the value of $1,200, over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents and charges payable out of or affecting the same, such an estate or interest as is mentioned in the section, whatever the value of the estate or interest may be. *Weir* v. *Smyth*, 19 A. R. 433.

Provincial Jurisdiction.]—Held, that the Legislature of the Province of Ontario had power under No. 14 of s. 92 B. N. A. Act to pass R. S. O. 1877 c. 71, providing for the qualification and appointment of justices of the peace. *Regina* v. *Bennett*, 1 O. R. 445.

Ratepayer of Municipality to which Fine Payable—*Payment by Salary.*]—Section 419 (a) of the Municipal Act, 1892, which provides that a magistrate shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, on conviction going to the municipality of which he is a ratepayer, includes a police magistrate. Where a police magistrate appointed under R. S. O. 1887 c. 72, is paid a salary by the municipality instead of by fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and so is not thereby disqualified. Semble, that in such a case there would have been no disqualification at common law. *Regina* v. *Fleming*, 27 O. R. 122.

Taking Objection.]—The court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception or proviso of s. 7, R. S. O. 1877 c. 71. *Regina* v. *Hodgins*, 12 O. R. 367.

II. JURISDICTION AND PROCEDURE.

1. *In General.*

Adjournment.]—The magistrate, on the 12th November, adjourned the case by consent, for one week, for judgment, and against the protest of defendant's counsel, changed the day, and gave judgment on the 18th:—Held, that the conviction must be quashed. *Regina* v. *Hall*, 8 O. R. 407.

Where the magistrate adjourned the hearing of a case under the Canada Temperance Act, 1878, for more than a week contrary to 32 & 33 Vict. c. 31, s. 46 (D.), the conviction was quashed, but without costs. Semble, the consent of the defendant to the adjournment, if proved, would not have given jurisdiction. *Regina* v. *French*, *Regina* v. *Robertson*, 13 O. R. 80. Followed in *Regina* v. *Hunter*, *ib.* 82n.

Held, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, he had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal.—Semble, that the provisions of s. 46 of 32 & 33 Vict. c. 31 (D.), that no such adjournment shall be "for more than one week" are directory merely. Regina v. French, Regina v. Robertson, 13 O. R. 80, distinguished and not followed. *Regina* v. *Heffernan*, 13 O. R. 616.

32 & 33 Vict. c. 31, s. 46 (D.), provides that the hearing may be adjourned to a certain time and place, but no such adjournment shall be for more than a week:—Held, that the week must be computed as seven days exclusive of the day of adjournment. *Regina* v. *Collins*, *Regina* v. *Goulais*, 14 O. R. 613.

Upon an information for an offence against the Canada Temperance Act a police magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced:—Held, that 32 & 33 Vict. c. 31, s. 46 (D.), which is to be read into the Canada Temperance Act by virtue of s. 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case. Notwithstanding the adjournment after the close of the hearing for fourteen days in order to consider and give judgment, the police magistrate had jurisdiction, and the conduct of the proceedings was not even irregular. Regina v. French, 13 O. R. 80, distinguished. *Regina* v. *Hall*, 12 P. R. 142.

Where, at the conclusion of the evidence, on a charge of selling liquor contrary to the Canada Temperance Act, the magistrate reserves his judgment for the purpose of reaching a decision or of considering the amount of the penalty, he is not restricted to the one week mentioned in s. 48 of R. S. C. c. 178. Regina v. Hall, 12 P. R. 142, followed. *Regina* v. *Alexander*, 17 O. R. 458.

A justice of the peace in summary proceedings before him cannot adjourn sine die for the purpose of considering his judgment. *Regina* v. *Quinn*, 28 O. R. 224.

Affidavit under Crown Lands Act.]—See *Regina* v. *Atkinson*, 17 C. P. 295.

Aldermen.]—Quære, have the aldermen of a city as ex officio justices of the peace, any jurisdiction beyond the city limits. *Regina ex rel. Blasdell* v. *Rochester*, 7 L. J. 102.

Appeal—*Costs—Commitment.*]—The issuing of a warrant of commitment for non-payment of costs of an appeal, under 32 & 33 Vict. c. 31, s. 75, is discretionary, not compulsory upon a justice; and the court will therefore on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandamus to issue it, if this be the proper remedy, which in this case it was held not to be, but that the application should have been under C. S. U. C. c. 126, s. 8. *Re Delancy* v. *Macnabb*, 21 C. P. 563.

Appeal from Dismissal of Complaint.]—Held, that a prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint: as by R. S. O. 1877 c. 74, s. 4, the practice of appealing in such a case is assimilated to that under 33 Vict. c. 47 (D.), which confines the right of appeal to defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below. *In re Murphy and Cornish*, 8 P. R. 420.

Arrest on English Warrant.]—The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest:—Held, that a person cannot, under the Imperial Act, 6 & 7 Vict. c. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and indorsed by a Judge of a superior court in this country. Such warrant must disclose a felony according to the law of this country, and semble, that the expression "felony, to wit larceny," is insufficient. The prisoner was therefore discharged. *Regina* v. *McHolme*, 8 P. R. 452.

Arrest without Summons.]—Under 1 Vict. c. 21, s. 27, a magistrate cannot cause the arrest of a party in the first instance; he must first be summoned before him. *Cronkhite* v. *Sommerville*, 3 U. C. R. 129.

Associate Justices — *Request.*]—Where a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate can interfere in the investigation of or adjudication upon the charge, except at his request. *Regina* v. *McRae*, 28 O. R. 569.

City and County.]—By R. S. O. 1877 c. 3, certain cities, including Kingston, form, for judicial purposes, part of the respective counties in which they are situate, and by c. 72, s. 6, no other justice of the peace shall act in any case for any city having a police magistrate. The conviction in this case was signed by two justices of the county of Frontenac. The case was heard in the county, and the conviction stated that it was signed there, but it appeared that one of the justices signed it in the city. In replevin for plaintiff's goods sold under a distress warrant issued upon such conviction:—Held, that the plaintiff could not recover: 1. for the justices had not acted for the city within c. 72; and 2, the conviction, which could not be questioned in this action, stated it was signed within the county. Quære, whether the signing of the conviction was a judicial or ministerial act, and therefore whether the place where it was done was material. *Langwith* v. *Dawson*, 30 C. P. 375.

Commitment—*Recital of Invalid Conviction—Duplicity.*]—A commitment of the defendant to gaol recited a conviction for "unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere:"—Held, that the commitment was bad on its face, as it recited a conviction which was invalid for duplicity and uncertainty. The commitment, although it alleged a conviction, could not be supported under s. 800 of the Criminal Code, because there was not a good and valid conviction to sustain it; the conviction returned being that the prisoner, at H., &c., did unlawfully procure a girl of seventeen years, I. D., to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the prisoner at L. in the state of New York, one of the United States of America; which did not come within any of the provisions of s. 185 of the Code. The words "a court of record" in the exception in s. 1 of the Habeas Corpus Act, R. S. O. 1897 c. 83, include only superior courts of record, and do not include a magistrate's court exercising the power conferred by s. 785 of the Criminal Code. *Regina* v. *Gibson*, 29 O. R. 660.

——— *Irregularities—Gaoler's Liability.*]—Where justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to the gaoler, though their proceedings be erroneous, the gaoler is not liable. Secus, if the proceedings be wholly void. *Ferguson* v. *Adams*, 5 U. C. R. 194.

Commitment by Unqualified Person.]—A commitment under 31 Vict. c. 16, signed by one qualified justice of the peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting under it, on an action against him. *Regina* v. *Boyle*, 4 P. R. 256.

Commitment for Indefinite Time.]—A warrant of commitment for indefinite time, or which directs the prisoner to be kept in custody till the costs are paid, without stating the amount, is bad. *Dawson* v. *Fraser*, 7 U. C. R. 391.

Corporation.]—The word "person" in R. S. C. c. 1, s. 7, s.-s. 21, includes any corporation "to whom the context can apply according to the law of that part of Canada to which such context extends," but as justices of the peace have not now and never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations, such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction. *Re Chapman and City of London, Re Chapman and London Water Commissioners*, 19 O. R. 33.

A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Ib.*

A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Ib.*

Defendant Giving Evidence.]—On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case, the defendant's evidence was received, and a conviction made against him, it was quashed with costs. *Regina* v. *Hart*, 20 O. R. 611.

Where a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety. *Regina* v. *Ramsay*, 11 O. R. 210.

Compelling accused to testify. See *Regina* v. *Lackie*, 7 O. R. 431; *Regina* v. *McNicol*, 11 O. R. 659.

On the trial of an offence under a by-law the magistrate cannot refuse to receive the defendant's evidence. *Regina* v. *Grant*, 18 O. R. 169; but see *Regina* v. *Hart*, 20 O. R. 611.

Distress—*Costs of Conveying to Gaol.*]—It was held no objection to a warrant of distress under a conviction, that the costs of conveying the defendants to gaol, in the event of imprisonment in default of distress, were specified. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

Held, also, that the mention in the warrant of the $1 costs of conveying defendant to gaol, could not vitiate, for it authorized a distress only for the penalty and costs of conviction. *Ib.*

Effect of By-law.]—The by-law directed imprisonment only in default of distress. Quære, whether 32 & 33 Vict. c. 31, s. 59, would apply so as to enable the justice to commit under it in the first instance upon proper evidence. *McLellan* v. *McKinnon*, 1 O. R. 219.

Quære, whether upon the evidence set out in the report of the case the finding that the plaintiff was not put on hard labour was justified. *Ib.*

Evidence to be in Writing.]—Semble, that it is the duty of a magistrate at a trial under his summary jurisdiction, to take the examination and evidence in writing. *Regina* v. *Flannigan*, 32 U. C. R. 593.

Exclusion of Evidence.]—Under 32 & 33 Vict. c. 20, s. 25 (D.), as amended by 49 Vict. c. 51, s. 1 (D.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently without further evidence committed him for trial:—Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind, and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review. Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court. *Regina* v. *Meyer*, 11 P. R. 477.

Felony not Specifically Charged.]—The information stated that the informant had "good reason to believe that the death of F. S. was caused by the administration of some poisonous drug by J. S., his wife, on or before the 15th March last," and on this charge a warrant was procured for the apprehension of J. S.:—Held, that no felony was charged, for the administration of the drug might have been either accidental or as a medicine; and that there was nothing therefore on which to found the magistrate's jurisdiction. *Stevens* v. *Stevens*, 24 C. P. 424.

Form of Commitment.]—Held, that a warrant reciting a coroner's inquisition, and stating the offence as follows: that C. "stands charged with having inflicted blows on the body of the said F.," and not shewing the place where the blows, if any, were inflicted, or the offence if any, was committed, is bad. *In re Carmichael*, 10 L. J. 325.

It lies on a party alleging that there is a valid conviction to sustain the commitment, to produce the conviction. *In re Crow*, 1 C. L. J. 302.

The warrant of commitment should shew before whom the conviction was had. *Ib.*

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants, each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding, is valid. If the portions in the margin of the second and third warrants could not be read as portions of the warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time, instead of counting consecutively. *Ib.*

A warrant of commitment which omits to state the place where the alleged crime was committed is defective. *In re Beebe*, 3 P. R. 270.

In favour of liberty, it is the duty of a Judge on an habeas corpus, when doubting the sufficiency of a commitment, to discharge the prisoner. *Ib.*

Form of Information.]—Held, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted, as it was in the form in which an indictment might have been framed; and moreover that the objection was met by 32 & 33 Vict. c. 32, s. 11 (D.), and by 32 & 33 Vict. c. 31, s. 67 (D.). *Regina* v. *Richardson*, 8 O. R. 651.

Form of Warrant.]—A warrant of commitment executed by two parties, and concluding "given under our hand and seal:"—Held, sufficient. *In re Clarke*, 10 L. J. 331. See *In re Smith*, 10 L. J. 247.

Imposition of Penalties—*Distress.*]—Where a statute gives justices of the peace power to make by-laws and impose penalties for their infraction, they cannot, unless they are expressly authorized by the statute, levy such penalties by distress. *Kirkpatrick* v. *Askew*, H. T. 7 Wm. IV.

Imprisonment—*Prior Distress.*]—Held, that under 36 Vict. c. 48, s. 315, where a person is ordered to pay a fine, or in default to be imprisoned, a distress must issue for the fine and be returned unsatisfied before he can be imprisoned. *Regina* v. *Blakeley*, 6 P. R. 244.

——— *Uncertainty.*]—A prisoner was convicted three times the same day for insolent conduct to a magistrate on the bench, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery by the bailiff into your, the gaoler's, custody thenceforward:"—Held, that the magistrate had a right to convict and to sentence for continuing periods, but that the periods of imprisonment, depending on the will of the officer who was to deliver him to the gaoler, were uncertain, and the prisoner was therefore entitled to his discharge. *Regina* v. *Scott*, 2 C. L. J. 323.

See, also, *In re Crow*, 1 C. L. J. 302.

Indian Superintendent Acting as Justice of the Peace.]—Held, that the defendant, who was a visiting superintendent and commissioner of Indian affairs for the Brant and Haldimand reserve, had jurisdiction under the statute relating to Indian affairs to act as justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian reserve in the county of Brant. *Hunter* v. *Gilkison*, 7 O. R. 735.

Inserting Words in Affidavit.]—It was stated in an affidavit in support of the rule for a new trial in an action for seduction, that the plaintiff's daughter had sworn before a magistrate that defendant never had criminal connection with her. The magistrate, in an affidavit used on shewing cause, stated that the defendant's brother, S., with the girl said to have been seduced, and her mother, came to him together, saying that the girl was going to clear his brother, that his mother was very ill, and the rumour was affecting her very much; that he, the magistrate, wishing

to do something to let the old lady die easy, and at the same time to let the girl have a chance to swear the child on S., inserted in the affidavit taken before him the words "criminal connection," instead of "carnal connection." Such conduct very strongly censured. *McIlroy* v. *Hall*, 25 U. C. R. 303.

Inconsistent Allegations in Information.]—Where an information contained every material averment necessary to give a magistrate jurisdiction to make an order upon the plaintiff to find sureties to the peace, but contained also additional matter, which it was contended so qualified and explained these averments as to render them nugatory:—Held, that this was a judicial question for the magistrate to decide, and therefore that in issuing his warrant for the appearance of the accused he was not acting without jurisdiction, even although a superior court might quash his order to find sureties. *Sprung* v. *Anderson*, 23 C. P. 152.

Information on Oath—*Effect of Warrant.*]—The warrant of a magistrate is only primâ facie and not conclusive evidence of its contents, as for instance, of an information on oath and in writing having been laid before him. Such information must be, under C. S. U. C. c. 102, s. 8, not only on oath, but in writing, and except on an information thus laid there is no authority to issue the warrant. *Fried* v. *Ferguson*, 15 C. P. 584.

Justices Sitting for Magistrate.]—Jurisdiction of justices of the peace in the absence of police magistrate. See *Regina* v. *Gordon*, 16 O. R. 64; *Regina* v. *Lynch*, 19 O. R. 664.

Pleading to Defective Information.]—The objection that defendant has pleaded guilty to a defective information is, under 32 & 33 Vict. c. 31, s. 5 (D.), not admissible. *Regina* v. *McCarthy*, 11 O. R. 657.

Quære, whether the defendant could object to the regularity of the information, he having appeared in obedience to the summons and pleaded not guilty. *Regina* v. *Roe*, 16 O. R. 1.

Prohibition.]—A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess. *Re Chapman and City of London, Re Chapman and London Water Commissioners*, 19 O. R. 33.

——— *Ministerial Acts.*]—Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a justice of the peace upon a conviction regular on its face, which was within the jurisdiction of the justice making it, such acts being ministerial, not judicial. Judgment below, 26 O. R. 685, reversed. *Regina* v. *Coursey*, 27 O. R. 181.

Reeves in Unorganized Districts.]—The reeves of municipalities in unorganized districts are, under the legislation relating thereto, ex officio justices of the peace in their respective municipalities, with power to try alone, and convict for, offences under the Liquor License Act, R. S. O. 1887 c. 194. *Regina* v. *McGowan*, 22 O. R. 497.

Right of Defendant to Call Witnesses.]—Remarks upon the general right of a person charged before a magistrate with an indictable offence to call witnesses for his defence, and of a person whose extradition is demanded to shew by evidence that what he is charged with is not an extradition crime. *In re Phipps*, 8 A. R. 77.

Separation of Counties.]—The affidavit of the returning officer verifying the roll was sworn, on the 2nd January, before A., who held a commission as justice of the peace for the united counties of York, Ontario, and Peel. Ontario had been separated from York and Peel by proclamation issued at Quebec on the 31st December, but it was not shewn that any one in Ontario knew of this proclamation until after the election:—Held, that A. had authority to take the affidavit. *Regina ex rel. Ritson* v. *Perry*, 1 P. R. 237.

Quære, whether A., notwithstanding the separation, would not still continue a justice of the peace for the three counties, and authorized to act for any one while he was in it, or at least for that in which he was resident. *Ib.*

Substituting New Charge — *Imprisonment—Habeas Corpus—Discharge.*]—The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder, and they, not finding sufficient evidence to warrant them in committing for trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally. By the Criminal Code, s. 108, it is matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person. The return to a writ of habeas corpus shewed the detention of the defendant under a warrant of commitment based upon the above conviction; and upon a motion for his discharge:—Held, that the detention was for an offence unknown to the law; and although the evidence and the finding shewed an offence against s. 108, the motion should not be enlarged to allow the magistrates to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid; and the prisoner should, therefore, be discharged. *Regina* v. *Mines*, 25 O. R. 577.

Territorial Jurisdiction.] — R. S. O. 1877 c. 72, s. 6, does not limit the territorial jurisdiction of county magistrates, but prohibits them from acting "in any case for any town or city"—the limitation is as to the cases, not as to place, and is only partial, i. e., for a city where there is a police magistrate, and then only when not requested by such police magistrate to act, or when he is not absent through illness or otherwise; and therefore in any case arising in a county, outside of a city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate while sitting in the city. Legislation on the subject reviewed. Owing to changes in the statute law the decisions in Regina v. Row, 14 C. P. 307, and Hunt v. McArthur, 24 U. C. R. 254, are no longer applicable. *Regina* v. *Riley*, 12 P. R. 98.

A warrant of commitment was made by the stipendiary magistrate for the police division

of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1885 respecting county corporations (58 Vict. c. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council:—Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial extent of the police division. Held, also, that the jurisdiction of a Judge of the supreme court of Canada in matters of habeas corpus in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte Macdonald*, 27 S. C. R. 683.

——— *Protection of Sheep Act.*]—See *Regina* v. *Perrin*, 16 O. R. 446.

Three Justices Sitting—*One Assuming to Convict.*]—S., a justice of the peace, upon an information laid before him, issued a summons for non-payment of wages under C. S. U. C. c. 75, s. 12, returnable before himself or such other justices as might then be present. On the return two other justices were present who, without any objection from S., heard the complaint with him. At the conclusion of the case, these two thought the complaint should be dismissed, while S. was in favour of the claimant, and against the protest of the other two, S. made an order requiring the defendants to pay the claim and costs, and in default that a distress should issue; the two other justices made an order dismissing the complaint. Subsequently a formal conviction was drawn up, and signed and sealed by S., the whole proceedings being set out as before him alone, and afterwards a distress warrant was issued by him. The minutes of the evidence taken down by the magistrate's clerk, were headed as in a cause before the three justices:—Held, that the conviction was clearly bad, and must be quashed, S. having no exclusive right to deal with the case merely because he had issued the summons. *Regina* v. *Milne*, 25 C. P. 94.

Waiving Issue of Summons.]—See *Regina* v. *Bennett*, 3 O. R. 45; *Regina* v. *Roe*, 16 O. R. 1; *Regina* v. *Clarke*, 19 O. R. 601.

Warrant.]—Semble, that a warrant issued by justices of the peace sitting in quarter sessions having no seal does not make it invalid. *Fraser* v. *Dickson*, 5 U. C. R. 231.

Semble, that the warrant issued in this case after the dismissal of the appeal by the sessions, and which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection. *Arscott* v. *Lilley*, 11 O. R. 153.

Where a conviction is affirmed on appeal to the sessions the warrant of distress or commitment may be issued by the convicting justice. *Arscott* v. *Lilley*, 14 A. R. 283.

A warrant of commitment need not be dated if not issued too soon. *Regina* v. *Sanderson*, 12 O. R. 178.

In determining, upon a motion to discharge a prisoner, whether a warrant of commitment is defective, the court cannot, in view of the Summary Trials Act, R. S. C. c. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction. And where the conviction alleged that the offence was committed in January, 1887, and the commitment in January, 1888, the motion was enlarged accordingly. *Regina* v. *Larin*, 12 P. R. 642.

Warrant of Apprehension—*Affidavit of Service of Summons.*]—The jurisdiction of a magistrate to issue a warrant under R. S. C. c. 178, s. 39, for the apprehension of a person who does not appear to a summons does not depend upon an affidavit being made by the person who served the summons; it is sufficient that it appear to the satisfaction of the magistrate that the summons was served within a reasonable time. *Read* v. *Hunter*, 8 C. L. T. Occ. N. 428.

Witness Fees.]—Section 58 of R. S. C. c. 178, authorizes justices of the peace to allow witness fees. *Regina* v. *Becker*, 20 O. R. 676.

See INTOXICATING LIQUORS, II. 2, 3—IV. 5.

2. *Convictions.*

(a) *In General.*

Affidavits.] — When a distress warrant, upon a conviction, has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina* v. *Sanderson*, 12 O. R. 178.

Amendment.]—Under s. 889 of the Criminal Code, the court, if a conviction under any Act to which the procedure in the Code applies, and for an offence over which the convicting magistrate has jurisdiction, is brought up by certiorari (whether in aid of a writ of habeas corpus or on motion to quash the conviction is immaterial) may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision. A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of $50 and $5 costs, or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of three months in default of payment of the fine and costs. *Regina* v. *Murdock*, 27 A. R. 443.

Company.]—Section 705 of the Municipal Act, R. S. O. 1897 c. 223, as to summary

prosecutions before a justice of the peace for offences against municipal by-laws, applies to incorporated companies as well as to individuals, as do also ss. 562, 853 and 858 of the Criminal Code, 1892, as to service of summonses. *In re Regina* v. *Toronto R. W. Co.*, 30 O. R. 214.

Defect in Form.]—Where the offence is sufficiently stated, the conviction cannot be avoided for matter of form. *In re Boucher, Cassels' Dig.*, 180.

Distress.]—Held, that a provision for distress in the conviction in default of payment of the fine and costs imposed, did not constitute a part of the penalty or punishment imposed by the by-law, but was merely a means of collecting the penalty as authorized by 39 Vict. c. 35, s. 2, s.-s. 14 (O.), and s. 421 of the Municipal Act, R. S. O. 1887 c. 184. *Regina* v. *Flory*, 17 O. R. 715.

Effect of Discharge.]—Held, in this case, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of the conviction. *Hunter* v. *Gilkison*, 7 O. R. 735.

Effect of Warrant.]—The mere fact of the warrant of commitment having been countersigned, under 31 Vict. c. 16 (D.), by the clerk of the Privy Council, does not withdraw the case from the jurisdiction of a Judge on a habeas corpus. The prisoner may contradict the return to the writ by shewing that one of the persons who signed the warrant was not a legally qualified justice of the peace. *Regina* v. *Boyle*, 4 P. R. 256.

Filing Second Conviction.] — Semble, that after a first conviction has been returned to the quarter sessions and filed, the justice, if he thinks it defective, may file a second. *Wilson* v. *Graybiel*, 5 U. C. R. 227.

Place of Making—*Distress — Hard Labour.*]—On a motion to set aside a conviction and warrant of commitment on the grounds, 1. that the conviction was not in the magistrate's office, but in that of the clerk of the peace; 2. that the conviction did not contain a clause of distress; and 3. that the conviction only warranted the imprisonment without hard labour, whereas the prisoner had been committed with hard labour:—Held, that the prisoner must be discharged, but on the last ground only. *Regina* v. *Yeomans*, 6 P. R. 66.

Place of Signing.]—A case having been heard by two magistrates in the county, the conviction was signed by one of them in the city: — Quære, whether the signing of the conviction was a judicial or ministerial act, and therefore whether the place where it was done was material. *Langwith* v. *Dawson*, 30 C. P. 375.

Stated Case—*Court of Appeal.*]—A case can be stated by a justice of the peace under R. S. O. 1897 c. 91, s. 5, for the judgment of the court of appeal, only where the constitutional validity of a statute is involved and not when the decision depends merely upon whether the statute is or is not applicable to the defendants. It was held, therefore, that an appeal, by way of stated case, would not lie from the decision of the police magistrate of the city of Toronto, that the Toronto Railway Company were bound by a by-law of the corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulation. *Regina* v. *Toronto R. W. Co.*, 26 A. R. 491.

Two Justices Necessary.] — Where a statute empowers two justices to convict, a conviction by one is void. *In re Crow*, 1 C. L. J. 302. See, also, *Graham* v. *McArthur*, 25 U. C. R. 478.

(b) *Form and Requisites.*

Alternative.]—A conviction by two justices for taking certain timber feloniously or unlawfully:—Held, bad, for it should not have been in the alternative; if the taking was unlawful only, not felonious, it should have shewn how unlawful; and also that the offence came under some statute which gave the justices power to convict. *Regina* v. *Craig*, 21 U. C. R. 552.

Certainty.] — The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence. *Regina* v. *Hoggard*, 30 U. C. R. 152.

Conviction Varying from Minute.]—Held, that the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. *Regina* v. *Brady*, 12 O. R. 358.

Indian Act—*Hay—Costs.*] — The defendant was convicted for removing hay from Indian lands contrary to s. 26 of the Indian Act, R. S. C. c. 43:—Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated. Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in the conviction the costs of commitment and conveying to gaol. *Regina* v. *Good*, 17 O. R. 725.

Locality of Offence.] — On motion to quash a conviction by two justices of the county of Norfolk for an assault:—Held, that stating the offence to have been committed at defendant's place in the township of Townsend was sufficient, for C. S. U. C. c. 3, s. 1, s.-s. 37, shews that township to be within the county. *Regina* v. *Shaw*, 23 U. C. R. 616.

Municipal By-laws.]—A conviction under a by-law must shew the by-law, that the court may judge of its sufficiency. *Regina* v. *Ross*, M. T. 3 Vict.

And it must shew by what municipality the by-law was passed. *Regina* v. *Osler*, 32 U. C. R. 324.

Quære, whether it is essential to state the date or title of the by-law. *Ib.*

Name of Informant.] — The name of the informant or complainant must in some

form or other appear on the face of a conviction. *In re Hennessy*, 8 L. J. 299.

Request to Proceed Summarily.]—In a conviction for assault it was held unnecessary to shew on the face of the conviction that complainant prayed the magistrates to proceed summarily, for the form allowed by C. S. C. c. 103, s. 50, was followed; and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit. Held, also, that it was clearly no objection that the assault was not alleged to be unlawful. *Regina* v. *Shaw*, 23 U. C. R. 616. See also *In re Switzer*, 9 L. J. 266; *Bagley* q. t. v. *Curtis*, 15 C. P. 396.

Seal.]—A conviction must be under seal. *In re Ryer and Ploars*, 46 U. C. R. 206; *Bond* v. *Conmee*, 15 O. R. 716; 16 A. R. 398.

Statutory Form.]—As to certain objections suggested to a conviction, it was held a sufficient answer that the conviction followed the form prescribed by the Act, C. S. C. c. 103, which was intended as a guide to magistrates, and to prevent failure of justice from trivial objections. *Reid* v. *McWhinnie*, 27 U. C. R. 289.

——— *Common Law Requisites.*]—Where a form of conviction is not sanctioned by any statute, it must be legal according to the principles of the common law; and in that case a conviction, which does not express that the party had been summoned, nor that he appeared, nor that the evidence was given in his presence, cannot be supported. *Moore* v. *Jarron*, 9 U. C. R. 233.

Uncertainty.] — The defendant was convicted before a magistrate, for that he "did in or about the month of June, 1880, on various occasions," commit the offence charged in the information; and a fine was inflicted "for his said offence:"—Held, that the conviction was bad, under 32 & 33 Vict. c. 21, s. 25 (D.), as shewing the commission of more than one offence. *Regina* v. *Clennan*, 8 P. R. 418.

An allegation in a conviction that the offence was committed between the 30th June and 31st July was held a sufficiently certain statement of the time. *Regina* v. *Wallace*, 4 O. R. 127.

Conviction held bad, as there had been no offence committed against the Act 32 & 33 Vict. c. 21, s. 110 (D.), under which the defendant had been convicted, and also in not shewing the time and place of the commission of the offence. *Regina* v. *Young*, 5 O. R. 400.

Variance from Memorandum.]—Held, that the fact that the memorandum of conviction differed from the conviction as returned, in not providing for imprisonment in default of payment, did not invalidate the conviction, for it is sufficient if the penalty has been fixed at any time before the conviction is formally drawn up. *Regina* v. *Smith*, 46 U. C. R. 442.

(c) *Motions to Quash.*

Amending Conviction.]—A conviction, substantially defective, cannot be amended. *Regina* v. *Ross*, H. T. 3 Vict.

Held, that an amended conviction cannot be put in after the return of a certiorari. *Regina* v. *MacKenzie*, 6 O. R. 165. See, also, *Regina* v. *Bennett*, 3 O. R. 45; *Regina* v. *Elliott*, 12 O. R. 524; *Bond* v. *Conmee*, 16 A. R. 398.

A magistrate may amend his conviction at any time before the return of the certiorari, and the court refused to quash because of the previous return of a bad conviction, especially where it had not been filed. *Regina* v. *McCarthy*, 11 O. R. 657.

Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a certiorari, the court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction. Regina v. Wallace, 4 O. R. 127, followed. But where a conviction for an offence over which the magistrate had jurisdiction, is bad on its face, the court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction. *Regina* v. *Coulson*, 24 O. R. 246.

Appeal—*Costs of Motion.*]—After the removal of a conviction into the high court, the convicting magistrate moved to have an affidavit filed by the defendant, removed from the files of the court, which was refused with costs payable by the magistrate to the defendant. Subsequently, under the belief that ss. 897 and 898 of the Code applied, the defendant obtained an ex parte order varying the previous order by making the costs payable to the clerk of the peace and then to the defendant, and an appeal from such amended order by the magistrate to the Judge sitting in weekly court, was dismissed. The magistrate then appealed to the divisional court from the order of the Judge of the weekly court, and, also, by leave, direct from the above amended order, when the former appeal was dismissed and the latter allowed. A Judge sitting in weekly court has no jurisdiction to entertain an appeal from an order of a Judge of the high court made in a criminal proceeding. *Regina* v. *Graham*, 29 O. R. 193.

——— *Order Quashing Conviction.*]—No appeal lies to the court of appeal for Ontario from an order of a divisional court quashing a conviction by a police magistrate for breach of a municipal by-law. *Regina* v. *Cushing*, 26 A. R. 248.

By-law.] — Where the conviction purported to be for an offence against a by-law, but shewed no such offence, it was quashed, and it was held that it could not be supported as warranted by the general law. *In re Bates*, 40 U. C. R. 284.

Certiorari — *Exclusion of Evidence.*]—A defendant is not entitled to remove proceedings by certiorari to a superior court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. *Regina* v. *Richardson*, 8 O. R. 651.

Even had a motion to quash the conviction been made in this case, and an order nisi

applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere. *Ib.*

The defendant was convicted by two justices of the peace under the Weights and Measures Act, 42 Vict. c. 16, s. 14, s-s. 2 (D.), as amended by 47 Vict. c. 36, s. 7 (D.), of obstructing an inspector in the discharge of his duty, and was fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing before the justices the defendant tendered his own evidence, which was excluded. The defendant appealed to the quarter sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed. On motion for certiorari:—Held, that the conviction having been affirmed in appeal certiorari was taken away except for want or excess of jurisdiction, and that there was no such want or excess of jurisdiction, inasmuch as the justices and the quarter sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by certiorari. Even if the determination on this point could be reviewed the justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime. *Regina* v. *Dunning*, 14 O. R. 52.

——— *Habeas Corpus — Certiorari.*]—A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of habeas corpus and certiorari. *Regina* v. *St. Clair*, 27 A. R. 308.

——— *Notice to Magistrate.*]—After the issue of a writ of certiorari for the removal of a conviction for the purpose of quashing it, the writ, though served on the clerk of the peace, did not come to the notice or knowledge of the convicting magistrate, who enforced the conviction by the issue of a distress warrant:—Held, that the magistrate was not guilty of contempt. *Regina* v. *Woodyatt*, 27 O. R. 113.

See CERTIORARI, II.

Costs Improperly Imposed.]— There is no general power to award costs upon a conviction under an Ontario statute, where such power is not given by the statute itself; and therefore where on a conviction under s. 162 c. 174, R. S. O. 1877, for attempting to obtain information at the polling place as to the candidate for whom a voter was about to vote, costs were awarded against defendant, the conviction was ordered to be quashed:—Held, also, that there was no power to amend the conviction in this respect. *Regina* v. *Lennon*, 44 U. C. R. 456.

Costs of Motion.]—It is not the practice to give costs in quashing a conviction. *Regina* v. *Johnston*, 38 U. C. R. 549.

Quære, whether defendant should not get the costs of quashing a conviction made to test the law. *Regina* v. *Jamieson*, 7 O. R. 149.

Where a weigh-master instituted a prosecution for his own benefit, after warning, instead of bringing an action in the division court, and the conviction was quashed, he was ordered to pay the costs. *Regina* v. *Hollister*, 8 O. R. 750.

A conviction was quashed without costs where it appeared that the defendant had attempted to tamper with the informant. *Regina* v. *Ryan*, 10 O. R. 254.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the justices of the peace and the informant were ordered to pay the defendant's costs. *Regina* v. *Walker*, 13 O. R. 83.

Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge wil be sustained by proper evidence. *Regina* v. *Kennedy*, 10 O. R. 396.

The order to quash the conviction was made without costs because the defendant had taken so many exceptions to the conviction upon which he had failed, and because the merits of the complaint were against him. *Regina* v. *Lynch*, 12 O. R. 372.

Conviction quashed with costs against the informant, where he had a pecuniary interest in the prosecution. *Regina* v. *Stewart*, 17 O. R. 4.

Remarks on the question of costs in quashing convictions. *Regina* v. *Westlake*, 21 O. R. 619.

The court in considering the question of costs suggested that in future with the notice of motion for a certiorari, a notice might also be served stating that unless the prosecution was then abandoned, and further proceedings rendered unnecessary, costs would be asked for, when a strong case would be made for granting the defendant costs in cases in which it would be unjust and unfair to put defendant to such costs. *Regina* v. *Westgate*, 21 O. R. 621.

Convictions quashed with costs to be paid by the prosecutor. *Regina* v. *Hazen*, 23 O. R. 387.

The practice is not to give costs on quashing a conviction. Regina v. Johnston, 38 U. C. R. 549, followed. *Regina* v. *Somers*, 24 O. R. 244.

Costs against the informant refused. Regina v. Somers, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina* v. *Steele*, 26 O. R. 540.

Effect of Appeal.]—The court has power to quash a conviction for an illegal adjudication of punishment, although it has been appealed against and affirmed in respect of

such adjudication, and 32 & 33 Vict. c. 31, s. 71 (D.), does not take away the right to certiorari in such a case. *McLellan* v. *McKinnon*, 1 O. R. 219.

Estoppel by Certiorari.]—Held, the defendant having had the certiorari directed to the magistrate who had convicted, was estopped from objecting that the conviction was in reality made by three, as appeared from the memorandum of conviction which was signed by them. *Regina* v. *Smith*, 46 U. C. R. 442.

Excessive Punishment.]—Held, following Regina v. Brady, 12 O. R. 358, that where imprisonment is directed on non-payment of a penalty, the award of distress of the goods to levy it, and then imprisonment in case the distress prove insufficient, is invalid in law, and an excess of jurisdiction. *Regina* v. *Lynch*, 12 O. R. 372.

Held, that the punishment being in excess of that which might have been lawfully imposed, the defect was not cured by ss. 2 and 3 of 49 Vict. c. 49 (D.). *Ib.*

Forum.]—Quære, whether a single Judge has power to hear a motion to quash a conviction. If he has power his decision is final, and not appealable. If he has no power, then his action is of no avail, and still unappealable. *Regina* v. *McAulay*, 14 O. R. 643.

The jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the courts of Queen's bench and common pleas respectively, and was exercised and exercisable by them respectively sitting in term; the courts or divisions of the high court of justice mentioned in s.-s. 3 of s. 3 of the Act can respectively exercise all the jurisdiction of the high court of justice in the name of the high court of justice; the sittings of these respective courts or divisions are analogous to and represent the sittings of the former courts of common law in term, and it is to the sittings of these courts or divisions that applications to quash convictions must be made, having regard to s. 87 and rule 484 of the O. J. Act, and of R. S. C. c. 174, s. 2, s.-s. 1, and s. 270. The courts or divisions are not to be confounded with the divisional courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. Section 28 of the Act, upon which the supposition that a single Judge sitting in court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only. And where a single Judge sitting in court heard and determined a motion to quash a conviction, an appeal to the Judges of the Queen's bench division from his decision, refusing to quash such conviction, was treated as a substantive motion to quash the conviction. *Regina* v. *Beemer*, 15 O. R. 266.

The jurisdiction of the full court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the divisional courts. *Regina* v. *Fee*, 13 O. R. 590.

The jurisdiction to hear motions for orders nisi in criminal matters vested in the common pleas division of the high court of justice for Ontario is the original jurisdiction of the court of common pleas prior to Confederation, and by virtue of s. 5 of C. S. U. C. c. 10, the court "may be holden by any one or more of the Judges thereof in the absence of the others." On a return of an order nisi to quash a conviction the court was composed of two of the Judges thereof, the third Judge being absent attending to other pressing judicial work:—Held, that the court was properly constituted to dispose of the order. *Regina* v. *Runchy*, 18 O. R. 478.

Whether proceedings to quash a conviction under an Ontario Act should be taken before a single Judge, or a divisional court, quære? *Regina* v. *Wason*, 17 A. R. 221.

Intituling Papers.]—On application to quash a conviction, as soon as the return to the certiorari has been filed the cause is in the court, and the motion paper and rule nisi must be intituled in the cause. Where the rule was not so intituled it was discharged, but, being on a technical objection, without costs; and under the circumstances an amendment was not allowed. *Regina* v. *Mortson*, 27 U. C. R. 132.

Limitation in Act.]—The Act 32 & 33 Vict. c. 31, s. 17 (D.), provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, $100:—Held, that the meaning of this is, that the amount of the costs in the case shall be deducted from $100 and that the balance or difference shall be the utmost limit of the fine; and that the conviction in this case, being to pay the sum of $100 without costs, was therefore bad. *Regina* v. *Cyr*, 12 P. R. 24.

Notice to Magistrate — *Recognizance.*]—Held, that a conviction once regularly brought into, and put upon the files of the court, is there for all purposes, and that a defendant may move to quash it, however, or at whosesoever's instance it may have been brought there. Where, therefore, on an application for a habeas corpus, under R. S. O. 1877 c. 70, a certiorari had issued, and in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate, or recognizance. Regina v. Levecque, 30 U. C. R. 509, distinguished. *Regina* v. *Wehlan*, 45 U. C. R. 396.

Objecting to Regularity of Certiorari.]—In shewing cause to a rule nisi for quashing a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. *Regina* v. *McAllan*, 45 U. C. R. 402.

Opening up Order.]—Where an order quashing a conviction is made upon default of any one appearing to support it, the effect of quashing it not only involving the restoration of the fine paid by the defendant, but exposing the convicting magistrate to an action, there is inherent jurisdiction in the court to open up such order so made. The jurisdiction of the full court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the divisional courts. *Regina* v. *Fee*, 13 O. R. 590.

Order Nisi to Quash—*Death of Prosecutor.*]—The death of the prosecutor, who is also informant, after a summary conviction, before the service on him of an order nisi

to quash, does not prevent the court from dealing with the matter and from quashing the conviction. *Regina* v. *Fitzgerald*, 29 O. R. 203.

Parties.]—On applications to quash, the convicting justice must be made a party to the rule. *Regina* v. *Law*, 27 U. C. R. 260.

Payment for Use of Hall.]—The magistrate ordered the defendant to pay $1 for the use of the hall for trying the case, and condemned the defendant in default of distress to imprisonment:—Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed. Regina v. Wallace, 4 O. R. 127, and Regina v. Walsh, 2 O. R. 296, commented on. *Regina* v. *Elliott*, 12 O. R. 534.

Prior Conviction.]—A warrant was issued by a magistrate for the apprehension of the defendant, who was brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction. The court quashed the second conviction, with costs:—Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the magistrate who convicted the second time could not take advantage thereof. *Regina* v. *Bernard*, 4 O. R. 603.

Procedure.]—A certiorari issued on 12th April, 1872, on motion of defendant, to a police magistrate, to return a conviction for selling liquor without license. This writ was returned on 21st May, in Easter term, with conviction and recognizance, and both defendants appeared to it by taking out rules. The prosecutor then obtained a rule nisi to quash the certiorari and for a procedendo to the police magistrate. But up to this time there had been no motion to quash the conviction. It was urged by defendant that he had all the term within which to move against the conviction, and that as the proceedings were removed into the Queen's bench they must be finally dealt with there:—Held, 1. That the proper practice is, that an appearance to the certiorari should be filed in the Crown office, and the case set down on the paper, so that either party might move for a concilium: 2. that the defendant was in default in not having moved to quash the conviction, or set down the case on the paper. Semble, that an affirmance of the conviction by the prosecutor is necessary to obtain the costs, and further, as this was not done, the court declined to estreat the recognizance. A procedendo was awarded, it being thought more advisable that the police magistrate should enforce the conviction than the court above. *Regina* v. *Flannigan*, 9 C. L. J. 237.

Recognizance.]—By s. 90 of R. S. C. c. 178, and the rule of court thereunder, no motion to quash any conviction brought before any court by certiorari shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties:—Held, that the sufficiency of the suretyship is not shewn by the mere production of the recognizance, but there must be evidence on which the court can say there were sufficient sureties. Where therefore there was no affidavit of justification to the recognizance it was held not to comply with the statute. *Regina* v. *Richardson; Regina* v. *Addison*, 17 O. R. 729.

It is only by the indulgence of the court that a second application is permitted or entertained, where the first application has been refused. And where the defendants' applications for orders nisi to quash convictions were refused upon the ground of non-compliance with the statute and rule requiring a recognizance and affidavit of justification to be filed, and the court upon such applications was not favourably impressed by what was urged as to the merits of the applications:—Held, that the indulgence of the court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects. *S. C.*, 13 P. R. 303.

Reviewing Evidence.]—The court will not quash a conviction upon the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial. The extreme severity of the fine, under the circumstances of the case, remarked upon. *Regina* v. *Howarth*, 33 U. C. R. 537.

Reviewing Finding of Fact.]—On an application to quash a conviction brought up upon certiorari, the court will not notice any facts not appearing in the conviction, for the purpose of impeaching it on any ground, except want of jurisdiction; nor has the court any power to review the decision of the sessions in a matter within their jurisdiction, nor to grant a mandamus to compel them to rehear an appeal. The court refused, therefore, to quash a conviction under the Liquor License Act, affirmed on appeal, on the ground, among others, that the general verdict of guilty was inconsistent with the answers of the jury to specific questions. *Regina* v. *Grainger*, 46 U. C. R. 382.

Where the proceedings before a magistrate are removed under 29 & 30 Vict. c. 45, the Judge is not to sit as a court of appeal from the findings of the police magistrate upon the evidence which that officer has taken; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a general rule except upon an appeal. *Regina* v. *Green*, 12 P. R. 373.

See, also, *Regina* v. *Dowling*, 17 O. R. 698.

When a summary conviction is removed by certiorari and a motion made to quash it, it is the duty of the court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever shewing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the court to review it as upon an appeal.

Regina v. Coulson, 24 O. R. 246, not followed. *Regina* v. *Coulson*, 27 O. R. 59.

Two Offences—*One Penalty.*]—Held, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty. *Regina* v. *Gravelle*, 10 O. R. 735.

Validity of By-law.]—Held, that the validity of a by-law might be questioned on a motion to quash the conviction made under it. *Regina* v. *Cuthbert*, 45 U. C. R. 19.

Want of Jurisdiction.]—A conviction should be quashed where there is no jurisdiction. *Regina* v. *Taylor*, 8 U. C. R. 257.

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3. *Specific Offences.*

Assault.]—At common law magistrates have no summary jurisdiction to try complaints for assaults. The jurisdiction is derived solely from C. S. C. c. 91, and can only be exercised where prayed under that statute. *In re Switzer*, 9 L. J. 266.

The defendant, on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having complied with the requirements of s. 8 of the Summary Trials Act, R. S. C. c. 176, by asking defendant whether he consented to be tried before him or desired a jury, proceeded to try and convict the defendant on the charge of the felonious assault:—Held, that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed. Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction. *Regina* v. *Hogarth*, 24 O. R. 60.

The defendant was convicted of a common assault, upon the complaint of the prosecutor, who orally requested the magistrate to proceed summarily:—Held, that the request to proceed summarily need not be in writing. *Regina* v. *Smith*, 46 U. C. R. 442.

The applicant, C., having appeared to an information charging him with an assault, and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words, "falsely imprison." This being refused, H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but indorsed on the information, "case withdrawn by permission of the court, with the view of having a new information laid:"—Held, that the complainant could not, even with the magistrate's consent, withdraw the charge, the defendant being entitled to have it disposed of. Held, also, that an information may be amended, but if on oath, it must be re-sworn; and that the amendment might have been made here. Semble, that the more correct course would have been to go on with the original case, and, under 32 & 33 Vict. c. 20, s. 46, to refrain from adjudicating. A mandamus to hear and determine the first charge, and, if dismissed, to grant a certificate of dismissal, was however refused; for the withdrawal was equivalent to a dismissal, and the magistrate might, under s. 46, refrain from adjudicating, and if it were dismissed without a hearing on the merits, there would be no certificate. *In re Conklin*, 31 U. C. R. 160.

Breach of the Peace.]—In a commitment for want of finding sureties for the peace, is it necessary to state that the justice had information on oath which would justify him in binding the prisoner to keep the peace. *Dawson* v. *Fraser*, 7 U. C. R. 391.

A commitment in default of sureties to keep the peace should shew the date on which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily injury. *In re Ross*, 3 P. R. 301.

The original conviction was for "acting in a disorderly manner by fighting, and breaking the peace, contrary to the by-law and statute in that behalf;" imprisonment with hard labour was imposed in default of payment of the fine, and the costs were made payable in the alternative to the magistrate or the prosecutor:—Held, bad. *Regina* v. *Washington*, 46 U. C. R. 221.

Contempt.]—A justice may commit for contempt while in the execution of his office, out of sessions, but it must be by a warrant in writing, and for a specified period. *Jones* v. *Glasford*, M. T. 2 Vict.

A commitment by a magistrate for contempt, if there be no recorded conviction, should shew that the party was convicted of the contempt; stating that he was charged with it, is insufficient. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Quære, whether a justice of the peace executing his duty in his own house and not presiding in any court, can legally punish for a contempt committed there. *Ib.*

While a power resides in any court or Judge to commit for contempt, it is in the privilege of such court or Judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke*, 7 U. C. R. 223.

A justice of the peace, while sitting in the discharge of his duty, has the power, without any formal proceeding to order at once into custody, and cause the removal of any party who by his indecent behaviour or insulting language is obstructing the administration of justice; but he has no power either at the time of misconduct much less on the next day to make out a warrant to a constable and to commit the offending party to goal for any certain time by way of punishment, without adjudging him formally, after a summons to appear for hearing, to such punishment on account of his contempt, and making a minute of such sentence. *Ib.*

A warrant to a constable to commit for contempt, containing a direction to detain the party for the space of two weeks, and until he shall pay the costs of his apprehension and conveyance to gaol, is defective. *Ib.*

See Young v. *Saylor*, 23 O. R. 513, 20 A. R. 615, sub-title III. 1, *post*.

Distilling Spirits.]—Justices of the peace out of session have no jurisdiction to

try misdemeanours in a summary manner, except on special statutory authority; and it was held, therefore, that a conviction by two justices of the peace, under 46 Vict. c. 15 (D.), for assisting in the distilling of spirits contrary to that Act, must be quashed. *Regina* v. *Carter*, 5 O. R. 651.

Drunkenness.]—A by-law of the city of Brantford enacted that any person found drunk on any of the public streets, &c., thereof, should be subject to the penalty thereby imposed, namely to a fine not exceeding $50, inclusive of costs, and in default of payment forthwith of the fine and costs, distress, and in default of sufficient distress, imprisonment in the common gaol for a term not exceeding six months, &c., unless the fine and costs were sooner paid:—Held, that under s.s. 19 of R. S. O. 1877 c. 184, s. 479, there was power to authorize imprisoument for the period mentioned. *Regina* v. *Grant*, 18 O. R. 169.

A conviction under the by-law directed in default of payment forthwith of the fine and costs and of sufficient distress, imprisonment for ten days in the common gaol unless the costs and charges, including the costs of conveying to gaol, were sooner paid:—Held, that the conviction was bad as there was no power to include the costs of conveying to gaol. *Ib.*

Highway Regulations.]—A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing bricks, stones, &c., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width, but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said articles:—Held, bad, as discriminating against residents of the town in favour of others. Held, also, that a conviction under such by-law was bad for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina* v. *Pipe*, 1 O. R. 43.

Intent to do Bodily Harm.]—The conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent to do her grievous bodily harm:"—Held, that if not sufficient to charge a felony under s. 17 of 32 Vict. c. 20 (D.), it was a good conviction for a misdemeanour under s. 19, the necessary statement of the intent being immaterial. *In re Boucher*, 4 A. R. 191.

The police magistrate has jurisdiction under the constitution to try either of these offences, the court being constituted by the statute of the Province, and jurisdiction over the offence assigned to it as an existing tribunal by the laws of the Dominion. *Ib.*

Livery Stable.]—Section 510 of the municipal Act, 1883, authorizes the licensing of owners of livery stables and of horses, &c., for hire. A by-law passed thereunder required every person owning or keeping a livery stable or letting out horses &c., for hire to pay a license fee. Defendant was convicted under this by-law, for that "he did keep horses, &c., for hire" without having paid the license fee:—Held, that the conviction was in conformity with both statute and by-law. *Regina* v. *Swalwell*, 12 O. R. 391.

Market Regulations.]—A conviction for violating a by-law was quashed, the by-law having been passed on the 27th March, to go into force the 3rd April following, in anticipation of an Act, 45 Vict. c. 24 (O.), passed the 10th March, to go into operation the 2nd April then next ensuing. Sub-section 2 of s. 8 of the Act subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," to market fees, whereas the twelfth section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market-place, &c., for the purpose of selling," &c.:—Held, that "vendors who shall voluntarily use the market-place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market-place for the purpose of selling;" nor was the expression "use the market-place for the purpose of selling" the same as "come upon the market-place for the purpose of selling;" and that the conviction was bad on this ground also. *Regina* v. *Reed*, 11 O. R. 242.

Held, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas s. 13 of the by-law applied only to cases of butcher's meat exposed for sale. *Ib.*

Nuisance.]—47 Vict. c. 32, s. 13, s.-s. 12 (O.), enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," &c. Section 2 of by-law No. 179 of the city of London, passed under that Act, is as follows: "No person shall, in any of the streets or in the market-place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said city. Provided always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada." The prisoner was convicted under the by-law of beating a drum in a public street in the city of London:—Held, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb, was ultra vires, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge. Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina* v. *Nunn*, 10 P. R. 395.

A conviction was, that the defendant did, on the 16th May, 1886, create a disturbance in the public streets of the village of L., by beating a drum, &c., contrary to a certain by-law of the village. The information was in like terms except that the act was laid as done on Sunday. The by-law was passed under 47 Vict. c. 32, s. 13 (O.), whereby power was given to pass by-laws (s.-s. 12), "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other

unusual noise or noises, calculated to disturb the inhabitants." The by-law was, "the firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited." The only evidence was that given by a person who said he "saw" the defendant "playing the drum on the streets of L." on the day in question:—Held, that the conviction was bad in not alleging that the beating of the drum was without any just or lawful excuse. Semble, that it could not be inferred from the evidence that the drum made any unusual noise, as the witness did not say he heard any noise, but only that he saw defendant beating a drum. Semble, also, that the words used in the statute that the noise made must be "calculated to disturb the inhabitants," and in the conviction that the defendant "did create a disturbance by . . the beating a drum," were not equivalent terms. *Regina* v. *Martin*, 12 O. R. 800.

Obstructing Highway.]—Held, that the defendant appearing on the evidence returned to have bonâ fide asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor (of Belleville) under the 72nd or 185th clause of 12 Vict. c. 82; and that the summary conviction of defendant under that Act for obstructing a street, might be quashed by certiorari. *Regina* v. *Taylor*, 8 U. C. R. 257.

Conviction by a magistrate for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction:—Held, bad. *Regina* v. *Huber*, 15 U. C. R. 589.

Offences on the Great Lakes.]—Held, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this Province has authority to inquire into offences committed on said lakes, although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.

Public Health Act — *Refusal to Hear Evidence.*]—The defendant was convicted in July, 1874, under the Public Health Act, 36 Vict. c. 43 (O.), of creating a nuisance; the magistrates refusing to hear witnesses for the defence, on the ground that the statute made no provision for such witnesses being called:—Held, that an application in May, 1875, for a mandamus to re-open the complaint, was not too late, and the writ was granted; the refusal to hear one side being the same as if the case had not been heard at all. Semble, that a certiorari might issue in such a case, notwithstanding s. 35 of the Act. *Re Holland*, 37 U. C. R. 214.

A conviction for carrying on a noxious and offensive trade contrary to R. S. O. 1887 c. 205, the Public Health Act, imposed in default of sufficient distress to satisfy the fine and costs, imprisonment in the common gaol for fourteen days, unless the fine and costs, including the costs of commitment and conveying to gaol, were sooner paid:—Held, following Regina v. Wright, 14 O. R. 668, that the imposition of the costs of commitment and conveying to gaol was unauthorized, and that s. 1 of R. S. O. 1887 c. 74, not referred to in that case, did not affect the question. *Regina* v. *Rowlin*, 19 O. R. 199.

Sale of Flour.]—The seller of flour in barrels not marked or branded under 4 & 5 Vict. c. 89, s. 23, was not liable to the penalty imposed, only the manufacturer or packer; and magistrates had no summary jurisdiction where the accumulated penalties were more than £10. *Regina* v. *Beckman*, 2 U. C. R. 57.

Sale of Hay.]—A by-law required "all hay, &c., sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weigh-scales," &c. A conviction under this by-law was, that defendant in contravention of said by-law brought hay into said town, and had same weighed on scales other than the public scales:—Held, that the conviction was bad in not stating that the hay was sold in the market or elsewhere in said town, and must be quashed; and with costs to be paid by complainant, the weigh-master, who had instituted the prosecution for his own benefit, after warning instead of bringing an action in the division court. *Regina* v. *Hollister*, 8 O. R. 750.

Sheep Act.]—The owner of a sheep killed or injured by a dog can, under R. S. O. 1887 c. 214, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep. It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed:—Held, that the saving provision of s. 87 of R. S. C. c. 178, should be applied; and the order nisi to quash the conviction was discharged. *Regina* v. *Perrin*, 16 O. R. 446.

Statute Labour.]—Under 1 Vict. c. 21, s. 27, a magistrate cannot cause the arrest of a person in the first instance on a charge of neglect to perform statute labour; he must be first summoned before him. *Cronkhite* v. *Sommerville*, 3 U. C. R. 129.

Trespass.] — Where the defendants had been convicted, under 32 & 33 Vict. c. 22, s. 99 (D.), of trespass to land, and it appeared on the evidence before the magistrate, set out in the report of this case, that there was a dispute between the parties as to the ownership:—Held, that it was a case in which the title to land came in question; and that the defendants had been improperly convicted, even though the magistrate did not believe that the defendants had a title, it not being within his province to decide on the title, but merely on the good faith of the parties alleging it. *Regina* v. *Davidson*, 45 U. C. R. 91.

The defendants were convicted of a trespass under C. S. U. C. c. 105, as amended by 25 Vict. c. 22. They appealed to the sessions, which affirmed the conviction. The conviction was then brought into the high court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes:—Held, that that was a fact to be adjudicated upon by the convicting justice upon the evidence, and, therefore, that a certiorari

would not lie for want of jurisdiction. *Regina* v. *Malcolm*, 2 O. R. 511.

S. owned lot 38 in the 8th concession of N. In 1866 he sold the west half of the lot to complainant, reserving a strip of thirty feet along the north line thereof as a road for himself and successors in title to and from the east half of the lot. S. put up a gate at the west limit of the land where it met the highway, which gate had been there from 1866 until removed by the defendants. Defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road, as the property of the complainant:—Held, that defendants were acting in good faith in claiming the right to remove the gate, and under fair and reasonable supposition of right, and the conviction was therefore quashed. Held, also, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where, as here, all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way and in favour of the defendant. Regina v. Malcolm, 2 O. R. 511, distinguished. Quære, whether a gate across a right of way is an obstruction in law. Held also, that the proviso in 32 & 33 Vict. c. 22, s. 60 (D.), is to be read as applicable to s. 29 and to the whole Act. *Regina* v. *McDonald*, 12 O. R. 381.

The honest belief of a person charged with an offence under R. S. O. 1897 c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief. The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons," gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore could not successfully assert, when charged under R. S. O. 1897 c. 120, s. 1, and the Criminal Code, s. 511, that he had "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Dary*, 27 A. R. 508.

Section 283 of the Railway Act of Canada, 51 Vict. c. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice. A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

Vagrant—*Imprisonment.*]—By s.-s. 2 of s. 8 of R. S. C. c. 157, any loose, idle, or disorderly person or vagrant, shall upon summary conviction before two justices of the peace be deemed guilty of a misdemeanour, and liable to a fine not exceeding $50, or to imprisonment not exceeding six months, or to both. By s. 62 of R. S. C. c. 178, the justices are authorized to issue a distress warrant for enforcing payment of a fine; and, if issued, to detain the defendant in custody, under s. 62, until its return; and, if the return is "not sufficient distress," then to imprison for three months. Two justices of the peace for the city of Toronto, in the absence of the police magistrate for the city, convicted the defendant of an offence under the Act, and imposed a fine of $50, and, in default of payment forthwith, directed imprisonment for six months unless the fine were sooner paid:—Held, that under the said sub-section the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and one of the justices to assist him in the trial of offences. Held, also that the conviction was bad, for under R. S. C. c. 157, there was no power to award imprisonment as an alternative remedy for non-payment of the fine; while under R. S. C. c. 178, imprisonment could only be awarded after a distress has been directed and default therein; and furthermore the imprisonment in such case could only be for three months. *Regina* v. *Lynch*, 19 O. R. 664.

The prisoner had been convicted by one justice of the peace of being a vagrant under 32 & 33 Vict. c. 28 (D.), which requires the conviction to "be before any stipendiary or police magistrate, mayor, or warden, or any two justices of the peace:"—Held, that the conviction was bad, as it did not appear that the justice was a police magistrate. *Regina* v. *Clancey*, 7 P. R. 35.

Quære, whether the conviction would have been good if it had appeared in the warrant that he was acting for the police magistrate under 36 Vict. c. 48, s. 308, or whether two justices would not have been required. *Ib.*

Waggons—*License.*]—The defendant was convicted of a breach of a by-law passed under s. 436 of R. S. O. 1887 c. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," &c. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, which were so being used on the day complained of:—Held, that the defendant came within the terms of the by-law, and was therefore properly convicted. *Regina* v. *Boyd*, 18 O. R. 485.

——— *Solicitation.*]—A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in consort with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. An employee of defendants with the consent of a railway company and under instructions from his employer boarded an arriving passenger train at one of the outlying city stations on its way to the main station in the city, and went through the cars calling out "baggage transferred to all parts

of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time:—Held, that there was no breach of the by-law but merely the carrying out of the defendants' agreement with the company; and further, that the train did not come within any of the places mentioned in the by-law. Semble, if the by-law in terms had covered this case it would have been ultra vires. *Regina* v. *Verral*, 18 O. R. 117.

See CRIMINAL LAW — INDIAN — INTOXICATING LIQUORS.

III. PROCEEDINGS AGAINST JUSTICES.

1. *Acting Without or in Excess of Jurisdiction.*

Breach of the Peace—*Detention Pending Bail.*]—Where a person was brought before a magistrate on a charge of a threatened assault, and was ordered by the magistrate to find sureties to keep the peace which not being immediately able to do, he remained in the custody of a police constable for three hours, during which time the magistrate frequently visited him to ascertain if he had found bail, and at night, not having found bail, he was taken to gaol, where he remained until the following morning, when he was discharged on bail being procured:—Held, that the order for commitment was good without being in writing, and that the magistrate was therefore not liable to trespass. *Lynden* v. *King*, 6 O. S. 566.

Committal without Prior Distress.]—Defendant, a justice of the peace, convicted the plaintiff under C. S. U. C. c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to the defendant, and a boy living with his parents, and having no property: — Held, that the action would not lie, for defendant was authorized by C. S. C. c. 103, s. 59, to commit in the first instance, that statute applying to this conviction, and the warrant was sufficient, as it followed the form given by the Act, which contains no recital of the ground for not first issuing a distress. Quære, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress. *Moffat* v. *Barnard*, 24 U. C. R. 498.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount:—Held, following Dickson v. Crabb, 24 U. C. R. 494, that this would not make defendant a trespasser. *Ib.*

Contempt—*Power to Exclude from Court Room — Privileges of Counsel — Review by Court of Justice's Proceedings.*]—A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court. In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment:—Held, that the justice had no power summarily to punish for contempt in facie curiæ, at any rate without a formal adjudication and a warrant setting out the contempt. Armour v. Boswell, 6 O. S. 153, 352, 450, followed. 2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion. If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial as would justify his course. *Young* v. *Saylor*, 23 O. R. 513; 20 A. R. 645.

See sub-title II. 3, *ante*.

Conviction Illegal on its Face.] — A magistrate, justifying under a conviction and warrant, must prove a conviction not illegal on its face, and a warrant of distress supported by it, and not on the face of it, illegal:—Held, therefore, that a conviction "for wilfully damaging, spoiling, and carrying away six bushels of apples of the said R.'s," did not support a warrant which recited "that whereas judgment was given against E., of, &c., in a suit, R. v. E., for a misdemeanour, in taking apples by force and violence off and from the premises of the said R, &c.: these are therefore to authorize, &c.:" and also, that neither the conviction nor the warrant stated an offence for which such a conviction could take place. *Eastman* v. *Reid*, 6 U. C. R. 611.

Conviction not Quashed—*Warrant not authorized by Conviction—Canada Temperance Act.*]—See *Mechiam* v. *Horne*, 20 O. R. 267, under INTOXICATING LIQUORS, II.

Defective Information.]—Defendant, as a justice, issued a warrant against the plaintiff, upon a complaint for detaining the clothes of one K. The plaintiff, on being told by the constable that he had the warrant, went alone to defendant, heard the evidence, was allowed to go away without giving bail, and returned the next day, when he was discharged:—Held, that no imprisonment was proved; and that defendant, having jurisdiction over the subject matter of the complaint, was not liable in trespass, even if the information were insufficient in point of form. *Thorpe* v. *Oliver*, 20 U. C. R. 264.

——— *Detention Pending Adjournment.*]—The plaintiff was brought before defendant and another, a magistrate, on the 2nd January, 1875, under a summons issued by defendant, on an information that he did, on, &c., "obtain by false pretences from complainant the sum of five dollars contrary to law," omitting the words "with intent to defraud," which by the statute is made part of the offence—32 & 33 Vict. c. 21, s. 93 (D.). The prosecutor and another witness, T., were examined, and their statements shewed that the plaintiff sold some wood to the prosecutor on a certain lot, telling him that some other

persons had drawn it out, but that it was his, and if there was any trouble about it he would stand between the prosecutor and all danger; that the prosecutor paid him $5 on account, and was afterwards prevented from drawing away the wood by one W., to whom T. swore it belonged; and that the plaintiff had offered to return the $5, which the prosecutor refused because the plaintiff would allow nothing for the use of his team. W. was absent, and the prosecutor asked for an adjournment, which was granted until the 5th. Defendant offered to take bail for plaintiff's appearance then, but the plaintiff refused to give it, saying "Send me to gaol," and defendant ordered the constable to take him into custody. The constable thereupon put him in the lock-up, which was not a proper place for the purpose, being very cold and uncomfortable, where he remained until the 5th. This constable, who acted as keeper of the lock-up, said defendant knew that prisoners remanded were confined there. On the 5th, W. appeared and was examined as a witness. The case was adjourned until the 7th, the plaintiff giving bail for his appearance then; and on that day the magistrate, having in the meantime consulted the county attorney, dismissed the charge. The plaintiff having sued defendant for malicious arrest and for false imprisonment:—Held, that there was no cause of action on either ground, and a nonsuit was ordered: for 1. The defendant had jurisdiction, for the information might by intendment be read as charging the statutable offence; and if not, the plaintiff should have taken the objection before the magistrate, when the information might have been amended and re-sworn; and he was precluded from raising it in this action. 2. There was, upon the evidence, no want of reasonable and probable cause for what defendant had done; for though what the prosecutor complained of was a breach of contract and the subject of an action, it might also support a criminal charge, and the remand under the circumstances was authorized; and that there was no proof of malice. Held, also, that the defendant could not be held liable for the plaintiff's sufferings, caused by the condition of the lock-up, for he had remanded him only, giving no express directions to put him there. *Crawford* v. *Beattie*, 39 U. C. R. 13.

Disallowed Legislation.]—Where an Act passed by the Provincial Legislature, was subsequently disallowed, but while in force the plaintiff had been convicted under it by defendants, and a warrant was properly issued by defendants for his arrest and imprisonment, which, however, was not executed until after the disallowance of the Act was published in the Gazette:—Held, that as the conviction and warrant were legal, the defendants could not be considered as trespassers. *Clapp* v. *Lawrason*, 6 O. S. 319.

Excessive Penalty.]—The warrant of commitment directed the plaintiff to be kept at hard labour, which the Temperance Act, under which the conviction took place, does not authorize. The turnkey swore that the plaintiff "did no hard work in gaol:"—Held, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within s. 17 of C. S. U. C. c. 126, which requires it to be proved that defendant had undergone no greater punishment than that assigned by law to the offence of which he was convicted. *Graham* v. *McArthur*, 25 U. C. R. 478.

Falsity of Charge.]—The falsity of a charge cannot give a cause of action against a magistrate who acts upon the assumption and belief of its truth; and an allegation that he acted without any just cause upon a false charge, but not charging malice, means only that the charge being false he had no just cause. *Sprung* v. *Anderson*, 23 C. P. 152.

General Charge.]—When magistrates commit a person upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the facts sworn to in order to substantiate that charge may not in point of law support it. *Gardner* v. *Burwell*, Tay. 189.

Habeas Corpus Act—*Second Warrant.*]—The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions. The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L., under advice of defendant H., the county crown attorney. Upon return to habeas corpus she was discharged from custody under the latter warrant, upon the ground that it did not take into account the two days' imprisonment she had suffered prior to her appeal. Thereupon she was detained under a third warrant, on which nothing turned, and she was again arrested under a fourth warrant issued by defendant L. upon the original conviction. In an action brought by the plaintiff for the penalty of £500 awarded by s. 6 of the Habeas Corpus Act, 31 Car. II. c. 2:—Held, that s. 6 of the Habeas Corpus Act, 31 Car. II. c. 2, has no application to a case in which the prisoner is confined upon a warrant in execution. Held, also, that the warrant in execution, issued by the convicting justice upon the discharge of the prisoner from custody for defects in the former warrant, was the legal order and process of the court having jurisdiction in the cause. Semble, that the warrant issued after the dismissal of the appeal by the sessions, which followed the original conviction in directing imprisonment for six months, without making allowance for the two days' imprisonment already suffered, was not open to objection. *Arscott* v. *Lilley*, 11 O. R. 153; 14 A. R. 297.

Imprisonment after Part Payment.]—Where in trespass for false imprisonment, defendant justified under a warrant from the president and board of police at Cobourg, under the Cobourg Police Act, for the non-performance of statute labour by the plaintiff, the justification was held bad because the plaintiff was imprisoned after part of the fine had been paid; and the warrant to imprison being for an absolute time, without any reference to the earlier payment of fine and costs, was illegal and void. *Trigerson* v. *Board of Police of Cobourg*, 6 O. S. 405.

A commitment for part of the sum adjudged by the conviction to be paid is not authorized by the Summary Convictions Act, and is illegal. The plaintiff was convicted under the Canada Temperance Act and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned, &c. He paid the costs but not the fine, and a distress warrant was issued against him. Nothing being

made under the distress a warrant of commitment was issued under which he was imprisoned:—Held, reversing 17 O. R. 706, that the commitment was bad. Trigerson v. Board of Police of Cobourg, 6 O. S. 405, approved and followed. *Sinden* v. *Brown*, 17 A. R. 173.

Imprisonment without Option of Payment.]—Under the Summary Punishment Act magistrates cannot issue their warrant to imprison absolutely for so many days, but only to imprison for so many days unless the fine and costs be sooner paid. *Ferguson* v. *Adams*, 5 U. C. R. 194.

Indorsement of Warrant.]—The warrant was issued in the united counties of Northumberland and Durham, and was indorsed by a magistrate in the county of Peterborough, "This is to certify that I have indorsed this warrant, to be executed in the county of Peterborough," but there was no proof of the handwriting of the justice who issued the warrant or recital of such proof as required by 32 & 33 Vict. c. 30, s. 23 (D.), sch. K:—Held, that the warrant was defective, and the arrest illegal, for which the defendant was liable in trespass. *Reid* v. *Maybee*, 31 C. P. 384.

Jurisdiction over the Individual the Test.]—The plaintiff was arrested upon a warrant issued by defendant, a magistrate, and brought before him. Defendant examined the plaintiff, but took no evidence, said he could not bail, and committed the plaintiff to gaol, on a warrant reciting that he was charged before him on the oath of W. H. with stealing. The plaintiff did not ask to be heard or to give evidence:—Held, that defendant was liable in trespass; for assuming that the plaintiff was properly brought before him, yet the commitment without appearance of the prosecutor, or examination of any witness, or of the plaintiff according to the statute, or any legal confession, was an act either wholly without or in excess of jurisdiction, and therefore within the second clause of C. S. U. C. c. 126. That section is to be confined to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction; but the magistrate's protection depends not on jurisdiction over the subject matter, but over the individual arrested. *Connors* v. *Darling*, 23 U. C. R. 541.

Magistrate Acting outside His Territory.]—In an action for causing defendant to be charged before a magistrate with misdemeanour, on which the magistrate issued his warrant and plaintiff was arrested, it appeared that the offence was alleged to have been committed by the plaintiff in the county of Middlesex, but the charge was made and the warrant issued in the city of London, by a justice of the peace for the county only, not for the city:—Held, that as the magistrate, acting out of his jurisdiction, had no authority whatever, the action was misconceived; that it was as if defendant had himself directed the arrest; and that trespass, therefore, not case, was the proper remedy. *Hunt* v. *McArthur*, 24 U. C. R. 254.

Magistrate Convicting Complainant for not Testifying.]—The plaintiff had laid information before the defendant, a magistrate, against G., for an assault, but afterwards decided not to proceed further. Defendant issued a summons addressed to her, reciting the information, and requiring her presence on a day named, then and there to testify, &c., but she said she did not wish to go on; and on the same day she was arrested under a warrant issued by defendant, which recited that she had refused to appear before him, and commanded her arrest "to answer to the charge, and to be further dealt with according to law." She was brought before defendant but refused to go on with the charge, and a friend paid the costs for her, when she was discharged. These proceedings were taken, the defendant said, in order to get the constable's fees:—Held, that defendant was liable in trespass, for the plaintiff was not bound to proceed with the charge; and defendant had no right to issue the summons under s. 16 of 32 & 33 Vict. c. 31, or the warrant under s. 17. *Cross* v. *Wilcox*, 39 U. C. R. 187.

Magistrate Convicting after Warning.]—A magistrate having entertained a case under the Master and Servant Act, C. S. U. C. c. 75, as amended by 29 Vict. c. 33 (D.), and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute:—Held, that the jury were warranted in finding that he did not bonâ fide believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action. *Cummins* v. *Moore*, 37 U. C. R. 130.

Magistrate Directing Sale of Stolen Cattle.]—Cattle supposed to have been stolen are taken by A., a constable, to B., an innkeeper to take care of. After some time B., wishing to be paid for the keep, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle and satisfy his claim, which B. does. The owner of the cattle sues C. in trespass:—Held, that trover, and not trespass, should have been the action. Semble, that under the circumstances B., the innkeeper, would not be liable to the owner in trespass. *Marsh* v. *Boulton*, 4 U. C. R. 354.

Malicious Prosecution—*Knowledge Acquired as Justice of the Peace.*]—Action for malicious prosecution. Defendant was a justice of the peace, and as such acquired his knowledge of the circumstances on which he preferred the charge against defendant:—Held, clearly no ground for requiring that express malice should be proved against him. *Orr* v. *Spooner*, 19 U. C. R. 154.

Oral Order for Arrest.]—When a magistrate allows a prisoner to depart without examining into the charges against him, with a direction to appear next morning at the police office; and in the meantime, on the ground that he was assaulted by the prisoner when in custody before him, gives an oral order to a constable to apprehend him, and take him to the station house or gaol, such imprisonment is illegal, and the magistrate cannot justify the arrest. *Powell* v. *Williamson*, 1 U. C. R. 154.

Overcharge.]—A magistrate acting under 32 & 33 Vict. c. 20, s. 37 (D.), convicted four persons for creating a disturbance and imposed upon each a fine of $5, but instead of

severing the costs which he had charged, imposed the full amount thereof against each defendant, and received it from each:—Held, that under the circumstances, more fully set out in the report of the case, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by R. S. O. 1877 c. 77, s. 4. *Parsons qui tam* v. *Crabbe*, 31 C. P. 151.

Public Works Act — *Evidence.*]—From the village of M., where the arrest and conviction in question took place and the liquors in question were destroyed, to the Canadian Pacific Railway, then in course of construction, over fifty miles distant, the company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation had been issued under R. S. O. 1877 c. 32, proclaiming this a public road; but subsequently the Dominion Government, by proclamation, issued under R. S. C. c. 151, proclaimed the ten miles on each side of the supply road to be in the vicinity of a public work:—Held, that the village of M. was not within three miles of a public work under R. S. O. 1877 c. 32. Per Galt, C.J.—The place did not come within either Act, no proclamation having been issued at the time. On application to the divisional court for leave to put in evidence the written order for the destruction of the liquor, which was not produced at the trial. Per Galt, C. J.—The magistrate had no power to make the order, the authority to do so being based on R. S. O. 1877 c. 32, which was not made applicable, and therefore the order was not admissible. Per Rose and MacMahon, JJ.—The order for the destruction of the liquor was not dependent on the conviction of the plaintiff, and came within R. S. O. 1877 c. 73, and the destruction was an act under an order thereunder, which order must be quashed to avoid the protection afforded by s. 4; but per Rose, J., it should not now be received in evidence. Per MacMahon, J.—It should be received; and a new trial granted on this part of the case:—Held, by the court of appeal that as there was no explanation why this order was not produced at the trial, it was too late to produce it now, and a new trial could not be granted even assuming that the order contained the adjudication as to the forfeiture of the liquors. *Bond* v. *Conmee*, 15 O. R. 716; 16 A. R. 398.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors stated, without objection, that he had received a written order to destroy the liquors, signed by both justices, and that he had returned the order to them. This order had not been quashed:—Held, that the defendants were entitled to say that the existence of such an order was proved, but that the order for the destruction and the adjudication of forfeiture were two different things, and that in order to obtain protection, the order or adjudication of forfeiture should have been proved, and that it was not necessary to quash a mere order for destruction. The order spoken of in R. S. O. 1877 c. 73, s. 4, is an order in the nature of a conviction, i. e., an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction, or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication. *S. C.*, 16 A. R. 398. Affirmed by the supreme court: *Cassels' Dig.* 511.

Refusal to Admit to Bail.]—Before 16 Vict. c. 179, magistrates were not liable for refusing to admit to bail on a charge of misdemeanour, without proof of malice. *Conroy* v. *McKenny*, 11 U. C. R. 439.

Where the defendant, a justice of the peace, had laid an information before another magistrate, by whom the plaintiff was arrested on a warrant which turned out to have been illegal or void, and imprisoned, the defendant and the other magistrate having refused to admit him to bail:—Held, in trespass by the plaintiff against defendant, charging him with the arrest and imprisonment, that in the absence of any other evidence, the mere refusal by defendant to admit the plaintiff to bail was no evidence that the defendant authorized the illegal arrest and imprisonment of the plaintiff, and a nonsuit was ordered. *McKinley* v. *Munsie*, 15 C. P. 230.

Trespass — *Arrest before Indorsement of Warrant—Detention Afterwards—Damages.*]—See *Southwick* v. *Hare*, 24 O. R. 528.

——— *Malicious Prosecution.*] — The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made by J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted:—Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest. Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

Two Justices Required—*Conviction by One.*]—Where defendant, sitting alone as a magistrate, convicted the plaintiff for selling liquor without a license in a township where a temperance by-law was in operation:—Held, that he was liable to trespass, for the Temperance Act gives jurisdiction only to two justices. Held, however, that the conviction, though void, must be quashed under C. S. U. C. c. 126, s. 3, before such action would lie. *Graham* v. *McArthur*, 25 U. C. R. 498.

Unsworn Information—*Successive Trespasses—Pleading.*]—Defendant, a justice, on the 5th May, 1869, issued his warrant against the plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant the plaintiff was arrested and brought before him:—Held, that defendant was liable in trespass, as without information on oath he had no jurisdiction over the person of plaintiff. Defendant, on 11th May caused plaintiff to be brought before him a second time on said warrant, when there was no prosecutor, no examination of witnesses, and no confession, and committed

plaintiff for trial:—Held, following Connors v. Darling, 23 U. C. R. 541, that it was a new act of trespass, for which a second count was well laid in the declaration. At the sessions defendant appeared as prosecutor, when plaintiff was tried and acquitted. Held, that a count for malicious prosecution could be added for this. Held, also, that a warrant, though good on its face, will not protect a justice under C. S. U. C. c. 126, s. 2, unless issued upon a proper information. *Appleton* v. *Lepper*, 20 C. P. 138.

——— *Arrest without Warrant.*]—A justice of the peace, who issues his warrant for the arrest of a person charged with felony without the information having been sworn, is liable in trespass. Sections 22 and 23 of the Criminal Code are a codification of the common law, and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant. *McGuiness* v. *Dafoe*, 27 O. R. 117; 23 A. R. 704.

Warrant Omitting Amount.]—Defendant, a justice, issued his warrant under C. S. C. c. 103, s. 67, to commit the plaintiff for thirty days for non-payment of the costs of an appeal to the quarter sessions, unless such sum and all costs of the distress and commitment and conveying the plaintiff to gaol should be sooner paid, but he omitted to state in the warrant the amount of costs of the distress and commitment. The plaintiff having been committed on this warrant, sued defendant for false imprisonment:—Held, that though it was the duty of the justice to ascertain and state such amount, yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not shew either a want or an excess of jurisdiction, but rather an irregular exercise of it; and that defendant therefore was not liable in trespass. Held, also, that the determination as to these costs was clearly a judicial, and not merely a ministerial act. *Dickson* v. *Crabb*, 24 U. C. R. 494.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount:—Held, following Dickson v. Crabb, 24 U. C. R. 494, that this would not make defendant a trespasser. *Moffat* v. *Barnard*, 24 U. C. R. 498.

Warrant Omitting to State Conviction.]—Omitting to state the conviction of a defendant in his warrant of commitment will not subject a justice to an action for false imprisonment, provided the actual conviction is proved upon his defence. *Whelan* v. *Stevens*, Tay. 245.

Warrant under Absconding Debtors Act.]—Defendant M., a magistrate, gave a warrant to defendant K., a constable, on the 23rd September, under s. 200 of the Division Courts Acts, to attach the goods of G. in the possession of the plaintiff and others, who were about to abscond. Under this certain goods were seized, and an action was brought against the constable, the magistrate, and the creditor. The magistrate having issued such warrant without the affidavit required:—Held, that he had no jurisdiction whatever, and was therefore a trespasser. The first seizure took place on the 23rd September, but the goods were then left with the plaintiff, on his giving a receipt, and on the 25th they were taken away by defendant K. and the creditor. The notice of action was for the seizure on the 25th. It was left to the jury to say when the actual seizure took place, and they found that it was on the 25th. Held, that this was a new trespass, for which the magistrate was liable, and a verdict against him was upheld. *Gray* v. *McCarty*, 22 U. C. R. 568.

Warrant Wider than Information.]—One R. laid an information before G., a police magistrate, stating that one P. G., the keeper of a tavern duly licensed, kept a disorderly house, &c., and prayed for a warrant against the said P. G., and all others found and concerned in her house. A warrant was accordingly granted by G., directed to all constables, commanding them to apprehend P. G. "and all others found and concerned in her house to answer," &c. Under this the defendants, except R. and G., went to the house and arrested P. G. and several others, among them the plaintiff, a traveller and a guest at the house, there being then no disturbance in the house:—Held, that the arrest of the plaintiff was illegal, there being no charge against him; but that R., having prayed process only against P. G., as not liable; and a nonsuit was set aside as to all the other defendants. *Clcland* v. *Robinson*, 11 C. P. 416.

Witness—*Arrest.*]—Where a police magistrate acting within his jurisdiction under R. S. C. c. 174, s. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest. *Gordon* v. *Denison*, 24 O. R. 576; 22 A. R. 315.

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2. *For not Returning Convictions.*

Justices before whom a conviction is made, are not jointly liable, under 4 & 5 Vict. c. 12, for not returning the same. A declaration charging that the return was not made to the next ensuing quarter sessions, is bad; the statute requiring a return to the next ensuing general quarter sessions. *Metcalf* q. t. v. *Reeve*, 9 U. C. R. 263.

The defendant, with two other justices, convicted one D. S. of having refused to serve as returning officer at an election, and fined him $20. It was afterwards discovered that this was not the first election for the ward, and therefore that the conviction was illegal. The conviction was not returned to the next quarter sessions; and thereupon, though after the return made, this action was brought for the penalty awarded by 4 & 5 Vict. c. 12:—Held, on motion for a nonsuit, that the illegality of the conviction was no defence; but that if on that account the fine had not been levied, a return should have been made explaining the circumstances. Quære, whether the declaration would not have been bad on motion in arrest of judgment for charging the offence to be that the defendant did not make return to the next ensuing court of general quarter sessions, instead of an immediate return as the statute requires. Quære, also, whether the court, if promptly applied to, would have stayed the proceedings, the action

being brought after the defendant had returned the conviction. *O'Reilly* q. t. v. *Allan*, 11 U. C. R. 411.

Declaration, that on, &c., an information on oath was laid before M., J. P., against T. J., for having within six months sold spirituous liquors to persons therein named, contrary to the statute: that said M. summoned the said J., who appeared before said M., defendant, and other named justices; and that said justices, having jurisdiction in the premises, convicted him of said offence, whereupon it became their duty to return such conviction to the then next ensuing general quarter sessions of the peace in and for, &c.; yet defendant did not make such return:—Held, that proof of an offence against a by-law of the municipality, and a conviction under such by-law, were not sufficient proof of the declaration. *Spillane* v. *Wilton*, 4 C. P. 236.

Held, that a justice is liable, under the statute, to a separate penalty of £20 for each conviction of which a return is not properly made to the quarter sessions; and that an action for the penalty would lie, on proof of the conviction and fine imposed, although no record thereof had been made by the justice. *Donogh* q. t. v. *Longworth*, 8 C. P. 437.

Defendant committed and fined the plaintiff for carrying away some cordwood. After notice of appeal the prosecutor, finding that the conviction was improper, went to the defendant, who drew for him a notice of discontinuance, which was served on the person acting as attorney for the plaintiff, before the meeting of the next quarter sessions. The defendant sent a general return to that court, including this and another conviction, but ran his pen through the entry of this conviction, leaving the writing, however, quite legible, and wrote at the end of it, "This case withdrawn by the plaintiff:"—Held, a sufficient return, within 4 & 5 Vict. c. 12. *Ball* q. t. v. *Fraser*, 18 U. C. R. 100.

Where to a qui tam action for not returning a conviction, defendant pleads another action for the same cause, it is sufficient to prevent that suit from being a bar to shew that it was not brought to recover the penalty, but to prevent defendant from being obliged to pay it to others; and it is not essential to shew collusion between the defendant and the plaintiff in such action. Held, the court being left to draw inferences as a jury, that the evidence in this case supported a replication that the first action was commenced by fraud and covin. *Kelly* q. t. v. *Cowan*, 18 U. C. R. 104.

Quære, whether 4 Hen. VII. c. 20 applies except when judgment has been recovered in the suit pleaded. The fact of defendant having appealed, and the fine therefore not having been collected, forms no excuse for not returning the conviction; but, semble, that if under such circumstances the justice returns the conviction only, without the return prescribed by the Act, he will not be liable. *Ib.*

A conviction of two or more justices being appealed from did not relieve them from making an immediate return under 4 & 5 Vict. c. 12. *Murphy* q. t. v. *Harvey*, 9 C. P. 528.

An order for the payment of money under the Master and Servant Act, is not a conviction which it is necessary to return to the sessions. *Ranney* q. t. v. *Jones*, 21 U. C. R. 370.

A conviction was had before defendant and M., another justice, on the 25th September, 1861. M. proved a return, with the conviction itself, made by him for himself and on behalf of defendant, on the 6th December, 1861, and signed by him in defendant's name, as well as for himself, the defendant having authorized and requested him to sign it. The Judge left it to the jury whether the return was "immediate," as required by the statute, telling them that the word should be construed to mean within a reasonable time; and they found for defendant:—Held, 1. That the fact was properly left to the jury, and their decision upon a matter of fact in a penal action was final. 2. That although the statute requires the return to be made by the convicting justices under their hands, yet it was sufficient. Quære, whether the return came within the term "immediate" under the statute. *McLellan* q. t. v. *Brown*, 12 C. P. 542.

This action was similar to the last case, and was tried on the same day, being brought against M., one of the justices, who was the principal witness for the defence in the last case. The defendant offered as evidence the record of that action with the verdict indorsed thereon, the object being to shew the return of the conviction by himself, and so indirectly to make him a witness in his own behalf:—Held, that the penalty not being a joint one but several, each justice being individually liable, such evidence was immaterial. Held, also, that the transmission of the conviction itself is not sufficient, without a return thereof. *McLennan* q. t. v. *McIntyre*, 12 C. P. 546.

C. S. U. C. c. 124, requires justices, under a penalty, to return convictions made by them to the next ensuing general quarter sessions. 29 & 30 Vict. c. 50 provides that it shall not be necessary to make such return until the quarter sessions to which the party complaining can appeal. 32 Vict. c. 6 (the Law Reform Act of 1868) enacts that the sessions shall be held only twice a year, and that such returns shall be made to the clerk of the peace, quarterly, on or before the second Tuesday in March, June, September, and December, in each year, and shall embrace all convictions not embraced in some previous return. This Act came into force on the 1st February 1869, and makes no mention of 29 & 30 Vict. c. 50. The plaintiff in his declaration charged defendant with not returning convictions made in December, 1868, and January, 1869, to the clerk of the peace before the second Tuesday in March following:—Held, insufficient, for when the convictions were made it was defendant's duty to return them to the quarter sessions, which for all that appeared he might have done: and it should have been averred that he did not so return them before the 1st February, 1869, or after that day to the clerk of the peace. Quære, as to the effect of the last Act upon 29 & 30 Vict. c. 50. *Ollard* q. t. v. *Owens*, 29 U. C. R. 515.

The law as to the return of convictions is unchanged since 4 & 5 Vict. c. 12, and a conviction made by an alderman in a city must therefore still be returned to the next ensuing general quarter sessions for the county, and not to the recorder's court for such city. *Keenahan* q. t. v. *Egleson*, 22 U. C. R. 626.

Held, in an action for not returning a conviction, no objection in arrest of judgment that the declaration shewed no law under which defendant could convict for the offence mentioned or that it charged him with not making a return of the conviction and of the receipt and application of the moneys received under it, when if he had not received the money he would have only to return the conviction. *Ib.*

Held, no objection to the declaration that the plaintiff sued for the receiver-general, and not for Her Majesty, inasmuch as suing for a penalty for the receiver-general, for the public uses of the Province, is in fact suing for the Queen. Besides, C. S. U. C. c. 124 authorizes a party to sue qui tam for the receiver-general. Held, also, that the defendant having actually convicted and imposed a fine, could not object that the declaration did not shew that he had jurisdiction to convict. *Bagley* q. t. v. *Curtis*, 15 C. P. 366.

A plaintiff suing a justice under C. S. U. C. c. 124, s. 2, for the penalty of $80 for not returning a conviction, is entitled to full costs without a certificate. *Stinson* q. t. v. *Guess*, 1 C. L. J. 19.

But see *Brash* q. t. v. *Taggart*, 16 C. P. 415.

Held, that a penal action for not returning a conviction, is founded on tort, and for that reason cannot be brought in a division court. *Corsant* q. t. v. *Taylor*, 10 C. L. J. 320.

Returns of convictions and fines for criminal offences being governed by 32 & 33 Vict. c. 31, s. 76 (D.), and not by the Law Reform Act of 1868, are only required to be made semi-annually to the general sessions of the peace. *Clemens* q. t. v. *Bemer*, 7 C. L. J. 126.

Declaration, that defendant and W. C., then being two justices of the peace for, &c., on the 30th December, 1872, convicted the plaintiff and J. and D. of an offence of which they stood charged by E. C., and adjudged each of them for the said offence to pay $1, to be paid and applied according to law, and costs; and thereupon it became the duty of defendant and W. C. as such justices, to make a joint return in writing of the said conviction, to the clerk of the peace for, &c., on or before the 2nd Tuesday in March, 1873, according to the form of the statute in such case made and provided, yet they did not, nor did either of them, as by the said statute in that behalf required, make any return of the said conviction to the said clerk of the peace on, &c., "contrary to the said statute," whereby and "by force of the statute in that behalf" the defendant forfeited $80, and an action has accrued to the plaintiff, who sues for the same "under the said statute," to demand and have from the defendant the sum of $80: —Held, on demurrer, declaration bad; for it should have alleged defendant's neglect to have been contrary to the statutes, not merely the statute, there being two statutes upon the subject, each requiring a different return. Held, also, that the plaintiff might sue for himself only, and need not sue qui tam. Held, also, that an action would lie against each magistrate for the penalty, for though in form in debt, the action was in fact ex delicto. Quære, there being now some offences under the jurisdiction of the Dominion, and some under that of Ontario, and a different return required and a different penalty imposed, as regards each class, whether the declaration should not state the nature of the offence, and that it was within the magistrate's jurisdiction, though formerly this was not requisite. *Drake* q. t. v. *Preston*, 34 U. C. R. 257.

Held, that justices of the peace must now return all convictions made by them to the clerk of the peace, on or before the second Tuesday in March, June, September, and December, respectively, following the date of the conviction. The several statutes on the subject referred to. *Corsant* q. t. v. *Taylor*, 23 C. P. 607.

Held, that the neglect of a justice of the peace to return convictions made by him as prescribed, renders him liable under 32 & 33 Vict. c. 31 (D.), as well as under C. S. U. C. c. 124, to a separate penalty for each conviction not returned, and not merely to one penalty for not making a general return of such convictions. The various statutes on the subject reviewed. *Darragh* q. t. v. *Paterson*, 25 C. P. 529.

The effect of R. S. O. 1877 c. 76, s. 1, is to require justices of the peace, where more than one take part in a conviction, to make an immediate return thereof to the clerk of the peace. Where, therefore, to a declaration alleging a conviction by the defendants, two justices of the peace, and their failure to make an immediate return thereof as required, the defendants pleaded that before action they duly made the return of the said conviction required by law to be made by them:—Held, that the plea was bad, for that the return therein set up was not a compliance with the statute. *Atwood* q. t. v. *Rosser*, 30 C. P. 628.

In an action against two justices of the peace to recover a penalty for not making an immediate return of a conviction under R. S. O. 1877 c. 76:—Held, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and that in a qui tam action the jury's finding for defendant should not be disturbed. In this case the conviction was made on the 31st August, and the magistrates withheld the return until the 15th September, expecting to receive the fine every day, and intending to return it with the conviction. The jury having been directed to find whether this was not "reasonably immediate" returned a verdict for defendants, which was upheld. *Longeway qui tam* v. *Arison*, 8 O. R. 357.

A police magistrate, acting ex officio as justice of the peace, is not subject to the provisions of s. 1 of R. S. O. 1887 c. 76, and need not make a return as therein required to the clerk of the peace. Section 6 of R. S. O. 1887 c. 77, exempts him from this duty whether he is acting as police magistrate or ex officio as justice of the peace. *Hunt* v. *Shaver*, 22 A. R. 202.

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3. *Necessity for Quashing Conviction or Proceedings.*

A conviction, bad on the face of it, although not quashed:—Held, no defence to an action of trespass. *Briggs* v. *Spilsbury*, Tay. 440.

A conviction not set aside protects a magistrate against an action of trespass. *Gates* v. *Brennah*, 6 U. C. R. 260.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling spirituous liquors without license:—Held, that under C. S. U. C. c. 126, s. 3, trespass will not lie against a magistrate until the conviction complained of has been quashed; that the conviction never having been sealed, it was not necessary to have it quashed before action; that as only one wrong was complained of by plaintiff, he could not recover on the two separate counts in trespass and case, but must elect on which to enter his verdict. Semble, that he could not recover on the first count because the magistrate had jurisdiction, &c., and by the statute the action should be in case. *Haacke* v. *Adamson*, 14 C. P. 201.

Held, following the last case, that an order or conviction not under seal need not be quashed before action brought for anything done under it. *McDonald* v. *Stuckey*, 31 U. C. R. 577.

But a conviction made by one magistrate, in a matter in which jurisdiction was given to two only, must be quashed, though wholly void. *Graham* v. *McArthur*, 25 U. C. R. 478.

Trespass against a justice of the peace. The magistrate in a case brought before him by a complainant who alleged that the plaintiff had taken a sheep of his off the road and sheared it, and kept the wool, made an order which was subsequently embodied in a document purporting to be a conviction, which stated that the plaintiff "unlawfully took a certain ewe from R. W.'s flock on the 4th June last, at Pickering, and having heard the matter of the said complaint, I do adjudge that the said ewe and fleece is the property of the said W., and I order and adjudge the said Jones be discharged therefrom upon giving up the said ewe and fleece to the said W. and paying the costs of this suit." The costs were fixed at $20, and the paper contained the usual distress clause, but the warrant to commit in case of default, was struck out:—Held, on motion for nonsuit, that, although the pretended conviction was clearly unsustainable, it should nevertheless have been quashed before action brought. *Jones* v. *Holden*, 13 L. J. 19.

Under C. S. U. C. c. 55, s. 86, a warrant may issue to imprison a person for non-payment of statute labour tax, without first summoning him to answer or making a conviction. It is not necessary, under C. S. U. C. c. 126, to set aside such warrant before an action can be brought against the justice. The point decided being new, the court discharged without costs a rule nisi obtained to quash the conviction. *Regina* v. *Morris*, 21 U. C. R. 392.

The plaintiff produced a warrant issued for his arrest for not finding sureties for the peace, in pursuance of an order to that effect recited in the warrant:—Held, that such warrant was prima facie evidence of the order. Held, also, that under C. S. U. C. c. 126, s. 3, no action would lie against the magistrate for anything done under the order or under the warrant to procure the appearance of the accused, until the same was quashed. *Sprung* v. *Anderson*, 23 C. P. 152.

When an appeal was brought from a conviction imposing imprisonment with hard labour, which the magistrate had no power to award, and the sessions amended the record by striking out "hard labour:"—Held, that their assuming to amend the conviction was not a quashing of a conviction, and therefore trespass would not lie against the justice. *McLellan* v. *McKinnon*, 1 O. R. 219.

Held, that the defendant, who was a visiting superintendent and commissioner of Indian affairs for the Brant and Haldimand reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian reserve in the county of Brant. Held, also, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of his conviction on the above charge; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been case; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter* v. *Gilkison*, 7 O. R. 735.

Held, that s. 4 of R. S. O. 1877 c. 73, as amended by 41 Vict. c. 8 (O.), prevents an action being brought for anything done under a conviction whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force. *Arscott* v. *Lilley*, 11 O. R. 285; 14 A. R. 283.

The plaintiff having been arrested, convicted, and imprisoned for having liquors for sale near public works, writs of habeas corpus and certiorari were issued and on the return thereof he was discharged. Under a writ of certiorari directed to defendants, the convicting magistrates, the conviction, which was not under seal, was returned by defendants' solicitor to whom all the papers had been delivered by defendants, and who in his affidavit accompanying the return swore that the conviction returned was the one made by defendants:—Held, in an action against the magistrates, that not being under seal it was not necessary that the conviction should have been quashed before action brought. Haacke v. Adamson, 14 C. P. 201, and McDonald v. Stuckey, 31 U. C. R. 577, followed. Held, also, that the return being made to a writ of certiorari directed to defendants, and not referring to the certiorari directed to the gaoler under the habeas corpus, and in face of the solicitor's affidavit, a properly sealed conviction, which, however, was not produced at the trial, could not be received. *Bond* v. *Conmee*, 15 O. R. 716; 16 A. R. 398.

The plaintiff, who resided in the county of H., was convicted before defendant G., a police magistrate for the county of B., for giving intoxicating liquor to an Indian, and fined, with committal to the county gaol of B. on non-payment of the fine. The fine not having been paid, G. issued a warrant of commitment, directed to all the peace officers of B., to arrest plaintiff, and prepared a form of indorsement to be signed by a justice of the peace of H., authorizing the defendant N., a constable, to arrest plaintiff in H. G. handed the warrant to N. telling him plaintiff lived in

H. and he would have to get the warrant indorsed. N. took it to R., a justice of the peace for H., who signed the indorsement, and plaintiff was arrested by N. and taken first before G. in B. to see if he would accept a note in payment, and then to the county gaol of B. The plaintiff was afterwards discharged on habeas corpus, but the conviction was not quashed:—Held, that the action was maintainable against the defendants G. and R.; that there was no power enabling R. to indorse the warrant, and that he was guilty of trespass in so doing; and that G. was liable as a joint trespasser, for by his interference he was responsible, not only for the arrest, but for the subsequent detention in the gaol of B.; and that it was not necessary to quash the conviction before action brought, as the arrest in the county of H. was not anything done under a conviction or order within s. 4 of R. S. O. 1887 c. 73. At the trial, the jury found that the plaintiff had sustained no damage as against R. and they assessed the damages solely against G. Judgment was thereupon entered as against G., and the action dismissed as to R.:—Held, that the finding of the jury as to the damages, was in law permissible; but had R. been held liable, as plaintiff at most could only have had a new trial, or elect to retain his judgment as against G. alone, the court would not interfere with the finding. Quære, whether the constable N. was protected under 24 Geo. II. c. 24. *Jones* v. *Grace*, 17 O. R. 681.

See, also, *Webb* v. *Spears*, 15 P. R. 232, under sub-head 5, *post*.

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4. *Notice of Action.*

See NOTICE OF ACTION.

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5. *Practice in Actions.*

Admission of Constable.]—The admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he committed the trespass, is not sufficient evidence as against the justice to entitle the constable to claim an acquittal under s. 6 of 24 Geo. III. c. 44. *Kalar* v. *Cornwall*, 8 U. C. R. 681.

Case.]—After a conviction is quashed, case will not lie against a magistrate without proof of want of reasonable or probable cause and malice. *Burney* v. *Gorham*, 1 C. P. 358.

One A. went before the defendants, two justices, and swore that from circumstances mentioned he was afraid that the plaintiff would destroy his property; and he therefore prayed that he might be bound over to keep the peace. Defendants thereupon, on plaintiff's refusal to find sureties, committed him to gaol:—Held, that 16 Vict. c. 180, clearly applied, and therefore only a special action on the case could be maintained. *Fullerton* v. *Switzer*, 13 U. C. R. 575.

Costs—*False Imprisonment.*] — Where in an investigation of a charge under the Petty Trespass Act, 4 Wm. IV. c. 4, before magistrates, the plaintiff was guilty of a contempt, for which the magistrates convicted him, but without warrant, and the plaintiff brought an action for false imprisonment against them and recovered:—Held, that the action did not arise in consequence of anything done by the magistrates under the Petty Trespass Act, and that therefore it was not necessary for the Judge, under s. 21 of that Act, to certify his approval of the verdict to entitle the plaintiff to his costs. *Armour* v. *Boswell*, 6 O. S. 450.

Held, that the facts of this case were such as to entitle defendant to the protection afforded by 4 & 5 Vict. c. 26; and that the privilege extended by that statute to justices, as regards exemption from costs, is not cancelled by the later Act, 14 & 15 Vict. c. 54. *Keely* v. *Raile*, *Finlay* v. *Raile*, 9 U. C. R. 666.

Two actions were brought against a justice for trespass and false imprisonment. On the 30th August, 1851, a verdict for the plaintiff was found in one case of £2 10s., and in the other of 1s.:—Held, that 14 & 15 Vict. c. 54, applied; and that the plaintiff was entitled to his full costs in both suits. *Keely* v. *Raile*, *Finlay* v. *Rade*, 2 C. L. Ch. 155.

Where a plaintiff was restricted to the recovery of only three cents damages, he was held not to be entitled to any costs. Held, also, that ss. 18 and 19 of C. S. U. C. c. 126, taken together, must be limited "to any such action" not provided for in s. 17 of the same Act. Held, also, that no one can have costs taxed to him who did not incur costs. *Huacke* v. *Adamson*, 10 L. J. 270.

In an action against justices of the peace for false imprisonment, &c., the divisional court (10 O. R. 631) ordered judgment to be entered for the plaintiff for $25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation:—Held, that the action being within the proper competence of the division court (unless the defendant objected thereto), the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off. Held, also, that the effect of R. S. O. 1877 c. 73, s. 19, read in connection with s. 12 of that Act, and with R. S. O. 1877 c. 43, s. 18, s.-s. 5, R. S. O. 1877 c. 47, s. 53, s.-s. 7, and R. S. O. 1877 c. 50, s. 347, is not to provide that the plaintiff should have costs on the superior court scale when his recovery is within the jurisdiction of an inferior court. *Ireland* v. *Pitcher*, 11 P. R. 403.

The defendant served upon the convicting magistrates notice of motion by way of appeal from an order of a Judge in chambers refusing a certiorari to remove a conviction under the Liquor License Act, returnable before a divisional court in Michaelmas sittings, but did not set the motion down for hearing before the sittings, or take any step after serving the notice of motion to bring it to a hearing during the sittings. The court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion. *Regina* v. *Armstrong*, 13 P. R. 306.

The provisions of R. S. O. 1877 c. 73, s. 4, protect a magistrate from an action for anything done under a conviction so long as the

conviction remains in force; not where the conviction does not justify what has been done under it. The plaintiff being in custody on a warrant issued by the defendant L. on a conviction had before him under the Vagrant Act, applied to be discharged under the Habeas Corpus Act, the plaintiff electing to remain in custody at London, instead of attending before the Judge in Toronto, and on the 4th February an order was made on that application for her discharge, which order was duly received by the gaoler on the 6th. Meanwhile, a fresh warrant had been issued by L. on the 4th and delivered to the gaoler, who, by direction of the county crown attorney, detained her for two hours after receipt of the order for her discharge, when another warrant was prepared, and she was again arrested. In an action brought for such arrest and imprisonment for two hours, the jury found the plaintiff was entitled to a verdict, but that she had not sustained any damage, which the Judge before whom the case was tried treated as a verdict for the defendants, but refused the justice his costs, (11 O. R. 285). On appeal, the dismissal of the action was affirmed, but held, reversing 11 O. R. 285, that s. 19, R. S. O. 1877 c. 73, has not been repealed by any of the provisions of the Ontario Judicature Act; and therefore the dismissal of the action should be with costs to the magistrate, as between solicitor and client. *Arscott* v. *Lilley*, 14 A. R. 283.

Damages.]—Trespass against a magistrate for seizing and selling plaintiff's goods. At the trial evidence was given to shew that the plaintiff had been guilty of the offence, but such evidence was offered and received only in mitigation of damages. The provisions of 16 Vict. c. 180, s. 12, which in such a case limit the damages to twopence, and deprive the plaintiff of costs, were overlooked, and the plaintiff obtained a verdict for full damages:—Held, that there must be a new trial without costs. Held, also, that the section is not confined to actions in which the justices had jurisdiction. *Bross* v. *Huber*, 15 U. C. R. 625.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling liquors without license. The first count was in trespass, the second in case. At the trial the offence of which the plaintiff was convicted, was fully proved:—Held, that on either count the damages must be reduced to three cents, under C. S. U. C. c. 126, s. 17, as plaintiff was proved "guilty of the offence of which he was convicted," and this applies as well to trespass as to case. *Haacke* v. *Adamson*, 14 C. P. 201.

In an action against two justices for one act of imprisonment, charged in one count as a trespass, and in another as done maliciously, the jury found $800 against one defendant, and $400 against the other:—Semble, that the damages could not be thus severed. Held, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. Quære, as to the proper mode of entering the judgment. One of the defendants having used insulting expressions to the plaintiff during the examination:—Held, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages; and that the verdict was not excessive. *Clissold* v. *Machell*, 25 U. C. R. 80; *S. C.*, in appeal, 26 U. C. R. 422.

Held, that upon the evidence given in this case a jury might assess several damages on each of the three counts, the two first being for assault and imprisonment on different days, and the third for malicious prosecution. *Appleton* v. *Lepper*, 20 C. P. 138.

The warrant of a magistrate to arrest, issued in the first instance, is only primâ facie, not conclusive evidence of its contents; as, for instance, of an information on oath and in writing having been laid before him. *Friel* v. *Ferguson*, 15 C. P. 584.

The plaintiff produced a warrant issued for his arrest for not finding sureties to the peace in pursuance of an order to that effect, recited in the warrant:—Held, that such warrant was primâ facie evidence of the order. *Sprung* v. *Anderson*, 23 C. P. 152.

Limitation of Time.]—Owing to a mistake in the crown office, a rule to return the writ of certiorari, and afterwards a rule for an attachment, issued, although a return had in fact been filed. The conviction was quashed, but more than six months having thus expired since the conviction, the court was asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Joice*, 19 U. C. R. 197.

Pleading.]—In an action against a justice of the peace and constable for having issued a search warrant against the plaintiff, for having and concealing a colt belonging to another:—Held, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and that the statement of claim was defective in not shewing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same. *Howell* v. *Armour*, 7 O. R. 363.

Held, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen. *Ib.*

The information, produced at the trial of an action for malicious prosecution, was, that the defendant's premises were set on fire; that he had good reason to believe that they were set on fire by the plaintiff, and prayed that the plaintiff might be held to answer "the said charge." The declaration alleged that defendant charged the plaintiff with having unlawfully and maliciously set on fire the defendant's premises:—Held, after verdict for the plaintiff, that the declaration, though not sufficiently precise, might be held to import a crime; but that there was a variance between the declaration and evidence, the information not charging any crime. *Munroe* v. *Abbott*, 39 U. C. R. 78.

Proving Conviction.]—Semble, that a conviction returned under the statute to the quarter sessions and filed by the clerk of the peace, becomes a record of the court, and may be proved by a certified copy. *Graham* v. *McArthur*, 25 U. C. R. 478.

Proof of Quashing of Conviction.]—To prove the quashing of a conviction by the court of Queen's bench a rule of court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned:—Held, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in all these respects. *Bross* v. *Huber*, 15 U. C. R. 625.

To prove the quashing of a conviction on appeal to the quarter sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shewn. It is not necessary to make up a formal record, for the statute C. S. U. C. c. 114, enables the court of quarter sessions to dispose of the conviction by order. *Neill* v. *McMillan*, 25 U. C. R. 485.

Security for Costs.]—Upon applications under 53 Vict. c. 23, (O.), for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country. Section 2 of the Act provides that it is to be shewn that the plaintiff is not possessed of property sufficient to answer the costs of the action:—Held, that the court should be less exacting as to the character of the property, where the person is a bonâ fide resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction; the test is: is it such property as would be forthcoming and available in execution? And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered. *Bready* v. *Robertson*, 14 P. R. 7.

An order under 53 Vict. c. 23 (O.) for security for costs in an action against a justice of the peace should not limit a time within which security is to be given nor provide for dismissal of the action in default; the order should be simply "that the plaintiff do give security for the costs of the defendant to be incurred in the action." *Thompson* v. *Williamson*, 16 P. R. 368.

In an action against a justice of the peace for false arrest and imprisonment, it appeared that there was a valid warrant of commitment against the plaintiff in the county of O., which was, in the absence of a police magistrate, indorsed by the defendant for execution in the city of T., and under which the plaintiff was there arrested. The plaintiff alleged that the arrest was illegal because the defendant's mandate was not actually indorsed upon the warrant, and because the defendant's authority was not shewn on the face of his mandate. It appeared, however, that the defendant's mandate was pasted or annexed to the warrant, and that the defendant in fact had authority though it was not set out. It was admitted that the plaintiff was not possessed of property sufficient to answer costs:—Held, that the defendant was entitled to security for costs under 53 Vict. c. 23 (O.). *Southwick* v. *Hare*, 15 P. R. 222.

An order under rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms. Thompson v. Williamson, 16 P. R. 368, distinguished. The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff:—Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff. *Ashcroft* v. *Tyson*, 17 P. R. 42.

Where a person who holds a public office is made defendant in an action the pleadings must be loked at to determine whether he is sued in his capacity of a public officer, and so entitled to security for costs under s. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shews by affidavits that his sole connection with the matter alleged against him was in his public capacity. *Parkes* v. *Baker*, 17 P. R. 345.

See COSTS, VII.

Setting aside Proceedings.]—Where in an application to set aside proceedings (as in the case of an action against a justice of the peace, for acts done under a conviction which has not been quashed) the facts relied upon would be a pleadable bar to the action, laches will not be imputed to defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading had expired. *Donelly* v. *Tegart*, 5 P. R. 225.

In an action against a justice of the peace for false imprisonment and for acting in his office maliciously and without reasonable and probable cause, an application was made before statement of claim to set aside the proceedings under s. 12 of R. S. O. 1887 c. 73, on the ground that the conviction of the plaintiff made by the defendant, had not been quashed. It appeared, however, that the plaintiff was arrested and imprisoned under a warrant issued by the defendant, which in fact had no conviction to support it:—Held, not a case within s. 12. Per Robertson, J., that the plaintiff had a complete cause of action without setting aside the conviction. Per Meredith, J., that the application was premature. *Webb* v. *Spears*, 15 P. R. 232.

Tender of Amends.]—Where a magistrate is sued in trespass for an illegal proceeding, under 4 & 5 Vict. c. 26, he may give in evidence a tender of amends, under the plea of general issue. *Moore* v. *Holditch*, 7 U. C. R. 207.

Trespass.]—In trespass against a magistrate for false imprisonment and seizing and selling goods and chattels, where he suffers

judgment by default, it is unnecessary for the plaintiff to prove that he gave notice of action or commenced his suit within six months. *Mills* v. *Monger*, 4 O. S. 383.

It is a good count in trespass against a justice on motion in arrest of judgment, that he with force and arms issued his warrant, whereby he caused the plaintiff to be wrongfully imprisoned without any reasonable cause, until the plaintiff gave his note to A. to obtain his discharge. *Brennan* v. *Hatelie*, 6 O. S. 308.

A count alleging that defendants were justices of the peace, &c., and assuming to act as such justices, but without any jurisdiction or authority in that behalf, caused a distress warrant to be issued against the plaintiff's goods for $50, which they had adjudged the plaintiff to pay under and by virtue of a certain conviction made by them without any jurisdiction, and caused the plaintiff's goods to be sold thereunder; which conviction was afterwards duly quashed on application of the plaintiff to this court, whereby the plaintiff lost the use and value of his goods, and was put to costs in getting the conviction quashed:—Held, a count in trespass; and that the plaintiff was properly nonsuited, the cause of action being an act done by defendants in the execution of their duty, with respect to matters within their jurisdiction. Quære, if the plaintiff had been entitled to succeed in trespass whether he could have recovered the costs of quashing the conviction as damages. *Hallett* v. *Wilmot*, 40 U. C. R. 263.

Venue.]—The effect of rule 254 of the O. J. Act is to abolish all local venues, as well those made so by statute as at the common law, except in actions of ejectment. *Legacy* v. *Pitcher*, 10 O. R. 620; *Ireland* v. *Pitcher*, *ib.* 631.

In an action for malicious arrest and for destruction of liquor under R. S. O. 1877 c. 73:—Held, following Legacy v. Pitcher, 10 O. R. 620, that in such an action the venue need not be laid where the offence was committed. *Bond* v. *Conmee*, 15 O. R. 716; 16 A. R. 398. The venue in the action was laid at the city of Toronto, and subsequently, by consent, an order was made striking out the jury notice and directing the trial to take place at Port Arthur:—Held, that in view of this order, the objection that the venue was improperly laid could not be sustained. *S. C.*, 16 A. R. 398.

See CONSTITUTIONAL LAW, I.—CRIMINAL LAW—INTOXICATING LIQUORS — MALICIOUS PROCEDURE, II.—MANDAMUS, II. 3—NOTICE OF ACTION, I.—TRESPASS.

JUSTIFICATION.

See BAIL, VI.—DEFAMATION, X. 1 (b)—DISTRESS, III. 3 (e) — MASTER AND SERVANT, III. 1.

KIDNAPPING.

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LACHES.

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IX. MISCELLANEOUS, 3746.

I. GENERALLY.

Interference with Legal Right.]—Mere delay of a party to enforce his claim at law furnishes no ground for the court of chancery interfering with his legal right, although it might be a good answer were he seeking specific performance of a contract. *Allan* v. *Newman*, 13 Gr. 364.

Knowledge of Facts.]—Laches cannot be imputed until after knowledge of the facts. *Rice* v. *George*, 24 Gr. 513.

The sale to the mortgagee in this case was a fraud on the plaintiffs, and they had not disentitled themselves to relief by delay, as, for all that appeared, the real facts as to the purchase were unknown to them until just before the filing of the bill. *Faulds* v. *Harper*, 9 A. R. 537.

Situation of Parties not Changed.]—The situation of the parties not having been changed, the defendant was not bound by laches. *McDonald* v. *McDonald*, 17 A. R. 192.

II. AS AFFECTING COSTS.

Defence to Action—*Ground for Setting aside Transaction—Knowledge of Facts.*]—Where defendants set up a defence to a bill which, if tenable, would have formed sufficient ground for their having taken steps to set aside the transaction which it was now sought to enforce, but they had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the court ordered them to pay the costs of the suit. *Miller* v. *Ostrander*, 12 Gr. 349.

Refused on Ground of Delay in Proof of Claim of Dowress.]—See *Hyde* v. *Barton*, 8 P. R. 205.

III. As Affecting Interest on Money.

Partnership Accounts—*Absence of Objection.*]—Three months before the filing of a bill respecting partnership accounts, the accounts had been furnished, in which interest and commission had been charged, and none of the partners had before suit suggested their objections to these charges:—Held, that they were not precluded by the delay from objecting thereto in the suit. *Jardine* v. *Hope*, 19 Gr. 76.

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

Right to Interest against Executors.]—The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515 after the same had been valued by appraisers at $733.69. On an appeal from the master's report charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court, in 1874, ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Gr. 153.

Executors with a discretionary power to sell their testator's real estate:—Held, not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into court, pending the suit, they were charged with interest. *McMillan* v. *McMillan*, 21 Gr. 369.

IV. As Affecting the Crown.

Knowledge of Facts — *Absence of Forfeiture.*]—McA. filed an application with the proper government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the commissioner of Crown lands; but, owing to a defective survey, it was impossible then to convey the berths. Subsequently, the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he, having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B. afterwards became entitled, by subsequent assignments for value, to all McA.'s interest, the assignments being duly filed in the Crown lands department. McA. and B., in 1884, joined in a petition of right for the issue of the license, and the attorney-general demurred to the same:—Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would be probably, under ordinary circumstances, a defence to a claim for specific performance, but under the facts in this case a vendor would not be allowed to set up such a defence. Held, also, that, as the assignments were duly filed, and the Crown had the power of forfeiting the claim for non-payment, and did not do so, even were the rule between subjects to apply, it would not be a bar in this case. Semble, it may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited. *McArthur* v. *The Queen*, 10 O. R. 191.

Ministers of Crown—*Acts of.*] — The law is that the Crown is not bound by estoppels and that no laches can be imputed to it, and that there is no reason why it should suffer by the negligence of its officers, yet it appears to be well settled that forfeitures such as accrued in this case may be waived by the acts of ministers and officers of the Crown. Attorney-General for Victoria v. Ettershank, L. R. 6 P. C. 354, and Davenport v. The Queen, 3 App. Cas. 115, referred to. *Peterson* v. *The Queen*, 2 Ex. C. R. 67.

Negligence of Officer.]—Laches cannot be imputed to the Crown, and, except where a liability has been created by statute, it is not answerable for the negligence of its officers employed in the public service. *Burroughs* v. *The Queen*, 2 Ex. C. R. 203.

——— *Quebec Law.*]—The rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. *Black* v. *The Queen*, 29 S. C. R. 693.

V. In Commencing Actions and Suits.

1. *Accounting for Delay.*

Ignorance of Rights—*Absence of Collusion.*]—The plaintiff, an ignorant man, and a foreigner, deposited a sum of money with the defendants on 24th September, 1884, and received from them a non-negotiable deposit receipt for the amount, in which it was stated that the defendants would "account to" the plaintiff therefor, &c. At the same time the plaintiff's signature was left with the defendants for the purpose of identification. The plaintiff left the receipt with one S. S. for safe keeping, and went away. He returned in April, 1885, when S. S. informed him that he had drawn the money, and promised to return it. The defendants had paid the money without proper identification, and without comparison of the signature of S. S. with that of the plaintiff. Ignorant of the method by which the money had been obtained and of his rights against the defendants, the plaintiff did nothing further, and S. S. left the country in August following, heavily indebted. Subsequently, in December of the same year, the plaintiff was informed of his rights, and consulted a solicitor, who promised to attend to the matter, but failed to do so. In April,

1886, the plaintiff consulted another solicitor, when a demand was made on the defendants, and on their refusal this action was brought. This demand was the first intimation to the defendants of the fraud practised on them:—Held, that, as the plaintiff's delay was not suggestive of collusion or of any unfair dealing on his part, his failure to make a demand or sue the defendants, when he first heard his money had been obtained by S. S., did not operate against him so long as his claim was not barred by the Statute of Limitations. Held, also, that no legal duty was cast on the plaintiff to notify the defendants, and thus an essential element of estoppel by conduct was absent. Merchants Bank v. Lucas, 13 O. R. 520, distinguished. *Saderquist* v. *Ontario Bank*, 14 O. R. 586, 15 A. R. 609.

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

Mistake—*Will—Heir-at-Law.*]—Upon the death of the testator's widow, the three surviving children of the deceased nephew (one daughter had died a short time before, intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made, in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside, and the rents and profits of sales received by the brother and sister repaid to him:—Held, affirming the judgment in 16 O. R. 341, that, as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will, the plaintiff was not barred by laches or acquiescence from recovering any portion of the land unsold at the time his claim was made, and any mortgages to secure purchase moneys of land previously sold and held by the defendants at the time his claim was made, and any moneys received by them after that time, but that there could be no recovery back of the moneys actually received by them before notice of the claim. Cooper v. Phibbs, L. R. 2 H. L. 148, Beauchamp v. Winn, L. R. 6 H. L. 223, and Rogers v. Ingham, 3 Ch. D. 351, followed. *Baldwin* v. *Kingstone*, 18 A. R. 63, and Appendix.

Negotiations.]—Delay in filing a bill to enforce a disputed agreement for a partnership, was considered sufficiently accounted for by evidence of an unanswered proposal for an arbitration, and of correspondence between the plaintiff and his solicitors before suit. *Haggart* v. *Allan*, 4 Gr. 36.

Poverty.]—A creditor brought an action against his debtor to recover his demand, which was stayed by an arrangement made in October, 1840; the debtor assigned to the creditor the house and premises occupied by the debtor, in satisfaction of the debt, and in consideration of a further sum paid to him, and for two years he continued to receive the rent of the premises, when the creditor obtained possession by ejectment. In December, 1855, the debtor filed his bill setting up that the transaction was a mortgage, alleging that his poverty had, in the meantime, prevented him from enforcing his claim. The court, though inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage. *Watson* v. *Munro*, 5 Gr. 662.

The court held the plaintiff entitled to redeem certain land, on payment of the amount of the defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transaction—the excuse assigned for the delay being his poverty; it appearing that the parties could be restored to their original positions without loss to the defendants. *Brady* v. *Keenan*, 14 Gr. 214.

Special Circumstances—*Ratification of Deed—Cutting down to Life Estate—Claim to Fee not at first Made.*]—See *Calvert* v. *Linley*, 21 Gr. 470.

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2. *Other Cases.*

Forgery—*Attack on Old Deed.*]—A defendant in ejectment filed a bill to restrain the action, alleging that the deed under which the plaintiff claimed was a forgery. The deed was dated about fifty years before the bill was filed, and the four witnesses to it were dead before the validity was impeached in any way. The court dismissed the bill with costs. *Fick* v. *McMichael*, 5 Gr. 646.

——— *Bill of Exchange — No Remedy Lost.*]—The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on R. & Co., for $4,889.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y. in the company's name, on plaintiff, payable on demand to their own order, for $4,800, dated 23rd July, 1883. This draft was taken by Y. to defendants' banking house at H., and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to the plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for $4,800. The plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for $4,800, which was refused by defendants. The plaintiff paid the first mentioned draft at maturity:—Held, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan* v. *Bank of Montreal*, 12 O. R. 39, 14 A. R. 533.

Judgment—*Action on—Discharge in Insolvency.*]—See *Parke* v. *Day*, 24 C. P. 619.

Misrepresentation—*Action against Promoters of Company.*]—If the individual shareholders in a joint stock company could bring an action against the promoters for damages caused by alleged misrepresentation by the latter as to the prospects of the company when formed, a delay of four years, during which they suffered the business of the company to go on with a full knowledge of the alleged misrepresentations, would disentitle them to relief. *Beatty* v. *Accton*, 13 S. C. R. 1, 12 A. R. 50.

Specific Performance — *Agreement to Convey Land—Possession.*]—In a suit for a specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later, P. was in possession of the land during the interval:—Held, that, as the evidence clearly shewed that P. was only in possession as agent of the trustees under the will and caretaker of the lands, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit. *Porter* v. *Hale*, 23 S. C. R. 265.

VI. In Commencing Summary Proceedings.

Motion for Mandamus—*Municipal Corporation—Sinking Fund.*]—The fact that an applicant for a mandamus against a municipal corporation to levy a sinking fund has been a ratepayer for years does not bar him because he did not apply earlier, as the levying a rate for a sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke* v. *Town of Palmerston*, 6 O. R. 616.

Motion for Prohibition to Division Court.]—See *Re Soules* v. *Little*, 12 P. R. 533.

Motion to Quash Liquor License By-law.]—See *Bann* v. *Brockville*, 19 O. R. 409.

Motion to Quash Municipal By-law.] —Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Fenton and County of Simcoe*, 10 O. R. 27; *In re McAlpine and Township of Euphemia*, 45 U. C. R. 199.

Motion to Remit Award.] — Delay in moving to have an award remitted back for correction, from the 21st August, when the award was made, until the 4th December, was held sufficiently accounted for by the loss of the nisi prius record and submission. *Stewart* v. *Beattie*, 37 U. C. R. 538.

Motion to Set aside Award.]—See *Pardee* v. *Lloyd*, 5 A. R. 1.

VII. In Prosecuting Pending Actions.

Accounting for Delay—*Poverty.*]—An action by solicitors to recover the amount of a bill of costs was begun and the defendant appeared in February, 1883. No further step was taken till February, 1892, when the plaintiffs delivered a statement of claim. The plaintiffs' reason for the delay was that the defendant had no means to pay during the period of delay. Upon motion by the defendant to dismiss and cross-motion by the plaintiffs to validate the delivery of the statement of claim:—Held, that the action should be allowed to proceed. Terms imposed upon the plaintiffs. *Finkle* v. *Lutz*, 14 P. R. 446.

Judgment—*Application for Leave to Issue—Discretion.*]—In 1880 a bill was filed by the plaintiff for an account in respect of mortgage, which had been assigned to the defendant as security for advances. A decree was pronounced in June, 1880, directing that the plaintiff might have an account if he desired it, and that the defendant should have his costs to the hearing. The decree was not then drawn up and issued, and in December, 1892, the plaintiff applied for leave to issue it. The delay was not explained, except by saying that the plaintiff had been out of the jurisdiction, and no details were given of when he went away or when he returned. It appeared that the plaintiff had no beneficial interest upon the footing of the accounts, as shewn by the assignment and the answer. The defendant swore to the loss of one material witness through death:—Held, that the decree meant that the plaintiff should, within some reasonable time, exercise the option given him of having a reference to take the accounts, at the peril of losing it if changed circumstances worked any prejudice to the defendant; and that, under all the circumstances, the application should, in the exercise of a sound discretion, be refused. Finkle v. Lutz, 14 P. R. 446, and Kelly v. Wade, ib. 66, distinguished. *Eaton* v. *Dorland*, 15 P. R. 138.

Mortgage — *Decree for Redemption — Quieting Title.*]—That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action, whether before or after judgment. After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his curator, the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought, after notifying the curator of the facts and proceedings, to quiet his title under the Quieting Titles Act, R. S. O. 1887 c. 113:—Held, that after the great unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title. *Re Leslie*, 23 O. R. 143.

Revivor—*Change in Interests.*]—A statute passed in 1889 gave persons making certain claims a right to bring an action within a year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until, one of the plaintiffs having died

in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interests of the parties:—Held, that the order should not be interfered with. The old practice had been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived. *Madagh* v. *County of York*, 17 P. R. 184.

See Kelly v. *Wade*, 14 P. R. 13, 66, *ante*, JUDGMENT.

VIII. IN TAKING PARTICULAR PROCEEDINGS IN PENDING ACTIONS.

Accounting for Delay—*Poverty.*]—Poverty is no excuse for delay in making an application to the court, as in such a case the party can apply in formâ pauperis. *Harris* v. *Myers*, 1 Ch. Ch. 229.

Issue of Execution—*Discharge in Insolvency.*]—Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a scheduled creditor, issued a fi. fa. against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him and his assets taken; and also because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was being granted, raise the objection of no assets:—Held, that the fi. fa. goods must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment. Semble, however, that the plaintiff, by his conduct and the lapse of time, was precluded. *Parke* v. *Day*, 24 C. P. 619.

Motion for Injunction.]—See *Sanson* v. *Northern R. W. Co.*, 29 Gr. 459; *Davies* v. *City of Toronto*, 15 O. R. 33.

Motion for Interim Alimony — *Accounting for Delay.*]—See *Thompson* v. *Thompson*, 9 P. R. 526.

Motion for Interpleader Order.]—See *Darling* v. *Collatton*, 10 P. R. 110.

Motion to Amend Order.]—One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the trial. A divisional court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendant not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued:—Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the court, being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally. Held, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment. *Cousins* v. *Cronk*, 17 P. R. 348.

Motion to Open Foreclosure.]—See *Miles* v. *Cameron*, 9 P. R. 502.

Motion to Set aside Judgment.]—See *Lightbound* v. *Hill*, 9 P. R. 295; *McLean* v. *Smith*, 10 P. R. 145.

Motion to Set aside Proceedings—*Infant.*]—Plaintiff in ejectment, though an infant, sued in person. Defendant became aware of the infancy at the first trial, but took no objection until after the second trial, when a verdict was given against him for non-appearance. He then moved to set aside the proceeding on this ground, and for want of proper notice of trial:—Held, that defendant was precluded by his delay, and the court refused to interfere. *Ham* v. *Eagan*, 3 P. R. 16.

An infant was a part owner of a patent right and engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solicitors to take proceedings to stop the infringement of the patent, and the solicitors, not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time, with the result that the infringement ceased, but it was subsequently dismissed with costs against the plaintiffs for want of prosecution. More than a year after he came of age he moved to set aside all proceedings in the action:—Held, that, under the circumstances mentioned, he was not entitled to relief on the ground of infancy. *Millson* v. *Smale*, 25 O. R. 144.

——— *No Detriment.*]—Delay from the 1st August to the 25th September in moving to set aside proceedings taken in the name of the applicant as one of the plaintiffs, without his authority:—Held, not a bar to relief, where no detriment had resulted to the defendants thereby. *Morris* v. *Confederation Life Assn.*, 17 P. R. 24.

Objecting to Order Amending Pleadings.]—See *Court* v. *Walsh*, 9 A. R. 294.

IX. MISCELLANEOUS.

Cheque—*Presentation for Payment.*]—See *Blackley* v. *McCabe*, 16 A. R. 295.

Collateral Securities — *Enforcing.*] — Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof, and if through his default or laches the money secured thereby is lost, it will be charged against the creditor and deducted from his demand. *Synod* v. *DeBlaquiere*, 27 Gr. 536.

Where promissory notes of third persons were transferred by the defendant without indorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes, and that he had not notified the defendant of

their non-payment:—Held, that, if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be exonerated from payment, but not otherwise; and that the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact, it was a conclusion of law that detriment had followed to the defendant. *Ryan* v. *McConnell*, 18 O. R. 409.

Contract—*Naming Engineer to Approve of Work—Delay—Effect of.*]—Two incorporated trading companies agreed by writing under their corporate seals, the one to construct certain works for the other, which on completion were to be inspected by engineers on behalf of each of the contracting parties, and upon the engineers approving of the works and reporting them as completed, they were to be accepted as soon as completed by the company for whom they were done, who were to be for ever debarred from denying or contesting the due and proper execution, completion, and acceptance of such works. The parties to perform the work having, as they alleged, completed it, notified the others thereof, calling upon them to appoint an engineer, as stipulated for, which request was not complied with, and subsequently a portion of the works contracted for (a bridge) was destroyed. On a bill filed for the purpose of compelling an acceptance of the works, the court thought that the delay of one of the contracting parties, until after such destruction, to name an engineer, as had been stipulated for by the agreement, did not preclude the other from obtaining an inspection of the works; but that such inspection and approval must under the circumstances be had by a reference. *Great Western R. W. Co.* v. *Desjardins Canal Co.*, 9 Gr. 503, 2 E. & A. 330.

Discovery of Fresh Evidence — *Diligence—Want of.*]—An application to open up proceedings by way of review, on the ground of newly discovered evidence, was refused with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of the prior purchase and payment to which such evidence related. *Dunsbie* v. *Cobourg and Peterborough R. W. Co.*, 29 Gr. 121. See, also, *Murray* v. *Canada Central R. W. Co.*, 7 A. R. 646.

Distress for Taxes—*Delay—Action.*]—Semble, where there is sufficient distress on the property, and the municipality by its own laches puts it out of its power to distrain, s. 100 of the Assessment Act does not avail to give the right to collect by action. *Carson* v. *Veitch*, 9 O. R. 706.

Executors—*Sale of Land—Accounting for Delay.*]—Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim. In fact, according to the terms of will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:—Held, that the executors were not responsible for any loss sustained by reason of the delay in selling. *McMillan* v. *McMillan*, 21 Gr. 369.

Partnership—*Overcharge — Interest.*]—A judgment creditor of J. applied for an order for sale of the latter's interests in certain lands the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the master's office K. alleged that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum as due him from J. for such overcharge. The master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim:—Held, restoring the master's report, which had been reversed, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption, of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners, considering their relationship and the apparent concert between them. *Toothe* v. *Kittredge*, 24 S. C. R. 287.

Patent for Invention—*Re-issue—Delay—Effect of.*]—Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue here. *Kidder* v. *Smart Manufacturing Co.*, 8 O. R. 362.

Railway Company — *Municipal Debentures.*]—A railway company held not to be in a position to enforce the delivery of debentures by a municipality after the lapse of nine years from the passing of the by-law, where a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired. *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 12 A. R. 234. See, also, *Re Grand Junction R. W. Co. and County of Peterborough*, 45 U. C. R. 302, 6 A. R. 339.

Sale of Land — *Compensation — Loss of Benefits.*]—Held, that, by acquiescing in the sale of land and by her laches, the widow had waived her right to compensation for the loss of benefits bequeathed to her by her husband. *Ripley* v. *Ripley*, 28 Gr. 610.

——— *False Representations—Defence.*]—Held, that the defendant was not debarred by laches from setting up the defence of false representation in the sale to him of certain land. *Lee* v. *McMahon* 2 O. R. 654, 11 A. R. 555.

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TRESPASS TO—*See* TRESPASS.
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Damage by Weeds.]—Action for damages to a farm caused by sowing barley purchased from the defendant, which was mixed with weeds. *McMullen* v. *Free*, 13 O. R. 57.

Laying out in Lots — *Replacing.*] — Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Allan*, 10 O. R. 110.

LAND TITLES ACT.

Caution—*Cessation of — Security.*]—Under s. 61 of the Land Titles Act, R. S. O. 1887 c. 116, a caution was registered against dealings by the registered owner, the cautioner alleging that the registered owner held as trustee for another against whose lands the cautioner had an execution. An action had been brought for a declaration to that effect. The master of titles made an order that entry of the cessation of the caution should be made, upon the registered owner giving security for the amount claimed by the cautioner; that payment should be made according to the result of the pending action; and that until such entry should be made the caution was to continue to have effect:—Held, that the scheme of the Act contemplates such a course of proceeding, although it is not specifically provided for by ss. 62 and 63; and that, under the circumstances, the order was the simplest and most effective that could be made in the interests of all parties. *Re Macdonald and Sullivan*, 14 P. R. 60.

Cautioner — *"Interest" — Appointee of Purchaser—"Owner" — Implied Revocation of Appointment.*]—The provision of the Land Titles Act, R. S. O. 1887 c. 116, permitting registration of cautions against registered dealings with lands, s. 61, applies to "any person interested in any way" in the lands:—Held, that as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee in writing of the purchaser of an interest in lands has a locus standi as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of s. 131. Held, also, that an action brought by the original purchaser, after the registration of her appointee's caution, and pending proceedings to set it aside, for specific performance of a contract to convey to her the interest in respect of which she had made the appointment, did not, under the circumstances in evidence, put an end to such appointment. *Re Claystone and Hammond*, 28 O. R. 409.

Costs—*Powers of Local Master of Titles—Discretion — Appeal.*] — A local master of titles has power by virtue of ss. 137 and 74 of the Land Titles Act, R. S. O. 1887 c. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by rule 16 (2) of the rules in the schedule to the Act has power to give a special direction that costs as of a court motion may be taxed. And where a master in his discretion so ordered, a Judge in chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence. *Re Ross and Stobie*, 14 P. R. 241.

Evidence—*Woman past Child-bearing—Registration.*]—Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other surviving children having conveyed their shares to her, applied under the Land Titles Act, R. S. O. 1887 c. 116, to be registered as owners with absolute title. The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned. The evidence of a physician who had made a physical examination of the petitioner shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would be a moral impossibility for pregnancy to take place:—Held, having regard to the provisions of s. 23, s.-s. 5, of the Act, that the master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon

it by granting the registration. *Re G——*, 21 O. R. 109.

Implied Covenant—*Leave to Defend.*]—In an action by the assignee of a charge registered against land under the Land Titles Act, R. S. O. 1887 c. 116, to recover money due under the covenant for payment implied by virtue of s. 29, there being no entry on the register negativing the implication, the defendant, in answer to an application for summary judgment under rule 739, swore that it was clearly understood between him and the original chargees that the land only was to be liable, and this was corroborated by one of the original chargees; the plaintiff, however, swearing that she was a bonâ fide purchaser for value without notice of this understanding:—Held, that there was a bonâ fide contest of a question to some extent novel, which ought to be fairly litigated in the usual way, without hampering conditions being imposed on the defence. Jones v. Stone, [1894] A. C. 124, followed. *Wilkes* v. *Kennedy*, 16 P. R. 294.

Jurisdiction under — *District Court Judge.*]—See *In re Michell and Pioneer Steam Navigation Co.*, 31 O. R. 542.

Order of Master of Titles — *Order of Court—Receiver — Equitable Execution.*] — Upon the proper construction of s. 92 of the Land Titles Act, R. S. O. 1897 c. 138, a person entitled to payment of costs under an order of a master of titles made by virtue of s. 91, can have "execution issued" by the proper officer, upon the order and certificate of the master, without any order of the high court directing or permitting it; but the words of the section do not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution." And, even if an application to the court were necessary in order to have "execution issued," these words would not include the appointment of a receiver. In re Shepherd, 43 Ch. D. 131, Croshaw v. Lyndhurst Ship Co., [1897] 2 Ch. 154, and Norburn v. Norburn, [1894] 1 Q. B. 448, followed. *Re Craig and Leslie*, 18 P. R. 270.

See In re McIlmurray and Jenkins, 22 A. R. 398, *post*, PLANS AND SURVEYS.

LANDLORD AND TENANT.

[*See* R. S. O. 1897 c. 170.]

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Incumbrances—*Pleading — Fixtures.*]—In an action on a covenant in a lease, that the defendant had not incumbered, assigning as a breach a claim by A. and B. to certain fixtures, defendant pleaded that before the lease of the plaintiff, the defendant had leased the same premises for five years to C., who had a right, under the lease, to the fixtures:—Held, plea bad. *Cameron* v. *Tarratt*, 1 U. C. R. 312.

Quiet Enjoyment — *Pleading Non Demisit—Title to Land.*]—In an action in the superior court for breach of a covenant for quiet enjoyment contained in a lease, the defendant pleaded non demisit. The plaintiff obtained a verdict for one shilling damages, but a certificate for costs was refused:—Held, that the plea of non demisit raised a question of title, and that the plaintiff was entitled to full costs. *Purser* v. *Bradburne*, 7 P. R. 18.

See, also, sub-title COVENANTS IN LEASES, IX.

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2. *Replevin.*

Avowry for Rent — *Non Tenuit — Variance as to Term.*]—Where in replevin the landlord avowed for two and a-quarter years' rent, but proved a tenancy for only one year, although the tenant continued in possession for three years, having, however, paid no rent, nor made any acknowledgment during the last two years:—Held, a fatal variance on the plea of non tenuit. *Thompson* v. *Forsyth*, E. E. T. 2 Vict.

Conversion of Tenant's Goods — *Evidence.*]—The plaintiff had quitted possession of defendant's farm, of which he had been the tenant, though his term had not expired, and there had been no legal surrender of it, but he had given notice of his intention to go, and defendant, it appeared, was willing to get rid of him. Having removed a portion of his goods, he subsequently returned for some more of them which were locked up in a barn on the place, of which he had the key, and, on finding the outer gate of the farm locked, went

to the defendant, who was close by, and requested him to open it and allow him to enter and get his goods, but defendant refused either to open the gate or allow him on the farm, and, although he did not in express terms refuse to give up possession of the goods, the jury found that such was his intention, and that the plaintiff so understood him:—Held, that this was not sufficient to constitute a conversion of the goods by the defendant so as to support an action of trover, and therefore that replevin would not lie. *Smalley* v. *Gallagher*, 26 C. P. 531.

See, also, DISTRESS.

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3. *Trespass.*

Equitable Defence—*Entry under Collateral Agreement—Justification.*]—Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was orally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent oral agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by s. 4 of the Statute of Frauds might be prevented from suing on it; and, as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

Master and Servant—*Pleading.*]—As to the proper mode of pleading an alleged demise from the Toronto Club of certain rooms and apartments in the club house to a servant or steward of the club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass. Semble, that under the demise as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed, he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments. *Williams* v. *Herrick*, 5 U. C. R. 613.

Removal of Fence—*Consent—Pleading.*]—The plaintiff sued for breaking and entering his close, the trespass being the entry of defendant's cattle. Defendant had leased land to plaintiff, and the cattle had got in owing to the removal of a fence, which separated the road from the land leased, and which was removed by the plaintiff, with defendant's assent, if not by his directions:—Held, that the removal of the fence by plaintiff would primâ facie excuse a trespass extra viam, which the plea admitted, and that, if defendant's consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied:—Held, also, that, as it was necessary to take down the north fence to use the right of way, this act justified the single act of trespass charged, and the plaintiff should have new assigned, if he relied upon excess in the quantity taken down, or in leaving the space open too long. The plaintiff, therefore, on the pleadings and evidence, was held not entitled to recover. *Pickard* v. *Wixon*, 24 U. C. R. 416. See, also, *Wixon* v. *Pickard*, 25 U. C. R. 307.

Tenant at Will.]—A tenant at will cannot sue his landlord for ousting him from possession. *Henderson* v. *Harper*, 1 U. C. R. 481.

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4. *Other Actions.*

Damages—*Giving False Notice of Sale.*]—By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation:—Held, reversing the decision in 45 U. C. R. 94, that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling* v. *Dickson*, 5 A. R. 549.

——— *Refusing to Give Possession.*]—Action by a tenant against his landlord for refusing to give him possession of the demised premises:—Held, that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth. But it is not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession. Ward v. Smith, 11 Price 19, not followed. Jacques v. Millar, 6 Ch. D. 153, commented upon. *Murrin* v. *Graver*, 8 O. R. 39.

Ejectment — *Action by Tenant—Non-entry.*]—A lessee may maintain ejectment before entry. The plaintiff claimed under a lease from one of the defendants, H., dated the 5th February, 1862, for a term to commence upon the 1st March following. Defendant B. claimed also under a lease from H., dated the 19th February, 1862, and it was admitted that he had entered before the 1st March, and still held possession:—Held, that the plaintiff was entitled to a verdict, though he had not entered under his lease. *Cleveland* v. *Boice*, 21 U. C. R. 609.

——— *Entry by Landlord—Demand—Distress.*]—A. leased a mill for a term of years to B., C., and D., who covenanted to pay the rent without default, otherwise the deed to be null and void, and A. covenanted for quiet

possession during the term, provided they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up, and afterwards obtained the key from one of the lessees, and A. distrained for rent such property as he found in the mill, which proved insufficient to pay the rent due, and refusing to give up possession, the lessees brought ejectment:—Held, that the lease being void by reason of the non-payment of the rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession, and that the lessor of the plaintiff could not recover. *Doe d. Somers* v. *Bullen*, 5 U. C. R. 369.

Money Had and Received — *Husband and Wife — Consideration for Lease.*] — Assumpsit for money lent and money had and received. On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of £70 paid (the money being the proceeds of the sale of her own lands), obtained from the defendant a lease of certain premises, to hold to her own use during her natural life, the defendant covenanting, at the expiration of the lease, to pay Hannah Healey, her heirs and assigns, the sum of £50:—Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant; and that having assented to the demise to his wife, he could not now sue for the consideration money paid to the defendant for the lease, either as money lent or as money had and received to his use. *Healey* v. *Bongard*, 1 C. P. 212.

Wrongful Entry—*Pleading.*]—See *Flett* v. *Way*, 14 P. R. 312.

II. Actions by Landlords.

1. *Covenant.*

(a) *Damages.*

Indemnity—*Costs—Interest — Liability.*]—Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence:—Held, that under defendant's covenant the plaintiff was entitled to recover the damages and costs in that suit, but not interest. When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering:—Quære, whether, when sued on the covenant, he can dispute the liability of the covenantee to damages so recovered. *Spence* v. *Hector*, 24 U. C. R. 277.

Money Demand.]—In an action brought to reform a lease and for damages for breach of a covenant:—Held, that the claim for damages was not a "purely money demand" under s. 4 of the A. J. Act, R. S. O. 1877 c. 49. *Gowanlock* v. *Mans*, 9 P. R. 270.

Rent—*Demand — Interest.*] — Held, that the plaintiff may claim interest on a demand for money rent, made payable by the covenant contained in the lease executed by defendant. But quære as to his right to recover interest on each instalment of rent as it falls due, without shewing a previous demand or other warning to defendant of an intention to demand interest in the event of non-payment. In this case an order was made for the allowance of interest from the commencement of the suit. Semble, the master ought not to allow interest on computation in such a case without a Judge's order to that effect. *Crooks* v. *Dickson*, 1 C. L. J. 211.

Held, affirming the order in the last case, that in an action of covenant for rent, an order by a Judge directing the master to allow the plaintiff interest on the amount claimed in the writ of summons, not specially indorsed, from the date of said writ, was properly made, although no interest was claimed in the declaration. *S. C.*, 15 C. P. 523.

(b) *Pleading.*

Acceptance of Money for Rent — *Assignee—Profert.*]—Where the lessee pleaded an assignment, and then averred the acceptance by the lessor from the assignee of the sum of £187 10s., not as the rent sued for in this action, but merely as "for the rent aforesaid, in form aforesaid, reserved and made payable:"—Held, that the plea was not argumentative, as setting up indirectly payment of the rent. A lessee sued in debt for rent and pleading an assignment and acceptance of the rent by the lessor from the assignee need not make profert of the deed of assignment. *McCulloch* v. *Jarvis*, 8 U. C. R. 267.

Breach of Covenant as to Husbandry.]—To a declaration on a covenant in a lease alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husbandlike manner, upon the demised premises, all the straw which should grow thereon, and charging as a breach that the defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing, that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it according to the true intent and meaning of the added part:—Held, on demurrer, plea bad. *Shier* v. *Shier*, 22 C. P. 147.

See, also, *Miller* v. *Kinsley*, 14 C. P. 188.

Breach of Covenant to Repair.] — Covenant for rent due on a lease of a mill, alleging that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence. *Wilkes* v. *Steele*, 14 U. C. R. 570.

Consideration for Lease — *Collateral Matter—Bar.*]—The averment of some consideration or inducement for the making of a lease other than the annual rents mentioned in the lease, is not necessarily a contradiction

of the lease, and therefore bad. A plea averring some consideration must shew that consideration passed and executed before the giving of the lease. After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction, cannot be pleaded in bar of an action on the lease. *McIntyre* v. *City of Kingston*, 4 U. C. R. 471.

Estoppel — *Judgment — Destruction of Building by Fire.*] — Action on defendant's covenant to pay rent, contained in a lease to him by plaintiff of a mill, for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging nonpayment of three half-yearly instalments of rent reserved. Plea, by way of estoppel, that previous to this action the lessee (the now defendant) sued the lessor (the now plaintiff) in the county court, alleging in his declaration that by the lease, in the event of total destruction of the mill by accidental fire, the term should cease and the rent be apportioned; that upon such destruction on the 30th October, 1869, the said term ceased, and the lessor became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that $137.50 thus became due to him, for which he sued therein; that the lessor pleaded in such action that the said lease was not his deed, and issue being joined thereon, the lessee recovered judgment for the said sum of $137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869. To this the plaintiff replied that after such fire the defendant continued to hold and occupy, and still holds and occupies, the premises under and by virtue of the lease, and would not and did not put an end to said term or surrender said premises:—Held, a good plea; for though the plea of non est factum did not put in issue the destruction of the mill, and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, were admitted for the purposes of such action, and the lessor was now estopped from disputing them. *Taylor* v. *Hortop*, 33 U. C. R. 462.

Mistake.]—Defendant pleaded, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended, and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, plea bad. *Shier* v. *Shier*, 22 C. P. 147.

Rent Claimed by Mortgagee.]—To an action for rent due on a lease defendant pleaded that after the lease the plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M., who claimed the rent:—Held, sufficient, without averring that the conveyance was by deed. *Perdue* v. *Hays*, 31 U. C. R. 111.

See Talbot v. *Poole*, 15 P. R. 99.

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2. *Trespass.*

Landlord not in Possession.] — When premises have been let, and the tenant is in possession, the landlord cannot sue a person for breaking and entering the premises and pulling down the fences, unless that person has at some other time removed the rails and converted them to his own use. *Bleeker* v. *Coleman*, 3 U. C. R. 172.

Re-entry by Landlord.]—Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession of the premises, if he can, without a breach of the peace. Verdict for the plaintiff, the landlord, in an action of trespass, sustained, where he re-entered through a window in the absence of the tenants, and nailed up the door, which was broken open by the defendants, who continued in possession. *Boulton* v. *Murphy*, 5 O. S. 731.

Removal of Buildings — *Surrender.*] — For trespass in breaking and entering, and pulling down tenements, &c., defendant justified as termor of the premises, with the right to remove buildings:—Held, that he should have proved the existence of the term down to the time of committing the grievance complained of; and that a surrender in fact having taken place, a release under seal for the rent was not necessary. *Wilson* v. *Wilson*, 10 C. P. 476.

Trees.]—A landlord may maintain trespass against his tenant for the value of trees cut down and carried away by him, and which were not demised to him, though growing on the land which the tenant held. *Chestnut* v. *Day*, 6 O. S. 637.

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3. *Other Cases.*

Ejectment — *No Notice of Service in — Nunquam Indebitatus.*]—Semble, that a plea of nunquam indebitatus to an action by a landlord against his tenant, for not giving notice that he had been served with a declaration in ejectment, is a material issue, upon which judgment may be entered for the defendant if the verdict be so found. *Lount* v. *Smith*, 5 U. C. R. 302.

——— *Security for Costs and Damages.*]—In an action of ejectment by a landlord against a tenant whose term had expired:—Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession. Sections 65 and 66 of the Ejectment Act do not apply where a bonâ fide defence or dispute is raised; and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused. Quære, whether ss. 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes. Held, that it is not now necessary for the plaintiff to sign the notice under s. 5 of the Ejectment Act, requiring the defendant to give the security sought. *Kelly* v. *Wolff*, 12 P. R. 234.

Rent—*Severance of Reversion — Several Actions.*]—Where a tenant leased premises at one entire rent, and his landlord died, having devised the premises among several persons:—Held, that those persons might bring separate actions against the tenant for such part of the

rent as each would be entitled to according to his respective share, without any other apportionment than that which a jury might make in each suit. *Hare* v. *Proudfoot*, 6 O. S. 617.

III. AGREEMENTS.

1. *Creation of Relationship.*

Adoption of Agreement—*Effect of.*]—A person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant; one of the true owners shortly afterwards took an assignment of the instrument, and gave to the tenant notice of the assignment; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement:—Held, that the agreement was thereby confirmed and adopted, and was binding on the estate. *Simmons* v. *Campbell*, 17 Gr. 612.

Alteration of Lease — *Action on Covenant.*]—A lease was granted by plaintiff to one T.; the defendant, before the expiration of the term, without the plaintiff's knowledge, struck out T.'s name and put his own opposite to the seal, and entered and paid rent:—Held, that the plaintiff could not maintain covenant against the defendant on such lease. *Lapp* v. *May*, 14 U. C. R. 47.

Crops — *Oral Understanding.*] — Where a person entered into possession, and sowed a crop, upon an oral understanding that he should have the products thereof, but no special time for occupation was mentioned:—Held, that a sufficient tenancy was created to entitle him to such crop. *Mulherne* v. *Fortune*, 8 C. P. 434.

Exclusion from Premises — *Agreement for Abatement—Rent—Sum in Gross.*]—The first and second counts of the declaration were respectively for distraining where no rent was due, and for excessive distress for rent. It appeared that defendant had leased to plaintiff, for a term of years, certain premises, portions of which were at the time in the possession of other persons, and that these persons retained possession against the plaintiff, and refused to give them up to him. In consequence of this, defendant after the expiration of the first year agreed with plaintiff to an abatement in the rent for that year, and gave him a receipt for the balance, which the plaintiff paid as the amount of rent due upon the premises. Defendant, however, subsequently distrained for the sum agreed to be remitted:—Held, on the authority of Neale v. McKenzie, 1 M. & W. 763, that at the time of making the lease, and during the whole period for which rent was claimed, no legal term was created by the instrument of lease between the parties, in consequence of the adverse holding of parts of the premises and the plaintiff's exclusion therefrom, and that no right to any rent in respect of such parts had ever arisen, and that therefore the rent could not properly be apportioned, because the tenant had never been subject to the entire rent by virtue of the demise. Held, also, distinguishing Watson v. Waud, 8 Ex. 335, that the agreement between plaintiff and defendant, as to the abatement of the rent, did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor; because the agreement was not made until after the expiration of the year to which it alone had reference, so that the relationship of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but a mere sum in gross, and could not, consequently, have been distrained for; and, therefore, that plaintiff could not recover on the first and second counts, which were framed upon the assumption that plaintiff was tenant to defendant at a certain rent. *Kelly* v. *Irwin*, 17 C. P. 351.

Exclusive Possession — *Working on Shares.*]—In trespass q. c. f. where the possession was disputed, defendant proved that the plaintiff's brother was in possession of the close to work it for the plaintiff on shares:—Held, that the agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession, so as to prevent the plaintiff from maintaining trespass. *Dackstader* v. *Baird*, 5 U. C. R. 591.

Labour — *Parol Agreement — Renunciation.*]—P., owning land, agreed with M. and B. that he should furnish a team of horses and the farming implements required, together with the seed, and they agreed to do the work as he should direct, and harvest the grain raised; each party was to pay for the threshing of their respective share of the grain; M. and B. were to keep up the fences, and to draw and sow the plaster required, which P. was to furnish; they also agreed to board all threshers engaged on the place, to dig all the root crops, and to house P.'s share, and to do the haying, and put two-thirds of all the produce in the barn for P., and not to leave the place while their labour was required there; the bargain to be for the summer and fall, and cease when the fall work was done. For the next year there was a parol agreement, varied in this, that P. was not to find the horses, and they were to have one-half instead of one-third of the crops:—Held, not a letting of the land on shares, giving to M. and B. a term and possession, but a contract for remuneration for their care and labour, to be performed as P. directed. *Park* v. *Humphrey*, 14 C. P. 209.

Person not in Occupation — *Oral Agreement.*]—The plaintiffs' agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occupied:—Held, that he was not liable for the rent. It was alleged that after the defendant had been told what the rent would be, he got the key by the agent's directions, and went to examine the house, and leaving the key in the door returned and said he would take it:—Semble, that this would not have altered the decision. *Bank of Upper Canada* v. *Tarrant*, 19 U. C. R. 423.

Possession—*Caretaker— Interest.*]—The lessee left the premises and put one D. in possession, who subsequently put defendant in possession. In ejectment by the lessee the jury were asked to find whether the plaintiff let the premises to D., so that he had an interest in them, which he transferred to defendant, or whether D. was a mere caretaker, and if there was no letting, to find for plaintiff. The jury found for defendant, and a

new trial was refused. *Reynolds* v. *Metcalf*, 13 C. P. 382.

Privilege — *Repairs—Lease.*] — A municipal corporation by by-law granted to the defendant, upon certain conditions, a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease. The dam and bridge were built and kept in repair by the defendant: — Held, that the contract amounted to a lease from the corporation for upwards of twenty-one years. *Regina ex rel. Patterson* v. *Clarke*, 5 P. R. 337.

"Right" to House—*Letting.*]—Defendant signed the following memorandum: "I agree to pay P." (the plaintiff) "£50 cy. for his right to the house I live in, the farm at present occupied by me, known as the Morrison farm, and the stables now used by me, for six months from the 1st April next:"—Held, evidence of a letting by plaintiff to defendant, not of a sale. *Fairbairn* v. *Hilliard*, 27 U. C. R. 111.

Telegram — *Acceptance of Offer — Commencement of Term.*]—A., living at Collingwood, wrote to B. at Toronto, on the 5th July, 1859, to the effect that he would give £40 a year for his house, and pay taxes, adding, if you agree telegraph at once to that effect, and I will take it. On the 6th B. telegraphed: "You may have the store for one year on terms of your letter." A. obtained the key from the former tenant on the 11th, and first entered on that day:—Held, that there was a perfect demise; that the rent commenced from acceptance by B. of A.'s offer, not from the time when A. entered; and that B. was therefore entitled to distrain for a year's rent on the 7th July, 1860. *Prosser* v. *Henderson*, 20 U. C. R. 438.

Termination of Tenancy — *Bill for Foreclosure—Terms of Agreement.*] — Defendant let to plaintiff certain premises "for the term of one year, to be computed from the 1st October, 1863, and so on from year to year, unless notice is given to the contrary, or equitable proceedings taken on mortgage hereinafter mentioned." Plaintiff continued to occupy under this lease, and in May, 1867, sub-let to one P. for one year, with right to P. to pay his rent to defendant. On the 10th January, 1868, a bill in chancery was filed on the mortgage. In May following P. paid rent to defendant up to the expiration of his year, and on the ensuing 25th July or August defendant distrained upon plaintiff for arrears of rent before the demise to P., and for rent from its expiration to the 1st July, 1868:—Held, that there was no tenancy subsisting at the time of the distress to justify the same, for that it was determined by filing the bill in chancery, and that the payment of rent by P. after that did not create a new tenancy, as there was no evidence that P. had paid at plaintiff's request. *Higgins* v. *Langford*, 21 C. P. 254.

——— *Overholding — Indefinite Tenancy.*] —Where a tenant, after the determination of a lease for a specific term, held possession for five months, paying by agreement £75 for the first three and the same amount for the last two months, (£150 in all) and afterwards occupied without any specific agreement:—Held, that no definite tenancy was created by the last overholding. *McInnes* v. *Stinson*, 8 C. P. 34.

Working on Shares — *Agreement — Possession.*]—The defendant who owned the farm agreed with the plaintiff to work it on shares, each of them supplying one-half of the seed and labour and to have half the profits, the plaintiff to pay $60 for implements and $160 annually; but the plaintiff was not placed in possession of any distinct portion of the farm, the parties being equally in possession of the whole:—Held, that there was no lease created between the parties, and that the $160 was not rent for which the defendant could distrain. *Oberlin* v. *McGregor*, 26 C. P. 460.

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2. *Lease or Agreement for Lease.*.

Construction of Particular Instruments.]—The words "agrees to let or hire" are words of a present demise, where the contrary does not appear to be the intention in the instrument in which they are contained. *Cumming* v. *Hill*, 6 O. S. 303.

Memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, and under which no rent had been paid before the distress:—Held, not to constitute a present demise, entitling the landlord to distrain. *Cheney* v. *Taylor*, 1 U. C. R. 166.

Memorandum of agreement for lease: "M., for the consideration hereinafter named, agrees to demise and lease to H. these premises, &c., for the period of three years certain at 10s. cy. per day, payable monthly in advance during said term, and with the privilege to said H. to hold the same for a further period of two years at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M. for the price and terms aforesaid, and to pay all taxes upon the said premises, possession to be given whenever the first monthly payment of rent is made:"—Quære, whether the above writing (not under seal) could be in any case construed as more than an agreement for a lease. *Hurley* v. *McDonell*, 11 U. C. R. 208.

A. agreed in writing as follows: "In consideration of £70 paid in hand by B., I hereby agree to sign a lease of lot No. 32 in the 2nd con. of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz., to let B. have the farm for seven years, commencing from the 1st April, 1848, at £70 per annum; the first payment having been this day paid by the said B., (the receipt being acknowledged) and the next payment on the 1st April, 1850, and so on. If B. wants to give up the farm before the expiration of four years, he is to pay £140 to me; if after four years, then £70. If I want to sell the farm, then I am to pay B. on the same terms. Six months' notice to be given to either party. I am to put up a frame barn, to be completed by 1st August, 1848, &c., also a house, &c., by 1st July, 1848; also to split 4,000 rails, and have them ready for hauling by 1st January, 1848; and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, &c.; and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off:"—Held,

not a lease creating a term of years, but only an executory agreement. *McLean* v. *Young*, 1 C. P. 62.

An agreement in writing, whereby A. agreed to rent to B. for three years from date, for £50 per annum, with taxes, payable quarterly during occupation, B. to spend £25 in improvements:—Held, a lease and not a mere agreement for a lease. *Grant* v. *Lynch*, 6 C. P. 178; S. C., 14 U. C. R. 148.

Held, that the document set out in this case was a lease, and not merely an agreement for one. *Becker* v. *Woods*, 16 C. P. 29.

Ejectment. As to a portion of the property, a sawmill, one B. said that on a Saturday he rented it orally from the plaintiff for a year, and it was intended to have a written lease, but on Monday the defendant put some one else in possession, and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon:—Held, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title. *Kyle* v. *Stocks*, 31 U. C. R. 47.

On the 1st October, 1875, plaintiff wrote to D., the owner of certain land in the township of Caledon, that he understood that one M., who had had a written lease from D., which had expired, but who had remained on on the terms of the lease, was going to leave, and that if the farm was for rent he would give D. $100 a year, and pay all taxes, &c., and requesting an answer by return mail, as he wished to commence ploughing. D., who was then in the United States, replied that he had no objection to plaintiff's terms as to renting the farm; and that he might commence to plough on the following conditions; "I rent to you for one year, with right to sell the farm at any time, you giving up possession thereof when required, on your being paid for labour and seed at valuation, should the purchaser wish possession. I will be up at Caledon as soon as I get home, and make final arrangements as to payment and security." The plaintiff entered and did the ploughing, but without M. having given up possession, or without the arrangements as to payment and security being perfected. Subsequently D. sold to the defendant, who thereupon took possession. It appeared that D. offered to pay the plaintiff for his fall ploughing, but that he did not send in any claim. Evidence was also given of expressions made use of by D. to intending purchasers, referring to plaintiff as the tenant who had the place for a year, but would give up possession on being paid for his ploughing, and as the outgoing tenant who would have to be paid for the ploughing:—Held, that there was no present demise, but that the plaintiff merely had a license to enter and plough, pending the conclusion of the proposed bargain, which license was revoked by the entry of defendant, the owner of the fee. Remarks as to plaintiff's conduct in bringing actions of trespass and ejectment on the same day. *Stubbs* v. *Broddy*, 27 C. P. 234.

"Memorandum of agreement for lease. M., for the consideration hereinafter named, agrees to demise and lease to H. those premises," &c., "for the period of three years certain, at 10s. cy. per day, payable monthly in advance, during said term, and with the privilege to said H. to hold the same for a further period of two years, at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M., for the price and terms aforesaid, and to pay all taxes upon the said premises; possession to be given whenever the first monthly payment of rent is made:"—Held, that H. could not maintain ejectment to obtain possession, for admitting it to be a lease, it could not be regarded as being for a term not exceeding three years from the making thereof, and so by the Statute of Frauds would require to be in writing; and therefore, without doubt, by the statute 12 Vict. c. 71, it could, for want of a seal, take effect only as an agreement to let. Quære, however, whether the writing could in any case be construed as more than an agreement for a lease. Quære, as to the effect of 12 Vict. c. 71, s. 4—whether every lease in writing must not be under seal, though not required to be written; so that an oral lease for a year would be good, but a written lease for the same period void, if not under seal. *Hurley* v. *McDonell*, 11 U. C. R. 208.

[12 Vict. c. 71, s. 4, was repealed by 14 & 15 Vict. c. 7, consolidated in R. S. O. 1897 c. 170, s. 10.]

An agreement not under seal in the following form: "This indenture witnesseth that I, O., agree to let to McK. the blacksmith's shop and lot, house and lot known as Milligan's Corners, for one, three, or five years, for the sum of £14 cy., or $56, to be paid twelve months after this date the first year, and so on to the end of the agreement; all improvements to be paid for if O. sells the place before three years is out; six months' notice to be given if O. sells or McK. wants to leave:"—Held, void, under C. S. U. C. c. 99, s. 4, as a lease for five years, not being under seal, but good for three years; and that no notice to quit was necessary to terminate it at that period. *Osborne* v. *Earnshaw*, 12 C. P. 267.

One L. by an instrument not under seal, dated 31st October, 1857, leased to O., one of the defendants, for five years. On the 31st March, 1858, he mortgaged the premises to the plaintiffs, redeemable as therein set forth, and on the 8th June, 1858, by indenture, he again leased the same premises for five years to O. Upon ejectment brought by the mortgagees:—Held, that the indenture of the 31st October, 1857, not being under seal, did not operate since 14 & 15 Vict. c. 7, s. 4, as a lease for five years, but created a yearly tenancy; and the plaintiffs were not entitled to succeed without notice to quit. *Caverhill* v. *Orvis*, 12 C. P. 392.

An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is a contract of letting and hiring, and not merely an agreement for a lease. *Wolfe* v. *McGuire*, 28 O. R. 45.

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3. *Lease or License.*

Quære, whether the instrument in question set out in this case amounted to a lease, or was a mere license to bore for oil, salt, or minerals. *Burnside* v. *Marcus*, 17 C. P. 430.

4. *Other Cases.*

Assignment by Proposed Lessee of his Rights—*Subsequent Taking of Lease in his own Name—Ejectment.*]—Ejectment. The plaintiff claimed under a lease to himself from the city of Toronto, dated 1st January, 1854. Defendant produced a deed poll, executed by the plaintiff, dated 3rd January, 1848, assigning to defendant and another all his right to the land in question, to hold to them, as joint tenants, during the time of the lease to be obtained for the same, and authorizing them to demand and receive a lease from the city on the same terms as agreed upon to be granted to himself. At the time this assignment was made the plaintiff held only an agreement for the lease, which lease, notwithstanding the assignment, he had afterwards procured in his own name:—Held, that the plaintiff was not precluded by the assignment from setting up the lease, and therefore that he was entitled to recover. *Parkinson* v. *Clendinning*, 13 U. C. R. 150.

Breach of Agreement for Lease—*Pleading.*]—Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto, in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September instant; a lease containing the usual covenants to be prepared and executed by both parties; and that for the due performance of the agreement the parties became bound to each other in $1,000, to be paid by the party in default, as liquidated damages. The third and fourth counts, after setting out the agreement, averred that all conditions were fulfilled, (except the tender of the lease, which defendant waived by tendering a lease to plaintiff for execution, and except the valuation of the furniture and liquors, &c., which defendant wrongfully prevented); and that all things happened, &c., to entitle plaintiff to have said agreement performed, and the premises let to him as aforesaid; and the plaintiff has always been ready and willing to perform, and has performed, his part of the said agreement; yet the defendant did not perform said agreement, nor (as stated in the third count) pay the $1,000, nor (as stated in the fourth count) let plaintiff into possession:—Held, both counts bad, for, among other reasons, no breach was specifically alleged; and it appeared that defendant tendered a lease for execution, to which no objection appeared, so that the plaintiff was in default in not executing it. Fifth plea, that the valuation of the furniture, &c., was not finished on or before the 29th September, nor yet finished. The plaintiff replied that this was caused solely by the acts and misconduct of the defendant:—Held, plea, good, as the valuation was a condition precedent to the granting of the lease; and replication bad, as a departure from the declaration. Sixth plea, that the plaintiff did not tender to the defendant any lease for execution, &c.:—Held, bad, as this was not incumbent on the plaintiff. Eighth plea, that the plaintiff did not execute the lease when tendered to him by defendant. Replication, that the plaintiff was ready and willing to do so, but was prevented by the acts and misconduct of defendant, &c.:—Held, bad, for not shewing how the plaintiff was thus hindered and prevented from executing a lease expressly tendered to him for execution. *Walker* v. *Kelly*, 24 C. P. 174.

Independent Covenants.]—A. by deed, in consideration of the rents, &c., on the part of B., to be paid and performed, agreed with B. that he would on or before the 1st October, upon request to him in writing by B., grant unto him a lease to be prepared or approved by B.'s counsel, of certain premises, to hold for five years at a rent named; the said lease to contain certain covenants; and said A. thereby agreed to deliver to said B. on the 1st October 200,000 staves at the above premises, at a price specified, for which B. agreed to pay said A. on certain days; and it was thereby agreed that said lease should contain a covenant by said A. that he would deliver to said B. in each of the two succeeding years, staves, &c.; and further, that B. should furnish securities for the due performance of the above agreement on or before the 20th July:—Held, that a request by B. for or the granting by A. of such lease, was not a condition precedent to the right of B. to have the staves delivered, the covenants to grant the lease and to deliver the staves being independent. *Leonard* v. *Wall*, 5 C. P. 9.

Mortgagee——*Payment of Rent to—Evidence of New Contract.*]—Held, that although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent, still as the circumstances in this case shewed that it was not intended to create such a contract, but rather that the interest being paid, the possession of the mortgagor and his tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee. *Forse* v. *Sovereen*, 14 A. R. 482.

Parol Agreement—*Taking Possession—Ejectment—Clearing Done by Tenant—Remedy.*]—Where, under a parol agreement for a lease, for ten years, made between defendant and plaintiff, on the terms of the plaintiff clearing, or paying a rental either in clearing or in money, the plaintiff entered into possession, and, after clearing a certain number of acres, the defendant sold the lot, and the purchaser ejected the plaintiff:—Held, that the plaintiff could not recover under the agreement, not being in writing; nor under the common counts for the value of his services, for the clearing of the land was not the primary service for which the lease was, after the performance of the work, to be given as a mode of compensation; but the lease was the primary thing contracted for, and the work was reserved as a rent from year to year. Semble, that the plaintiff's remedy, if any, was for specific performance of the agreement against the purchaser, who had purchased with notice of the plaintiff being in possession. Semble, that if the bargain had been for work to be done by plaintiff in clearing the land, to be paid for by allowing him to occupy, and defendant had prevented the occupation, the plaintiff might have recovered the value of the work. *Draper* v. *Holborn*, 24 C. P. 122.

Possession after Expiration of Lease —*Implied Obligation.*]—Where a lessee continues in possession as a yearly tenant after the expiration of a lease, containing a covenant by him to repair, a similar obligation will be implied. *Hett* v. *Janzen*, 22 O. R. 414.

——— *Indorsement on Former Lease — Terms.*]—A lessee of house No. 107 signed an indorsement on the lease that he would lease house 109 at the same rent, he getting possession as soon as the premises should be vacated by the then tenants, which indorsement, however, was not signed by the lessor:—Held, that from the time of his getting possession of No. 109, the lessee held it on the same terms as No. 107, and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms, applied to the letting of No. 109. *Mehr* v. *McNab*, 24 O. R. 653.

——— *Rent.*]—Where a party who has held for a term at a certain rent continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent. *Hilliard* v. *Gemmell*, 10 O. R. 504.

——— *Rent—Application of Provisions of Old Lease—Acceleration Clause.*]—A company were assignees of a lease in writing containing a provision for the acceleration of six months' rent in case the tenant became insolvent. Before the expiry of the lease an arrangement was made between the company and the landlord for a reduction of the rent after the expiry of the lease, nothing being said as to the other terms:—Held, that the arrangement made imported the terms of the old lease, so far as applicable, including the acceleration clause. *Re Canada Coal Co., Dalton's Claim*, 27 O. R. 151.

Possession before Execution of Lease —*Destruction of Building by Fire—Repairs.*]—Where appellant had entered into a contract to demise certain premises for a term to the respondents, and previously to the commencement of the term to repair the old premises and build a new warehouse; and the respondents entered accordingly at the day agreed upon, but before the appellant had completed the building and repairs and before the lease was executed, and a fire soon after destroyed the premises:—Held, that the respondents were not bound to execute a lease and rebuild the destroyed premises, the appellant not having completed his contract, and that till such completion the premises were at his risk. *Counter* v. *McPherson*, 1 O. S. 22, 5 Moo. P. C. 83.

Reservation — *Specific Performance.*]—The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop; the intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. At the hearing the bill was dismissed with costs. *Morris* v. *Kemp*, 13 Gr. 487.

Termination of Lease by Agreement.]—In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge. *Donaldson* v. *Wherry*, 29 O. R. 552.

Trustees—*Power to Bind Co-trustees—Renewal.*]—See *Lewis* v. *Davis*, 8 O. R. 1; *post*, TRUSTS AND TRUSTEES.

Unconcluded Agreement—*Possession—Tenant at Will—Notice to Quit.*]—The defendant entered into negotiations with a loan company, who were the owners of a farm, for a lease thereof to him. The terms were discussed, and pending a lease to be prepared by the company's solicitors and executed by defendant, he was allowed to enter into possession. The defendant admitted that until he executed the lease there was no completed agreement. A lease was accordingly prepared, containing what the company understood were the terms, which defendant refused to execute. The company thereupon sold the land to plaintiff and gave defendant notice to quit. In an action by plaintiff to recover possession:—Held, that the plaintiff was entitled to recover; that as the defendant was not in possession under any concluded agreement regarding the lease he was merely in as tenant at will to the loan company, which tenancy was determined by the notice to quit. *Lennox* v. *Westney*, 17 O. R. 472.

IV. ASSIGNMENT OF LEASE.

1. *Liability of Assignee.*

Covenant as to Building—*Running with Land.*]—In a lease for years to G., his executors and assigns, assigned by G. as to the residue of the term to defendants, was contained, after the usual covenants to yield up the premises in good repair, the following proviso: "Provided always that nothing herein contained shall be deemed, or taken, or construed to be deemed, or taken, in any way, to compel the said G., his executors, administrators, or assigns, to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they now are; but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings, to be done and performed by the said G. at his own proper cost and charge:"—Held, that the words recited constituted a covenant, and that such covenant ran with the land and bound the assignees of the lease, though assigns were not expressly mentioned in the instrument. *Perry* v. *Bank of Upper Canada*, 16 C. P. 404.

Covenant as to Business to be Carried on—*Injunction.*]—A lessor demised for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying high wines. Upon a bill filed by the lessor against the lessee and the sub-lessee, the court restrained the parties from continuing to rectify high wines or carry on any

other business that would interfere in any way with the insurance. *Arnold v. White*, 5 Gr. 371.

Covenant to Insure—*Running with Land.*]—Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings:—Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee. *Douglass* v. *Murphy*, 16 U. C. R. 113.

Covenant to Repair — *Damages and Costs—Interest—Indemnity to Lessee.*]—See *Spence* v. *Hector*, 24 U. C. R. 277.

Covenants—*Indemnity to Lessee—Costs.*]—The plaintiff, being lessee of S., assigned his term and all other property to defendants for the benefit of his creditors. Defendants took possession in March, and remained until August, disposing of the plaintiff's stock so assigned; they then quitted the premises, having paid the rent up to November following. They requested the lessor to take the premises off their hands, but he refused. In January they assigned to one B., a pauper, (the plaintiff knowing nothing of this assignment.) After the expiration of the term he was sued by the lessor, and compelled to pay two quarters' rent; for which, and for his costs so incurred, he brought assumpsit against these defendants:—Held, that the assignment by the defendants could not be treated as fraudulent, and that the plaintiff could not recover. Held, also, that the interest in the lease passed to defendants under the assignment, as set out in the case. *Magill* v. *Young*, 10 U. C. R. 301.

——— *Indemnity to Lessee—Damages.*]—A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, and, upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damage he has sustained:—Held, that he is entitled to recover for the rent and damages he has been obliged to pay the lessor. *Ashford* v. *Hack*, 6 U. C. R. 541.

——— *Indemnity to Lessee.*] — Where a lease, containing a covenant against assignment without the consent of the lessors, is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay. *Brown* v. *Lennox*, 22 A. R. 442.

——— *Mortgage of Term—Possession not Given—Reversion — Merger — Discharge.*]—S., having mortgaged certain land in fee, afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words, ("bargain, sell, and release,") to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff, to secure a balance of the purchase money. This mortgage had been discharged before action, by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage:—Held, that defendant, as assignee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered. 2. That such reversion passed to the plaintiff by the first conveyance from S. (which contained apt words to pass the legal estate), though in it the mortgage was recited. 3. That the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J.; and that the plaintiff being still bound by the lease, defendant was so as well. 4. That the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued; and that he was therefore entitled to recover. *Cameron* v. *Todd*, 22 U. C. R. 390.

Held, affirming the above judgment, that T. was liable to pay this rent notwithstanding that he had never entered into possession of the premises: the effect of the conveyances being such that T. was estopped from disputing the right of C. as reversioner to enforce payment thereof. *Todd* v. *Cameron*, 2 E. & A. 434.

——— *Mortgage of Term — Sale under Mortgage.*] — One M., being the original lessee, assigned to P., who did not execute the assignment, but assigned to defendant by mortgage, reciting it. Afterwards, on a decree in a foreclosure suit brought on this mortgage, the land was sold to M. as the highest bidder, who entered into possession, but paid nothing, and received no conveyance, nor was any order made vesting the property in him:—Held, that defendant became liable on the covenants in the lease, under his assignment from P., and continued so notwithstanding the sale. *Magrath* v. *Todd*, 26 U. C. R. 87.

——— *Mortgage of Lease—Assignment or Sub-lease — Habendum — Reversion of One Day.*]—A lease of real estate for twenty-one years, with a covenant for a like term or terms, was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the habendum of the mortgage was, "to have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals:"—Held, by the court of appeal, that the premises did not grant any estate or interest, and the habendum was not void as repugnant; that the one day excepted might be taken as the last day of the term; and that the mortgagees were not assignees of the term and liable for the rent. Held, reversing the judgment of the court of appeal, that the premises of the mortgage

contained an express assignment of the whole term, and the habendum, if intended to reserve a portion to the mortgagor, was repugnant to the premises, and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital, which described the lease as one for a term of twenty-one years. Held, further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally, without stating it to be the last day of the term, is insufficient to give the instrument the character of a sub-lease. *Jamieson* v. *London and Canadian Loan and Agency Co.*, 23 A. R. 602, 27 S. C. R. 435.

It having been held in the preceding case, that the defendants were, under the assignment of lease by way of mortgage there in question, assignees of the term and liable on the covenants in the lease contained, it was now held, that they were entitled to execute a statutory discharge of the mortgage, and thus put an end to their liability, the assignment to them having been made, with the lessor's consent, for a limited purpose. *Jamieson* v. *London and Canadian Loan and Agency Co.* (No. 2), 26 A. R. 116, 30 S. C. R. 14.

——— *Sub-demise for Longer Period.*]—Where a lessee of land for five years demised the land for seven years:—Held, that the demise in question operated as an assignment of the original term, and conferred upon the original lessor, in respect of the privity of estate thus created, a right of action against the assignee of the term for the arrears of rent due under the original lease. *Selby* v. *Robinson*, 15 C. P. 370.

——— *Whole Term not Assigned.*]—A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to and vest in the defendant, as the plaintiff alleges, is a good plea. *Annis* v. *Corbett*, 1 U. C. R. 303.

——— *Whole Term not Assigned.*] — In debt for rent on a lease, the declaration stated that the right and interest of the lessee in the demised premises came by assignment to and was vested in the defendant. It was in evidence that defendant was at most only underlessee for a part of the term:—Held, that a nonsuit was rightly directed. *Lawler* v. *Sutherland*, 9 U. C. R. 205.

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2. *Liability of Lessee on Covenant for Rent.*

In covenant for rent, a plea relying on the plaintiff's acceptance of the assignees as his tenants, and on his receipt of prior rent (not the rent sued for) from them, as relieving defendant (the lessee) from any further liability, is a bad plea, as being no defence to an action on an express covenant. *Stinson* v. *Magill*, 8 U. C. R. 271.

Covenant by lessor against lessee for not repairing or paying rent. Plea, that before breach, with the plaintiff's consent, defendant assigned to H. all his estate in the premises, and it was agreed between them that H. should hold for the residue of the term, and defendant be from that time discharged from the covenants: that defendant accordingly gave up possession to H., who held to the end of the term, and the plaintiff accepted him as tenant in discharge of defendant's liability:—Held, on demurrer, plea bad, for no assignment by deed was alleged; and, though an assignment of the term by a lessee, and the acceptance by lessor of the assignee, will prevent the lessor from bringing debt for the rent, he can still maintain covenant. *Montgomery* v. *Spence*, 23 U. C. R. 39.

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3. *Other Cases.*

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

Covenant — *Re-entry — License—Severance of Reversion — Registration—Notice.*]—Upon a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or sub-letting without leave, when the lessor gives license to assign part of the demised premises, he may re-enter upon the remainder for breach of covenant not to assign or sub-let, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole. Sections 12 and 13 of the Landlord and Tenant Act, R. S. O. 1887 c. 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable pro hâc vice only, the latter referring to specific cases of licensing the alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was held, that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave, he might re-enter. A lessee under such a lease, which contained also a covenant for renewal, sub-let, and the sub-lease contained a covenant to renew for the term to be granted on the renewal of the superior lease, less one month; and to this the lessors assented. On an assignment by the lessee, without leave, of his reversion expectant on the sub-lease:—Held, that the lessors might re-enter as against the sub-tenant, notwithstanding their assent, for it must be deemed to have been an assent to the renewal of the sub-lease, provided that the superior lease was renewed. A lessee under such a lease created a number of sub-tenancies on part of the land, with leave. He then assigned all the rents, &c., to an assignee. The head lessors assented to the assignment, and covenanted with the assignee that so long as the rents reserved were paid, and the covenants observed, they would not claim any forfeiture, as to the lands affected by the assignment, and

that the rights of the assignee should not be prejudiced by any act of the original lessee, or any person claiming under him, or by any breach or non-observance by the lessee, or any person claiming under him, of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and sub-letting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises, after the interest of the assignee of the rents had expired by lapse of time:—Held, that, in the absence of notice of the assignment without leave, pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action. After an assignment by the lessee without leave, of part of a lot, was registered, the lessors took a surrender of part of the same lot demised by another lease and registered it:—Held, that the registration of the assignment without leave was not notice of it to them, as they were not bound by the nature of the surrender to examine the register as to that part of the lot affected by the assignment without leave. A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He, with his grantees to uses, then made a lease of the land, containing a covenant not to assign or sub-let without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees, to sell, lease, or mortgage. An action was brought to recover the lands for breach of the covenant against assigning:—Held, that by the conveyance of the undivided one-seventh share, the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach of the covenant occurring either before or after the severance. *Baldwin* v. *Wanzer*, *Baldwin* v. *Canadian Pacific R. W. Co.*, 22 O. R. 612.

Covenant not to Assign—*Administratrix of Lessee — Proviso for Re-entry.*]—A lease, dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements," the proper title of the statute then in force, C. S. U. C. c. 92, being "An Act respecting Short Forms of Leases;" and it contained the following covenant: "And the said lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent and to pay taxes, and will not assign or sub-let without leave." Then followed, "proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment made by the administratrix of the lessee:—Richards, C.J., thought the weight of authority in favour of holding that the administratrix was not bound by the covenant not to assign, not being named in it, but that in a court of appeal it might properly be held otherwise. A. Wilson, J., inclined to think the covenant one concerning the land, which would bind the assigns, though not named in it; but held that the proviso for re-entry did not apply to it. *Lee* v. *Lorsch*, 37 U. C. R. 262.

Oral Lease—*Expiration of—Notice to Quit—Possession by Sub-tenant after Expiry.*]—M., by oral agreement, leased certain premises to McC., who sub-let a portion thereof. After the original tenancy expired, on 15th November, 1887, the sub-tenant remained in possession, and in March, 1888, received a notice to quit from M. In June, 1888, M. issued a distress warrant to recover rent due for said premises from McC., and the sub-tenant paid the amount claimed as rent due from McC., but not from herself to McC. More than six months after the notice to quit was given, proceedings were taken by M. to recover possession of the premises from the sub-tenant:—Held, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on sufferance, did not work estoppel against the landlord, as the tenancy had always been repudiated. *Gilmour* v. *Magee*, 18 S. C. R. 579. See *Magee* v. *Gilmour*, 17 O. R. 620, 17 A. R. 27.

Parol Assignment without Knowledge of Lessor.]—On the 1st May, 1859, J. D. demised by lease under seal certain premises to E. B. D. for the term of five years. This lease contained a covenant that the lessee should not assign without the leave of the lessor. Subsequently to its date the lessee with the assent of the lessor assigned the lease to the defendant for the remainder of the term unexpired. Defendant then orally assigned his right to the term as sublet to one P., who entered into possession of the demised premises:—Held, the assignment of and by defendant to P., being by parol, and being without the knowledge of the lessor, J. D., that defendant was, notwithstanding it, properly assessed in respect of the demised premises. *Regina ex rel. Northwood* v. *Askin*, 7 L. J. 130.

Right to Purchase Fee.]—Held, affirming the decree in 9 Gr. 488, that the assignment by the personal representative of a lessee for years does not carry with it a right of purchasing the fee contained in the lease. *Henrihan* v. *Gallagher*, 2 E. & A. 338.

See Re Haisley, 44 U. C. R. 345; *Martin* v. *Hall*, 25 Gr. 471; *Boulton* v. *Blake*, 12 O. R. 532; *Seldon* v. *Buchannan*, 24 O. R. 349.

V. ASSIGNMENT OF RENT OR REVERSION.

Bond for Rent.]—In debt on a bond conditioned to pay rent, a plea that before the rent became due the plaintiff assigned to A., to whom the defendant paid the rent, was held good on demurrer. *McDougall* v. *Young*, Dra. 111.

Covenant to Pay for Buildings—*Husband and Wife.*]—Liability of lessor's wife, assignee of the reversion, on covenant of her husband to pay for a building to be erected by the lessee on the demised premises. See *Ambrose* v. *Fraser*, 12 O. R. 459, 14 O. R. 551.

Covenant to Repair.]—Plaintiff sued defendants, who were the assignees of the rent

for the term which plaintiff was to enjoy, on a covenant by his lessor to repair, as being a covenant running with the land:—Held, that they were not liable, for they had no reversion, and the covenant would not run with the rent. *McDougall* v. *Ridout*, 9 U. C. R. 239.

Crops—*Liability to Pay for.*]—The tenant covenanted to leave some acres sown, to be paid for by the landlord at a valuation upon the termination of the term. The defendant purchased the reversion from the landlord, and offered to sell the crops at the valuation, treating them as his own:—Held, that by his acts he had assumed the landlord's liability, and was responsible under the lease. *Murton* v. *Scott*, 7 C. P. 481.

Debt for Rent.]—One of the defendants in an action for wrongful distress had assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:—Semble, that debt might have been maintained by the assignee for the rent. *Hope* v. *White*, 17 C. P. 52.

Deed — *Necessity for.*]—Defendant, owner in fee, conveyed to D. and took back a mortgage. D. then leased to plaintiff, and afterwards, by writing, without deed, assigned to defendant, all the rent to become due under the lease:—Held, that there could be no assignment of the rent without deed. *Dove* v. *Dove*, 18 C. P. 424.

——— *Necessity for — Validity of Assignment—Solicitor—Costs.*]—D., being indebted to the plaintiff for costs, by an instrument not under seal assigned to him a lease of certain premises made by D. to defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from defendant the rent which accrued due after the making of the assignment, the Judge charged the jury that while plaintiff remained D's solicitor he could not take any security for his benefit, and that he should have dissevered the connection between them, and let D. have independent legal advice:—Held, misdirection, for that the assignment, if not valid in other respects, was valid so far as it was a security for costs already incurred. Held, also, that D. was not a necessary party. Quære, whether the assignment should be treated as of the reversion or of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, namely, of the moneys payable under the covenants of the lease, and so valid. *Galbraith* v. *Irving*, 8 O. R. 751.

Oral Agreement as to Buildings—*Assignee Bound by.*]—A lessee, after he had taken possession under his lease, agreed orally with the lessor to erect at his own expense a rough-cast addition to a brick tenement then on the premises, with the privilege of selling or removing such addition. The lessee accordingly built such addition, and afterwards transferred his interest to the defendant. The lessor subsequently sold and conveyed the fee to the plaintiff, subject to this lease, and by the lessee "assigned to B." (the defendant, who was then in possession.) The defendant being about to sell and remove such addition, the plaintiff took proceedings to restrain him from so doing, claiming the same as part of his freehold:—Held, that the plaintiff was not only bound by the terms of the lease, but took subject to any other rights or equities existing between the original lessor and lessee, including such oral agreement to permit the removal of the addition. *Close* v. *Belmont*, 22 Gr. 317.

Rent Due before Assignment.] — The assignee of a reversion cannot recover rent accrued due before the assignment. *Wittrock* v. *Hallinan*, 13 U. C. R. 135.

See McGill v. *Proudfoot*, 4 U. C. R. 33; *Thistle* v. *Union Forwarding and R. W. Co.*, 29 C. P. 76.

VI. Attornment.

Mortgage — *Consent of Mortgagor.*]—In replevin, the defendant, who had mortgaged the demised premises to one E., claimed as landlord, under a lease alleged to have been made by him subsequent to the mortgage, three quarters' rent, which had been paid by the tenant E.:—Held, on the evidence, that E. was the original and actual lessor, or, at all events, that previous to the payment of the rent avowed for, the tenant had attorned to E. with the defendant's consent. *McLennan* v. *Hannum*, 31 C. P. 210.

——— *Demise to Mortgagor—Possession.*] —See *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483.

See Bank of Montreal v. *Gilchrist*, 6 A. R. 659; *Mulholland* v. *Harman*, 6 O. R. 546.

See Mortgage.

VII. Buildings, Erections, and Improvements.

Compensation for Improvements—*Oral Agreement—Partnership.*]—A. and B. being partners, A. alone orally leased certain premises for a place of business, for five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A., but never signed by the lessor. It was orally agreed between the lessor and A., that A. should erect a granary, &c., on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved partnership, and B. released and assigned to A. all his right to debts, &c. A. then took C. into partnership, with whom the lessor settled the account for the goods by allowing an alleged set-off. A. afterwards brought an action against his lessor for the goods sold and the value of the granary, &c.:—Held, 1. that B. should have joined in such an action; 2. that the settlement with C. was not bonâ fide as against A.; 3. that no lease having been executed, upon the facts A. was a tenant at will, and that it might be orally agreed that he should make improvements and be paid for them, and that plaintiff might sue for them in his own name, though they were made with partnership funds. Quære, should the action be for work, labour, and materials, or upon the special agreement? *Brougham* v. *Balfour*, 3 C. P. 72.

——— *Invalid Lease—Ratification.*]—One E. was left in charge of the estate of N., who promised to leave the same by will to E. N. afterwards left this country, and died abroad intestate, and E., acting on the presumption that N. had died without heirs, made a building lease in his own name of a portion of the estate, and the lessee entered into possession and erected buildings thereon. Afterwards the heir of N. established his right to the estate as such, and refused to recognize the validity of the lease; whereupon a bill was filed seeking to bind the heir with this lease, or that he should pay the value of the improvements on the ground of a ratification of the lease. The court refused to grant either branch of relief asked, and the fact that the heir had instituted proceedings in this court against the lessor, calling upon him for an account of the rents, &c., received by him from the estate of the intestate, was not such a proceeding as could properly be considered a ratification of E.'s acts. *Moffatt* v. *Nicholl*, 9 Gr. 446.

——— *Removal of Buildings.*]—The guardian of an infant tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and an application having been made in a cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him on the property (doing no damage to the realty), but the court refused to allow him out of such rents for any improvements made by him upon the premises. *Townsley* v. *Neil*, 10 Gr. 72.

Condition of Lease—*Erection of Building—Site—Specific Performance.*] — One of the conditions of a lease was that the lessee (the defendant) should erect a barn of certain specific dimensions, and the land whereon it was to be erected was mentioned, but the lease was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, and the latter thereupon filed a bill, alleging that such a site was unsuitable, and that it had been selected by the defendant from improper motives; that another site had been agreed on between them, and that the building itself was faulty in its construction; and prayed an injunction restraining the defendant from allowing the barn to remain in its present position; and by amendment sought to enforce specific performance of the contract. The evidence failed to establish the material allegations of the original bill:—Held, 1. that by the terms of the lease the plaintiff had not the right of selecting the site of the barn; 2. that it was not a proper case for decreeing specific performance, or for awarding damages in lieu thereof; but that the plaintiff must be left to his remedy at law. *Campbell* v. *Simmons*, 15 Gr. 506.

Held, that the decree in the previous suit was no bar to a subsequent suit by the tenant for a specific performance of the agreement for a lease. *Simmons* v. *Campbell*, 17 Gr. 612.

Crown Lands—*Arbitration and Award.*] —The plaintiffs leased certain Crown lands to the defendant, the lease containing a covenant by the defendant not to remove gravel or sand from the premises. The defendant afterwards ascertained that no patent had been issued to the plaintiffs, and applied to the Crown lands department for a patent to himself, and also sold gravel off the premises. The plaintiffs then pressed the claim they had previously made to the department, and the commissioner of Crown lands ruled that the patent should issue to them on payment to the defendant for his improvements. The defendant refused to agree to any terms of compensation. The plaintiffs served him with a notice of arbitration, and an award was made, which was not taken up, as the defendant refused to pay his share of the arbitrators' fees. This action was then brought for arrears of rent, payment for use and occupation, damages for breach of covenant not to remove gravel, and delivery of possession:—Held, that the plaintiffs were not in a position to bring the action until the defendant had been paid for his improvements. *Boulton* v. *Shea*, 22 S. C. R. 742.

Destruction by Fire—*Negligence.*]—To rebut the presumption created by art. 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (en bon père de famille), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. *Murphy* v. *Labbé*, 27 S. C. R. 126.

A steam sawmill was totally destroyed by fire during the term of the lease, whilst in the possession of and occupied by the lessees. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to shew that necessary and usual precautions had been taken for the safety of the premises, a night watchman kept there making regular rounds, that buckets filled with water were kept ready and force-pumps provided for use in the event of fire, and they submitted that as the origin of the fire was mysterious and unknown it should be assumed to have occurred through natural and fortuitous causes for which they were not responsible. It appeared, however, that the night watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, and that on discovering the fire the watchman failed to make use of the water-buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm:—Held, that the lessees had not shewn any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by art. 1629 of the Civil Code against the lessees had not been rebutted; and that the evidence shewed culpable negligence on the part of the lessees which rendered them civilly responsible for the loss by fire of the leased premises. Murphy v. Labbé, 27 S. C. R. 126, approved and followed. *Klock* v. *Lindsay*, *Lindsay* v. *Klock*, 28 S. C. R. 453.

——— *Subsequently Erected Buildings.*]—The lessor covenanted with the lessee that he would at the expiration of the term pay him, his heirs or assigns, a valuation for his building on the land demised:—Held, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed, at the expiration of the term, against the landlord. *In re Haisley*, 44 U. C. R. 345.

——— *Waste.*]—In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste. *Wolfe* v. *McGuire*, 28 O. R. 45.

Fixtures and Machinery.]—A covenant in a lease to pay for "buildings and erections" on the demised premises covers and includes fixtures, and machinery which would have been fixtures but for 58 Vict. c. 26, s. 2 (c) (O.). *Re Brantford Electric and Power Co. and Draper*, 28 O. R. 40. Affirmed, 24 A. R. 391.

Renewal of Lease.]—See *Sears* v. *City of St. John*, 18 S. C. R. 702.

Right of Building over Lane.] — See *Jones* v. *O'Keefe*, 26 O. R. 489, 23 A. R. 129.

Water Lots—*Filling in.*]—The lessor of a water lot who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the works so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term:—Held, affirming the judgment in 22 A. R. 415, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso. *Adamson* v. *Rogers*, 26 S. C. R. 159.

See post, IV. 1, IX. 1.

VIII. Construction and Operation of Leases.

(*See post*, IX.)

1. *Commencement and Termination of Tenancy.*

Cancellation of Lease—*Proviso for—Sale of Reversion—Pleading.*]—Declaration, that J. M., being seised in fee of certain land, let it by deed to defendant for ten years, and the defendant thereby promised to pay him the yearly rent specified; and afterwards, during said term, J. M. by deed granted to the plaintiff all his reversion in the said land; and one year's rent became due, and remains unpaid. Plea, that it was provided by said deed that if J. M. should at any time have an opportunity to sell the said lot, then the said deed should be cancelled, and defendant should give up the place; that before any rent became due, J. M. had an opportunity of selling and did sell said lot to the plaintiff, and by deed granted all his reversion therein to the plaintiff, as alleged; and said J. M., with plaintiff's concurrence, before said rent became due, gave notice to defendant that he had sold the said lot to the plaintiff, and that he then put an end to the lease, and said term was then put an end to before the rent accrued due:—Held, plea bad, per Richards, C. J., because the notice could not be given by J. M. after he had assigned his reversion, and it did not appear that the lease had been cancelled, or the term put an end to, or that defendant had given up the place. Per Wilson, J., because the sale alleged was not within the provision, but a sale of the reversion subject to the lease, not of the land with the immediate right of entry. *Pepper* v. *Butler*, 37 U. C. R. 253.

Day of Termination.]—Under a lease dated 1st October, 1857, habendum for five years from the date thereof, "yielding and paying therefor on every first day of October during the said term," it was proved that the first year's rent had been paid in advance:—Held, that the term included the whole of the 1st October, 1862. *McCallum* v. *Snyder*, 10 C. P. 191.

Definite Term — *Privilege of Holding over—Notice to Quit.*] — Plaintiff leased to the defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year, by either party so inclined:—Held, that defendant was bound to give three months' notice of his intention to quit at the end of the first year. *Counter* v. *Morton*, 9 U. C. R. 253.

——— *Privilege of Holding over—Monthly Tenancy.*]—Defendant leased to the plaintiff "that certain frame house now standing and being on lot No. 10," &c., "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows, from the 1st November now next ensuing for and until the 1st April following, a period of five months," at a monthly rent of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold possession of said premises, and should remain longer than 1st April, he should pay at the rate of £50 per annum as rent, to be paid monthly:—Held, that the lease was a demise till the 1st April, with an option to the lessee to remain afterwards as a monthly tenant (not from year to year) at the rate of £50 a year; and that it was not a demise of the whole of lot 10, as alleged. *McPherson* v. *Norris*, 13 U. C. R. 472.

Destruction of Buildings by Fire.]—A lease of a mill and ten acres of land adjoining, for five years at the rent of $500 for the first year and $550 for each of the four succeeding years, payable half-yearly in advance, contained the usual covenants and provisions, in which was the covenant to pay rent, without any exception as to fire, and to keep in repair, accidents by fire excepted; and the lease concluded with the following clause: "Should the mill be rendered incapable by any fire, or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term:—Held, that the effect of the whole instrument was, that

the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half-year succeeding such destruction. *Agar* v. *Stokes*, 5 A. R. 180.

See, also, *Browne* v. *Pinsoncault*, 3 S. C. R. 102, overruled by *Porteous* v. *Reynar*, 13 App. Cas. 120.

Grant — *Habendum for Years — Rent — Livery of Seisin.*]—A., by indenture, in 1826, in consideration of the rents and covenants by M., to be paid and performed, "granted, demised, and to farm let to M., his heirs and assigns," certain land, habendum "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of twenty-one years," yielding and paying yearly during said term to M., his heirs and assigns, 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term, M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A.:—Held, that without livery of seisin the fee simple granted in the premises, could not take effect, and the habendum for twenty-one years would stand; but a new trial was granted to determine the fact of livery. *McDonald* v. *McGillis*, 26 U. C. R. 458.

Life Estate—*Merger of Term.*]—Defendant on 13th October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be utterly null and void:—Held, that by the lease S. took a life estate, in which the term merged. *Dalye* v. *Robertson*, 19 U. C. R. 411.

——— *Lease — Tenant — Death during Term — Executor — Right to Rent.*]—The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns." The lessor died before the expiration of ten years, and this action was brought by the testatrix of her will to recover (inter alia) the instalments of rent which became payable, as it was alleged, upon the lease after her death:—Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant. Held, also, that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death. *Thatcher* v. *Bowman*, 18 O. R. 265.

Mortgagee — *Payment of Rent to—Evidence of New Contract—Termination of Tenancy.*]—See *Forse* v. *Sovereen*, 14 A. R. 482.

Notice of Determination — *Right to Give—Construction of Proviso.*]—A lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice;"—Held, reversing the judgment in 26 A. R. 78, and that in 29 O. R. 75, that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate. Held, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Lumbers* v. *Gold Medal Furniture Mfg. Co.*, 30 S. C. R. 55.

——— *Service—Joint Tenants—Insolvency—Attachment—Fraction of Day.*]—A. B. created a lease in favour of C. W. and W. W., brothers and partners in trade, of certain premises in Toronto, in which the partnership was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of A. B. himself or his certain attorney." A notice, for the purpose of determining, was, during the currency of the lease, served by A. B., which was in ample time, but was served on W. W. only, who signed an admission of service for himself and C. W., who was at the time absent from the Province, but the fact of such service, it was shewn, had been communicated to him by his brother, whether within the six months or not did not appear:—Held, sufficient within the terms of the lease; and semble, that service upon one of two joint tenants would be sufficient. On the same day, but subsequent to the service of such notice, a writ of attachment in insolvency issued against a trading firm, of which A. B. was a member:—Held, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it was done, that the notice so given by A. B. was effectual. *Barrett* v. *Merchants Bank*, 26 Gr. 469.

Notice of Intention to Continue — *Time for Giving.*]—The plaintiff leased to one B. a mill for three years from the 9th March, 1860, adding this proviso: "Provided the lessee shall within three months previous to the 9th day of March next, which will be in the year 1861, give the lessor a notice in writing that he will keep the mill on the terms hereinafter set forth." Notice was given by the lessee between the 9th December, 1860, and the 9th March, 1861, of his intention to continue the lease for the three years. In an action against the sureties of the lessee for rent, the defendants contended that by the terms of the lease the notice should have been given previous to the commencement of the three months:—Held, that, although the intention of the parties might have been to give and receive three clear months' notice, yet by the proviso the notice was to be given within the three months prior to the 9th March, 1861; and the plaintiffs were entitled to succeed. *Shipman* v. *Grant*, 12 C. P. 395.

Oral Lease — *Expiry on Day Certain—Notice to Quit — Sub-lease—Disclaimer.*]—

Since the Judicature Act the result of an oral lease of real property for more than three years, to continue until and expire upon a day certain, where the tenant has taken possession, is that he is bound to give up possession at the end of the stipulated period without notice to quit. And where McC., the tenant for such a term, sub-let to the defendants, but not for any definite period:—Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants. The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term, and the defendants, without the concurrence of McC., who had tried to dislodge them and refused to receive rent from them after the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC. to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff and insisted that they were still in under McC.:—Held, that the payment of the rent did not, under the circumstances, establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shewn. The plaintiff after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants:—Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient. *Magee* v. *Gilmour*, 17 O. R. 620.

The court of appeal dismissed an appeal, holding that the tenancy, though by oral lease, void under the Statute of Frauds, was a tenancy for a term certain and not from year to year: that the sub-tenancy came to an end with the tenancy, and that the subsequent proceedings did not operate to create a new term as between the sub-tenants and the plaintiff. *S. C.*, 17 A. R. 27.

Payment to Terminate — *Tender—Acceptance of Rent.*]—Plaintiff, E., on 1st April, 1858, leased to defendant, R., for five years at £100 a year, payable half-yearly, on the 1st April and October in advance, and by the lease it was agreed that "if E. (the lessor) require the premises before the term expires, he is to pay £50 to R. (the lessee) for possession; otherwise should R. require to leave before the term, he has to pay E. £50." On the 6th September, 1860, the plaintiff notified defendant that he would require the premises on the 10th October following, and on that day he tendered the £50, which defendant refused:—Held, that plaintiff was entitled to maintain ejectment. It was not proved at the trial whether the rent due on the 1st October for the next six months in advance had been paid or not:—Quære, whether, if it had been shewn that the plaintiff received it, this would affect his right. *Eckhardt* v. *Raby*, 20 U. C. R. 458.

Period of Commencement—*Evidence—Receipt for Rent.*]—Ejectment for lots 15, 13, and north half of 12, in the 2nd con. Sandwich. Defendant, in his notice of title, besides denying the claimants' title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlords, and proved a receipt for rent in full to the 31st March, 1861. The action was commenced on the 12th October, 1861. The defendant, in reply, proved that his tenancy commenced in May, and that one of the plaintiffs in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on. The jury having found for the plaintiffs, and that the defendant was their agent on the premises:—Held, on motion for a new trial, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th March for rent up to date. *Colby* v. *Wall*, 12 C. P. 95.

——— *Date of Lease — Delivery.*]—The plaintiff, by lease, consisting of seven sheets, and bearing date 15th March, 1862, demised certain premises to W. On the 21st July following, this lease was cancelled by an instrument under seal; the second and fourth sheets were taken out and re-placed by others, and it was re-executed and re-delivered without any other alteration. As it then stood, it was dated as before, to hold "from the 1st day of April now next," for nine years, "from thence next ensuing," at a yearly rent, payable "in advance, that is to say, on the 1st April, 1862, and on the 1st April in each year during the term;" the conclusion being that the parties had thereunto set their hands and seals, "the day and year first above written." In an action against the sheriff for taking W.'s goods in August, 1862, without satisfying a year's rent alleged to be then due:—Held, that the lease took effect from the delivery, on the 21st July, 1862, not from the date; that the term began on the 1st April, 1863; that the first year's rent payable "in advance," was not due until that day, the words, "that is to say, on the 1st April, 1862," being merely falsa demonstratio; and that the plaintiff therefore was properly nonsuited. *Bell* v. *McKindsey*, 23 U. C. R. 162.

Held, affirming the above judgment, that the lease spoke from the day of re-execution, not from its date; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction. *S. C.*, 3 E. & A. 9.

——— *Future Period — Memorandum in Writing—Clearing Land.*]—Plaintiff, by deed, leased land from one S. for five years from 1st October, 1862, agreeing thereby to give up possession on the expiration of the term. On the lease was indorsed an unsigned memorandum, that if plaintiff cleared any more land he was to have the same rent free for the first three years. No land was cleared by plaintiff until the fall of 1865, and in the fall of 1867 he put in a crop of wheat. After the expiration of his term S. permitted him to remain on the premises, and in the following April he left, giving to S. the place with all on it. In June following, S., by deed, leased the land and crops thereon to two of the defendants for five years from the 7th January previously, and subsequently, when the wheat had ripened, plaintiff entered upon the land, then in defendants' possession under S., and cut the crops. Defendants took possession of the wheat, in shocks on the land, and plaintiff brought trover:—Held, that the memorandum

if not part of the lease, not being by deed, was void, because the three years were to commence from a time future, viz., from the clearing of the land, and it required, therefore, to be in writing; and if part of the lease, it must be construed as co-extensive only with the lease, and not as extending its duration beyond 1st October, 1867. *Kaatz* v. *White*, 19 C. P. 36.

Sale of Premises—*Right to Crops—Option—Time of Exercise.*]—Plaintiff leased certain premises from D., agreeing to give up possession on receiving six months' notice if D. sold during the term, with the right, if he had any crop in the ground, of harvesting it, or if not, to be paid for the summer fallow. In August of the first year, before a crop was put in, D. sold to defendant, of which the plaintiff had notice, and that possession would be required on the 1st April. Defendant refused to pay the plaintiff for the crop subsequently put in by him, and converted it to his own use:—Held, that the plaintiff was entitled to recover, in trover, from defendant, the value of the crop so converted. Held, also, that the option to pay for the crop or for the summer fallow was to be exercised by the lessor. Semble, that it might be exercised at any time before harvesting. *Harrison* v. *Pinkney*, 44 U. C. R. 509.

Uncertain Duration of Term—*Pleading.*]—Declaration for overflowing the plaintiff's land, by maintaining a dam on a stream running through it, and thus penning back the water. Plea, that one K. had purchased from the Crown, and paid part of the purchase money, and got his receipt therefor from the Crown lands agent, and thereby was the owner of the land mentioned in the declaration, and (before he conveyed to the plaintiff, who claims under him) by indenture demised to defendant and one H., the part of said land then liable to be overflowed by the mill-pond of defendant and H. by the dam then erected, to hold so long as the land should be thenceforth occupied and overflowed as a mill-pond: and that defendant has ever since kept the water penned back, and has occupied the said land as a mill-pond, and has kept the dam then erected of the same height as it then was, but no higher, which are the trespasses complained of:—Held, on demurrer, a good plea; that the term set out in the lease pleaded, was sufficiently certain, and K.'s estate to enable him to make the lease, was sufficiently pleaded. *Kerr* v. *Bearinger*, 29 U. C. R. 340.

——— *Tenancy at Will or from Year to Year—Receipt of Rent—Notice to Quit.*]—In July, 1880, M. conveyed certain lands to plaintiff, which were part of lands of which the defendant was tenant from year to year of M. under a tenancy since 1868. In December, 1880, the plaintiff executed in favour of M. what purported to be a statutory lease of the lands conveyed to him, at a yearly rent of twenty cents. The habendum was during the term of the occupancy of the tenant as lessee of G. T., the defendant, "of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and to be fully complete and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon." The defendant continued to pay rent to M., and was never called upon to attorn or pay rent to the plaintiff, and received no notice to quit from M. prior to action brought, and no demand of possession from plaintiff until about the commencement of this action. M. required an undertaking from plaintiff not to disturb defendant while he continued her tenant, and informed defendant of this lease, and that he should have undisturbed possession while he paid rent to her. The defendant claimed title under M., and contended that the conveyance did not affect his rights under his lease:—Held, that the lease by plaintiff to M. did not operate as a lease for years, owing to the uncertainty of the termination thereof; but would be a tenancy at will until payment of rent, when it would be a tenancy from year to year; and also might be deemed an agreement fixing the annual value of the premises at twenty cents, which M. should collect from the defendant and pay over to the plaintiff. Held, also, that, on the conveyance by M. to plaintiff, there was a severance of the reversion, and the rent became apportionable at common law, but the concurrence of the defendant was necessary, or apportionment by a jury; and that it might not be unfairly assumed that there was such concurrence, and that defendant paid the twenty cents to M. for plaintiff, becoming thereby tenant from year to year to plaintiff, and entitled to six months' notice to quit; or that M. paid the rent to plaintiff and became tenant from year to year to plaintiff; and she receiving rent as theretofore from defendant he was as against or under her entitled to the benefit of such term, and either she or defendant to the six months' notice. The defendant was therefore held entitled to possession until he received the proper notice to quit. *Reece* v. *Thompson*, 14 O. R. 499.

Vacancy — *Breach of Condition as to—Avoidance of Lease.*]—The defendants leased to the plaintiff certain premises, the lease containing the following clause: "In case the said premises . . . become and remain vacant and unoccupied for the period of ten days . . . without the written consent of the lessors, this lease shall cease and be void and the term thereby created expire and be at an end . . . and the lessor may re-enter and take possession of the premises" as in the case of a holding over. The plaintiff entered and occupied for about two years, when he moved out and left the premises vacant for over ten days, and claimed that the lease was at an end:—Held, that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors, and that the vacancy created by the lessee did not put an end to the term. *Palmer* v. *Mail Printing Co.*, 28 O. R. 656.

See Longhi v. *Sanson*, 46 U. C. R. 446; *Wallbridge* v. *Gaujot, Palmer* v. *Wallbridge*, 14 A. R. 460, 15 S. C. R. 650; *Donaldson* v. *Wherry*, 29 O. R. 552; *Wilson* v. *Gilmer*, 46 U. C. R. 545; *Lennox* v. *Westney*, 17 O. R. 472; *Wilson* v. *Keys*, 15 C. P. 32.

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2. *Particular Words.*

"Agrees to Let."]—The words "agrees to let or hire" are words of a present demise, where the contrary does not appear to be the intention in the instrument in which they are contained. *Cumming* v. *Hill*, 6 O. S. 303.

"**Competent.**"]—Plaintiff demised to defendant, covenanting that it should be "competent" for the defendant to make certain specified repairs, and the lease was declared to be on the express understanding that such repairs should be made within one year from the date of the said lease:—Held, that, notwithstanding the word "competent," the defendant covenanted to do the work specified. *McDonald* v. *Cochrane*, 6 C. P. 134.

"**Demise.**"]—Semble, that the word "demise" in a lease raises an implied covenant to give possession. *Saunders* v. *Roe*, 17 C. P. 344.

"**Lease.**"] — The word "lease," differing from "grant" or "demise," implies no contract for entry and quiet possession. *Ross* v. *Massingberd*, 12 C. P. 62.

"**Lease and to Farm Let.**"] — Quære, whether the words "lease and to farm let" imply a covenant to give possession on the day when the term is to commence. *Harvey* v. *Ferguson*, 9 U. C. R. 431.

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3. *Right to Possession.*

Breach of Covenant for Possession—*Implied Covenant — Pleading.*]—The declaration set out a deed made between plaintiffs and defendant, by which defendant demised to plaintiffs certain land for a term of years from a day passed, and assigned as a breach that defendant had given plaintiffs possession or enabled them to enter, and they had been wholly unable to obtain possession. Plea, that by making said deed defendant had enabled plaintiffs to enter into and obtain possession:—Held, on demurrer, that the breach assigned in the declaration was sufficient, but that it could not be sustained by proof only that defendant had not given actual possession, for it would be necessary to shew that plaintiffs had attempted to get possession, and had been prevented by reason of some adverse occupation, not with their consent, or by some physical impediment or hindrance placed in the way by defendant, or caused in some way to be done by his means with intent to prevent possession being taken. Held, also, plea bad, for that defendant was bound to do more than simply deliver the lease to the plaintiffs. Where the demise is by deed, an action may be maintained on an implied covenant to give possession, when there are any proper words to create a covenant by implication; and semble, that the word "demise" will have that effect. *Saunders* v. *Roe*, 17 C. P. 344.

Demand—*Security for Crops, &c.—Valuation.*]—Covenant on an indenture whereby defendant leased and to farm let to plaintiff at a yearly rent, the crops in the ground and the stock and implements of husbandry to be valued on the day of entry, and to be taken by the plaintiff at such valuation. The plaintiff demanded possession of defendant at a tavern not on the premises, but defendant refused to give it unless he was paid or received security for the value of the crop and stock, &c.:—Held, that defendant was justified in such refusal under the terms of the lease; and quære, whether, if the lease had been without any stipulation, the demand of possession made would have been sufficient. *Harvey* v. *Ferguson*, 9 U. C. R. 431.

Improvements—*Proviso as to—Right to Retain Possession.*] — Defendant leased to plaintiff "Sutherland's farm, being the west part of lot No. 15 in the 4th concession of West Zorra, as at present occupied by the said Sutherland," for eight years, at a yearly rent. The lease provided that the plaintiff should not cut down timber for the purpose of clearing outside the brush fence, but might clear all within, and might use all the woodland on the said leased premises for pasture, and "that the said Sutherland (defendant) shall be at liberty at any time to build and make any improvements he may think proper upon any portion of the said leased premises lying outside the said brush fence at present upon the said premises, without any diminution of rent or any consideration therefor;"—Held, that the defendant, having improved and built upon a portion of the land outside of the brush fence during the term, was entitled to retain possession thereof. *Leonard* v. *Sutherland*, 19 U. C. R. 301.

Independent Covenant — *Possession before Commencement of Term.*]—Action on the following covenant in a lease to the plaintiff, executed by L. in his lifetime, on the 3rd April, 1862, for twelve years from 1st April, 1863: "And the said lessor covenants with the said lessee for quiet enjoyment. And it is hereby agreed between the parties hereto, that the said T. (notwithstanding anything heretofore to the contrary) shall be at liberty to take possession of the said premises, and every part thereof (except thirty acres for crop this fall, reserved to the use of the said lessor,) on the 20th October next." (1862.) Before that day the lessor died. The plaintiff, on 20th October, went to the premises and found the lessor's widow there, who claimed her right to dower, and refused possession. He then demanded possession of the defendants, executors of L., and brought this action:—Held, that the covenant for possession on the 20th October was independent of the lease for twelve years, which commenced in April, 1863, and that, though the plaintiff might have maintained ejectment, he was also entitled to recover damages for breach of the covenant. *Thompson* v. *Crawford*, 13 C. P. 53.

Security for Performance of Covenants—*Condition.*]—Defendant leased to the plaintiff for three years from the 1st May; and the plaintiff covenanted that, on or before said 1st May he would give to defendant two sufficient securities for the performance of his covenants in the lease:—Held, that the giving such security was a condition precedent to the plaintiff's right of possession under the lease. *Murphy* v. *Scarth*, 10 U. C. R. 48.

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4. *Other Cases.*

Emphytеusis—*Bail à Rente — Petitory Action—Transfer by Deed of Sale—Quebec Law.*]—See *Price* v. *Le Blond*, 30 S. C. R. 539.

Infant—*Lease by—Effect of.*]—See *Lapsett* v. *Perdue*, 18 O. R. 575.

Lessee's Partner—*Terms of Lease—Effect on.*]—The lease was to plaintiff's brother only, but he and plaintiff were in partnership, and jointly interested in it and in the goods on the demised premises, and it provided that

on the tenant beginning to remove the goods, the rent should become due. In an action by plaintiff for wrongfully distraining, defendant justified under such provision:—Held, that under these circumstances the plaintiff must be deemed to be a tenant, and subject to the terms of the lease. *Young* v. *Smith*, 29 C. P. 109.

Non-execution of Lease by Tenant.]—Held, that the non-execution by the wife of a lease to her and her husband, containing covenants to be performed by her, did not render her incapable of taking thereunder, for that, notwithstanding, the term passed to her. *Britton* v. *Knight*, 29 C. P. 561.

Privilege — *Crops—Valuation—Trover—Election.*]—By a lease from one D. to the plaintiff it was provided that if D. sold the farm the plaintiff should give up possession upon receiving six months' notice before the 1st April, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the plaintiff received the stipulated notice after he had prepared the summer fallow but before he had sown it. He afterwards sowed it with fall wheat, and gave up possession on the 1st April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use:—Held, affirming the judgment in 44 U. C. R. 569, that the true construction of the provision was, that the plaintiff was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless D elected to pay for them at a valuation; that he had never parted with the property in the crop; and that he was therefore entitled to recover in trover against the defendant. *Harrison* v. *Pinkney*, 6 A. R. 225.

Right of Re-entry — *Reservation to Stranger.*]—Upon a lease purporting to be made by R. W. as attorney for A. H., reserving a right of re-entry "by the said R. W. into the demised premises," not saying as such attorney:—Held, that no right of entry was reserved, for there can be no reservation of a right of re-entry to a stranger to the legal estate. *Hyndman* v. *Williams*, 8 C. P. 293.

Taxes—*Payment by Tenant under Terms of Lease—Not a Payment of Rent—Statute of Limitations.*]—See *Finch* v. *Gilray*, 16 A. R. 484.

IX. Covenants in Leases.

1. *As to Buildings, Fences, and Improvements.*

(See *ante* VII.)

(a) *To Build and Rebuild.*

Destruction by Fire—*Rebuilding—Better Material—Increased Rent.*]—By a lease of property in a town, the lessor agreed to erect the outside of a frame building, and bound himself in case of its being destroyed by fire, to rebuild to the same extent, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval the municipal council had by-law prohibited the erection of frame buildings in that locality. The lessee refused to pay rent until the lessor re-built, and the lessor then filed a bill to cancel the lease, as it had become impossible for him to carry out his agreement. The court refused this relief; but, on a submission in the answer, directed a reference to the master to fix a proper rent to be paid, upon the lessor rebuilding with brick, with costs to be paid by the plaintiff. *William* v. *Tyas*, 4 Gr. 533.

Short Forms Act—*Covenant not Running with Land — Rebuilding.*]—See *Emmet* v. *Quinn*, 7 A. R. 396.

Time for Performance.]—R. leased to C. for eight years. C. covenanted that he would at his own charge place the premises in good order, build a new stable, &c., and would repair and keep repaired the fences and gates then erected, or that might be erected during the term. On account of these improvements and additions it was agreed that no rent should be paid for the first nine months:—Held, that the lessee was not obliged to perform his covenant within the first nine months; and quære, whether he should have the whole term to do the work, or must do it within a reasonable time. *Castle* v. *Rohan*, 9 U. C. R. 400.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about twenty-five years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor should put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of $150 a year. Plaintiff also agreed to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:—Held, that the circumstances attending the execution of the lease, as also the corroboration afforded by the lease itself, warranted the court in permitting parol evidence to shew that the first year of the term was the year in which the house was to be erected. Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable. *Bulmer* v. *Brumwell*, 13 A. R. 411.

See Campbell v. *Simmons*, 15 Gr. 506, 17 Gr. 612; *McFattridge* v. *Talbert*, 2 U. C. R. 156.

(b) *To Fence, Clear, and Ditch.*

Breach—*Measure of Damages.*]—In an action by plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenant contained in the lease, to dig ditches, &c.:—Held, that the measure of damages was the difference between the rentable value of the demised premises with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements. At the trial the Judge directed

that if certain improvements were made, the damages were to be reduced thereby. On its being shewn to the court that those improvements had substantially been made, the damages were reduced to $200. *McEwen* v. *Dillon*, 12 O. R. 411.

Interpretation — *Indefinite Language—Evidence.*]—The lease from the defendant to the plaintiff contained the usual covenant by the lessee to repair fences, &c., but the lessor agreed "to build the line fence between the premised hereby demised and the farm of D. M., should the same be required during the currency of the lease." The evidence shewed that there was no line fence between the farms, but that there was a fence upon D. M.'s land about twenty-four yards south of the boundary line. The plaintiff alleged that this fence was out of order; and that the defendant would not repair it, and that in consequence damage had been done to his crops by cattle, and he contended that the stipulation as to the line fence being "required during the currency of the lease," was fulfilled by the fence on D. M.'s land being out of repair:—Held, that no liability could accrue under the defendant's covenant until something occurred to disturb the state of things existing at the time the lease was made, and that the covenant was designed to meet such contingency as D. M. refusing to allow entry on his land to repair the fence, or his requiring the line fence to be built. Per Osler, J. A., that the language of the covenant being indefinite, evidence was properly admitted to explain it. *Houston* v. *McLaren*, 14 A. R. 103.

Performance — *Sufficiency.*]—The lessee covenanted to clear and fence five acres each year, and to split and put into fences 500 rails each year to fence said land cleared by him, and there was a right of re-entry on breach. This number of rails would not nearly fence five acres:—Held, that the covenant was satisfied by clearing five acres each year, and fencing with a fence of some kind, having—in this case a brush fence—in it 500 rails. Held, also, that the clearing need not be in blocks of five acres; and that defendant, having finished clearing three acres (part of a larger field), which had been chopped by the plaintiff, but was unfit for cultivation without logging, burning, &c., and fenced it on one side so as to form a lane, which was required between this fence and an old fence there before, and having cleared more than two acres elsewhere, had complied with the covenant. *McLaren* v. *Kerr*, 39 U. C. R. 507.

See Cook v. *Edwards*, 10 O. R. 341.

As To Pay for Buildings, Improvements, and Repairs.

Construction of Covenant—*Pleading.*]—The declaration alleged that defendant, by lease dated 1st October, 1862, did let to the plaintiff certain premises for five years, and that it was agreed that the plaintiff should sufficiently repair the erections, buildings, gates, and fences on said premises, and that defendant would allow to the plaintiff one-half of the cost of repairing the house or tavern, and would pay the whole of the cost of repairing the fences and gates, the said repairs and erections to be paid for by defendant at the end of the first year of the said term. It then averred that the plaintiff did within the first year duly repair the house and the fences and gates, &c., and that defendant after demand and valuation refused to pay one-half of the cost of repairing the house, and the whole of the cost of repairs to the fences and gates, and to allow to the plaintiff the amount due him under the agreement out of the rent. The defendant pleaded that the covenant to repair in the lease was as follows: "And the said lessee," meaning the plaintiff, "doth hereby for himself, &c., covenant, &c. . . that he, the said lessee, his, &c., will, at the costs and charges of the said lessee, well and sufficiently repair and keep repaired the erections and buildings, fences and gates, erected or to be erected upon the said premises, and the said lessor finding or allowing one-half of the expenses of repairing the house. . . The lessee to repair fences, the amount to be valued and to be paid by the lessor at the end of the first year of the term, the rails to be taken off the premises if possible." To this the plaintiff demurred; and replied that the meaning of the lease was, that both the repairs to the house and repairs to the fence were to be paid for by the lessor:—Held, that on the pleading defendant was bound to pay half the repairs of the house and all the repairs of the gates and fences. *Miller* v. *Kinsley*, 14 C. P. 188.

Destruction by Fire — *Accident — Rebuilding.*]—By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, &c., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." Subsequently the appellant (alleging that a fire had been caused by the negligence of the respondents) brought an action against them for the amount of the cost of reconstructing the premises and restoring them to good order and condition, less the amount received from insurance:—Held, that the respondents were not responsible for the loss, as the fire in the present case was an accident by fire within the terms of the exception contained in the lease, and therefore articles 1053, 1627, and 1629, C. C., were not applicable. *Evans* v. *Skelton*, 16 S. C. R. 637.

Dilapidations Caused by Landlord.]—Defendant covenanted to repair, and that if he should fail the lessor might do it and sue for the sum expended. To an action for repayment of money thus spent, defendant pleaded that the dilapidations so repaired were caused by the plaintiff wilfully, maliciously, and in the dead hour of the night, and the possession of the premises thus disturbed, contrary to the lease:—Held, on demurrer, no defence, but the subject of a cross-action only. *Kelly* v. *Moulds*, 22 U. C. R. 467.

Proviso Construed as Covenant.]—A lessee covenanted to build on the demised premises during the term, "provided always, and it is the true intent and meaning of these presents, and the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," &c.:—Held, a covenant to pay. *McFattridge* v. *Talbert*, 2 U. C. R. 156.

Running with Land—*Equitable Lien.*]—B. demised certain lands to W. by deed of

lease, containing an agreement that, "at the expiration of the lease, the lessor, his heirs or assigns, will pay the said lessee, &c., one-half of the then value of any permanent improvements he may place upon the said lands," &c.:—Held, that the liability to pay for the said improvements ran with the land and attached as an equitable lien thereon as against the plaintiff, to whom B. had conveyed the said land, such lien attaching on the title which B. had at the time of such conveyance to the plaintiff, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien. *Berrie* v. *Woods*, 12 O. R. 693.

——— *Devisees of Lessor.*]—Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected. *McClary* v. *Jackson*, 13 O. R. 310.

——— *Married Woman—Separate Estate—Trustees—Lien—Set-off.*] — In 1849 W. F. married A. F. without marriage settlement. In 1872 W. F. entered into a covenant for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse, which the lessee was to have liberty to erect, and did erect upon the demised premises. Pending the term, W. F. conveyed the reversion in such a way that it became vested in himself and W. as trustee, as to the whole beneficial interest, for A.F.:—Held, affirming the decision in 12 O. R. 459, that the separate estate of A. F. was not bound by the covenant, though she was equitable owner of the reversion as above mentioned at the time of the erection of the malthouse, and until the expiration of the lease. Whether the covenant was one that ran with the land or not, and whether A. F. or her trustees were assignees within the meaning of 32 Hen. VIII. c. 34 or not, privity of estate is not tantamount to privity of contract so as without more to affect the separate estate of a married woman, as if she had expressly contracted with reference thereto. Held, also, that a claim on behalf of the said trustees for rent in arrear, and for damages for non-repair, was not matter of set-off against damages recovered against W. F. for breach of his said covenant, though he was one of the trustees, they not being matters arising in the same right. Semble, if the amount to be paid for the malthouse had formed a lien on this particular land out of which the rent issued, it might be that the claim for set-off in respect of rent in arrear and damages for non-repair would have prevailed. *Ambrose* v. *Fraser*, 14 O. R. 551.

Trustees—*Powers of.*]—Power of trustees to grant lease for twenty-one years with provision for compensation for improvements or renewal. *Brooke* v. *Brown*, 19 O. R. 124.

(d) *To Repair Buildings.*

Breach of Covenant—*Action for—Discovery in—Inspection of Buildings.*] — Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which the property of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired. The plaintiff sued for damages for breaches of the covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants:—Held, that an order for inspection by the defendants should not be made. *Hills* v. *Union Loan and Savings Co.*, 19 P. R. 1.

——— *Continuing Breach—Waiver—Fixtures.*]—On the 5th December, 1882, plaintiff by lease, made according to the Act respecting Short Forms of Leases, R. S. O. 1877 c. 103, demised to defendant certain premises for a grocery and liquor store, for a term of years. In April, 1883, defendant made a door through an inner brick wall, to get access from the store to a portion of the premises previously reached only from the outside. Plaintiff at first objected to this, but afterwards assented to it. A partition, partly glass and partly wood, in which was a door, separated the office from the store. In April, 1885, defendant proceeded to move this partition nearer the centre of the store, substituting wood for the glass, closing up the door and converting a front window into a door, so as to make the office a liquor store, to comply with a municipal by-law requiring a separation of liquors from groceries:—Held, 1. that the breaking through the brick wall, for the purpose of making the door, was a breach of the covenant to repair, but was not a continuing breach, and had been waived by the landlord. 2. That under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make; that the right to erect such fixtures is to this extent, viz., that they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title. 3. That the plaintiff's reversion not being injured by the acts complained of, there was no waste and no forfeiture. *Holderness* v. *Lang*, 11 O. R. 1.

——— *Defence to Action for Rent.*]—Covenant for rent due on a lease of a mill, alleging that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence. *Wilkes* v. *Steel*, 14 U. C. R. 570.

——— *Measure of Damages.*]—In an action on a lease (having many years to run) for rent and non-repair of the premises:—Held, that the reversioner by reason of the length of lease was not restricted to nominal damages, but the measure of damages was the amount by which the reversion was injured by the want of repair. *Atkinson* v. *Beard*, 11 C. P. 245.

Construction of Covenant—"*Competent.*"]—See *McDonald* v. *Cochrane*, 6 C. P. 134, *ante* VIII. 2.

Fixtures—*Wooden Buildings — Erection during Term.*] — D. covenanted during the term to repair and keep in repair, and the said premises so repaired, with all things which at any time during the term should be fixed or fastened to or set up in or upon the premises, at the expiration of the term peaceably to yield up, with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture:—Held, to extend to a building resting on blocks of wood, not let into the ground, also to a building resting on stumps, and also to a building laid on a scantling and old posts not let into the ground, all placed on the demised premises during the term. *Allarice* v. *Disten*, 11 C. P. 278.

Memorandum as to Repairs—*Effect of, on Covenant — Wharf.*]—Defendant demised to plaintiff a yard and wharf, covenanting generally, to put the wharf into good and sufficient repair on or before a given day. The condition of the wharf was discussed between the parties, and a memorandum was drawn up by defendant and signed by both: "Work to be completed to put wharf into good repair; two stringers, and one stringer to be put into place; all that part of wharf not planked to be planked with new plank, and all the broken plank or holes to be repaired with sound plank." Plaintiff signed this memorandum before examining the wharf, and on the defendant's representation that it was all right. These repairs were executed, but about a month afterwards the wharf fell in, apparently by reason of the defective state of the caps on which the stringers rested. There was no clear evidence of an agreement as to any specified amount of repairs being taken as full performance of the covenant in the lease:—Held, that the memorandum did not control or modify the covenant, and that the plaintiff was entitled to recover for the damage sustained by the wharf not having been put into good repair. *Snarr* v. *Beard*, 21 C. P. 473.

Notice—*Accident — Wharf — Continuing Breach.*]—A lease of a wharf or pier, for eight years, dated 7th May, 1874, contained covenants by the defendants, the lessees, to repair generally, "reasonable wear and tear and accidents by fire and tempest excepted;" and to repair after notice in writing, but without the above exceptions. In May, 1876, the wharf was damaged by the action of the ice forced against it by a high wind. In July, 1876, the demised premises were sold to the plaintiff under an execution against the lessors, and a deed thereof executed by the sheriff in July; and in November the plaintiff gave a written notice to repair the damage caused as aforesaid. In an action by the plaintiff against defendants for the breach of the covenants to repair generally and after notice:—Held, that the non-repair was a continuing breach of the covenants to repair, of which the plaintiff, as assignee, might avail himself. Held, also, that the covenant to repair after notice was subject to the same exceptions as were contained in the general covenant. Held, also, that the damage here sustained could not be said to be an accident caused by tempest, so as to bring it within the exception. *Thistle* v. *Union Forwarding and R. W. Co.*, 29 C. P. 76.

Running with Land — *Time for Performance—Breach—Damages.*] — In a lease for years made to G., and assigned by G., as to the residue of the term, to defendants, was contained, after the usual covenant to yield up the same in good repair, a proviso that nothing therein contained should in any way compel the said G. to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they then were: "but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to be done and performed by the said G. at his own proper cost and charge;"—Held, that these words constituted a covenant, which covenant ran with the land and bound the assignees of the lease, though assigns were not expressly mentioned. Held, also, that the lessee was not entitled to delay repairing until the end of the term; but that such repairs were to be made as were necessary to prevent the buildings going to destruction, and the moment such necessity existed and the tenant failed to repair, the covenant was broken. The evidence shewed that the premises had been allowed to go to decay for want of necessary repairs; that up to and about the time G. left them they were in reasonable repair, but that after that, and whilst in defendants' possession, proper repairs had not been made:—Held, evidence for the jury of a breach of covenant by defendants whilst owners of the lease, and that the plaintiffs were not bound to give express evidence of the actual state of the premises when the lease was first made. Marriot v. Cotton, 2 C. & K. 553, referred to, distinguished, and doubted. Review of English authorities as to injuries to the reversion, the time of bringing the action therefor, and the measure of damages. *Perry* v. *Bank of Upper Canada*, 16 C. P. 404.

——— *Liability of Executors — Implied Covenant—Assignment—Notice— Reasonable Wear and Tear.*]—On the 19th May, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Forms Act. The statutory covenants were prefaced by the words: "And the said lessee for himself, his heirs and executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and executors, administrators, and assigns, in manner and form following, that is to say." Then followed the ordinary statutory covenants, except after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant "not to assign or sublet without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance;"—Held, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B.; and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," &c.

Held, also, that there could be no liability on defendants as executors of J. B. for breach of implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal with express covenants, no such implied covenant would arise. Held, also, that an action of waste would lie notwithstanding the express covenant to repair; but there must be what would constitute waste. A mere breach of covenant, not amounting to waste, not being sufficient; but to maintain such action the plaintiff must have a vested interest in the reversion, at the time of waste committed, so that her claim, if any, must be for waste committed after she acquired the reversion and up to J. B.'s assignment; but there could be no liability here, for as to J. B. it appeared that his assignment was made more than a year prior to his decease; and R. S. O. 1877 c. 107, s. 9, only applied to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendant to set this up as a defence, the onus being on plaintiff to shew that she came within the statute; and as to the executors it appeared they had no interest in the term and had never intermeddled with the property. Held, also, that there was no breach of the covenant by defendant to repair according to notice, because the notice was given to J. B. after he had parted with his interest in the term. Held, also, that as to many of the alleged breaches they were such as came within the terms "reasonable wear and tear," while as to others the evidence failed to disclose the date when they occurred and therefore whether prior to the assignment to J. B. *Crawford* v. *Bugg*, 12 O. R. 8.

Stranger.]—A lessee covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr* v. *McVab*, 24 O. R. 653.

See McDougall v. *Ridout*, 9 U. C. R. 239; *Davey* v. *Lewis*, 18 U. C. R. 21; *Thompson* v. *Baskerville*, 40 U. C. R. 614; *Ferguson* v. *Troop*, 17 S. C. R. 527; *Evans* v. *Skelton*, 16 S. C. R. 637; *Hett* v. *Janzen*, 22 O. R. 414; *Brown* v. *Trustees of Toronto General Hospital*, 23 O. R. 599.

(e) *To Repair Fences.*

Breach — *Measure of Damages.*] — In an action by lessor against lessee on a covenant to repair fences, on or before a certain day:—Held, that such a covenant was not a continuing covenant, and damages must therefore be assessed once for all. 2. The proper measure of damages in such a case is the amount by which the beneficial occupation of the premises during the term is lessened. Whether the cost of repairing would also be a correct method of estimating the damages must depend upon the circumstances of each case. Semble, if the cost of repairing would be so large as to be out of proportion to the tenant's interest in the premises, he would not be justified in repairing and treating the cost of such repairs as his damages. *Cole* v. *Buckle*, 18 C. P. 286.

Removal of Fence — *Right of Way — Pleading.*] — Plaintiff sued defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof; and the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way, to prevent horses, &c., straying therefrom; that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter, that the lease contained covenants allowing the plaintiff to enter on the land and view the state of repair, and that defendant would repair according to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which the defendant with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 U. C. R. 307. See *Pickard* v. *Wixon*, 24 U. C. R. 416.

——— *Waiver — Acceptance of Rent.*] — Semble, that in this country the removal of a fence on a farm from one place to another is not per se, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances of each case. Where the lessor accepted rent after such a removal, with knowledge of it:—Held, a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant. *Leighton* v. *Medley*, 1 O. R. 207.

See Castle v. *Rohan*, 9 U. C. R. 400; *Houston* v. *McLaren*, 14 A. R. 103; *Cook* v. *Edwards*, 10 O. R. 341.

(f) *To Return in Good Repair.*

See Klock v. *Lindsay*, *Lindsay* v. *Klock*, 28 S. C. R. 453, *ante* VII.

2. *For Quiet Enjoyment.*

Breach — *Authority of Statute — Non-fulfilment of Lessee's Covenant.*]—By letters patent, bearing date in 1849, certain lands situate on the water's edge in the city of Toronto, were granted to one A., the patent containing a condition for the erection of an esplanade according to a certain plan, within three years. A., by indenture, demised the said lands to M., of whom plaintiff was assignee, with full covenants against all the

world, and M. covenanted to perform the condition in the patent. The statute 16 Vict. c. 29 enacted that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it and impose a special rate to defray the expense thereof: and by 20 Vict. c. 80 further powers were granted to the corporation. The corporation entered upon the premises, and by filling up the space between the water's edge and the esplanade, prevented the working of the plaintiff's mill. For this the plaintiff brought an action on the covenant against defendants, the assignees of the lessor:—Held, that as the act of the corporation was done under superior authority (the legislature), although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud, or procurement of the lessor, but from the non-fulfilment by the lessee of his own covenants, defendants were entitled to succeed. *Smarr* v. *Baldwin*, 11 C. P. 353.

Easement — *Indemnity.*] — The plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view, and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim:—Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill founded, the landlord was not a proper party to be called on for indemnity under rule 329. Thomas v. Owen, 20 Q. B. D. 225, followed. *Scripture* v. *Reilly*, 14 P. R. 249.

Ejectment by Assignee of Prior Mortgage.]—Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon, created prior to the lease, and thereupon sued defendant for breach of the covenant:—Held, that he could not recover, as the assignee of the mortgages was not a person "claiming by, from, or under" defendant, but under the defendant's predecessor in title. Held, also, that the fact that defendant had taken the estate subject to the mortgages, and was to pay them off, did not extend her liability under the covenant. *Bellamy* v. *Barnes*, 44 U. C. R. 315.

Eviction — *Title Paramount.*]—In 1858 the defendants, a railway company, requiring lands for their station and grounds, fenced in a piece of land, with the consent of the proprietor, M., but the amount to be paid for it was for some reason not agreed upon. Defendants, however, occupied it until 1866, when they leased a small portion of it to the plaintiff for the purpose of a warehouse, and in 1868 M., not having been paid for the land, put up a fence which interfered with the plaintiff's enjoyment. The plaintiff thereupon sued defendants on the covenant in the lease for quiet possession:—Held, that he could not recover, for M. could not have dispossessed the defendants, his right to the land having been by the statutes converted into a claim to compensation; and the eviction, therefore, if there was one, was not by title paramount. *Clarke* v. *Grand Trunk R. W. Co.*, 35 U. C. R. 57.

——— *Justification—Non-payment of Rent—Absence of Proviso for Re-Entry.*]—Declaration, that defendant by deed demised certain land to the plaintiff for five years, at the rent thereby reserved, and subject to the covenants and conditions therein contained; and thereby defendant covenanted that the plaintiff, paying the quarterly rent thereby reserved, and performing his covenants therein contained, should quietly hold and enjoy the premises, &c., for the said term; and all conditions were fulfilled, &c., yet during the said term defendant entered and evicted the plaintiff. Plea, that the plaintiff did not pay the rent by said lease reserved, or perform the covenants therein contained, whereby defendant became entitled to enter upon the demised premises:—Held, plea bad, for no proviso for re-entry was shewn, and it in no way justified the eviction, but merely stated matters quite consistent with the right to sue. *Purser* v. *Bradburn*, 25 C. P. 108.

Implied Covenant — *Breach.*] — Where the plaintiff declared on an indenture of lease, not setting out any covenant for quiet enjoyment (the lease itself in fact containing none), and assigned as a breach that defendant had hindered the plaintiff from entering on the demised premises at the time when the term commenced, and continually since kept him out; to which defendant pleaded merely a denial of having hindered the plaintiff from entering and enjoying; and the jury on this issue found for the plaintiff; the court refused to set aside the verdict, holding that there was an implied covenant for quiet enjoyment, and that proof of the defendant's refusing to give possession to the plaintiff amounted to a breach of it. *Smart* v. *Stuart*, 5 O. S. 301.

Market Fees — *Lease of — Collection — Obstruction — Action.*]—Defendants leased to plaintiff the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. Twenty years previously they had passed a by-law, giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to M., who obstructed a portion of the same with building materials. The plaintiff thereupon sued defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market:—Held, that such action was not maintainable. *Reynolds* v. *City of Toronto*, 15 C. P. 276.

Part of Building — *Disturbance of Possession—Locking Outside Door—Breach of Covenant—Act of Agent.*]—The plaintiffs declared upon the covenant for quiet enjoyment in a lease to them by defendants of a flat in a building, above the flat occupied by defendants, together with all passages, ways, &c., to the said rooms belonging, alleging that defendants had disturbed them in their possession. Plea,

in substance, that the rooms were part of a large building, in which there were other rooms used as offices, to which access was obtained from the street by the door and staircase, which were used by the other tenants in common with the tenants of the rooms leased to plaintiffs; that the whole building was in charge of a caretaker employed by defendants, who were landlords of the whole, and for the safety and convenience of all kept the key of the street door, and locked it after the usual office hours, after which the plaintiffs could at all reasonable times get the key and have access to their rooms: that the demise was made subject to the right to use said door by defendants and other tenants; and that the disturbance alleged was the locking of said door by the caretaker after office hours: —Held, that the plea shewed no defence. *Maclennan* v. *Royal Ins. Co.*, 37 U. C. R. 284.

The agent of an insurance company at Toronto negotiated for a lease to plaintiffs, who were barristers, &c., of one flat of the company's offices for three years at $600 a year, and executed on the part of the company a lease, containing the usual covenant for quiet enjoyment, and received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 p.m., thus excluding the plaintiffs after that hour; and the agent refused to let them have a key unless they got the caretaker to be present:—Held, that the company were responsible for this act of their agent, which was clearly a denial of the plaintiffs' rights under the lease. *Maclennan v. Royal Ins. Co.*, 39 U. C. R. 515.

Sale of Land — *Illegal Entry by Purchaser.*]—In a lease of a farm for five years, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold and conveyed to a purchaser and an assignment of the lease made to him. In the fall of the year, after the purchase, and before the lessee had harvested his crop, the purchaser entered on the land and ploughed it up, thereby causing injury to the lessee: — Held, that the purchaser was a "tenant" within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was a trespasser and liable for damages. Held, also, that no liability was imposed on the lessor under the covenant for quiet enjoyment. *Newell* v. *Magee*, 30 O. R. 550.

See Anderson v. *Stevenson*, 15 O. R. 563; *Gold Medal Furniture Co.* v. *Lumbers*, 29 O. R. 75, 26 A. R. 78, 30 S. C. R. 55 (*ante* VIII. 1.)

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3. *Not to Assign or Sublet without Leave.*

Assignee of Lease — *Whether Bound — Covenant Running with Land—Subletting—License—Presumption.*]—On 19th May, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Forms Act. The statutory covenants were prefaced by the words:—"And the said lessee for himself, his heirs and executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and executors, administrators, and assigns, in manner and form following, that is to say." Then followed the ordinary statutory covenants, except that after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant "not to assign and sublet without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign was (except as to the additional words) in the language used in covenant 7, column 2, of the Short Forms of Leases Act:—Held, that the covenant not to assign or sublet, &c., did not include assignees, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect; and therefore J. B.'s assignment to C. B. was no breach thereof; and this was equally so as to subletting by using the premises as a tenement house; and also, from the fact of the user having been open and notorious both by P. and J. B. for some thirteen years, a license to do so must be presumed. Quære, whether such covenant ran with the land, the authorities on the point being conflicting; but the county Judge, to whom the case had been referred, having found that it did so run, a Judge sitting in appeal refused to interfere. *Crawford* v. *Rugg*, 12 O. R. 8.

Damages—*Measure of.*] — Where, a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such breach, the rent so payable in advance without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession. *Patching* v. *Smith*, 28 O. R. 201.

Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health. Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500. Williams v. Earle, L. R. 3 Q. B. 739, followed. *Munro* v. *Waller*, 28 O. R. 574.

Forfeiture — *Entry—Trespass.*]—Defendant leased land to one M. for five years from 1st December, 1874, by a lease in the statutory short form, containing covenants not to sublet or assign without leave, &c. On 20th

February, 1876, defendant, finding the premises vacant and going to ruin, the door of the house broken and open, fences down, &c., re-entered and nailed up the door, and on the 29th leased it by deed to one G. for five years. On the 9th March the plaintiff, who had been hired to work for M., receiving the use of the house and part of the crops for his pay, broke into the place, and remained there until 17th April, when defendant seized under a distress for rent, there being none due, and removed the plaintiff's stove, &c. The plaintiff then promised to leave on the 19th, and gave up the key to defendant as a symbol of possession, and G.'s stove was put up in place of the plaintiff's. On the 19th, when G. and defendant went there, M. resisted their entrance, and they came to blows. M. and defendant had an arbitration, which resulted in an award that defendant should pay $18 costs to M., and that M. should give up possession, as he had broken his covenants in the lease. The plaintiff sued defendant for trespass to the land, and in trover, and the jury found a verdict for $100:—Held, that the plaintiff could not recover for the trespass, having no title to the land, for if he went in under a lease from M., and not as his servant only, that of itself constituted a forfeiture, and entitled defendant and G. to enter. A verdict was therefore entered on the trover count for 1s. damages for the injury done to the plaintiff's stove, and for defendant on the other counts. *McArthur* v. *Alison*, 40 U. C. R. 576.

——— *Mortgage—Waiver.*]—The plaintiff leased land for ten years from 1st December, 1871, to one D., who covenanted that neither he nor his assigns would assign, transfer, or sublet the premises without the plaintiff's consent in writing first obtained, with a proviso for re-entry. D. mortgaged his interest to one H. to secure him against his indorsement of a note for D., the proceeds of which D. expended in converting the premises into a race-course and pleasure grounds and erecting buildings thereon. This note being dishonoured, H. informed the plaintiff of the mortgage, and that owing to the plaintiff's absence it had been taken without his consent, whereupon the plaintiff waived all objections on this ground, and declared that he would take no advantage of the omission, and H. then paid the note, and afterwards expended a large sum in foreclosing the mortgage and improving the premises. H. having foreclosed, advertised the land for lease. One W. took possession in May, 1874, on the understanding that he was to have the place for five years, with the privilege of remaining the whole of the original term, at a rent of $530 a year, and there was to be a written agreement, to be drawn up if possible so as not to affect H.'s lease. He remained ten months, and made improvements, and while in possession sublet part of the land to one C. for $300 a year. W. gave up possession to H. in April, 1875, not being able to obtain the written agreement which had been promised to him; and on arbitration with H. the arbitrators awarded to W. $524 in full for improvements, "less $224 due for rent," on which basis they settled. H. notified C. in October, 1874, not to pay any money for rent unless authorized by H.:—Held, that what took place between H. and W. was a breach of the covenant; and semble, that the lease was forfeited also by the dealing between H. and C. *Baron* v. *Campbell*, 40 U. C. R. 517.

——— *Notice—Demand—Evidence — Copy of Underlease.*] — No notice or demand is necessary before action upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let. A copy of an under-lease between defendant and his under-tenant was proved in evidence upon notice given to produce the original:—Held, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial. *Connell* v. *Power*, 13 C. P. 91.

——— *Recovery of Land — Buildings not Included.*]—The plaintiffs, owners in fee of certain land, on the 30th October, 1866, leased it for twenty-one years to one B. by a lease under the Short Forms Act, containing covenants to pay rent and not to assign or sublet without leave. By a deed of the same date, after reciting the lease and an agreement of B. to purchase the buildings on the land for $1,400, the plaintiffs conveyed the said building to B., his executors, administrators, and assigns. B. then mortgaged the premises to H., and afterwards assigned his interest to C., who assigned to G. H., and G. H. assigned to M. This last assignment was objected to by the plaintiffs, who brought ejectment against the defendant D., who was in possession of the buildings under an oral lease from B., for the forfeiture occasioned by such assignment, as also for non-payment of rent. While a rule nisi to set aside their verdict was pending, the plaintiffs obtained a decree in chancery by which the conveyance to B., as far as it conveyed the land on which said buildings stood, was declared to be a mistake, and was rectified so as to pass only a chattel interest in said buildings, and no estate in the land:—Held, that the plaintiffs were entitled to recover for the breach of the covenant not to assign, etc., but that under the circumstances their recovery must be limited to the land alone and not to the buildings thereon, and that therefore they could not enter into the buildings or remove the defendant therefrom. *Toronto Hospital Trustees* v. *Denham*, 31 C. P. 203.

——— *Voluntary Assignment for Creditors.*]—The lessees, under a lease containing a covenant not to assign without leave, in the statutory form, made a voluntary assignment in insolvency on the 17th May, 1869. The assignee sold the stock-in-trade of the insolvents, who were dry goods merchants, and the purchaser took possession of the premises from him on the 27th May, the assignee also occupying a room there for the management of the estate:—Held, a breach of the covenant and a forfeiture, for the term passed to the assignee, under the Insolvent Act, and if his election to accept it were necessary it was shewn by his conduct. *Magee* v. *Rankin*, 29 U. C. R. 257.

Oral Assent.]—In ejectment, for breach of covenant not to assign without license, against the assignee of the lessee, the plaintiff's oral assent to the assignment before defendant entered into possession is no defence. *Carter* v. *Hibblethwaite*, 5 C. P. 475.

Proviso for Re-entry—*Absence of.*]—In a lease there was no express proviso for reentry, but the lease was stated to be made "subject to the following stipulations." Then followed a number of clauses, one of which

was that the lessee should not assign the lease without the consent in writing of the lessor: —Held, that the words quoted had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture and right of entry for their breach; and therefore that ejectment would not lie for assigning the lease without the consent of the lessor. *McIntosh* v. *Samo*, 24 C. P. 625.

——— *Application of.*]—A lease, dated 1st July, 1868, purported to be be made "in pursuance of an Act to facilitate the leasing of lands and tenements," the proper title of the statute then in force, C. S. U. C. c. 92, being "An Act respecting Short Forms of Leases," and it contained the following covenant:—"And the said lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent and to pay taxes, and will not assign or sublet without leave." Then followed "Proviso for re-entry by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee:—Held, that the proviso for re-entry applied only to the non-performance of positive, not negative, covenants, and that there was therefore no right of re-entry here. *Lee* v. *Lorsch*, 37 U. C. R. 262.

Reassignment to Original Lessee.]—The words "any person or persons" in the long form of the covenant not to assign or sublet without leave in the Act respecting Short Forms of Leases, R. S. O. 1887 c. 106, include the original lessee, and where an assignment by him has been made with consent, a reassignment to him without a fresh consent is a breach of the covenant. McCormick v. Stowell, 138 Mass. 431, not approved of. Varley v. Coppard, L. R. 7 C. P. 505, and Corporation of Bristol v. Westcott, 12 Ch. D. 461, referred to. *Munro* v. *Waller*, 28 O. R. 29.

Temporary Renting of Premises.]—Proviso for re-entry if the lessee "do or shall at any time or times during the continuance of the said term, let, set, or assign over these presents or the term, estate, or premises hereby granted, or otherwise part with his interest therein or thereto to any person or persons whatsoever," without the lessor's consent in writing. The lessee, on leaving the country for a time, rented the premises to one J., who was to go out when required:—Held, no forfeiture. *Leys* v. *Fiskin*, 12 U. C. R. 604.

See Brown v. *Lennox*, 22 A. R. 442; *Baldwin* v. *Wanzer*, 22 O. R. 612.

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4. *To Give up Possession.*

Ejectment—*Setting up Former Lease.*]—Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time:—Held, that on ejectment brought by the lessor at the end of the term the lessee could not set up a former lease to him for a longer period. *Doe d. Wimburn* v. *Kent*, 5 O. S. 437.

"Incoming Tenant"—*Purchaser—Trespass—Crops.*]—See *Newell* v. *Magee*, 30 O. R. 550.

Sale of Premises—*False Representation as to—Right of Action.*]—See *Cowling* v. *Dixon*, 45 U. C. R. 94; *Gold Medal Furniture Mfg. Co.* v. *Lumbers*, 29 O. R. 75, 26 A. R. 78, 30 S. C. R. 55.

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5. *To Pay Rent.*

Construction—*Consideration— Surrender—Notice.*]—The plaintiff, by deed of 30th December, 1882, created a term for ten years, which became vested in the defendants, of "all the mines of ores of iron and iron stone, as well opened as not opened, which can, shall, or may be wrought, dug, found out, or discovered within, upon, or under ten acres square of the north half of lot number 12 in the 6th concession of Madoc;" yielding and paying $1 per gross ton of the said iron stone or ore for every ton mined and raised from the land and mine, payable quarterly on the first days of March, June, September, and December, in each year. The lessees covenanted to dig up, &c., not less than 2,000 tons the first year and not less than 5,000 tons in every subsequent year and "pay quarterly the sum of $1 per ton for the quantity agreed to be taken during each year." . . And if the same should exceed the quantity actually taken, such excess to be applied towards payment of the first quarter thereafter in which more than the stipulated quantity should be taken: "Provided, that if the iron ore or stone shall be exhausted and not to be found or obtained there, by proper and reasonable effort, in paying quantities, then the parties of the second part shall be at liberty to determine the lease." The defendants entered, and proceeded to work the mines until September (or December), 1884, when, having taken out about 300 tons, they ascertained that the ore could not be obtained in paying quantities, whereupon they notified the lessor thereof and of their desire to surrender their lease, which surrender the lessor refused to accept, and instituted proceedings to recover the amount of two quarters' rent, all prior rents having been regularly paid. The defendants counterclaimed for the rents already paid by reason of failure of consideration:—Held, (1) that, no specified mode of surrendering the term having been provided for by the lease, the act of the defendants was a sufficient determination thereof; (2) that the consideration for the lease had not failed, so as to bring it within the class of cases where the subject matter could be treated as nonexistent, and by the true construction of the lease the plaintiff was entitled to be paid quarterly for the quantity of ore agreed to be got out; that the defendants were not entitled to recover back any of the rents paid; and that the lessor was entitled to judgment for such rent as accrued due between the 1st June and the giving of the notice of surrender. *Wallbridge* v. *Gaujot*, 14 A. R. 460; *Palmer* v. *Wallbridge*, 15 S. C. R. 650.

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6. *To Pay Taxes.*

Agreement for Lease—*Usage of Conveyancers—Evidence — Judicial Discretion.*]—

Upon a reference to settle the form of lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Upon such a reference the referee is entitled to rule as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered. *In re Canadian Pacific R. W. Co. and City of Toronto*, 27 A. R. 54.

Breach—*Repair after Action.*]—Breach of covenant to pay taxes remedied before statement of claim for recovery of possession filed. *Buckley* v. *Beigle*, 8 O. R. 85.

Construction of Covenant—*Taxes for Year of Commencement of Lease.*]—Defendant, in 1872, (the day and month not being given) leased a farm from the plaintiff for a year from the 27th September, 1872, and covenanted by the lease to pay during the said terms "all taxes, rates, . . assessments . . whatsoever, whether parliamentary, municipal, or otherwise, which now are or which, during the continuance of the said term, . . shall at any time be rated, charged, assessed, or imposed in respect of the said premises:" with a proviso for re-entry for breach of covenants:—Held, that defendant was not liable for the taxes for 1872, which had been assessed against the plaintiff: for that the words, "all rates, &c., which now are," referred to the kind or character of the taxes assessable against the land, and the words, "or which shall at any time," &c., to any other kind of taxes which might thereafter be imposed. *Macnaughton* v. *Wigg*, 35 U. C. R. 111.

Local Improvements—*Additions for Arrears.*]—Held, that under the wording of the covenant to pay "all taxes, rates, duties, and assessments whatsoever, . . now charged or hereafter to be charged upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act year by year to the amount of the taxes in arrear or additions made by the municipality. *Boulton* v. *Blake*, 12 O. R. 532.

Right of Building over Lane—*Interest in Land.*]—A lessee covenanted, pursuant to the Short Forms of Leases Act, to pay all taxes "to be charged upon the said demised premises or upon the said lessor on account thereof." The premises consisted of a building with a lane to the rear, described as being "north of the premises hereby demised," over which the lease provided that the lessee might at any time erect a building or extension, provided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the building which should at that time be erected "on the lands and premises hereby demised and over the said lane:"—Held, that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease. Semble, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the court of revision to have the omission rectified, does not relieve him from his obligation. Held, also, that the interest of the defendants in the lane was clearly an interest in land. And semble, even if it were not separately assessable, this would not excuse the defendants from repaying the lessor what he had to pay for taxes in respect to it. *Janes* v. *O'Keefe*, 26 O. R. 489.

Held, on appeal, per Hagarty, C. J. O., and Burton, J.A., affirming the judgment in 26 O. R. 489, that the covenant to pay taxes did not apply to the portion of the building afterwards erected over the lane. Per Osler and Maclennan, JJ.A., that the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane. Held, also, however, that this was at all events a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the assessment department. *Janes* v. *O'Keefe*, 23 A. R. 129.

Sale for Taxes—*Purchase by Lessee.*]—K. and others, on 1st October, 1880, leased to C. and another two parcels of land for four years, the lessees covenanting to pay all taxes, rates, &c., "which now are, or which during the continuance of the term hereby demised, shall at any time be rated," &c. In March, 1881, the lessors mortgaged one of said parcels to H. In December, 1883, part of the mortgaged land was sold to C. for the arrears of taxes to 31st December, 1882, and a conveyance was subsequently made to him by the warden and treasurer. It appeared that the land was sold for the taxes due for the year 1880 and 1882, with interest and costs. In an action brought by the mortgagee H. to set aside the tax deed as a cloud on the title, or to have the tax purchaser declared a trustee for him:—Held, that the tax purchaser could not hold the title so acquired against his lessors and the plaintiff, the lessees being bound under their covenant to pay the taxes for which the land was sold. Macnaughton v. Wigg, 35 U. C. R. 111, distinguished. *Heyden* v. *Castle*, 15 O. R. 257.

See Meehan v. *Pears*, 30 O. R. 433.

Special Rate.]—An ordinary lease under the Short Forms Act, containing the words, "and to pay taxes," covers a special rate created by a corporation by-law, as well as all other taxes. *In re Michie and City of Toronto*, 11 C. P. 379.

See sub-title XXI. *post.*

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7. *Other Covenants.*

Husbandry — *Converting Pasture into Arable Land—Timber—Fences.*] — A lessee covenants that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now or shall hereafter be brought under cultivation, in a good, husbandlike, and proper manner, and shall not

nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises, and also shall and will sufficiently repair and keep repaired the erections and buildings, fences and gates, erected or to be erected upon the said premises; the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite." The lessor having brought an action on the above covenant for damages against the lessee, on the ground that he had converted certain pasture into arable land, which, however, the jury found was an act of proper husbandry, thereupon judgment was entered for the defendant. On motion for a new trial:—Held, that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so that he might limit it to the buildings, fences, and erections existing at the date of the lease. *Cook* v. *Edwards*, 10 O. R. 341.

——— *Manure—Expiry of Term — Mesne Profits — Action — Estoppel.*] — A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon: — Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding. Hindle v. Pollitt, 6 M. & W. 529, followed. In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them:—Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term. *Elliott* v. *Elliott*, 20 O. R. 134.

——— *Title to Land—Custom—Pleading—Division Courts.*]—In an action brought in the high court by a landlord against a tenant, for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described, for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husbandlike, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings:—Held, not so; for the defendant was, on the face of the record estopped from pleading non demisit, and his denial could only be read as a traverse of the actual execution of the lease. Purser v. Bradburne, 7 P. R. 18, commented on. Held, also, that the "custom" pleaded was not the "custom" meant by s. 69, s.-s. 4, of the Division Courts Act R. S. O. 1887 c. 51, which refers to some legal custom by which the right or title to property is acquired, or on which it depends. Legh v. Hewitt, 4 East 154, followed. Held, therefore, that the action was within the competence of a division court, and that the costs should follow the event in accordance with rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

——— *Use of Hay—Rights of Execution Creditor.*]—Plaintiff leased as a dairy farm a farm with a number of cows, the lease containing the following clause: "All the hay, straw, and corn stalks raised on the . . farm to be fed to the same cows on the . . farm:"—Held, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had. *Snetzinger* v. *Leitch*, 32 O. R. 440.

Implied Covenants.] — See *Smart* v. *Stuart*, 5 O. S. 301; *Lyman* v. *Snarr*, 10 C. P. 462; *Reynolds* v. *Corporation of Toronto*, 15 C. P. 276; *Saunders* v. *Roe*, 17 C. P. 344; *Davis* v. *Pitchers*, 24 C. P. 516; *Coleman* v. *Reddick*, 25 C. P. 579; *Crawford* v. *Bygg*, 12 O. R. 8.

Not to Cut Timber—*Tapping Trees.*]—It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping. The general question of waste discussed. *Campbell* v. *Shields*, 44 U. C. R. 449.

Not to Remove Gravel.]—See *Boulton* v. *Shea*, 22 S. C. R. 742.

Redemption of Mortgage.]—A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—Held, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. *Brewer* v. *Conger*, 27 A. R. 10.

Restricting Use of Premises—*Auction Sales—Injunction.*]—By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store:"—Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction. *Cockburn* v. *Quinn*, 20 O. R. 519.

——— *Offensive Trade — Injunction.*]—A lessee for a term of years stipulated that he would not carry on any business that would affect the insurance. He made an underlease omitting any such stipulation, and the under-lessee having commenced the business of rectifying high-wines, was restrained. *Arnold* v. *White*, 5 Gr. 371.

Running With the Land.]—See *Crawford* v. *Bugg*, 12 O. R. 8; *Berrie* v. *Woods*, 12 O. R. 623; *Emmett* v. *Quinn*, 7 A. R. 306; *McCaskill* v. *McCaskill*, 12 O. R. 783; *McClary* v. *Jackson*, 13 O. R. 310; *Anderson* v. *Stevenson*, 15 O. R. 563; *Ambrose* v. *Fraser*, 14 O. R. 551.

To Care for Trees — *Application of.*]—A covenant in a lease that the lessee will "take proper care of the fruit trees," primâ facie only applies to the trees planted and growing on the premises at the time the lease is executed. Semble, that it would not apply to trees planted by the lessor under an oral agreement subsequent to the execution. If before the lease was executed it had been expressly agreed that the trees to be afterwards planted by the lessor should be included in the covenant, and upon that understanding they were planted:—Semble, that the covenant might be held to apply to them: but that such agreement must be established by the lessor by undoubted testimony. *Crozier* v. *Tabb*, 26 C. P. 369.

To Furnish—*Continuing Covenant — Removal of Furniture.*]—The proprietors of a house in the course of erection, which was intended to be used as an hotel, made a lease thereof for a term of five years from the time of the completion of the building. The lease contained, amongst others, a covenant in these words: "And the said lessee covenants further with the said lessors that he will furnish the said hotel in a substantial and good manner:"—Held, that this was a continuing covenant, and that the lessee was not at liberty, during the continuance of the term, to remove out of the house the furniture thereof which he had placed in it. *Rossin* v. *Joslin*, 7 Gr. 198.

To Pay for Furniture—*Valuation.*]—A lease was made between three parties—plaintiff of first part, one B. of second part, and defendant of third part. The plaintiff leased to B. an hotel, with certain goods and chattels; and B. covenanted, among other things, at the end of the lease to pay plaintiff the difference between £550 and the value of such goods, which value should be ascertained by arbitration. The defendant covenanted with the plaintiff that B. should pay the difference between the said sum of £550 and the value of such of said goods and chattels, &c., not adding "to be ascertained as aforesaid:"—Held, that these words were to be understood. *Hayes* v. *Addy*, 3 C. P. 262.

To Renew.]—See *Anderson* v. *Stevenson*, 15 O. R. 563; *Sears* v. *City of St. John*, 18 S. C. R. 702; *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

To Return Chattels Rented with Farm.]—Defendant leased a farm from the plaintiff for seven years, and stipulated that he should let him have with it a horse, waggon, plough, harrow, and a set of harness, at a valuation, to be returned of equal value at the expiration of the term. Plaintiff sued for non-return, alleging that defendant had not returned the said goods, or any of them, of equal value, or otherwise:—Held, breach well assigned, and declaration sufficient. Quære, as to the meaning of the agreement. *Pew* v. *Hart*, 14 U. C. R. 256.

To Supply Power—*Implied Covenant.*]—Plaintiff leased premises to one M., for ten years, by writing not under seal, under certain terms, M. to furnish plaintiff with steam power to the extent of five horses. Defendant for some time carried on the business in partnership with M., and subsequently, a dissolution having taken place, continued the business himself. During the partnership a certain amount of steam power was provided for plaintiff by lessee. Plaintiff sued defendant for not furnishing the quantum of steam power since the dissolution. Defendant denied his liability, setting up a yearly tenancy not under seal, and that he was not a tenant under the agreement entered into with M.:—Held, 1. that the agreement or lease to M. was void, not being under seal, but might be referred to for the terms of the letting; 2. that a promise by defendant to furnish the power was implied by law, from the facts and situation of the parties. *Lyman* v. *Snarr*, 10 C. P. 462.

X. Crops.

Agreement to Work Farm on Shares —*Death of Owner—Right to Share—Devisee—Executors.*]—M. in the spring of 1852 agreed by parol with A. to work his farm on shares, and put in a crop of rye. In December, 1852, A. entered into a written agreement with G. to rent the farm to him for three years; and in January, 1853, A. died leaving a will. M. in 1853, with the assent of G., reaped the crop which he had sown in the previous year:—Held, that the share of such crop to which A. would have been entitled must go to the devisee of the land, and not to the executors. *Tubbs* v. *Morgan*, 12 U. C. R. 151.

Construction of Provisions in Lease as to.]—See *Harrison* v. *Pinkney*, 6 A. R. 225.

Execution—*Seizure of Crop—Expense of Threshing.*]—When a sheriff, acting in good faith for all concerned, agreed to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing should be allowed him. *Galbraith* v. *Fortune*, 10 C. P. 109.

——— *Seizure of Crop—Independent Chattel.*]—D., in November, 1862, took land from defendant's agent on a written agreement to clear so much a year, getting certain crops, and all the timber, excepting pine of a special size. In July, 1863, D. wrote to plaintiff that if he would complete the clearing under this arrangement, and deliver to D. $40 worth of cordwood, he should have all the benefit arising from it. Under this the plaintiff claimed a crop of wheat sown in the fall of 1863, and seized by the sheriff in July, 1864, under an execution against D. On an interpleader issue the jury found for the plaintiff, negativing any fraud as between him and D.:—Held, that the plaintiff could have no title to the land, for the agreement with D. and assignment to the plaintiff, not being by deed, were both void, under C. S. U. C. c. 90, s. 4: but that having been let into possession by D., and having cultivated the land for his own benefit, and at his own expense, it could not be held that the wheat, which was an independent chattel, not within the statute, was

defendant's property; and that the verdict, therefore, must stand. *Hogan* v. *Berry*, 24 U. C. R. 346.

Expiration of Lease—*Right to Away-going crops—Covenant—"All"—Meaning of.*]—In trover for an away-going crop, which the plaintiff contended he was entitled to under a covenant in his lease, "that he should not sow fall grain in all fields now cleared in the first or last year of the lease," on proving that he had not sown the grain in all the fields, the court held the word "all" must be construed "any:" that the lease, therefore, did not militate against the common law rule; and that the plaintiff was precluded from claiming the away-going crop. *Gilmore* v. *Lockhart*, H. T. 6 Vict.

——— *Construction of Lease.*]—In a three years' lease, the words, "also to allow the said W. and J. N. (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land, which had been sown by the preceding tenant, and which he was entitled to reap, were—Held, to confer on the tenant the right to sow a crop during the tenancy, which they might reap afterwards. *Campbell* v. *Buchanan*, 7 C. P. 179.

——— *Custom—Evidence—New Lease.*]—In trover for wheat reaped and claimed by the defendants as of right belonging to them, as an away-going crop after the expiration of a lease for seven years, the plaintiff's witnesses proved a new lease in writing of the premises to a third party, from the expiration of the defendants' lease, but the new tenant swore that he had no right to the crop:—Held, that it was not necessary for the plaintiff to produce the new lease. Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to customary right of the away-going crops is excluded. Semble, that there is in Upper Canada no custom of the country as to the away-going crops. *Burrowes* v. *Cairns*, 2 U. C. R. 288.

——— *Memorandum—Surrender.*]—Plaintiff by deed leased land from one S. for five years from the 1st October, 1862, agreeing thereby to give up possession on the expiration of the term. On the lease was indorsed an unsigned memorandum, that if plaintiff cleared any more land he was to have the same rent free for the first three years. No land was cleared by plaintiff until the autumn of 1865; and in the autumn of 1867, he put in a crop of wheat. After the expiration of his term S. permitted him to remain on the premises, and in the following April he left, giving up to S. the place with all on it. In June following S., by deed, leased the lands and crops thereon to two of the defendants for five years from the 7th January previous, and subsequently, when the wheat had ripened, plaintiff entered upon the land, then in defendants' possession under S., and cut the crops. Defendants took possession of the wheat in shocks on the land, and the plaintiff brought trover:—Held, that the memorandum could not operate so as to transfer to plaintiff the right of entering in 1868 on the possession of defendants, and taking the crops in the ground, the property in which had passed to them under the lease from S., and which, moreover, the evidence shewed plaintiff had before this expressly surrendered, with the land, to S.; nor on the authority of Burrowes v. Cairns, 2 U. C. R. 288, could the plaintiff claim, as an outgoing tenant, the wheat as an away-going crop; and that he was not, therefore, entitled to recover against defendants. *Kaatz* v. *White*, 19 C. P. 36.

Payment of Part of Crop as Rent—*Inchoate Purchaser—Delivery to.*]—S. A., before the marriage to C. R., her present husband, (on the 1st April, 1857,) leased certain lands to the defendant by the year, one-third of the yearly crop to be paid as rental. To a declaration alleging the non-delivery of the crop as agreed, defendant pleaded, thirdly, that on 17th April, 1860, the lands in question were sold under chancery sale to one D., who paid his deposit and signed a memorandum, and thereby became entitled and entered into possession, and took and converted one-third of the crop to his own use, whereby he, the defendant, was prevented from furnishing the same:—Held, that D. being only an inchoate purchaser, he was not entitled to the crops, and therefore that defendant was liable on his contract. *Richardson* v. *Trinder*, 11 C. P. 130.

See Murton v. *Scott*, 7 C. P. 481; *Campbell* v. *Baxter*, 15 C. P. 42; *McGinnes* v. *Kennedy*, 29 U. C. R. 93; *Newell* v. *Magee*, 30 U. C. R. 550.

XI. Disputing Landlord's Title.

1. *Generally.*

Fraud.]—A. being in possession without title, B. represented himself to him as owner, when he was not. A., by writing, agreed to lease from B. for five years, at a rental of £4 10s. This writing was signed by A. alone:—Held, that under the circumstances A. could dispute B.'s title on the grounds of fraud and misrepresentation. *Lynett* v. *Parkinson*, 1 C. P. 144.

Heirs of Tenant.]—A. entered into possession under B., who orally promised him a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died:—Held, that A. having entered under B., his heirs were estopped from disputing B.'s title, and could be ejected by B. *Armstrong* v. *Armstrong*, 21 C. P. 4.

Mistake—*Crown—Landlord and Tenant—Estoppel.*]—Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case, the Crown, being the lessor, is in no better position in respect of the doctrine of estoppel than a subject. *The Queen* v. *Hall*, 6 Ex. C. R. 145.

Notice to Quit.]—When the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right:—Held, that he was entitled neither to notice to quit nor to a demand of possession. *Doe d. Bouter* v. *Frazer*, 4 O. S. 80.

Payments Made to Stranger—*Assent of Landlord.*]—Defendant rented land from P. for five years, but paid all the rent to A., except for the last year and a half, which he paid to B. The first of the payments to B. was made with A.'s assent. The plaintiff, claiming under a deed from A. made after this payment, brought ejectment:—Held, that the payments so made to B. formed no defence to this action. *Pomeroy* v. *Dennison*, 13 U. C. R. 283.

Pleading—*Claim of Ownership—Removal of Building.*]—Declaration, that the plaintiff let to defendant a certain tenement, to be used by him as a dwelling house, for certain rent, whereby it became his duty not to remove or despoil the same, yet defendant did remove the house, which thereby became wholly lost to the plaintiff; and for that defendant converted to his own use certain goods and chattels, to wit, a building and the materials of which it was composed. Plea, that the building was situate on defendant's land, and incumbered the same, wherefore defendant gave due notice to the plaintiff to remove it, and because it was not removed in a reasonable time defendant removed it, doing as little damage as possible:—Held, on demurrer, plea bad; for defendant, having accepted a lease of the house, which would carry with it the land on which it stood, was estopped from thus denying his landlord's title. *Reynolds* v. *Offitt*, 15 U. C. R. 221.

——— *Non Demisit.*] — See *Talbot* v. *Poole*, 15 P. R. 99.

Proof of Landlord's Title.]—A tenant let into possession by a person claiming rent cannot dispute the title of such person; nor if let into possession by a third person, and having acknowledged the title of and agreed to pay rent to the plaintiff, can he afterwards compel him to prove his title. *Smith* v. *Modeland*, 11 C. P. 387.

Quære, if A., in possession of land to which he pretends no claim, taking a lease from B., who represents himself to be the owner, is estopped from putting B. to prove his title. *Doe d. Radenhurst* v. *McLean*, 6 U. C. R. 530.

Setting up Former Lease.]—When a lessee took a lease for two years, and covenanted to leave the premises without notice at the end of that time:—Held, that on ejectment by the lessor at the end of the term, the lessee could not set up a former lease to himself for a longer period. *Doe d. Wimburn* v. *Kent*, 5 O. S. 437.

Setting up New Lease to Another.]—The lease under which defendant held having expired:—Held, that he could not set up a lease from plaintiff to a third party, to commence at the expiration of his lease, and contend that the lessee under that lease was entitled to possession, but that he must give up possession, in accordance with the terms of his lease, to his landlord. *Fox* v. *Macaulay*, 12 C. P. 298.

Statutable Objection.]—Quære, whether a tenant or licensee of land is estopped from disputing his landlord's or licensor's title as void on a statutable objection. *Hallock* v. *Wilson*, 7 C. P. 28.

Stranger — *Goods on Premises.*] — A stranger, whose goods have been seized on the premises of a tenant, cannot, any more than the tenant himself, question the landlord's right to demise. *Smith* v. *Aubrey*, 7 U. C. R. 90.

——— *Purchase from.*]—A tenant in possession will not be allowed to purchase from a stranger over his landlord's head. *Doe d. Simpson* v. *Molloy*, 6 U. C. R. 302.

See Peers v. *Byron*, 28 C. P. 250; *Westgate* v. *Westgate*, 28 C. P. 283; *Mulholland* v. *Harman*, 6 O. R. 546.

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2. *Expiry of Landlord's Title—When Tenant may Shew.*

The land had been granted to plaintiff's wife, and during her lifetime he had allowed defendant to occupy. She afterwards died without having had children, and the plaintiff brought ejectment:—Held, that he could not recover, for defendant was not estopped from shewing that the plaintiff's title had expired. *Robertson* v. *Bannerman*, 17 U. C. R. 508.

The plaintiff, holding a lease under the Crown, which expired in 1854, executed a lease to defendant for six years from the 1st April, 1845. After the expiration of his term, defendant continued in possession, and paid rent as before, up to and for 1857, though, as the jury found, he was aware in 1856 that the plaintiff's term under his lease from the Crown had ceased:—Held, that the plaintiff was entitled to recover in ejectment. *Clouse* v. *Cline*, 19 U. C. R. 58.

One H., a widow, having possession of the land in question, but no other title, leased it to defendant on the terms, as stated by defendant (there being no writing), that he was to give her $60 a year as long as she lived, and then to do the best he could with the heirs of her husband, to whom it belonged, she having in fact no title. In an action by the plaintiff claiming under the will of H., and as assignee of her heir-at-law, for rent due after H.'s death:—Held, that the defendant was not estopped from shewing that H.'s title determined at her death, and that she claimed and professed to give him no greater title. *Patterson* v. *Smith*, 42 U. C. R. 1.

P., being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife, the present plaintiff, and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to M., the defendants' devisor, who, at the expiration of his lease, took a second lease with a covenant to deliver up at the end of the term. He purchased the interest of one of the daughters, and a new lease was thereupon made to him by the plaintiff, the rent being reduced by one-third, because it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession, alleging that he owned the land, and that the plaintiff's right to dower was barred by lapse of time:—Held, that M., the

tenant, having, while owner of one undivided half of the land, covenanted to give up possession to the plaintiff at the end of the term, and having got into possession under her, the defendants claiming under M. were estopped from disputing her right, and must restore possession to her before setting up an adverse title; that M., by accepting the lease at a reduction of one-third of the rent, on his purchase of the daughter's interest, had acquiesced in the plaintiff's claim as dowress, and was estopped from setting up the Statute of Limitations against her, and that she was entitled therefore to judgment for one-third of the land for life, and to mesne profits since the expiration of the lease. Patterson v. Smith, 42 U. C. R. 1, remarked upon. *Pyatt* v. *McKee*, 3 O. R. 151.

In an action of ejectment by a landlord against a tenant whose term had expired:—Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession. *Kelly* v. *Wolff*, 12 P. R. 234.

3. *Mortgagees.*

Attornment—*Payment of Rent.*]—S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain land known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and, after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:—Held, that after such attornment and payment of rent the defendant could not be heard to deny the plaintiffs' title, and they being the equitable owners of the land were entitled to recover. *Bank of Montreal* v. *Gilchrist*, 6 A. R. 659.

Cesser of Right by Mortgage.]—A. on the 14th August, 1844, demised lands to B. and C. for a year from 1st January, 1845. A. afterwards on the 23rd August, 1844, conveyed in fee to D., taking back on the same day a mortgage for the purchase money payable on a certain day, the mortgagor to remain in possession until default. On the 1st December, 1845, B., one of the lessees, let E. into possession for a month, bringing the time up to the end of the term for which A. had demised to B. and C.—E. refused to go out at the end of the month, upon which D. brought ejectment:—Held, that E. was not estopped, as tenant of the assignee of A., from shewing that the title the assignee had once held—and that but for a moment—had ceased by reason of the mortgage back to A., under which A., and not D., since default made, was entitled to possession; and that judgment should be entered for the defendant. *Doe d. Marr* v. *Watson*, 4 U. C. R. 398.

4. *Purchasers at Sheriff's Sale.*

Collusion with Tenant.]—A., purchasing land at a sheriff's sale, having reason to believe that he could not get possession without legal proceedings against the execution debtor, B., to avoid this contrived by collusion with B.'s tenant to get into possession without the consent of B.:—Held, in ejectment by B. against A., that A. could not set up any title in himself adverse to B.; that before he could do this, however good his title may be, he must abandon the possession obtained through C., and bring an action against B. *Doe d. Miller* v. *Tiffany*, 5 U. C. R. 79.

Evidence—*Agreement—Fraud.*]—A. conveyed land to B., who conveyed to C., but remained in possession, professing to hold as C.'s tenant. C. conveyed to the plaintiff. Defendant claimed under a purchase at sheriff's sale, on an execution against A., and to be in possession through B., as his tenant; and he offered to prove that having brought ejectment against B., the latter had agreed to become his tenant: and that the transactions between A., B., and C. were fraudulent, the property remaining in A. This evidence having been rejected on the ground that the defendant could not rely upon B.'s possession, inasmuch as he was tenant to C., and had submitted to a distress for rent at his instance:—Held, that it was admissible. *Tennery* v. *Burnham*, 10 U. C. R. 208.

Interest of Heir-at-law.]—The defendant under a judgment and execution recovered by him against P., the heir-at-law of H., had P.'s interest in this land put up for sale by the sheriff, when the plaintiff purchased, and paid the purchase money:—Held, that the defendant was precluded from disputing the plaintiff's title derived from such sale. *Patterson* v. *Smith*, 42 U. C. R. 1.

Quasi Tenant at Will.]—A debtor in possession of lands which have been sold for a debt at a sheriff's sale on a judgment against him, is quasi tenant at will to the purchaser, and cannot dispute his title, and a third person defending as landlord, but shewing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself. *Doe d. Armour* v. *McEwen*, 3 O. S. 493.

5. *Other Cases.*

Assignee of Tenant—*Estoppel.*]—Action for rent due from March, 1855, by the plaintiff as assignee of the term, the plaintiff's right to sue and defendant's liability being both disputed. As to defendant's liability, the plaintiff shewed that one Stanton, in 1844, leased to one March for twenty-one years, who, in August, 1853, assigned to one Philpotts, who assigned to defendant:—Held, that defendant being the assignee of March, could not dispute Stanton's right to make the demise in question. *Jones* v. *Todd*, 22 U. C. R. 37.

Continuance of Lease—*Estoppel Limited to.*]—The plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the land under the Statute of Limitations, but was not aware of the fact of his having done so. The defendant, who had purchased the interest of the heirs of the original owner and vendor, and his solicitor, by representing to plaintiff that he had no-

title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of the term:—Held, that under the circumstances the lease must be set aside; but, even if allowed to stand, it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance. *Hillock* v. *Sutton*, 2 O. R. 548.

Devisee—*Part of Premises—Estoppel.*]—Plaintiff leased to defendant the west half of lot 2, 6th concession of Madoc, specifying the premises, with the grist-mill, saw-mill, and tavern thereon. It appeared, on a survey made, that part of the buildings were on lot 1, but that the land in dispute went with the buildings as part of the premises demised, and that defendant had entered and held possession of all as lessee. He refused, however, to give up possession, claiming to hold that portion included in lot 1 as devisee of one M., though it appeared that M. himself was unaware of the true boundary, and held all under the plaintiff by lease, and that it was through his means the plaintiff had afterwards leased to defendant:—Held, that the defendant was estopped from denying plaintiff's title. *Davey* v. *Cameron*, 14 U. C. R. 483.

Devisee of Landlord—*Purchasing from Tenant—Entry.*]—On the 9th January, 1844, one J. W. took possession of the land in question, under an indenture of lease for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. J. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since:—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that as the entry of J. W., under whom the son and the defendants claimed, was under C., defendants could not object to C.'s title at the time of J. W.'s entry. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

Disavowal of License—*Adverse Holding—Possession.*]—A., being in possession of the west half of a lot of land as assignee of the vendee of the Crown (no patent having issued), assigned the same to B., one of the lessors of the plaintiff, but continued in possession of part; and having accepted from B. a written permission to occupy the same, afterwards disavowed such holding, and claimed to hold in his own right. During the period A. so claimed, B. assigned the whole west half to C., the other lessor of the plaintiff:—Held, that such disavowal by defendant A. could not create a holding so adverse to B. as to prevent B.'s assigning to C. without first obtaining possession by ejectment. *Doe d. Henderson* v. *McWade*, 2 C. P. 8.

Fraud—*Forfeiture.*]—One C. B. had leased from the plaintiff part of the property, and being in possession gave it up for $60 to defendant, who claimed that it was her own:—Held, that this was clearly a fraud upon the plaintiff as landlord, by which the lease was forfeited, and that the defendant could not set up C. B.'s right under it. *Kyle* v. *Stocks*, 31 U. C. R. 47.

Holding under Different Right—*Executors.*]—In ejectment by the executors of B. against defendant as lessee of B. deceased, receipts given by the attorneys of B. were proved, mentioning money paid as "due the Smeathman" estate:—Held, that the rule against a tenant denying the title of his landlord did not apply, the defendants appearing to hold under the Smeathman estate, and not under the plaintiffs. *Baldwin* v. *Burd*, 10 C. P. 511.

Personal Representative of Deceased Owner.]—The defendant having dealt with the plaintiff as personal representative of her husband's estate, and become tenant to her as such:—Held, that he was estopped from objecting that the land was not hers, and she had no power to lease it. *Christie* v. *Clarke*, 16 C. P. 544.

Tax Sale — *Fraud — Estoppel.*]—N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sale for taxes, filed a bill against W. and O'N. (appellants), who were in possession, praying inter alia that defendants be ordered to deliver up possession of the lands and to account for the value of trees, &c., cut down and removed. W. by his answer adopted O'N.'s possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O'N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O'N. went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place, and thereby obtained possession for the benefit of W. The court (29 Gr. 338) held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The court of appeal varied the decree by declaring that it was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof:—Held, affirming the judgments, that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed. *White* v. *Nelles*, 11 S. C. R. 587.

Tolls—*Lease of—Estoppel.*]—A declaration on a covenant stated that by indenture between plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorized by law to be received upon a certain turnpike road, for one year; that the defendants covenanted to pay a certain rent therefor; and that by virtue of the said demise the defendants entered and were possessed for the term so to them granted. Breach, non-payment of the rent:—Held, on demurrer, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent; and that the non-execution by the lessors, under such circumstances, was no defence. And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise. Held, also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized in writing, was bad. *Municipal Council of Frontenac* v. *Chestnut*, 9 U. C. R. 365.

XII. EVICTION.

Covenant in Lease—*Bond for Performance of—Pleading — Amendment.*]—Declaration on a bond conditioned for the performance by one V. of the covenants in a lease made by plaintiff to him. The defendants pleaded, 4th, that at the making and during the continuance of the lease the plaintiff wrongfully retained possession of part of the demised premises and refused to allow defendant V. possession thereof, whereby V. was prevented, &c., upon which the plaintiff took issue. Upon the trial the evidence tended to shew an eviction rather than that the lessee never took possession, and the court, by reason of the variance and the amount at stake, granted a new trial, with costs to abide the event, giving the plaintiff leave to amend his replication to the fourth plea. *Macdonald* v. *Vanwick*, 12 C. P. 263.

Indemnity — *Provision for—Eviction for Cause—Breach of Conditions—Quebec Law.*] —See *Regina* v. *Poirier*, 30 S. C. R. 36.

Rent—*Abatement—Eviction from Road—Appurtenance—Part of Premises—Covenant.*] —An abatement of rent was sought for by the defendant upon the ground that he had been evicted from a road forming an appurtenance to the land leased:—Held, that under the evidence the road could not be looked upon as an appurtenance, and that there had been consequently no eviction. In covenant for rent between the original parties to a deed, an eviction from part of the premises is a good defence; there can be no apportionment of the rent as in debt. *Shuttleworth* v. *Shaw*, 6 U. C. R. 517.

——— *Action for—Plea of Eviction—Title of Stranger.*]—Where in assumpsit for non-payment of rent according to agreement, defendant pleaded an eviction by a stranger, who he averred entered under a lawful claim derived through or under the plaintiff, the plea was held bad on general demurrer, because it did not shew that the claim might not have been under a title derived from the tenant himself. *McNab* v. *McDonell*, 2 U. C. R. 169.

——— *Action for—Plea of Eviction—Parol Demise of Part of Premises.*]—Covenant for non-payment of rent on a lease by plaintiff to defendant for 21 years. Plea, on equitable grounds, setting up in substance that the plaintiff claimed title to the land under a deed from one G.; that before executing this deed, G. agreed with one H. to sell to him part of the land, and that H. should have possession of it until he had completed the contract, and H. took possession accordingly, and he and his heirs holding such possession of right under the said agreement, defendant has been wholly prevented from entering into and enjoying said portion:—Held, on demurrer, plea bad, for that at most it shewed only a parol demise, and that only as to part of the premises; that G. was merely tenant at will or at sufferance, and liable to be ejected by defendant; and that relief, if any, would only have been apportionate, and upon terms, in a court of equity. *Crooks* v. *Dickson*, 15 C. P. 23.

——— *Action for—Plea of Eviction—Use of Water—Easement.*]—To an action for the breach of covenants contained in a lease, in the non-payment of rent, and leaving the premises in an improper state of repair, the defendant pleaded on equitable grounds, setting out the demise, whereby the plaintiff demised to the defendant certain land and premises on which a mill was erected, "together with the water-wheel in said building and the right to draw water from the mill-pond adjoining the above described premises for driving the said water-wheel and machinery driven thereby," &c. The plea then averred that one D., claiming by title paramount, having proved such title by an action brought therefor, hindered and prevented defendant from using the said water so demised, whereby the demised premises were rendered useless and of no value to defendant, who delivered up possession to the plaintiff of the said premises and water rights in a perfect state of repair, and defendant had not used said premises during any portion of the time during which the rent sued for accrued due, and delivered them up as aforesaid before said time commenced. The plea then prayed that the action might be restrained, and the plaintiff ordered to pay the costs thereof, and that the lease should be delivered up to be cancelled:—Held, plea bad, as a legal defence, because the right to use the water was no part of the demised premises, but merely an easement thereof; and even if it were, an eviction in respect of it would not authorize the tenant to abandon the residue of the premises; and as an equitable plea, because no case was shewn for a total abandonment of the contract, for defendant having paid rent for some years could not replace matters as before the lease, and he had a remedy by action on the plaintiff's implied covenant to supply the water-power. *Coleman* v. *Reddick*, 25 C. P. 579.

——— *Distress for — Monthly Tenant of Part—Grant of Reversion.*]—Defendant leased to the plaintiff by deed for three years, there being another tenant in possession of part as a monthly tenant, who was succeeded by two others, holding under defendant:—Held, that the lease to the plaintiff, being under seal, operated as a grant of the reversion (with the rent incident thereto) as to the part thus held, and that defendant was entitled therefore to distrain for the whole rent in arrear. Kelly v. Irwin, 17 C. P. 357, remarked upon, and not followed. *Holland* v. *Vanstone*, 27 U. C. R. 15.

——— *Distress for—Replevin—Avowry—Reply of Eviction — Demise of Part — Paramount Title—Consent.*]—In replevin, defendants avowed under distress for one quarter's rent, due to S. B., one of them, on a demise to the plaintiffs at a quarterly rent. The plaintiffs replied: 1. non tenuerunt; 2, that S. B. had previously leased a portion of the premises demised to them to one P., for a term unexpired, and that P. evicted the plaintiffs. To the last plea defendants rejoined that the plaintiffs voluntarily delivered up possession of such portion to P., and elected to remain as tenants of the remainder for the time and at the rent in the avowry mentioned. It was proved that P. having a lease from S. B., including a narrow strip of land demised to the plaintiffs, which had been used by them as a passage to the rear of their premises, began, about the middle of the quarter previous to that for which the rent was claimed, to put up a building which covered such passage; that in lieu of such entrance, another was opened on the north side of the house, on land belonging to S. B., and paved with boards taken from the old passage; that the men who

did this work were employed by the plaintiffs at P.'s request, and were sent by them to him to be paid; that this change of the passage was proposed by the plaintiffs, as they said it would answer them as well. After it was made the plaintiffs paid the rent for the following quarter, claiming no deduction. When the next quarter's rent fell due, they refused to pay, claiming an abatement for alleged injuries caused by the erection of P.'s new building, but not for the obstruction of the passageway. This was refused, as a separate action was then pending for those injuries. Defendants distrained, and thereupon this action was brought:—Held, that defendants could not support their avowry as for rent reserved, on the whole of the premises under the original letting, for no interest passed to the plaintiffs in that part which had been previously demised; that the plaintiffs were not precluded by their assent from setting up an eviction by paramount title which they could not have resisted; and that, under the pleadings, they were therefore entitled to a verdict. *Carey* v. *Bostwick*, 10 U. C. R. 156.

What Constitutes—*Depriving Tenant of Part of Premises—Intention—Consent.*]—A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time, without the necessary consent, whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted:—Held, that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee. 2. The two months' limitation in the lease had reference to the entry by the lessee to commence the repairs, and not to his subsequent occupation of the premises, and the time having entered upon the premises within the prescribed period, had a reasonable time to complete the work, and his subsequent occupation was not wrongful. *Ferguson* v. *Troop*, 17 S. C. R. 527.

——— *Destruction of Building—Abandonment—Entry.*] — In an action to recover a year's rent on a covenant in a lease for three years, it was shewn that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and the plaintiff entered, ploughed, and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money. It was shewn that a proposition had been made to leave the matter to arbitration:—Held, that the acts of the plaintiff did not amount to an eviction, that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover. *Nixon* v. *Maltby*, 7 A. R. 371.

——— *Issue of Writ in Ejectment—Rent.*]—Prior to the lease of the premises for the rent of which this action was brought, the plaintiff's predecessor in title had mortgaged the same, and the assignee of the mortgage brought ejectment against defendant, the tenant of the premises, who thereupon gave up possession:—Held, that this amounted to an eviction, and that plaintiff could only recover the rent up to the date of the writ, which must be looked upon as the date of the eviction. *Barnes* v. *Bellamy*, 44 U. C. R. 393.

——— *License to Use Outside Fence—Bill-posting.*]—It appeared that the defendant, the landlord, having leased certain premises to the plaintiff, had rented the outside of the fence around the premises to one C. to post bills on, but, the plaintiff claiming the fence, C. posted no bills, and only put up a notice forbidding others to post bills without his leave, which notice was pulled down:—Held, no eviction. *Oliver* v. *Mowat*, 34 U. C. R. 472.

See Dainty v. *Vidal*, 13 A. R. 47; *Kinnear* v. *Aspden*, 19 A. R. 468.

XIII. Forfeiture.

1. *By Disclaimer.*

Ejectment—*Notice to Quit.*]—A disclaimer by a tenant of his landlord's title, at once puts an end to an existing tenancy, and ejectment may be at once maintained without a notice to quit. *Doe d. Claus* v. *Stewart*, 1 U. C. R. 512; *Doe d. Nugent* v. *Hessell*, 2 U. C. R. 194.

Record — *Acknowledgment.*]—A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by record that the fee is in another than in his landlord. *Doe d. Daniels* v. *Weese*, 5 U. C. R. 589.

Right of Tenant — *Fraud.*]—In ejectment it appeared that one C. B. had leased from the plaintiff part of the property, and, being in possession, gave it up for $60 to defendant, who claimed it as her own:—Held, this was clearly a fraud upon the plaintiff as landlord, by which the lease was forfeited, and that the defendant could not set up C. B.'s right under it. *Kyle* v. *Stocks*, 31 U. C. R. 47.

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2. *By Insolvency.*

Assignment—*Overholding Tenants Act—Rent—Demand.*]—S. and his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two quarters' rent were overdue and in arrear, made such an assignment to C., who thereupon took possession of the premises and shortly afterwards paid D. the two quarters' arrears of rent. A few weeks later D. served on S. and his partners a demand of possession and notice of application under the Overholding Tenants Act, which S. handed to C., and C. appeared before the county Judge on the hearing of the application, and had himself added as a party to the proceedings. On motion by

C. in the high court to set aside the proceedings:—Held, that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of s. 2 of the Overholding Tenants Act, and that C. having intervened in the proceedings could not object that no demand had been served on him. Held, also, that the receipt, after the forfeiture, of the rent which had become due before the forfeiture, did not operate as any waiver thereof, and that a sufficient demand in writing of possession had been made upon C. by the landlord. *Dobson* v. *Southeran*, 15 O. R. 15.

Attachment — *Proviso in Lease — Construction.*]—It was provided by a lease that in case the term should at any time be seized or taken in execution or in attachment by any creditor of the lessee, or if the lessee, becoming bankrupt or insolvent, should take the benefit of any Act that might be in force for bankrupt or insolvent debtors, the term should immediately become forfeited and void. Proceedings having been taken in compulsory liquidation under the Insolvent Act of 1869, and an attachment placed in the plaintiff's hands:—Held, that the lease was forfeited, and that the clause was not limited to an attachment issued under the Absconding Debtors Act. *Kerr* v. *Hastings*, 25 C. P. 429.

See Scarth v. *Ontario Power and Flat Co.*, 24 O. R. 446; *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44.

See BANKRUPTCY AND INSOLVENCY, I. 6.

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3. *By Non-payment of Rent.*

Avoidance of Lease—*Proceedings for.*]—Where the lessee covenanted to pay the yearly rent, with a condition for re-entry "if the tenant should do or omit anything in breach or non-performance of any of his covenants:"—Held, that the non-payment of the rent would not make the demise void ipso facto, but only void upon proper proceedings being taken for that purpose. *Doe d. King's College* v. *Kennedy*, 5 U. C. R. 577.

——— *Proceedings for — Demand.*]—The plaintiff leased premises from defendant at a rent of $150 a year, covenanting to pay rent, &c., and it was added "this lease will be void if the said plaintiff fail to perform this agreement:"—Held, that the last clause would only make the lease voidable at the option of the lessor, not void; and that to entitle the lessor to determine the lease for non-payment of rent, a formal demand was necessary. Quære, whether the words "this agreement" would apply to the covenant to pay rent. *Faugher* v. *Burley*, 37 U. C. R. 498.

Covenant to Convey—*Rent in Arrear—Covenant Void.*]—Covenant, on an indenture, excusing profert, by which defendant demised land to plaintiff for five years, and covenanted to convey to him in fee if he should pay £125 on or before a day named. Breach, that although the plaintiff offered the money before the day named, and requested a conveyance, yet defendant refused. Plea, after setting out the indenture in full, which contained a proviso that in case the rent or any part thereof should be in arrear for forty days, then the indenture and every thing therein contained should be void—that before and at the time of the tender in the declaration mentioned the first year's rent was in arrear for forty days, whereby the indenture and the covenant to convey became void:—Held, plea good. *McLellan* v. *Rogers*, 12 U. C. R. 571.

Distress — *Demand—Proof of.*]—In ejectment for a forfeiture for non-payment of rent, the plaintiff must prove, if proceeding under 4 Geo. II. c. 28, that there was no sufficient distress upon the premises, and if at common law, that the rent was demanded in proper time by a person duly authorized. *Doe d. Cuvatt* v. *McLeod*, M. T. 4 Vict.

——— *Demand — Dispensing with.*] — Where the lease expressly provides that it shall be void on non-payment of rent, whether demanded or not, the C. L. P. Act, s. 263, does not apply, and in ejectment for the forfeiture there is no necessity to shew a want of distress:—Held, however, that if it had been otherwise, in this case, on the evidence stated, absence of distress was sufficiently shewn. *McDonald* v. *Peck*, 17 U. C. R. 270.

——— *Demand—Dispensing with—Termination of Lease before Forfeiture.*]—In an action by a tenant against his landlord for refusing to permit him to enter to take away the emblements, it appeared that defendant gave notice, after the crops were sown, to terminate the lease according to the proviso contained in it, and the lease was so terminated on the 20th March. Between that day and the 30th March, defendant brought ejectment. Defendant, by his plea, set up that there was also a provision in the lease for re-entry if any part of the rent should remain in arrear for fifteen days, although no formal demand should be made thereof; that a part of the rent was due on the 15th March, and before he could recover in his ejectment or get possession, more than fifteen days had elapsed from that time, and he entered on account of the said right of re-entry for non-payment of rent, as well as on account of the termination of the lease by notice; and by reason of plaintiff's default in payment of rent and defendant's entry, plaintiff forfeited his right to the emblements, and they became defendant's, as part of his reversionary estate in the land:—Held, on demurrer, plea bad: 1. because there could be no forfeiture for non-payment of rent, after the term was at an end, which it was before the forfeiture became complete; 2. because defendant, having terminated the lease and brought ejectment before there could have been any forfeiture for non-payment, could not afterwards set up such non-payment as forfeiture. Held, also, that the defendant, under the proviso in the plea, could have brought ejectment for non-payment of rent, without a demand, though there might have been sufficient distress on the premises. *Campbell* v. *Baxter*, 15 C. P. 42.

Election to Forfeit—*Retractation—Payment of Rent and Costs—Implied Request for Relief.*] — Rent under a lease made pursuant to the Short Forms Act becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs:—Held, that the bringing of the action was an election on the part of the

landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture, of rent which accrued due before, would not amount to such a request. The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate, by force of R. S. O. 1887 c. 143, ss. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture. These sections are applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenant intended to seek to be relieved from the forfeiture; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession. Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture. Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it. *Denison* v. *Maitland*, 22 O. R. 166.

Execution—*Sale of Term under—Avoidance of Lease.*]—Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants, the lease and the term thereby granted, should cease and be void. The lessee entered, and on the 1st April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant; and the sheriff afterwards, under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it as a term with fifteen years yet to run, at a rent of $100 a year. The plaintiff became the purchaser and brought ejectment against defendant on the sheriff's deed:—Held, that the plaintiff's title failed, on the ground that the lease being void by the non-payment of rent, and S. having given up possession by arrangement with defendant, his interest was gone. *Dalby* v. *Robertson*, 19 U. C. R. 411.

Re-Entry—*New Demise—Termination on Notice—Covenant.*] — In ejectment against one M., the defendants appeared and defended, by order, as landlords in lieu of M. The plaintiff claimed under a covenant in a lease from him to M., on the right of re-entry for non-payment of rent and non-performance of covenants. It appeared that the instrument set up by plaintiff as a lease was an agreement, dated 2nd April, 1867, whereby plaintiff agreed to sell the land to M., for £100, M. paying £10 each year and interest at six per cent. till the whole was paid: provided that if the payments were not made within one month from the time appointed, the interest due was to be considered as rent, for which the plaintiff might enter and distrain; M. not to commit waste, &c., and to pay taxes; and in case of default in making the payments for three months, then he should surrender the premises to plaintiff; and M. agreed not to let or assign without leave. It also appeared that the plaintiff held under a lease, dated 23rd March, 1865, from defendants for ten years, being one of the company's printed leases, which gave right of re-entry for non-payment of rent and taxes, and for assigning without leave; that four years' rent was in arrear, and that there was no written authority to the plaintiff to sell to M. The lease also contained, besides the general proviso for re-entry, a special power to determine the lease on a given notice. In February, 1872, defendants executed a lease to M. for seven years, but no evidence was given to shew when it was actually delivered:—Held, that if it had been shewn that defendants were proceeding to re-enter for the plaintiff's default, and that M. took the lease from defendants to save himself from eviction, this would be a bar to the plaintiff's right, and there would be no necessity of their putting him out of possession, and his re-entering under the new demise; but as this evidence was wanting, a verdict found in defendants' favour was set aside and a new trial granted. Held, also, that the general proviso in defendants' lease for re-entry was not controlled or affected by the special power given to determine the lease on a given notice. Held, also, that under the agreement between plaintiff and M., the plaintiff had the right to re-enter and take possession on default; and the covenant to surrender possession after three months' default could not alter plaintiff's right. *Hely* v. *Canada Co.*, 23 C. P. 20.

To supply the evidence held by the judgment of the court in the last case to be wanting at the previous trial, the defendants proved an admission by M. that he held the land for the defendants, after he had first informed them that he held under the plaintiff, and that he and the plaintiff had made improvements thereon:—Held, that the defendants, with full knowledge of these facts, granting a lease to M. with a covenant against incumbrances, shewed that they were proceeding to enforce the forfeiture against plaintiff, and that M. attorned to them to avoid eviction; also that the defendants coming in in this suit against M., and defending as M.'s landlords, contending the lease was at an end, shewed that their desire was to forfeit it. It was objected that as defendants were defending in lieu of M., they could only set up the same defence as M. could; but held, that as the defendants had really become M.'s landlords, and he their tenant, by accepting a lease utterly inconsistent with the demise to plaintiff, they could defend in their own right, and urge this lease and M.'s attornment to them, as their entry for conditions broken in plaintiff's lease. *S. C.*, 23 C. P. 597.

——— *Sufficiency of, to Avoid Lease—Power of Attorney.*]—One G., a rector, in 1861, leased land to the plaintiff for twenty-one years, at an annual rent, with a proviso for re-entry on non-payment. The plaintiff entered and paid rent until the summer of 1865, when he went away from the county, leaving nearly a year's rent overdue, and giving the key to a person in the adjoining house. In July, 1866, the premises being then vacant,

G. went to England, leaving a power of attorney with his son, authorizing him to collect and distrain for his rents, and to commence and prosecute all actions and other proceedings which might be expedient to be done or prosecuted about the premises as if he were present. Defendant in some way got the key and went in, and afterwards obtained a lease from G.'s son for twenty-one years. G. on his return, in 1866, recognized this lease and received rent under it regularly from defendant until 1868, when the plaintiff brought ejectment, claiming under his lease from G.:—Held, that the facts shewed a sufficient re-entry by G. to avoid the plaintiff's lease, and that the plaintiff therefore could not recover. Quære, whether the son was authorized, under the power of attorney, to bring ejectment and enter for the forfeiture. Semble, that the lease to the plaintiff was binding on the rector and those claiming under him until forfeited. *O'Hara* v. *McCormick*, 30 U. C. R. 567.

Relief against — *Evidence—Misrepresentations.*]—To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reason of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified:—Held, that the evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief. The origin both of the action for specific performance and of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the court; and in each the court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 22 O. R. 1.

——— *Option to Purchase.*]—The court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture. A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds. Coventry v. McLean, 22 O. R. 1, approved. *Coventry* v. *McLean*, 21 A. R. 176.

4. *By Non-performance of Covenants and Conditions.*

Notice of Forfeiture—*Sufficiency—Distress after Action.*]—A notice of forfeiture of a lease under R. S. O. 1887 c. 143, s. 11, s.-s. 1, given in the words "You have broken the covenants as to cutting timber," &c., without more particularly specifying the breach and claiming compensation, is sufficient. After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due:—Held, that such course did not per se set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year. *McMullen* v. *Vannatto*, 24 O. R. 625.

Proviso for Forfeiture—*Application, where Penalty for Breach—Notice to Quit—Demand.*]—Plaintiff and defendant being joint owners of land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during plaintiff's life, the plaintiff agreed to let defendant work the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do, and each bound himself to the other in £1,000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. In ejectment:—Held, that the plaintiff had a right to recover on breach of any of the conditions, notwithstanding there was a covenant also to perform them, and a penalty attached to the breach; and that no notice to quit or demand of possession was necessary. *Sheldon* v. *Sheldon*, 22 U. C. R. 621.

——— *Application to Negative Covenant—Sale of Spirits—Entry—Overholding Tenants Act.*]—The defendant leased from the plaintiff the "refreshment-room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment-room," and that if he "should fail, refuse, or neglect to carry out the terms of the lease, then the lessee should, if required by the lessor, quit, leave, and absolutely vacate the premises, and the lease should terminate." The Judge found that by a sale of spirits in the bar-room, part of the demised premises, the lease had been forfeited, and ordered the issue of a writ to put the landlord in possession under the Overholding Tenants Act, R. S. O. 1877 c. 137:—Held, affirming his decision, that the sale was a contravention of the lease; that the proviso for the termination of the same extended to negative covenants; that the lease was therefore forfeited, and a right of entry accrued to the lessor; and that it was a case coming within the Overholding Tenants Act. *Longhi* v. *Sanson*, 46 U. C. R. 446.

Relief against—*Covenant—Construction—Difficulty.*] — Where a covenant accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposes to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief. *McLaren* v. *Kerr*, 39 U. C. R. 507.

——— *Non-payment of Taxes—Payment pending Action.*]—In actions to re-enter for breach of a covenant in a lease, the court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice, the court of chancery would have relieved against the forfeiture. Thus in the present case, where the plaintiff claimed to

recover possession of certain lands leased by her to the defendant on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed:—Held, that the action could not succeed. The above is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment. *Buckley* v. *Beigle*, 8 O. R. 85.

Taxes—*Time for Payment—Entry.*]—Action by lessee against lessor for eviction. Plea, that the plaintiffs by the lease covenanted that they would, during the term, pay all taxes, and that the non-fulfilment of their covenants, or any of them, should operate as a forfeiture of the said deed, and that the same should be considered null and void; that during the term certain taxes were unpaid on the land, amounting to $8.55 for municipal and $9.55 for school purposes for 1863, which the plaintiffs did not pay, although the same were duly demanded, and they had no distress on the land, and such taxes in March, 1864, were returned by the collector as due on non-resident lands, whereby the said deed and the term became forfeited and void, and the defendant afterwards peaceably entered and became possessed as in his first estate:—Held, that the plea was sufficient; that the taxes became due when demanded, and the plaintiffs had not the whole term to pay them in; and that defendant could enter without bringing ejectment. *Taylor* v. *Jermyn*, 25 U. C. R. 86.

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5. *Waiver of Forfeiture.*

Knowledge — *Acquiescence* — *Positive Act.*]—Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some expenditure of money in improvements or some positive act of waiver, such as receipt of rent. *McLaren* v. *Kerr*, 39 U. C. R. 507.

Laches — *Acquiescence.*]—Semble, that it was no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency. *Kerr* v. *Hastings*, 25 C. P. 429.

Receipt of Rent.]—Where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the hab. fac. poss. has issued, is a waiver of the execution. *Bleecker* v. *Campbell*, 4 L. J. 136.

Plaintiff leased to defendant for twenty-one years, with a covenant by defendant to erect, within four years, a house, &c., which covenant was broken, but the lessor received rent to a period subsequent to the time of the alleged forfeiture:—Held, a waiver of the right of entry for breach of the covenant. *Roe* v. *Southard*, 10 C. P. 488.

——— *Continuing Breach.*]—Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent. *Ainley* v. *Baldwin*, 14 U. C. R. 535.

——— *Entry.*]—Declaration for trespass to land. Plea, liberum tenementum. Replication, a demise by defendant to plaintiff for a term unexpired. Rejoinder, averring a breach of covenant to repair, and defendant's entry thereupon. Surrejoinder, that after the alleged breach and forfeiture defendant accepted rent accrued due after the forfeiture, which was thereby waived:—Held, surrejoinder bad, for there could be no waiver after entry. *Thompson* v. *Baskerville*, 40 U. C. R. 614.

——— *Promissory Note.*]—Defendant gave a note for the rent due up to the 1st December, 1856. He afterwards obtained a note of the plaintiff's for £28.15s., and being unable to pay his taxes, gave it to the bailiff before it fell due, telling him to ask the plaintiff to advance the sum required, and to credit the balance on the then current rent. The plaintiff's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing, saying that he would apply it on the previous note given by defendant, which remained unpaid:—Held, that there had been no acceptance of rent due after December, 1856, so as to waive the forfeiture. *McDonald* v. *Peck*, 17 U. C. R. 270.

Reference to Arbitration.]—Plaintiff, by indenture, agreed to convey to defendant certain land, the right to purchase which had been assigned by defendant to him, on payment by defendant of certain sums, and that defendant should occupy until default. After default plaintiff and defendant referred all matters in difference. The award postponed the date of payment as to which defendant had been in default, and before the date so fixed defendant tendered the amount:—Held, that the instrument executed by plaintiff created a demise, or a re-demise, in favour of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference after default either waived it, or postponed the time for payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Black* v. *Allan*, 17 C. P. 240.

Time—*Performance of Work—Extension—Effect on Vendee of Lessor.*]—Two leases were executed between the same parties, and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty. It was a condition of the leases that the lessee should commence digging for oil on or before the 1st June, 1861, which he failed to do. On the 16th September, 1863, the lessor accepted from the lessee $50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was indorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th November, 1864, another memorandum was indorsed on the same lease, and signed by the lessor, agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was, until after this time, beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part; the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the court of chancery decreed that there was waiver of the condition to commence work by a particular time, and that the ten-acre lease was binding on the patentee,

and restrained him from bringing ejectment; and the decree was affirmed on appeal. *Flower* v. *Duncan*, 13 Gr. 242.

XIV. Lease of Chattels.

Construction and Operation of.]—Defendants, having contracted with certain companies for the manufacture by them of plant for their railway, consisting of locomotives, cars, &c., and being unable to furnish the funds as agreed upon, on the 24th September, 1869, called upon plaintiffs, who, under an indenture entered into of that date, agreed to furnish the funds then necessary, as well as a sufficient sum to ensure the completion of the plant, &c. By the same indenture the plaintiffs acquired an absolute title to the articles in question, and therein agreed to lease the same to defendants for three years, at a weekly sum or rental of $1,000, with a proviso, 1, that the payment of the sum of $105,500 at any time during the term should put an end to the same, and that it should be lawful for defendants to hold, retain, and possess the engines, &c., as their absolute property; 2, that all sums by the weekly payments as aforesaid paid by defendants under said agreement, should be credited to them on account of the $105,500, and on payment of that sum, as in either proviso mentioned, the agreement should cease, &c. There was no express covenant therein for payment by defendants of the said sum, nor any mention of a debt due by defendants to plaintiffs:—Held, that under the indenture above mentioned and the facts of the case, defendants were never the owners of the locomotives, &c., in question; that they held only a contract for the manufacture thereof, which by the said indenture was assigned to the plaintiffs, who thereunder paid for and became absolute owners of the property in question. 2. That the intention of the parties as inferred from the instrument was, that said instrument should only operate as a lease to defendants, and not as a sale and mortgage back of the said property. *Bank of Upper Canada* v. *Grand Trunk R. W. Co.*, 13 C. P. 304.

Covenant—*Return of Goods—Order and Condition—Guarantee.*]—Where the lessee of goods covenanted to restore them to the lessor "at the expiration of the term in as good order as they then were, reasonable wear and tear only excepted," and the goods during the term were destroyed by fire, without the lessee's default:—Held, that the exception, "reasonable wear and tear excepted," referred to the order and condition of the goods so as to exclude bad repair, breakage, &c., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods. *Chamberlen* v. *Trenouth*, 23 C. P. 497.

Replevin—*Breach of Condition of Lease—Parties—Agent of Owner.*]—Defendant in writing acknowledged the receipt from the plaintiff, described as assistant manager of the Howe Machine Company, of a sewing machine, on hire for nine months at $5 a month in advance. He agreed to pay $45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessors to be in jeopardy, the plaintiff or the company might resume possession of it; and defendant waived all right of action for trespass, damages, or replevin, by reason of any action taken by the plaintiff or the company in resuming such possession. The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the company, a foreign corporation; and had no property in it except as their agent:—Held, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard* v. *Hunter*, 36 U. C. R. 316.

Sale of Chattels—*Distress—Purchase by Landlord.*]—In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for $75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 extra in settlement with him, making $200 in all:—Held, that the evidence sufficiently shewed the piano to be the plaintiff's property, and that he was entitled to maintain trover for it against defendant. Held, also, that the sale to the defendant passed nothing, for as landlord he could not himself purchase goods sold by the bailiff, under 2 Wm. & M., sess. 1, c. 5, s. 2; and although, as between J. and defendant, the defendant's claim might be complete by the subsequent arrangement with J., yet the plaintiff (the owner) was not bound by it. Held, also, that defendant could not set up a lien for the rent as against the plaintiff, for the distress was at an end, and the goods in no way in the custody of the law. *Williams* v. *Grey*, 23 C. P. 561.

Seizure under Attachment.] — The plaintiffs, who were piano manufacturers, offered to sell to M. a piano for $300, and to accept certain approved notes in payment. The piano was left with M., but this negotiation fell through, and it was then agreed that M. might have the piano on giving his notes at 1, 12, and 24 months for $100 each. These notes were sent to M., with a "rent receipt," both of which were signed by him and returned to the plaintiffs. By the rent receipt M. was to have the piano on hire at $6 per month for three months, payable in advance, and M. might purchase it on payment of the notes, with interest. But until the whole of the purchase money was paid, the piano was to remain the plaintiffs' property on hire by M.; the plaintiffs to have power to retake possession without demand, on non-payment of any instalment of purchase money or rent in advance, and although part of the purchase money might have been paid or notes given on account thereof; the agreement for sale being conditional, and punctual payment being essential to it. Nothing was paid on the piano as purchase money or rent, and on the 26th January, 1874, the first note having fallen due on the 18th, it was seized under an attachment against M. as an absconding debtor:—Held, that no property in the piano passed to M., that being the intention of the parties, and the legal effect of the instrument; that the arrangement was not objectionable as being

contrary to the Chattel Mortgage Act, and therefore the plaintiffs were entitled to the piano as against M.'s creditors. *Stevenson* v. *Rice*, 24 C. P. 245.

Seizure under Execution—*Operation of Lease—Interest of Lessee.*] — Where A. demised to B. for a term of years, with a clause of forfeiture in case the term should be taken in execution, and contemporaneously with the lease delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease of the premises, signed by M., stating that "he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family," on an interpleader between A. and C., who had seized the chattels under an execution against B:—Held, 1. that the memorandum formed no part of the lease, but operated only as a license to use, which was revocable; 2. that even if the chattels had been included in the lease, the chattels themselves could not have been sold, and that A. therefore was entitled to a verdict in the interpleader issue; 3. that at the most the interest which B. had in the chattels was incidental to the term and to the enjoyment thereof by B., and that therefore neither the goods themselves nor B.'s interest therein could be sold separately from the term; 4. that if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels; and therefore, that upon all the grounds the verdict in favour of A. was right; 5. that if it had been intended that only the debtor's special interest in the goods should be sold by the sheriff under an execution, not the goods themselves, the interpleader should have been framed to meet such a case. *Mackleston* v. *Smith*, 17 C. P. 401.

——— *Vesting by Terms of Lease—Revestiog.*] — By an oral agreement, entered into in June, 1876, the plaintiff leased to his son M., who was residing with him, the farm occupied by them, for five years, at an annual rent of $100, M. agreeing also to support the plaintiff and the other members of his family. By the terms of the agreement M. was to have the use and enjoyment of the stock and implements on the premises, estimated to be worth $1,010. It was also stipulated that M. should have power to sell or otherwise dispose of such portions of the stock and implements as he might think desirable, but at the conclusion or sooner determination of the term, he was to leave others of equal value, any surplus above that amount to be his own. Either party was to be at liberty to determine the lease at any time he thought fit to do so. In January, 1879, M. having become financially embarrassed, and finding he was losing by the farm, expressed his determination to try some other mode of life, and said that the plaintiff might have the place and the stock, &c., thereon, if he, the plaintiff, would discharge him from any claim in respect of the rent, no portion of which had been paid. M. did accordingly abandon the place, and the plaintiff thereupon assumed the management and control thereof, and took possession of the stock, &c. M. subsequently returned to his father's and continued to reside and work on the farm for his father. In March following M. executed a surrender to the plaintiff of all his right and interest in or to the farm and crops upon it. In the month of April, for the expressed consideration of $340, which it was alleged his father had lent him, he also executed a memorandum assigning to the plaintiff all his interest in the stock and farming implements, &c., on the place, which included, it was said, a buggy, cutter, and harness, which had been purchased by M. for his own use. In October, 1879, the defendant sued out execution against M., under which the sheriff seized the farm stock and implements, together with the said buggy, cutter, and harness. In an interpleader proceeding by the father, in which a verdict was rendered for the plaintiff, on appeal from a rule refusing to set the verdict aside:—Held, reversing the judgment in 32 C. P. 90, that the lease from the father to his son had the effect of vesting the chattel property in the latter; and quære, whether it was afterwards revested in the father by the writings executed by M.; but as the question whether there had been a delivery and change of possession sufficient under the Bills of Sale Act had not been passed upon by the jury, and as some doubt existed in respect of the buggy, cutter, and harness, a new trial was ordered; costs to abide the result. *Oliver* v. *Newhouse*, 8 A. R. 122.

XV. Liability for Negligence.

Agreement to Repair — *Notice—Damages.*]—An express contract between a landlord and his tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair. In such a case the tenant should himself repair, at the expense of the landlord. *Brown* v. *Trustees of Toronto General Hospital*, 23 O. R. 599.

Covenant to Repair—*Non-repair during Lease and Subsequent Yearly Tenancy.*] — Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied; and the landlord, if ignorant of a defect arising from non-repair during the currency of the lease, and continuing during the subsequent tenancy, is not liable to a stranger for an injury caused by such neglect, happening during such subsequent tenancy. *Hett* v. *Janzen*, 22 O. R. 414.

Destruction of Premises by Fire.]—See *Murphy* v. *L'Abbé*, 27 S. C. R. 126, *ante* VII.; *Klock* v. *Lindsay*, *Lindsay* v. *Klock*, 28 S. C. R. 453.

Elevator — *Servant of Landlord.*] — Liability of landlord to tenant for injuries occasioned by negligence of servant of the landlord in charge of an elevator. See *Stephens* v. *Chaussé*, 15 S. C. R. 379.

Fall of Verandah—*Liability to Daughter of Tenant.*]—The lessee had covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr* v. *McNab*, 24 O. R. 653.

Ice on Sidewalk — *Owner of Adjacent Building—Tenant.*]—In an action against a

city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under s. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of the building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time:—Held, that the owner was, but the tenant was not, liable over to the municipality for damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

XVI. Notice to Quit and Demand of Possession.

[See R. S. O. 1897 c. 170, s. 18.]

Necessity for—*Adverse Title.*]—A tenant endeavouring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to a notice to quit. *Doe d. Graham* v. *Edmondson*, 1 U. C. R. 265.

Where possession is demanded from defendant in ejectment, and he, instead of claiming to be a tenant, asserts his rights to the fee, he has no claim to a notice to quit as a tenant. *Doe d. McKenzie* v. *Fairman*, 7 U. C. R. 411.

——— *Death of Lessor.*]—M. conveyed the land in question to J., the wife of R. R. alone executed a lease to the defendant, and died during the term, before his wife:—Held, that on R.'s death the term expired, and that the plaintiff claiming under a conveyance from R. and his wife could eject defendant without notice to quit or demand of possession. *Burns* v. *McAdam*, 24 U. C. R. 449.

A demand of possession is not necessary where the estate of the defendant terminated by the death of his grantor, the husband of the lessee for life. *Nolan* v. *Fox*, 15 C. P. 565.

——— *Denial of Title—Estoppel.*] — Defendant had been tenant to the plaintiffs at a yearly rent, payable quarterly, for a term which expired on 1st June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by the defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th September, 1860, their attorney served a written demand of possession on defendant, who told him that was just what he wanted, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant, besides denying their title, claimed to hold as their tenant:—Held, that the plaintiffs were entitled to recover, for 1, the defendant having denied their title could not insist upon notice to quit; and 2, he was estopped by his offer to leave the place. Semble, that defendant, though he had not accepted the lease tendered, was, under the circumstances, the plaintiffs' tenant. *Cartwright* v. *McPherson*, 20 U. C. R. 251.

——— *Evidence of Disclaimer.*]—The assertion of title by a tenant before, coupled with a refusal to pay rent after, action brought, is sufficient evidence of a disclaimer to obviate the necessity of proof of a notice to quit, especially where the tenant attempts to rely on such title at the trial. *Doe d. Cuthbertson* v. *Sager*, 6 O. S. 134.

——— *Forfeiture.*]—No notice or demand is necessary before action upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let. *Connell* v. *Power*, 13 C. P. 91.

——— *Knowledge of Predecessor.*]—Where the lessor of the plaintiff conveyed in fee to defendant and took back a lease for life at a nominal rent, and defendant continued in possession for several years with the lessor's knowledge, but without his express consent:—Held, that he was entitled to a demand of possession. *Doe d. Mann* v. *Keith*, 4 O. S. 86.

——— *Lease from Stranger.*]—Where a tenant takes a lease from a stranger, and undertakes to pay him rent, his original landlord need not serve him with a notice to quit, or demand possession, before ejectment. *Doe d. Daniels* v. *Weese*, 5 U. C. R. 589.

——— *Non-recognition by Owner—Benefit of Predecessor's Notice.*]—In ejectment the plaintiff claimed under a deed from the church society, the patentees, to himself, in 1864, habendum to him and his successors, incumbents of the church of St. John, in the parish of Mono, for ever, with a proviso that the land should not be leased without the consent in writing of the churchwardens. The defendant proved that he took possession in 1853, with the assent of the then incumbent, V., and the churchwardens, and that he was to have a lease for sixteen years, and to clear so many acres each year, and pay taxes, &c., but no lease was ever executed. He had remained ever since, having cleared forty acres, and put up buildings. V. was succeeded as incumbent by the plaintiff, and F., a successor of the plaintiff, was incumbent when this action was brought. Neither the plaintiff nor F. had ever recognized defendant as tenant, though F. had offered him $70 to go off quietly, and F. had demanded possession of him, but the plaintiff had not:—Held, that on the evidence the plaintiff might recover as the grantee of the society, and that the demand of possession, if necessary, made by F. would enure to plaintiff's benefit. Semble, that no demand of possession or notice was necessary, for, as against the plaintiff, the grantee of the society, the defendant could have no right, not having entered under or been recognized by him. *Henderson* v. *White*, 23 C. P. 78.

——— *Overholding Tenant.*] — Where a tenant overholds for a considerable time, and refuses to pay rent, he may be ejected without a notice to quit or a demand of possession. *Doe d. Burritt* v. *Dunham*, 4 U. C. R. 99.

——— *Overholding Tenant.*]—A. had a lease from the government of a clergy reserve for twenty-one years, ending in 1837. A. sublet to B. In 1843, after the term had expired, A. obtained a patent in fee from the Crown, and finding B. still in possession, he brought ejectment:—Held, that B. was not entitled to notice to quit, or demand of possession. *Doe d. Wismer* v. *Hearnes*, 6 U. C. R. 193.

——— *Proviso for Renewal.*]—Defendant held under lease for five years, containing a covenant by the lessor to grant him a renewal for five years at a rent named, if requested. The first term having expired, and no request made:—Held, that the lessor might eject without any demand. *Dewson* v. *St. Clair*, 14 U. C. R. 97.

——— *Specific Term.*]—A person taking a farm on shares for a specific term is a lessee, and entitled to six months' notice to quit. *Doe d. Bunnill* v. *Lin*, E. T. 7 Wm. IV.

——— *Tenancy from Year to Year—Definite Term.*]—Where a tenancy from year to year exists, and during its continuance the parties agree for a lease for a certain term, with a power to the tenant to purchase, which is never executed, the tenant stands in his original situation after the agreement fails, and cannot be ejected without a regular notice to quit. *Doe d. Crookshank* v. *Crookshank*, M. T. 5 Vict.

——— *Uncertain Holding—Mortgage.*]—In ejectment by a mortgagee the tenant claimed possession under a lease from the mortgagor, and refused to attorn to the mortgagee (who demanded possession) and shewed no lease, nor any certain holding:—Held, that he was not entitled to notice to quit. *Doe d. Samson* v. *Parer*, 4 O. S. 36.

——— *Void Lease—Agreement to Quit.*]—Where defendant had gone into possession of land under a demise for four years, which was void under the Statute of Frauds, and before the expiration of the first year the lessor of the plaintiff told him that he should want the land in the spring, and defendant agreed to give it up then:—Held, that there was no necessity for proving a formal notice to quit. *Doe d. Lynde* v. *Merritt*, 2 U. C. R. 410.

Sufficiency of—*Time.*]—Plaintiff leased part of a house from defendant L. at $4 a month, and if L. sold the house he was to leave if he could get another, or, according to some of the witnesses, to leave in a month. L. sold the house and conveyed it, on the 7th August, to the vendee, W., who wanted immediate possession. L. had previously given the plaintiff oral notice to go, and on the 7th August, after he had conveyed, he at the suggestion of W. gave the plaintiff a written notice, which W. saw L. sign. The plaintiff at first promised to go, but afterwards refused, and his property was put out by L. and the other defendant on the 9th September, on which W. took possession. The jury found that the tenancy was to terminate on a month's notice, and gave the plaintiff a verdict for $100:—Held, that the finding must be taken to mean that the plaintiff was to have a month after the sale; that if the notice was given and the entry made by L. by authority of W. it would be sufficient; and a new trial was granted to determine this point. *Matthews* v. *Lloyd*, 36 U. C. R. 381.

——— *Disclaiming Tenancy.*]—See *Peers* v. *Byron*, 28 C. P. 250.

Waiver — *Receipt of Rent after Action Brought.*]—In ejectment plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, and after action brought, plaintiff received from defendant a payment on account of rent, which he shortly afterwards returned to defendant:—Held, that there is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and therefore the payment of rent after action brought, had no effect upon this action, either as a bar to it or as a waiver of the notice to quit. Held, that the intention with which the rent was received must be considered. *Laxton* v. *Rosenberg*, 11 O. R. 199.

See Doe d. Bouter v. *Frazer*, 4 O. S. 80; *Doe d. Somers* v. *Bullen*, 5 U. C. R. 369; *Harvey* v. *Fergusson*, 9 U. C. R. 431; *Osborne* v. *Earnshaw*, 12 C. P. 267; *Counter* v. *Morton*, 9 U. C. R. 253; *Sheldon* v. *Sheldon*, 22 U. C. R. 621; *Campbell* v. *Baxter*, 15 C. P. 42; *Manning* v. *Dever*, 35 U. C. R. 294; *Hughes* v. *Brooke*, 43 U. C. R. 609; *Reeve* v. *Thompson*, 14 O. R. 499; *Magee* v. *Gilmour*, 17 O. R. 620, 17 A. R. 27, 18 S. C. R. 579; *Lennox* v. *Westney*, 17 O. R. 472; *Eastman* v. *Richards*, 29 S. C. R. 438; *Weller* v. *Carnew*, 29 O. R. 400; *Gold Medal Furniture Co.* v. *Lumbers*, 29 O. R. 75, 26 A. R. 78, 30 S. C. R. 55.

XVII. Option to Purchase.

Construction of Agreement—*Payment—Rent.*]—By an indorsement under seal upon a lease, it was agreed that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased; but that, if the agreement became void by non-fulfilment of its terms by the time for payment of the second instalment, the lease was to remain in force; and in case of the lease being cancelled, no rent to be paid after 3rd February, 1863, the date of the agreement to purchase. Under the lease the rent was payable in advance, and at the date of the agreement to purchase, a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid and the interest also, according to the tenant's evidence, but according to the landlord's it was not paid at the time, though he admitted that he had agreed to allow the interest to stand for some months afterwards:—Held, that by the memorandum indorsed on the lease the rent payable in advance was not to be paid in case the lease was cancelled, and that it was cancelled by payment of the second instalment without the interest, for the landlord waived payment of such interest at the day; and therefore that the landlord could not recover the quarter's rent which fell due on 1st February, as this was either satisfied by the agreement and payment of money on the 3rd February, when the first instalment was paid, or abandoned by the memorandum with

all other rent, whether accruing due before or afterwards. *Forge* v. *Reynolds*, 18 C. P. 110.

Death of Lessee—*Exercise of Option—Heir-at-Law.*]—Where a lease for years contains an agreement for sale of the fee, the right to purchase goes to the heir-at-law, not to the personal representative of the lessee. *Henrihan* v. *Gallagher*, 9 Gr. 488.

Affirmed in appeal, but the decree varied by directing the vendee of the personal representative to execute a mortgage upon the property, the conveyance of which he had obtained from the lessors as assignee of the lease. Sampson v. McArthur, 8 Gr. 72, remarked upon and overruled, so far as the same decided that the right to purchase contained in a lease was personalty. *S. C.*, 2 E. & A. 338.

Destruction of Premises by Fire—*Rent.*]—A. leased to B. a house for fifteen years, and during the term, by agreement, A. therein assented to an assignment by B. to C., and gave C. the option to purchase the fee within one year, at a given sum, payable by instalments; and C. at the time of the agreement, paid A. £50, to be on account of purchase money, in case he elected to purchase, otherwise to go for rent. There was a proviso in the original lease to B. that, should the house be burnt, the rent should cease. C. did not purchase, and the premises were afterwards burned, at which time, long before the expiration of the lease, the rent due was £12 10s.:—Held, that, notwithstanding this proviso, A. was entitled to rent until the £50 was absorbed. *Pulver* v. *Williams*, 3 C. P. 56.

Exercise of Option in Lease — *Part Payment—Title by Possession.*]—On the 9th January, 1844, one J. W. took possession of the land in question under an indenture of lease, for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th January in each year, the first payment to be made on the 9th January, 1845; and if purchase carried out, in lieu of the rent reserved, a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second; but the person in whom the legal estate vested having died, it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850; when he was succeeded by his son, to whom it appeared that he had previously sold, and the son conveyed to the defendants, who entered, and had been in possession ever since:—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that the fact of the son shewing to the defendants, when he sold to them, a letter written by C.'s attorney at the time of his father's purchase, to the person then in charge of the land, to deliver possession to his father, did not create a new tenancy at will between the defendants and C. Held, also, that the execution of a deed in 1862, by J. W.'s heir-at-law to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him. Held, also, that as the entry of J. W., under whom the son and the defendants claimed, was under C., the defendant could not object to C.'s title at the time of J. W.'s entry. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

Specific Performance—*Account.*]—Demurrer. Bill set forth an indenture purporting to be a lease, with a covenant for leave to lessee to become purchaser of the demised premises upon certain stipulated terms, but alleged that before and at the time of the execution of the indenture it was expressed and understood by the parties thereto that it should, and that in fact it did, operate and take effect as an absolute conveyance and mortgage of the premises therein mentioned, and that the amount of rent reserved was determined by the interest of the purchase money, £1,000, and that the rent was in fact paid as interest thereon; and the bill prayed, amongst other things, an account of what was due for principal and interest in respect of the purchase money, and a specific performance of the covenant for purchase. Defendant demurred to the bill, and the demurrer was allowed. *Cullen* v. *Price*, 1 O. S. 302.

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

——— *Non-performance of Independent Covenant.*]—The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink on the land, during the term, a test well to the depth of 1,000 feet, for the purpose of obtaining oil; and it was provided that at any time during the term the lessees should have the option of purchasing, and the lessor should convey to them, on their request, any five acres of the demised land at $12 a lot; and that at the end of the term the lessees should have the option of purchasing the residue at the same price. The lessees did set about making the well, but the machinery broke after they had reached a depth of 530 feet, and they were in consequence, unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete; and the work had

enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice, before the end of the term, that they would take the five acres:—Held, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the non-completion of the well to the stipulated depth; without prejudice to any action by the lessor on the covenant. *Hunt* v. *Spencer*, 13 Gr. 225.

Time for Exercising Option—*Computation.*]—The lessee had the right of purchase, on his desiring to do so within the period of two years after the date of the commencement of the term, the 1st April, 1852. On the 1st April, 1854, the desire of purchasing was declared:—Held, in time, the day of commencement of the term, 1st April, 1852, being exclusive. *Sutherland* v. *Buchanan*, 9 Gr. 155.

XVIII. Overholding Tenants Acts.

1. *Under 4 Geo. II. c. 28.*

Unliquidated Claim—*Double Value.*]—A claim for damages against an overholding tenant for double the yearly value of the land under 4 Geo. II. c. 28, s. 1, is an unliquidated claim, and therefore is not provable against an estate in the hands of an assignee for creditors under R. S. O. 1897 c. 147. *Magann* v. *Ferguson*, 29 O. R. 235.

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2. *Under 4 Wm. IV. c. 1, C. S. U. C. c. 27.*

Costs — *Non-payment — Attachment.*] — The court will not grant an attachment against an overholding tenant, under 4 Wm. IV. c. 1, s. 53, for the non-payment of costs, until an order to pay the costs has been first served upon the tenant and a demand made. *In re McLachlan*, 3 U. C. R. 331.

Crops—*Valuation—Tender.*] — Where, on the expiration of a tenancy, crops remain to be valued, this should be done and the amount tendered before applying under the Overholding Tenants Act. *In re Boyle*, 2 P. R. 134.

Expiration of Term — *Acceptance of Rent.*] — A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot, in the middle of the third month, be treated by his landlord as an overholding tenant under this Act. Quære, does the statute apply in any case but the plain one of a tenant overholding after the expiration of a term expressly created by contract between the parties. *Adams* v. *Bains*, 4 U. C. R. 157.

Forfeiture.] — This Act applies only to tenants whose terms have expired by lapse of time, not to cases of forfeiture. *Re McNab and Dunlop*, 3 U. C. R. 135.

Indefinite Term.]—A tenancy for an indefinite term at a monthly rent, to be put an end to by a month's notice, is not within C. S. U. C. c. 27, s. 63; and a precept to put the landlord in possession was therefore refused. The tenancy intended by that Act is not one which can only be put an end to by notice but one which comes to an end by the effluxion of a stipulated period, or perhaps by the happening of a particular event, as under a lease for the life of the lessor. *Patton* v. *Evans*, 22 U. C. R. 606.

Jury—*Disagreement—New Jury.*]—Where the first jury summoned could not agree, and were discharged:—Held, that another jury might be summoned, and an effectual inquisition held. Held, also, that on the evidence set out, this was a case within the Act, and that the finding against defendant as an overholding tenant was warranted. *In re Woodbury and Marshall*, 19 U. C. R. 597.

Held, that the fact of a jury being unable to agree, and so discharged, in an overholding tenancy case, does not determine the authority of the commissioner to summon a second jury. *In re Babcock*, 9 L. J. 185.

——— *Discharge.*]—The fact of the jury having been discharged by consent of parties does not prevent the writ being still proceeded upon. *Ib.*

Mesne Profits.]—A landlord proceeding under this Act cannot, under 14 & 15 Vict. c. 114, s. 12, recover mesne profits, that Act applying only to ejectment. *Allan* v. *Rogers*, 13 U. C. R. 166.

Misconduct of Commissioner.] — Semble, that the court will not quash the inquisition for misconduct of the commissioner, but that it can hold him amenable for such misconduct on an independent application. *Ib.*

Notice of Inquisition—*Service.*]—Notice of the inquisition not having been served personally, and there being evidence to shew that defendant was not resident on the premises when such notice was served, the notice and all subsequent proceedings were set aside, but without costs. Semble, that no motion on behalf of another person or owner could be received, as such person could not be bound by any proceedings against the alleged tenant. *Goodler* v. *Cook*, 2 C. L. Ch. 151.

Parties — *Purchaser at Sheriff's Sale.*]—Where B. purchased at sheriff's sale, under execution, D.'s interest in a term of years, held under a third party, at a time when D. was in possession, and afterwards, upon D.'s request, allowed him to continue in possession for five days, it was held that there was no privity between the parties, so as to bring the case within the overholding tenancy clauses of the Ejectment Act. *Bonser* v. *Boice*, 9 L. J. 213.

——— *Receiver — Vendee.*]—If a receiver has been appointed by the court of chancery, to whom the tenant has attorned, or if the interest of the original landlord has been sold to another, in either case the original landlord is not the proper person to take proceedings. *In re Babcock*, 9 L. J. 185.

Receipt of Rent after Verdict.] — Where the jury, in a proceeding under this Act, found in favour of the landlord, the court refused to restore the tenant to possession, on the ground that the agent of the landlord had received a month's rent after the verdict. *Wright* v. *Johnson*, 2 U. C. R. 273.

Tenant at Will.]—The statute 4 Wm. IV. c. 1, s. 53, does not authorize a writ against a mere tenant at will, though he continue to hold after notice to quit and demand of possession. The statute extends only to tenants holding after the expiration of their term. *Clement* v. *Shriver*, 5 O. S. 310; *Aduerant* v. *Shriver*, T. T. 6 & 7 Wm. IV., R. & H. Dig. 263.

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3. Under 27 & 28 Vict. c. 30.

Evidence — *Refusal to Give Possession — Affidavit.*]—A landlord proceeding under 27 & 28 Vict. c. 30 must adduce some evidence to shew that the tenant refuses to give up the premises, and that his tenancy has expired. Held, also that the affidavit of the landlord himself, filed under s. 1, with a view to proceedings under the Act, is not legal evidence against the tenant. *In re O'Connell*, 1 C. L. J. 163.

[This Act was repealed by 31 Vict. c. 26 (O.)].

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4. Under 31 Vict. c. 26 (O.)

Colour of Right—*Bonâ Fide Belief.*]—Held, on the evidence, that the county court Judge was justified in determining that the tenant was an overholding tenant, within the meaning of the Act, and wrongfully held over without any right or colour of right. *Gilbert* v. *Doyle*, 24 C. P. 60.

——— *Occupant.*] — A person put in possession of a brickyard and house thereon was dismissed by his employer, but refused to give up possession until certain accounts were adjusted:—Held, that he was an "occupant" overholding without colour of right. *Fowke* v. *Turner*, 12 L. J. 140.

Forfeiture—*Demand—Notice of Inquisition—Service.*]—This Act gives jurisdiction to the county Judge in cases when the tenancy has been determined by forfeiture for breach of contract. Service of the demand of possesion must be personal; and service of notice of inquisition must either be personal or at the place of abode of the tenant. *Nash* v. *Sharp*, 5 C. L. J. 73.

Mortgagee against Mortgagor.] — A mortgagee, from whom the mortgagor has accepted a lease of the mortgaged premises, will not be permitted on the expiration of the term to proceed against the mortgagor as an overholding tenant under the above Act. *In re Reeve*, 4 P. R. 27.

Tenant with Right to Purchase—*Proceedings by Mortgagee of Lessor.*]—Defendant went into possession as tenant of A. under a lease with a right to purchase at a certain sum. He elected to purchase, and remained in possession for about a year after the determination of the lease, when plaintiff, the mortgagee of the lessor, brought ejectment and demanded security for costs and damages, as against a tenant overholding, under C. S. U. C. c. 27:—Held, that the plaintiff was entitled to the relief asked, as the defendant's character as tenant had not been that of a vendee. 2. That it made no difference that the plaintiff was mortgagee of the lessor. *Anonymous*, 3 P. R. 350; *S. C., sub nom. Wartell* v. *Ince*, 10 L. J. 297.

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5. Under R. S. O. 1887 c. 144.

Colour of Right—*Real Dispute—Procedure—Stay of proceedings.*]—The expression "colour of right" in the Overholding Tenants Act, R. S. O. 1887 c. 144, means such semblance or appearance of right as shews that the right is really in dispute. The Act confers no authority upon the county Judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case. Gilbert v. Doyle, 24 C. P. 60, and In re Woodbury and Marshall, 19 U. C. R. 597, not followed. Upon the proceedings before the county Judge being commanded to be sent up, the high court may stay proceedings upon the writ of possession under the Act. *Price* v. *Guinane*, 16 O. R. 264.

——— *Real Dispute.*]—When there was a dispute between landlord and tenant as to the date when the tenancy commenced, and an application was made under the Overholding Tenants Act at a time when, according to the tenant's contention, his lease had not expired:—Held, that there was that "colour of right" in the tenant which the Act contemplates. Price v. Guinane, 16 O. R. 264, followed. *Bartlett* v. *Thompson*, 16 O. R. 716.

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

Motion to Reverse Finding of County Judge—*Forum.*]—An application under s. 6 of the Overholding Tenants Act may be properly made to a divisional court; and semble, it is the only court in which the motion can be made. *Re Scottish Ontario and Manitoba Land Co.*, 21 O. R. 676.

See Longhi v. *Sanson*, 46 U. C. R. 446; *Dobson* v. *Southeran*, 15 O. R. 15.

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6. Under 58 Vict. c. 13 (O.)

(See R. S. O. 1897 c. 171.)

Colour of Right—*Real Dispute.*]—Since the amendment of the Overholding Tenants Act, R. S. O. 1887 c. 144, by 58 Vict. c. 13, s. 23, striking out of the Act the words "without colour of right," the Judge of the county court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord asserting it to be a monthly holding, and the tenant a yearly tenancy:—Held, that the county court Judge had jurisdiction. *Moore* v. *Gillies*, 28 O. R. 358.

XIX. Particular Rights of Tenants.

To Bore for Oil.]—See *Lancey* v. *Johnston*, 29 Gr. 67.

To Clear Land—*Covenant as to—Delay—Damages.*]—A lease of rectory land by the rector contained a covenant not to clear more than a certain portion of the land demised; that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." It appeared that the lessee's cutting was not meant to be limited to what "might be necessary in working regular clearings on the land," and the lessee, with the lessor's consent, cut and sold the timber off 180 acres; but the lessee having for two years done nothing towards clearing this portion of the demised land, it was held that the delay was open to the objection of being contrary to "the due course of farming and good husbandry," and that the lessee was liable to damages in respect thereof. *Lundy* v. *Tench*, 16 Gr. 597.

——— *Injury to Reversion—"Improvements"—State of Nature.*]—In an action by reversioner against tenant, for injury to the reversion caused by cutting down and carrying away trees and underwood, defendant pleaded his tenancy, under a demise from D., for nineteen years; that at the time of the demise, the land was chiefly wild and in a state of nature, and could not be used for farming purposes, for which it was demised, and defendant cut down and removed the trees, &c., upon a portion of the wild land, cleared and made it fit for cultivation, fenced and cultivated it, making it productive and useful, and thereby improved the land in value, and did not injure plaintiff's reversion:—Held, plea bad. *Drake* v. *Wigle*, 22 C. P. 341.

The owner of land made several leases of portions thereof, wherein it was stipulated that the lessees should have a right to cut the timber thereon; and they on their parts covenanted to make certain improvements. By the lease to the defendant it was agreed that the lessee should render up all improvements, but the lease did not bind him to make any:—Held, that the lease did not confer a right to cut the timber standing on the demised premises, notwithstanding the same were wild and in a state of nature. *Goulin* v. *Caldwell*, 13 Gr. 493.

To Compensation for Expropriation of Land.]—See *Re Welland Canal Enlargement, Fitch* v. *McRae*, 29 Gr. 139.

To Compensation for Improvements—*Lease Set aside on Grounds of Improvidence.*]—See *Shanagan* v. *Shanagan*, 7 O. R. 209.

To Damage for Injury to Land—*Railway.*]—The plaintiffs, in this case, though only lessees of the land, were held to be "proprietors" within the reasonable construction of the Railway Act, and entitled to recover for damage done to the land. *Brown* v. *Grand Trunk R. W. Co.*, 24 U. C. R. 350.

To Maintain Action for Injury to Lateral Support of Building.]—See *McCann* v. *Chisholm*, 2 O. R. 506; *Backus* v. *Smith*, 5 A. R. 341.

To Property in Stones Cleared off Land.]—A tenant who, for the purpose of rendering the land more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them and is liable for their value if he disposes of them. Saunders v. Breakie, 5 O. R. 603, commented on. *Lewis* v. *Godson*, 15 O. R. 252.

To Redeem Mortgage.]—See *Martin* v. *Miles*, 5 O. R. 404.

To Set-off against Rent.]—See *Walton* v. *Henry*, 18 O. R. 620.

To Way—*Mode of User.*]—The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant, and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land, and this bridge the defendant pulled down:—Held, that the plaintiff's mode of user was reasonable and that the defendant was not justified in interfering with the bridge. *Butchart* v. *Doyle*, 24 A. R. 615.

XX. Particular Tenancies.

1. *Created by Mortgage.*

Demise to Mortgagor — *Construction — Rent Reserved—Intention.*] — A mortgage of real estate provided that the money secured thereby, $20,000, should be payable with interest at seven per cent. per annum as follows: $500 on 1st December, 1883; $500 on the first days of June and December in each of the four following years; and $15,500 on 1st June, 1888; and it contained the following provision: "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause, or clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees. The mortgagor was in possession of part of the premises and his tenants of the remainder and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution, the mortgagees claimed payment of a year's rent under the statute of Anne:—Held, that the mortgage deed failed to create

between the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne c. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease, although not signed by the mortgagees, the rent reserved was so unreasonable and excessive as to shew conclusively that the parties could not have intended to create a tenancy, and that the arrangement was unreal and fictitious. The right to impugn the validity of a lease between a mortgagor and mortgagees, on the ground that it is merely fictitious and colourable, is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved. *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483. *See Ontario Loan and Debenture Co.* v. *Hobbs*, 15 O. R. 440, 16 A. R. 525.

See also cases under DISTRESS and MORTGAGE.

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2. *Lease for Lives.*

Created by Tenant in Tail—*Determination by Death.*] — Where a tenant in tail makes a lease for lives and dies without issue, the lease is absolutely determined by his death, so that no acceptance of rent by him in remainder or reversion can make it good. The acceptance by the remainderman of a yearly nominal rent is not a confirmation of the lease, especially where a party disclaims holding as his tenant. *Doe d. Graham* v. *Newton*, 3 U. C. R. 249.

Merger of Term—*Sheriff's Deed.*] — Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S. and the heirs of his body for twenty-one years or the term of his natural life from the 1st April, 1853, fully to be complete and ended," but not to be underlet to any person except to the family of the said S. for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on the failure to perform the covenants, the lease and the term thereby granted should cease and be void:—Held, that by the lease S. took a life estate in which the term merged. *Dalye* v. *Robertson*, 19 U. C. R. 411.

Renewal — *Evidence — Counterpart of Lease — Custody of — Duration of Life — Presumption.*]—By indenture made in 1805 F. demised certain premises to C. to hold for the lives of the lessee, his brother, and his wife, "and renewable for ever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine; otherwise the right of renewal of the life fallen should be forfeited; and if any question should arise, it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignee of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an indorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives, and receipt of the renewal fine was acknowledged:—Held, that the words "renewable for ever" in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity, notwithstanding there was no covenant by the lessor so to renew; that the indorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on the defendants, and entitled the plaintiffs to a renewal for a new life so inserted, but the right to further renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential, and the evidence having shewn that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary. The person in possession pleaded that he was a purchaser for value without notice, and entitled to the benefit of the Registry Act, R. S. N. S., 5th ser., c. 84:—Held that the memorandum indorsed on the lease was not a deed within s. 18 of the Act, nor a lease within s. 25; that if a speculative purchaser having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice. Semble, that s. 25 of the Nova Scotia Act, R. S. N. S., 5th ser., c. 84, applies only to leases for years. *Clinch* v. *Pernette*, 24 S. C. R. 385.

See Doe d. Lawson v. *Coutts*, 5 O. S. 499, *post*, 4.

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3. *Monthly Tenancies.*

Construction of Instrument.] — The following instrument executed under seal: "This is to certify that we agree to give O. 7s. cy. per month for the use of the farm (describing it) for so long a time as O. may let us have it; and moreover we fully bind ourselves to give up quiet and peaceable possession to said O. of said farm when he may require it:"—Held, to create a tenancy from month to month, determinable on proper notice. *Orser* v. *Vernon*, 14 C. P. 573.

Defendant leased to the plaintiff "that certain frame house now standing and being on lot No. 10," &c., "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows, from the 1st November now next ensuing for and until the 1st April following, a period of five months," at a monthly rent of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold possession of said premises, and should remain longer than the 1st April, he should pay at the rate of £50 per annum as rent, to be paid monthly:—Held, that the lease was a demise till the 1st April, with an option to the lessee to remain afterwards as a monthly tenant

(not from year to year) at the rate of £50 a year; and that it was not a demise of the whole of the lot 10, as alleged. *McPherson* v. *Norris*, 13 U. C. R. 472.

R. & Co. made the following offer in writing to the owner of the premises mentioned therein:—"We are prepared to rent that store where the 'Herald' offices used to be and will give $400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st August next at the rate of $400 per year." . . . This offer having been accepted, R. & Co. occupied the premises for a year and seven months, no new agreement being made after the 11 months expired, paying their rent monthly during said period. They then gave a month's notice and quitted the premises. The landlord, asserting that the tenancy was from year to year, brought an action for rent for the two months after the tenancy ceased according to the notice:—Held, that the tenancy was one from month to month after the original term ended, and the month's notice to quit was sufficient. *Eastman* v. *Richard*, 29 S. C. R. 438.

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4. *Yearly and From Year to Year.*

Agreement to Work on Shares — *Entry.*]—Plaintiff and defendant being joint owners of land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during the plaintiff's life, the plaintiff agreed to let defendant work the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do, and each bound himself to the other in £1,000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. On ejectment brought by the plaintiff:—Held, that defendant by his entry became a tenant from year to year, on the terms of the agreement. *Sheldon* v. *Sheldon*, 22 U. C. R. 621.

Habendum — *Repugnant Subsequent Clause.*]—A lease with habendum for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months' written notice prior thereto; — Held, that the clause was repugnant to the habendum and must be rejected, and that the lease terminated at the end of the year without any notice. *Weller* v. *Carnew*, 29 O. R. 400.

Lease for Life not under Seal.]—A lease for life for a nominal rent, not under seal, although it could not pass a freehold interest, would operate as a lease from year to year. *Doe d. Lawson* v. *Coutts*, 5 O. S. 460.

Lease for Years not under Seal.]—Defendant claimed title as tenant of the person through whom plaintiff claimed, by virtue of letters under the terms of which he (the defendant) was entitled to possession for ten years upon certain conditions, which he had performed:—Held, that he thereby obtained a yearly tenancy. *White* v. *Nelson*, 10 C. P. 158.

One L. by an instrument not under seal, dated 31st October, 1857, leased to S. O., one of the defendants, for five years:—Held, that S. O. became tenant from year to year for five years, determinable during the term by half a year's notice. *Caverhill* v. *Orvis*, 12 C. P. 392.

Letting at Annual Rent—*Distress.*]—A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year as the first, if the tenant remains in possession of the premises; and the landlord may distrain for the first year's rent at the end of the second year; and the Real Property Act, 4 Wm. IV. c. 1, s. 20, does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards. *McClenaghan* v. *Barker*, 1 U. C. R. 26.

Notice—*Acknowledgment — Oral Agreement.*]—Plaintiff claimed under a deed from J., the patentee, dated 12th April, 1853, and proved that on the 4th April, 1854, he served defendant with a notice to give up possession on the 30th September then next, in failure whereof "I shall require you to pay me rent of £1 per month for the same, for every month wherein you may continue in possession of the same, until I recover possession of the same by legal proceedings or otherwise." Defendant at the time of the deed to the plaintiff, and for some time previous, had been living on the lot, under an oral agreement with J. that he should have it for several years, and had made improvements:—Held, that the plaintiff must recover; that the notice was not an acknowledgment of yearly tenancy, so as to entitle defendant to six months' notice; and that the agreement with J., could have no effect. *Cleland* v. *Kelly*, 13 U. C. R. 442.

Oral Lease — *Implied Tenancy — No Rent Paid.*]—Where the tenant enters under an oral lease void under the statute, a tenancy from year to year may be implied, though no rent has been paid. In this case, one R. G. orally leased a farm to the plaintiff on the 15th April, 1873, for five years, at $100 a year. The plaintiff entered on the 17th, cleared 4½ acres, and put in peas and oats, of which the lessor was aware. R. G. died on the 5th September, having devised the land to defendant, who entered in the same month and took the crops which the plaintiff had sown:—Held, that the plaintiff was a tenant from year to year, and that defendant was a trespasser in entering upon him. *Gibboney* v. *Gibboney*, 36 U. C. R. 236.

Payment of Taxes — *Permission to Build.*]—Where D., being tenant for life of two lots, gave M. oral permission to occupy one lot and build upon it, on condition that he should pay the taxes on both lots; and M. accordingly went on and built, and paid the taxes for several years:—Held, that a yearly tenancy had been created, and that D. could not eject M.'s sub-tenant without notice to quit. *Davis* v. *McKinnon*, 31 U. C. R. 564.

Receipt of Rent — *Expiration of Term.*]—The receipt of rent by the wife, with the husband's assent, from a tenant of her estate after the expiration of a term, creates a tenancy from year to year. *Johnson* v. *McLellan*, 21 C. P. 304.

——— *Inference.*] — Defendant asserted that he was a yearly tenant, while the plaintiff alleged that he was tenant only from one year's end to the other:—Held, that on the facts stated in the case the receipts for rent set out afforded no inference as to the nature of the tenancy. *Houghton* v. *Thompson*, 25 U. C. R. 557.

——— *Repairs.*]—In ejectment the plaintiff and defendant both claimed, by their notices, under one P. It appeared at the trial that P. sold to the plaintiff in 1868, and that defendant had been living on the premises since 1864, having paid to P.'s agent about two years' rent in money and repairs. Defendant was not asked at the trial to admit the plaintiff's title:—Held, that a yearly tenancy must clearly be assumed, and that, as no notice to quit was shewn, the plaintiff could not recover. *Birchall* v. *Reid*, 35 U. C. R. 19.

Receipt of Rent after Notice to Quit.]—C., on 1st May, 1866, leased to defendant for ten years at a yearly rent, payable quarterly on 1st January, April, July, and October, with a proviso that if the lessor should sell during the term, the lessee would give up possession on six months' notice. On the 11th November, 1872, a notice to quit at the end of six months was given to defendant, signed by C. and by S., to whom C. had sold the premises, and to whom C. conveyed on the 7th May, 1873. Defendant paid rent to C. and S. to 1st January, 1873. S. conveyed to the plaintiff on the 12th July, 1873, and on the 28th October following, defendant, who had continued in possession, paid to the plaintiff the quarter's rent due on the 1st October:—Held, that defendant was in under a yearly tenancy created by plaintiff's acceptance of rent, and could not be ejected by plaintiff without notice. Quære, whether he could not claim under the original lease, on the ground that the notice to quit by C. and S. had been waived by the acceptance of rent by S. By his notice he claimed under the original lease only:—Held, that, if necessary, this should be amended. *Manning* v. *Deere*, 35 U. C. R. 294.

See Eastman v. *Richard*, 29 S. C. R. 438, *ante* 3; *Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.*, 31 O. R. 40, *post* XXVII.

XXI. Rates and Taxes.

Land Leased by Municipality — *Liability—Distress.*] — Held, that land owned by a city, but leased to a tenant for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes. *Scragg* v. *City of London*, 28 U. C. R. 457.

Lease Silent as to.]—Where the lease contained no provision as to the taxes:—Held, that the landlord should pay them. *Dore* v. *Dore*, 18 C. P. 424.

Non-payment by Tenant — *Eviction — Time for Payment—Pleading.*]—Action by lessees against lessor for an eviction. Plea, that the plaintiffs by lease covenanted that they would during the term pay all taxes, and that the non-fulfilment of their covenants, or any of them, should operate as a forfeiture of the said deed, and that the same should be considered null and void; that during the term certain taxes were imposed on the land, amounting to $8.55 for municipal and $9.55 for school purposes for 1863, which the plaintiffs did not pay, although the same were duly demanded, and they had no distress on the land; and such taxes in March, 1864, were returned by the collectors as due on non-resident lands, whereby the said deed and the term became forfeited and void; and the defendant afterwards peaceably entered, and became possessed as in his first estate:—Held, on demurrer, that the plea was sufficient; that the taxes became due when demanded, and plaintiffs had not the whole term to pay them in; and that it was unnecessary to set out every requisite to shew a valid rate, there being a distinction in this respect between an avowry and a justification. *Taylor* v. *Jermyn*, 25 U. C. R. 86.

"Occupier" — *Assessment as—Neglect to Appeal.*]—Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term still continues; but held, that the plaintiff in this case, having omitted to appeal, was liable to pay the sum assessed against him, and therefore could not replevy the goods which had been seized. *McCarrall* v. *Watkins*, 19 U. C. R. 248.

Payment by Tenant — *Set-off against Rent — No Valid Demand—Voluntary Payment.*]—Certain property in a city had been owned by B., and on his death in 1884, intestate, and without known heirs, defendant entered and leased the property to the plaintiff, the defendant agreeing to pay the taxes. In 1884, the taxes assessed for 1883 not having been paid, a distress was entered therefor, when the plaintiff paid them and claimed to deduct them from the rent. The assessment for 1883 was against B. as owner, of which he received notice, and he was similarly assessed and received notice for the two prior years. In the assessment roll the name of the street and property was given, but not the number of the house or lot, except an arbitrary number adopted by the assessors for their convenience, and without information from them the lot could not be discovered:—Held, that s. 21 of the Assessment Act, R. S. O. 1877 c. 180, which, in the absence of an agreement to the contrary, authorizes the tenant to deduct the taxes paid by him from his rent, only does so when he can be compelled to pay the same; and as, following Chamberlain v. Turner, 31 C. P. 490, there appeared to be no valid demand here, there was no right to collect the taxes, and therefore no right to deduct the same. Quære, whether the description in the assessment roll was sufficient; but under the circumstances, and in view of the provisions of s. 57 validating the roll as finally passed by the court of revision, B. probably could not have raised this objection to a distress or suit for the taxes. *Carson* v. *Veitch*, 9 O. R. 706.

——— *Set-off against Rent.*] — A tenant who covenants to pay rent without any deduction cannot claim a deduction for taxes paid by him. *Grantham* v. *Elliott*, 6 O. S. 192.

——— *Set-off against Rent—Sewer Rate.*] —Certain premises in the city of Toronto, which drained into a ravine, were demised by defendant to one A., of whom the plaintiff in

replevin was assignee. The city, in making improvements, closed up the ravine, and thereby accumulated water on the premises, rendering a drainage into the common sewer necessary. The plaintiff then drained his premises into such sewer, and paid the sewerage rate charged upon the proprietor of the property, and claimed to set it off against defendant's rent:—Held, on demurrer, that such payment was voluntary, and could not be recovered back from defendant, although it might enure to his benefit. Quære, whether the tenant was not liable under his covenant to pay taxes. *Aldwell* v. *Hanath*, 7 C. P. 9.

——— *Set-off against Rent — Statute.*]—By the Assessment Act, R. S. O. 1897 c. 224, s. 26, any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement to the contrary between the occupant and the owner:—Held, that under the above section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy. Heyden v. Castle, 15 O. R. 257, discussed. *Meehan* v. *Pears*, 30 O. R. 433.

——— *Set-off against Rent — Voluntary Act.*]—Defendant took a written agreement for a lease of certain premises, which was silent as to taxes, but when it was signed he orally agreed to pay taxes. No lease was ever executed, owing to a disagreement on another point. Defendant occupied the premises for four years, paying taxes for three years without objection, but when sued for rent which subsequently accrued, he claimed to set off such taxes on the ground that as the agreement made no provision for them, and could not be added to by oral evidence, they must fall upon the landlord:—Held, that having made the payment voluntarily in pursuance of his own agreement, even if it were without consideration, he could not recover back or set-off such payment. *McAnnany* v. *Tickell*, 23 U. C. R. 499.

——— *Set-off against Rent.*] — A tenant occupied a house for some six years, during which period he paid his landlord's taxes:—Held, that he could not deduct the taxes paid out of the last quarter's rent under the 26th clause of the Assessment Act, although there was no agreement as to payment of taxes between him and his landlord. *Wade* v. *Thompson*, 8 L. J. 22.

——— *Effect of—Statute of Limitations.*]—A tenant agreed to pay for certain premises $6 a month and taxes, and for some eighteen years remained in possession, paying the taxes and paying nothing else. The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period:—Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent. Davis v. McKinnon, 31 U. C. R. 564, observed upon. Judgment in 16 O. R. 336 reversed. *Finch* v. *Gilray*, 16 A. R. 484. Followed in *Coffin* v. *North American Land Co.*, 21 O. R. 80.

See ante IX. 6.

XXII. Renewal of Leases.

Agreement—*Covenant to Execute Lease with Renewal Covenant.*] — The declaration set out that B. by an agreement under seal leased premises to K., and alleged that it was thereby agreed that K. was to pay the annual rent of £10, and to get a lease from B. for twenty-one years, with a renewal or valuation at the termination thereof, said K. paying all expenses in case of a renewal; at the end of the second period K. to receive no allowance for any improvement; lease to be perfected with the usual covenants between landlord and tenant, at the request and expense of K. It then alleged that K. conveyed his interest to L., who devised to the plaintiff; that B.'s reversion passed to defendants; that after the expiration of the twenty-one years, the plaintiff applied to defendants to execute to him a further lease for a renewal term of twenty-one years at an annual rent of £10, and the defendants refused to execute the lease, or to grant to plaintiff any renewal, contrary to said agreement:—Held, on demurrer, that the memorandum of agreement contained no covenant for a renewal of the term at the expiration of twenty-one years, but to execute a lease during the term containing a covenant for a renewal or valuation. Quære, whether the instrument was a lease or only an agreement for one. *Leys* v. *Baldwin*, 2 C. P. 488.

Agreement for—"*Release*" — *Meaning of—Mistake—Omission of Arbitration Clause—Ratification—Payment for Improvements.*]—On 1st November, 1871, defendant by deed leased land for five years to the plaintiff, who agreed in lieu of rent to clear certain specified portions. Appended to the lease was an agreement, dated the 25th January, 1876, which was to form part of the lease, "that in the event that the lessee shall get a release of the premises now leased, after the expiration of the same lease, then the value of a certain barn built by the lessee on the said premises shall be allowed to apply to the rent which shall be payable during the said release. The value of said barn is $400. In the event that there be no release as aforesaid, that the lessor shall pay to the lessee the sum of $400 for the said barn, at the expiration of the said lease." It was alleged that this agreement by mistake omitted to provide for a reference to arbitration as to the term of the renewal lease, (it being clear that by the term "release" the parties intended a renewal lease); but the evidence as to such mistake was chiefly the oral testimony of defendant, which the plaintiff denied:—Held, that the agreement clearly could not be reformed by adding such provision. Held, also, that the term "release" must be construed to mean a renewal of the old lease, and therefore a lease for the same term. And, semble, that the rent would be payable, as before, by improvements, i. e., by the barn. The defendant having refused to grant a new lease for more than three years, the plaintiff was therefore held entitled to recover the $400. *Dawson* v. *Graham*, 41 U. C. R. 532.

Ascertainment of New Rent—*Arbitration—Time—Original Rent.*]—Plaintiff leased

to M. for twenty-one years, and it was stipulated by the lease that at the expiration of the term the lessee might retain possession, on condition that within three months a new rent should be ascertained by arbitration; but that if the lessor desired to resume possession he might do so, on paying the value of the improvements, to be ascertained as therein provided for; and this arrangement was to be made at the end of each term. It was then provided, that if "at the expiration of the next or any subsequent term of twenty-one years, no new ground rent should be ascertained as aforesaid," or if the lessor should not resume possession, then the lessee should continue in possession, upon payment of the rent last ascertained to be payable. This lease was assigned by M. to defendant, as trustee for one F. At the expiration of the first term of twenty-one years no notice was given, nor new rent fixed; but after the three months had gone by, arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at a sum more than five times the first rent, or that the lessor should pay a certain sum for the improvements. The lessor offered to renew, and notified the lessee, who refused to accept at the new rent; and he then brought ejectment:—Held, 1. that the plaintiff could not recover, for whether the arbitration was binding upon defendant or not, as to the amount of rent, he was entitled to a new term by the conditions of the lease, and there had been no forfeiture; 2. upon the construction of the lease, that the provision last mentioned applied at the end of the first term of twenty-one years, as well as of subsequent terms, and that defendant was therefore entitled to retain possession for another term at the original rent. *McDonell* v. *Boulton*, 17 U. C. R. 14.

Ascertainment of Value of Improvements — *Arbitration—Time for Payment—Renewal at Original Rent.*]—In a lease for twenty-one years, ending on the 1st September, 1872, it was covenanted that on the expiration thereof the lessor, one R., should at his option, either pay within thirty days the value of the buildings, or renew for a further term of twenty-one years; such value and the rent to be determined by arbitration. On the expiration of the lease, an agreement of reference was entered into, between C., the lessee, one B., to whom C. had mortgaged his interest, and R., the award to be made by the 30th September: but it was agreed that, should the award not be made by that time, and R. should elect to pay for the buildings, he should pay the sum awarded within a week after the award, and the extension of time should be taken as a covenant in the lease. The parties enlarged the time for making the award until the 1st November, and on the 26th October the umpire made his award. R. elected to pay for the buildings, but the amount awarded was not paid to the mortgagee, the person entitled to receive it, until the 5th November, more than a week after the award was made. Defendants were tenants under C.; their terms were unexpired when this action was brought, and they had paid their rents to C. for the quarter ending on the 1st October. On the 18th September R. leased the premises to the plaintiff, and after R. had paid for the buildings, the plaintiff demanded possession from defendants, which they refused to give, and informed plaintiff of their having paid their quarter's rent to C. The plaintiff then called on C., who paid to him the proportion of the rent which he had received for the period between the expiration of C.'s lease and the 1st October:—Held, that the receipt of the rents by plaintiff from C. was no evidence of a recognition of an existing tenancy between plaintiff and defendants, for there was no direct dealing with the tenants themselves, and the fact of plaintiff demanding possession, and only being paid a fractional part of the quarter's rent paid by the tenants to C., repelled the idea of any intention to recognize defendants as his tenants. Held, also, that the fact of R. not having paid the amount awarded for the buildings within the week, did not deprive him of his right of election, and so enable C. to hold for a further term of twenty-one years; for B., being the proper person to receive the amount, might extend the time for paying it. The plaintiff, therefore, was held entitled to maintain ejectment against defendants. *Roaf* v. *Garden*, 23 C. P. 59.

Assignee of Lease — *Rights of.*]—Assignee of lease, or part thereof, entitled pro tanto to benefit of covenant for a renewal and customary right of pre-emption. *McVean* v. *Woodell*, 2 O. S. 33.

Costs of Arbitration.]—It was provided in a lease that if the lessee should desire a renewal for a further term and give a defined notice, containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three arbitrators, or a majority of them:—Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrators' fees, for which the action was brought, and one-half of the plaintiff's costs of the action. Marsack v. Webber, 6 H. & N. 1, and in re Autothreptic Steam Boiler Co., 21 O. B. D. 182, followed. *Smith* v. *Fleming*, 12 P. R. 520, 657.

Covenant to Renew — *Action on—Plea of Want of Authority to Lease.*]—To an action against a municipal corporation on their covenant to renew a lease, defendants pleaded that they had no authority to make the lease, as plaintiff, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in chancery, of which plaintiff had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *Town of Brantford*, 19 U. C. R. 207.

——— *Breach—Damages—Measure of.*]—Defendants leased lands to one W. for eight years, on which the lessee covenanted to erect a good house during the first year, and the defendant covenanted to grant a renewal lease for ten years at the end of the term, at a rent to be fixed by arbitration. Defendants were unable to renew, owing to a decree in chancery declaring that they had no power to grant the lease. The buildings, which were of wood, were removed and sold under execution

against the plaintiff, who had purchased the term two years before it expired, for $3,000. In an action against the defendants on their covenant to renew:—Held, that the plaintiff was entitled to recover the value of the occupation of the premises, with the buildings, above the probable ground rent, for the term which he had lost, and that $2,500, the amount of the verdict found, was not excessive. *Van Brocklin* v. *Town of Brantford*, 20 U. C. R. 347.

——— *Construction of—Increased Rent.*]—A renewable lease provided that renewals should be at such "increased" rent as should be determined by arbitrators "payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents." The lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term $80 per annum; for the remaining eleven years $100 per annum:"—Held, that the proper method of increasing the rent on renewal was by adding to the rent of $80 per annum for the first ten years, and to the rent of $100 per annum for the remaining eleven years of the renewal term. Held, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises. *In re Geddes and Garde*, 32 O. R. 262.

——— *Extension of Term—Registration—Mortgage—Priorities.*]—A lease of land for four years, with a covenant to renew for four years more, was held not to require registration, actual possession having gone with the lease; and such a lease, though not registered, was held valid, as respects the covenanted renewal as between the lessee and the subsequent mortgagees of the lessor. *Latch* v. *Bright*, 16 Gr. 633.

——— *Extension of Term — Registration—Mortgage — Priorities.*] — A. leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term, unless he should choose to pay for the improvements. The lease was registered. The lessees then assigned part of the premises, and the assignees did not register. C. devised his interest to B., who subsequently mortgaged the whole premises to the plaintiffs; the mortgage was registered:—Held, that the covenant for renewal did not extend the term so as to bring the lease within 9 Vict. c. 34; that the unnecessary registration did not make it requisite to register the assignment; and therefore that the mortgage to the plaintiffs could not affect the premises assigned. *Doe d. Kingston Building Society* v. *Rainsford*, 10 U. C. R. 236.

——— *Glebe Lands—Lessor's Successor not Bound.*]—A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Ins. Co.*, 20 C. P. 170.

——— *Option of Lessee—Evidence of Exercising.*]—Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over. *Lindsay* v. *Robertson*, 30 O. R. 229.

——— *Option of Lessee—Notice or Demand.*]—Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee . . . should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances. *Brewer* v. *Conger*, 27 A. R. 10.

——— *Option of Lessor—Second Term—Possession after Term—Specific Performance.*]—A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and under the like covenants, conditions, and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired, the lessees continued in possession and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender, and, after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option:—Held, affirming the judgment in 28 N. B. Rep. 1, that the lessors were not entitled to a decree for specific performance. *Sears* v. *City of St. John*, 18 S. C. R. 702.

Covenant to Renew or Pay for Improvements—*Option — Specific Performance.*]—Where the lessor covenants for a renewal of the term, or in default for payment for improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew. *Hutchinson* v. *Boulton*, 3 Gr. 391.

——— *Option—Time for—Election.*]—Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and

should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors have the right to elect, and the lessee must accept a renewal unless before the expiration of the term the lessors elect not to renew. Judgment in 20 O. R. 729 affirmed. *Ward v. City of Toronto*, 26 A. R. 225.

Executor of Lessor—*Devolution of Estates Act.*]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Refusal to Renew—*Right to Compensation for Improvements—Renewal at Original Rent in Default of Payment—Valuation—Trespass.*]—M. leased premises to E. for twenty-one years, covenanting that if E., his executors, administrators, or assigns, should desire to renew (three months' notice having been given), the rent should be fixed by arbitration; that if M. neglected to execute a new lease upon the terms agreed on, M., his heirs and assigns, would pay at a fair valuation to E. for all buildings or improvements, except those erected at the date of the lease; and that if M. neglected to pay within one month for such improvements, the lease should be considered to be renewed for twenty-one years at the same rent as before. M. devised the premises to the plaintiffs, or some of them. E. sublet to W., reserving a reversion, and subsequently assigned to defendant, having previously, about three months before its expiration, made a claim in writing for a renewal. Defendant notified the plaintiffs before the end of the term of his purchase, and his readiness to arbitrate as to the improvements. N., one of the plaintiffs, replied on their behalf that the devisees would not renew, and requested the defendant to point out the improvements with a view to arbitration if necessary. No improvements of any kind had been made by E. prior to the sub-lease, nor by defendant since the assignment, but all had been done by W. during his sub-tenancy. No demand of possession was made other than that contained in the reply to defendant's notice:—Held, in ejectment, that the refusal by plaintiffs to renew discharged defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of plaintiffs to pay for them; that the improvements to be paid for were not those made by E. alone, but by W. as well, who claimed under him; and that the improvements made by W. not having been paid for by the plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favour of defendant, the assignee of E. Held, also, that, the lease not providing for the mode of valuation, the plaintiffs might have made it and tendered the amount to defendant, subject to determination by a jury as to its fairness and reasonableness, in case of defendant's refusal to accept it; but that the defendant's omission to have the valuation made gave the plaintiffs no right to eject. Held, also, that during the month allowed by the lease to pay for the improvements, or at any rate until he was paid or pending negotiation respecting them, defendant could not be treated as a trespasser. Distinction between a lease of this kind and the ordinary lease, where a renewal is claimable and is claimed, observed upon. *Nudell v. Williams*, 15 C. P. 348.

Rent for Buildings—*Absence of Covenant—Arbitration — "Ground Rent."*]—A renewal lease is a continuation of the old lease, and if rent for buildings erected by the tenant is not provided for under the first lease, neither should it be under the extension, in the absence of express provision. An application to refer back an award in a case where a tenant had a renewable lease and had during the original term erected buildings on the premises, there being no provision in the lease as to buildings erected by the tenant, and where the arbitrators in arriving at the rent for the renewed term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs. *Re Allen and Nasmith*, 31 O. R. 335, 27 A. R. 536.

See Davis v. Lewis, 8 O. R. 1

XXIII. Rent.

1. *Abatement, Deduction, or Set-off.*

Action for Rent—*Plea of Set-Off.*]—Set-off may be pleaded to an action for rent due under a demise, though not to an avowry for rent in replevin. *McAnnany v. Tickell*, 23 U. C. R. 122.

Agreement for Abatement—*Creation of New Tenancy.*]—See *Kelly v. Irwin*, 17 C. P. 351, *ante* (III. 1).

Damages for Breach of Covenants.]—See *Walton v. Henry*, 18 O. R. 620.

Eviction from Road—*Appurtenance.*]—An abatement of rent was sought for by the defendant upon the ground that he had been evicted from a road forming an appurtenance to the land leased:—Held, that under the evidence the road could not be looked upon as an appurtenance, and that there had been consequently no eviction. *Shuttleworth v. Shaw*, 6 U. C. R. 517.

Improvements — *Liens in Arrear.*]—Where the landlord had covenanted to allow the tenant all reasonable improvements made by him, in the amount of his rent.—Held, that the tenant could deduct the value of the improvements from the rent due; and that such right of reduction might be given in evidence under the plea of liens in arrear. *Wilcoxson v. Palmer*, T. T. 3 & 4 Vict.

——— *Incomplete Work.*] — A landlord agreed with his tenant that if he should not paint the tavern outside, and the sheds and driving house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint. The tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the building on the 12th July, 1845, when the landlord distrained for a quarter's rent due on the 1st July, 1845:—Held, in replevin, that the distress was warranted, though the painting which had been begun, but not completed, exceeded the quarter's rent distrained for. *Millmine v. Hart*, 4 U. C. R. 525.

Premises Burnt.]—See *McGill* v. *Proudfoot*, 4 U. C. R. 33, and *Cornock* v. *Dodds*, 32 U. C. R. 625, *post* 7.

Repairs — *Liens in Arrear.*] — To an avowry under a distress for rent, the plaintiff replied liens in arrear, and also set out specially an agreement to be allowed to make certain repairs and to deduct the amount from the rent, which he averred he had done:—Held, good. *Wheeler* v. *Sime*, 3 U. C. R. 143.

Sale of Part of Premises—*Amount of Abatement—Question for Jury—Distress—Taxes.*]—Plaintiff leased land to defendant at a yearly rent of 15s. and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent thereof, to be determined by arbitration in case of dispute. A railway company required a portion of the land, which defendant conveyed to them after an arbitration as to price:—Held, that such portion was sold by defendant within the meaning of the lease. 2. That the abatement from the rent should not be measured by the interest of the money paid by the company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s. per acre as the average value of the whole. 3. That after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the deduction. 4. That there was no ground for claiming any abatement of the taxes from the £10 on account of the sale. *Bickle* v. *Beatty*, 17 U. C. R. 465.

Tavern License Fee.]—See *Writt* v. *Sharman*, 41 U. C. R. 249 ,*post* XXIII. 10.

Taxes.]—See cases under XXI.

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2. *Apportionment.*

Adverse Holding of Parts of Premises.]—Declaration for distraining where no rent was due, and for excessive distress for rent. It appeared that defendant had leased to the plaintiff for a term of years certain premises, portions of which were at the time in the possession of other persons, who retained possession against the plaintiff. In consequence of this, defendant, after the first year, agreed with plaintiff to an abatement in the rent for that year. Defendant, however, subsequently distrained for the sum agreed to be remitted:—Held, on the authority of Neale v. McKenzie, 1 M. & W. 763, that at the time of making the lease, and during the whole period for which rent was claimed, no legal term was created by the instrument of lease between the parties, in consequence of the adverse holding of parts of the premises, and the plaintiff's exclusion therefrom, and that no right to any rent in respect of such parts had ever arisen, and that therefore the rent could not properly be apportioned, because the tenant (the plaintiff) had never been subject to the entire rent by virtue of the demise. *Kelly* v. *Irwin*, 17 C. P. 351.

This case was remarked upon and not followed in *Holland* v. *Vanstone*, 27 U. C. R. 15.

Attachment of Debts—*Rent Accrued—Payment over.*]—R. S. O. 1877 c. 136, ss. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes. And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived:—Held, that he was entitled to payment over upon gale days of the proportion of the rents which had accrued due on the day of service of the attaching order. *Massie* v. *Toronto Printing Co.*, 12 P. R. 12.

——— *Rent Payable up to Date of.*]—See *Barnes* v. *Bellamy*, 44 U. C. R. 303, *ante*, XII.

Ejectment—*Eviction—Accrual of Rent—Time.*]—J. B. leased certain lots, A, B, C, D, E, and F, with other lands, to the defendant. J. C. also, at the same time, leased lot G and other lands to defendant. J. C. then conveyed his reversion in lot G. to J. B., and J. B. conveyed away the other lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., with the knowledge that J. S. McM. intended to endeavour to procure a conveyance of the fee for the purpose of laying out the land in building lots, which he failed to do, and J. S. McM. assigned all his interest in lots A, B, C, D, E, F, and G, to C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix, the plaintiff. The rent of lots A, B, C, D, E, F, and G, fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against C., and took possession of the lots. In an action to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee who had assigned the lease, and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent as to these lots:—Held, following Mayor, &c., of Swansea v. Thomas, 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover. Held, also, that there was no eviction of the defendant by the lessor. Held, also, on the evidence that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety. Held, also, following Barnes v. Bellamy, 44 U. C. R. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly. *Boulton* v. *Blake*, 12 O. R. 532.

Eviction from Part of Premises—*Action on Covenant.*]—In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt. *Shuttleworth* v. *Shaw*, 6 U. C. R. 539.

Necessity for — *Separate Devisees of Demised Premises—Jury.*]—Where a tenant leased premises at one entire rent, and his landlord died, having devised the premises among several persons:—Held, that those persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than a jury might make in each suit. *Hare* v. *Proudfoot*, 6 O. S. 617.

Sale under Power in Mortgage—*Eviction.*]—Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined, between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determination. The defendant was tenant of certain land, subject to two prior mortgages created by his landlord. The plaintiff was a subsequent mortgagee, who had given notice of his mortgage, and had required the defendant to pay the rent to him. Afterwards the land was sold by the prior mortgagees to a person who on the same day re-sold it to the defendant. The purchaser from the mortgagees claimed to be entitled to the rent:—Held, that as to the rent which had accrued up to the date of the sale, the right of the plaintiff as mortgagee of the reversion was not affected by the sale; that the rent was apportionable; and that the plaintiff was entitled to recover. *Kinnear* v. *Aspden*, 19 A. R. 468.

3. *Occupation Rent.*

Ascertainment of — *Improvements.*]—No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor* v. *McGregor*, 5 O. R. 617.

Person not in Occupation.]—A person who does not occupy and has no power to lease cannot be charged an occupation rent. *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 230.

Recovery of—*Claim for Mesne Profits in Previous Action.*]—See *Elliott* v. *Elliott*, 20 O. R. 134.

Tenant in Common.]—A tenant in common in actual occupation of the joint estate, is not chargeable with rent. It would be otherwise if he had been in actual receipt of rent from third parties. *Rice* v. *George*, 20 Gr. 221.

See post, XXVII.

See also IMPROVEMENTS.

4. *Payment in Advance.*

Agreement by Parol.]—A tenant may by parol bind himself to pay rent in advance. *Galbraith* v. *Fortune*, 10 C. P. 109.

Construction of Clause in Lease.]—Under a lease dated 1st October, 1857, habendum for five years from the date thereof, yielding and paying therefor on every first day of October during the said term, it was proved that the first year's rent had been paid in advance:—Held, that the rent was not payable in advance for the subsequent years. *McCallum* v. *Snyder*, 10 C. P. 191.

——— *Equitable Defence—Reformation.*]—Defendant on the 2nd September, 1872, leased land to the plaintiff for five years from the 1st October, 1872, at the yearly rent of $230, payable on the 1st October each year, in each and every year during the continuance of the term, "the first payment of $200 to be made on the 31st December, 1872, in advance, the balance of said year's rent, amounting to $30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th October, 1873, for the second year's rent:—Held, that such rent was not payable in advance. Evidence was tendered that the instructions to draw the lease, and the agreement of both parties, was that the rent should be paid in advance:—Held, there being no equitable plea, that such evidence was properly rejected; and that an equitable defence is not admissible under the general issue by statute. Held, also, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease, in accordance with the agreement of the parties; and a verdict for the plaintiff was set aside, on payment of costs, to enable him to do so. *Brown* v. *Blackwell*, 35 U. C. R. 239.

Right to—*Accrual of—Subsequent Events—Divesting.*]—Covenant for three quarters' rent, alleged to be payable by the lease quarterly in advance. Plea, as to the rent for the last quarter, commencing on the 1st March, 1861: 1. that before the expiration of the first month of that quarter the plaintiff wrongfully evicted defendant; 2. that by a provision in the lease, in case of the mill demised being accidentally burned, the rent was thenceforth to cease, and that it was so burned on the 5th March, 1861; 3. on equitable grounds, as to the rent subsequent to the 6th March, 1861, the same provision in the lease, alleging the destruction of the mill by fire before the 6th:—Held, on demurrer, pleas bad, for the rent, being payable in advance, was due on the 1st March, and nothing which occurred afterwards could divest the plaintiff's right. *Ryerse* v. *Lyons*, 22 U. C. R. 12.

5. *Payment in Kind or by Work.*

Construction of Condition — *When Property Vests.*]—A. leased a farm to B. upon the condition that B. was to deliver to him one-half of the wheat raised on it. B. was to harvest and thresh and deliver the wheat to defendant's granary:—Held, that under this agreement A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A. till B., the tenant, had threshed it and delivered to him his portion. *Haydon* v. *Crawford*, 3 O. S. 583.

Construction of Covenant—*Procuring Patent.*] — A., authorized by Government to settle a township, covenanted to allot B. 100 acres therein, and procure a patent as soon as the settlement duties were performed, and B. covenanted to pay A. a bushel of wheat per annum for every acre cleared after he had been in possession for three years:—Held, that A. might sue for the rent after B. had been in possession for three years, although no patent to B. had issued. *McNab* v. *McFarlane*, 3 O. S. 287.

Death of Landlord—*Who Entitled.—Devisee.*]—See *Tubbs* v. *Morgan*, 12 U. C. R. 151, *ante* X.

Sale of Land—*Rights of Inchoate Purchaser.*]—See *Richardson* v. *Trinder*, 11 C. P. 130, *ante* X.

Work — *Clearing—Uncleared Part—Rent for.*]—Plaintiff demised to defendant certain land at the clear yearly rent of $1.50 per acre of cleared land, on 1st February in each year, one-half in cash and one-half in work on said land, in clearing and fencing as hereinafter mentioned, with a covenant for payment of taxes by defendant, with liberty to deduct one-half, exclusive of statute labour, from the rent, one-half from the money and one-half from the rent to be paid in labour, and defendant within the first year to make and put up in the fences on said cleared land 2,000 rails, for which he was to be allowed out of said rent $20, viz., $10 out of the money rent, and $10 out of the labour rent; with the further agreement, as to the rent to be paid in work, that defendant should be allowed at the rate of $13 per acre for the land which he should chop, log, clear, and fence, in payment of said rent. Then there was another clause, "that the portion of said lot now chopped, but not cleared, and also the portion under contract with McK. for chopping, shall be logged, cleared, and fenced, within two years from the date, by the said lessee, who, in return for his work on said portions of land, shall have two crops therefrom free of rent, and shall afterwards pay the same rent per acre for said portions as for the land now cleared:"—Held, that the tenant was not liable for rent for land to be chopped, cleared, and brought into cultivation by him. *Jones* v. *Montgomery*, 21 C. P. 157.

——— *Improvements.*] — See *Mitchell* v. *McDuffy*, 31 C. P. 266; *Workman* v. *Robb*, 7 A. R. 389.

See Nowery v. *Connolly*, 29 U. C. R. 39; *Oberlin* v. *McGregor*, 26 C. P. 460, *ante* III. 1; *Wallis* v. *Harold*, 23 U. C. R. 279, *post* XXVII.

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6. Payment or Tender of Rent.

Distress by Superior Landlord.]—Covenant for non-payment of rent due on a lease made by plaintiff to defendant. Plea, that A. was seised in fee of the premises and leased to B., whose term came to the plaintiff by assignment, and that afterwards, during the term and before action, A. distrained on the occupiers of the premises for rent due on the lease from B., and received a part of the rent from them, and the residue from the defendant:—Held, on general demurrer, plea good. *Leonard* v. *Buchanan*, 6 O. S. 407.

Place of Payment—*Foreign Corporation—Tender and Payment into Court—Currency.*]—The plaintiffs, two corporations, declared on defendants' covenant to pay them $22,500 for six months' rent, due on the 1st June, 1863. Defendants pleaded that the premises leased were situate partly in the United States; that the plaintiffs had their place of business in the United States; and that on the 1st June defendants tendered to them there $22,500 in lawful currency of the United States, which they refused; and the defendants brought into court $15,525 of lawful money of Canada, which they averred was on the 1st June, and is equal in value to the said $22,500 of the lawful currency of the United States. The plaintiffs replied that the deed was executed in Canada; that one of the plaintiffs was a company incorporated and having its domicile here, and the other in the United States; that the rent reserved was payable in current money of this Province; and that at the execution of the deed and hitherto the said $22,500 was and had been always equal to $22,500, and not at any time to $15,525, of current money of the Province; and that the tender made of the equivalent in American currency of the last mentioned sum was not valid. On demurrer to the replication:—Held, that the contract being made in Canada, and mentioning no place where the payments were to be made, must be governed by our law; that the rent must be intended from the declaration to be payable in current money of Canada; that there was nothing in the plea to displace this intendment; and that the plaintiffs therefore were entitled to judgment. *Niagara Falls International Bridge Co.* v. *Great Western R. W. Co.*, 22 U. C. R. 592.

Promissory Note.]—Defendant leased to F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession, and the plaintiff made payments to defendant on account of rent, for which defendant gave receipts as for premises leased to F.:—Held, that the plaintiff could not insist upon the taking of the note as a discharge of the rent due from F. *McLeod* v. *Darch*, 7 C. P. 35.

——— *Agreement to Wait.*] — **The mere** taking of a note for rent will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to wait until it has been dishonoured; and in this case:—Held, that such agreement was proved. *Simpson* v. *Howitt*, 39 U. C. R. 610.

Right to Rent—*Agreement.*]—The plaintiff declared that on the 12th December, 1857, one T. mortgaged certain lands to defendant for £300, and defendant, by memorandum in writing, signed by said T. and defendant, then agreed with T. to lease said lands from him, T., for two years at £40 a year, which said rent defendant and T. then agreed should be indorsed on and taken in part payment of the mortgage, so soon as the two years should have elapsed; that afterwards in April, 1858, defendant sold and assigned said mortgage to the plaintiff, and then promised the plaintiff to pay him the £80 at the end of said two years, but did not pay the same. Plea, that before said agreement T. sold and conveyed the lands to one G., who thereupon gave notice to defendant to pay said rent to him, and that afterwards defendant paid to G. the first year's rent, and then gave up possession of the land to him:—Held, on demurrer, that the declaration was insufficient, for the agreement between defendant and plaintiff would be without consideration, as they could not without T.'s privity compromise his right to the rent; and that the plea shewed a good defence. *Murdiff* v. *Ware*, 21 U. C. R. 68.

Tender—*What Constitutes.*]—In order to constitute a legal tender, the money must be either produced and shewn to the creditor, or its production expressly or impliedly dispensed with. Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence shewed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is the

rent," which he had, and told the landlord he had, in his right hand in a desk, but did not produce it or shew it to the landlord, who said nothing and left the premises:—Held, that there was no evidence of a tender, or of a dispensation with a tender. *Matheson* v. *Kelly*, 24 C. P. 598.

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7. *Premises Burnt.*

Corporation—*Lease not under Seal—Liability of Lessees for Rent—Parties—Beneficial Plaintiff.*]—Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enter and hold thereunder he will be liable for all rents reserved thereby during the time he so holds; and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied, but, before the expiration of the term demised, the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment:—Held, that they were liable for the rent during the residue of the term, which had since expired. In such a case the property had been conveyed by the owner to the bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings, and the bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The court, under the circumstances, made a decree for payment of the amount in favour of the party beneficially entitled. *Findayson* v. *Elliott*, 21 Gr. 325.

Covenant of Surety for Lessee—*Action on—Defence—Cesser of Term — New Tenancy—Estoppel—Judgment.*]—Action on defendant's covenant as surety of a lessee, under a lease of a mill for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging non-payment of three half-yearly instalments of the rent reserved. Plea, on equitable grounds, that defendant covenanted as surety only; that by the lease it was agreed that in case of the total destruction of the mill by accidental fire, &c., the lease should at once cease and be at an end; that the lessee paid all rent due up to the total destruction of the premises by fire, including the half-year's rent due on the 15th June, 1869; and that the premises were so destroyed on the 30th October, 1869, whereupon the term ceased and was at an end. To this the plaintiff replied, that after such fire, the lessee, with the knowledge and approval of the defendant, continued to hold and occupy, and still holds and occupies, the premises under and by virtue of the lease, and, with the like knowledge and approval of the defendant, would not and did not put an end to the said term, or surrender said premises:—Held, plea good, for defendant's covenant being restricted to the term ceased with it; and that the replication was bad, as shewing at most the creation of a new tenancy, to which the covenant would not extend. Defendant also pleaded, by way of estoppel, that previous to this action the lessee sued the lessor in the county court, alleging that by the lease, in the event of the total destruction of the mill by accidental fire, the term should cease, and the rent be apportioned; that upon such destruction on the 30th October, 1869, the said term ceased, and the lessor became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that $137.50 thus became due to him, for which he sued therein; that the lessor, the now plaintiff, pleaded in such action that the said lease was not his deed, and issue being joined thereon the lessee recovered judgment for the said sum of $137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the 30th October, 1869:—Held, a good plea; that the judgment recovered, if a bar to the recovery of this rent against the principal, was a good defence for the surety; and that such judgment was a bar, for though the plea of non est factum did not put in issue the destruction of the mill and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, the lessor was now estopped from disputing them. Held, also, that the replication to this plea being the same as to the first plea, was bad for the same reasons. *Taylor* v. *Hortop*, 22 C. P. 542.

Option to Purchase — *Deposit on Account of Purchase Money — Application to Rent notwithstanding Premises Burnt.*]—See *Pulver* v. *Williams*, 3 C. P. 56, *ante* XVII.

Proviso for Equitable Adjustment of Rent — *Arbitration—Jury—Surrender—No Necessity for Averment of.*]—It was provided by a lease that in case of the total destruction of the premises by fire the term should cease, "and the proportion of rent up to that time shall be equitably adjusted between the parties." The rent was payable half-yearly in advance on the 15th December and the 15th June, and on the 30th October the premises were burned:—Held, that the effect of the covenant was that defendant would repay to the plaintiff so much of the rent paid in advance on the 15th June preceding the fire, as ex æquo et bono it was determined he should repay; that the plaintiff might sue for such proportion, to be determined by a Judge or jury, without having it first adjusted by arbitration; that the cause of action was well stated in the declaration, and that a specific averment of a surrender of the demised premises, as a condition precedent, was unnecessary. *Hortop* v. *Taylor*, 21 C. P. 56.

Proviso for Reduction of Rent—*Binding on Assignee of Lessor—Ascertainment of Amount—Jury.*]—A., the assignee of the lessor, sues B., the lessee of a grist mill, in debt for rent. The lease contains the following covenant: "The lessor, for himself, his heirs, executors, administrators, and assigns, covenants and agrees with (the defendant) amongst other things, that he (the lessor) shall and will insure the grist mill demised, and the dwelling house, against loss and damage thereto by fire, and in case the grist mill should be by mistake burnt down or injured by fire, and the same happens under such circumstances as would enable him, his executors, administrators, and assigns, to recover the loss from the insurance company insuring the same, or, in case it be not insured, then under such circumstances as would ordinarily entitle him to his loss if he had been insured, then and in that case he shall, within the ordinary and reasonable time after such fire, make good

and repair or rebuild the grist mill, and during all the time the grist mill shall be unfit for working, in consequence of such damage or loss by fire under the circumstances aforesaid, a fair reduction and allowance shall be made in the rent, to be ascertained and computed by two indifferent arbitrators, one to be appointed by the lessor, his heirs, executors, administrators, and assigns, and the other by the defendant, his heirs," &c. Under this covenant, B. put in a plea containing the following averments: "That after plaintiff's title accrued, the grist mill was accidentally burnt and destroyed by fire, under such circumstances as would ordinarily have entitled the plaintiff to recover the loss arising from the fire, if plaintiff had the grist mill insured against loss by fire; and also that the annual value of the grist mill was fully equal to £200, as the rent that ought to be due and payable annually for it; and that the sum of £200 was and is a fair annual allowance for the use of the grist mill, and is of right to be deducted from rent to be due and payable from the defendant to the plaintiff, for the destruction of the said mill by fire as aforesaid, and that after the destruction of the said grist mill by fire, neither the plaintiff nor the defendant appointed an arbitrator to estimate the reduction of rent to be allowed for the same, and that the mill has not since been of any profit or advantage whatever to him, the defendant:"—Held, upon demurrer to plea, that under this covenant the assignee as well as the original lessor was bound. Held, also, that neither the landlord nor tenant having referred the deduction from the rent (which was to be made under the circumstances provided for in the covenant) to arbitration, the tenant was therefore not precluded from making the jury the medium by which a deduction was to be made. Quære, if the landlord had offered to arbitrate, and the tenant had refused, could the reduction then be referred to a jury? *McGill* v. *Proudfoot*, 4 U. C. R. 33.

——— *Repayment of Rent Paid in Advance.*] — Plaintiff, on the 30th December, 1867, leased to T. two mills, called the oatmeal mill and the new mill, for ten years, at $1,000 per annum, payable half-yearly in advance, on the 15th June and December, with a covenant for re-entry on non-payment, and a proviso that if the oatmeal mill was burned, there should be a reduction of $400 per annum in the rent, and if the new mill was burned, a reduction of $600 per annum, and if both were destroyed, the term should cease, and only the proportion of rent due at the time of destruction be paid. The new mill was burned on the 30th October; the rent up to the 15th December of that year having been paid in advance:—Held, that the lessee was not entitled to the reduction of $600 a year for the period from the 30th October to the 15th December, for which he had already paid; and that having insisted upon making a deduction out of the rent falling due on the 15th December, he had incurred a forfeiture by non-payment of his rent. *Cornock* v. *Dodds*, 32 U. C. R. 625.

Rebuilding — *Better Material—Municipal By-law—Increase of Rent.*] — See *Williams* v. *Tyas*, 4 Gr. 533, *ante* IX. 1.

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8. *Premises Uninhabitable.*

Action for rent. Plea, that the house became unfit for habitation in consequence of the roof admitting water, and for want of sufficient drainage, whereby the said house became wet, damp, unwholesome, noisome, and offensive, of which the plaintiff had notice, and defendant thereupon quitted the same before the commencement of the time for which rent was demanded:—Held, on demurrer, no defence. *Denison* v. *Nation*, 21 U. C. R. 57.

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9. *Time for Payment.*

(a) *Acceleration.*

Assignment for Benefit of Creditors.] —Under 58 Vict. c. 26, s. 3, s.-ss. 4 and 5 (O.), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but also to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the lien extends for such further period, over the three months, as the possession lasts. *Clarke* v. *Reid*, 27 O. R. 618.

Execution—*Distress—Severance of Reversion.*]—A condition in a lease that in case any writ of execution shall be issued against the goods of the lessee, the then current year's rent shall immediately become due and payable, and the term forfeited, is personal to the original lessor and lessee, and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion. *Mitchell* v. *McCauley*, 20 A. R. 272.

Insolvency.]—A proviso that in the event of insolvency the next year's rent should become due:—Held, void as a fraud on the Insolvent Act. *In re Hoskins*, 1 A. R. 379.

——— *Winding-up Act—Quebec Law.*]—There is nothing in s. 56 of the Dominion Winding-up Act which alters or interferes with the lex loci contractus in the case of a claim. Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code, art. 1092) on such insolvency the rent not yet exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, &c., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

Removal of Goods from Premises.]—Under a proviso in a lease, on the tenant commencing to remove the goods from the demised premises the then current year's rent immediately became due and in arrear. On 31st October, on the tenant proceeding to sell and dispose of all the goods on the demised premises, with the intention of finally quitting the place before the 21st November following, when the rent became due and the lease terminated, the landlord entered and distrained:—Held, that under the terms of the proviso the current year's rent became due and in arrear, and the distress was therefore legal. *Young* v. *Smith*, 29 C. P. 109.

Repudiation of Contract.] — When a tenant leaves the demised premises before the expiration of the term, paying rent up to the

time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot, on the principle that there has been a repudiation of the contract, at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due. Hochster v. De la Tour, 2 E. & B. 678, and Frost v. Knight, L. R. 7 Ex. 111, considered. *Connolly* v. *Coon*, 23 A. R. 37.

See Fuches v. *Hamilton Tribune Co.*, 10 P. R. 409.

See, also, BANKRUPTCY AND INSOLVENCY, I. 6.

See also the next sub-head.

(b) *Construction of Proviso.*

Annual Payment.]—A. leased to B., from the 1st September, 1846, for six years, at a yearly rent; the first payment to be made on the 1st March, 1848, and the succeeding yearly payments to be made on the 1st March during the lease. Per Robinson, C.J.—The rent for the sixth year fell due at the expiration of the last year's occupation, viz., on the 1st September, 1852. Per Burns, J.—The last year's rent should be accelerated, and therefore two years' rent were due on the 1st March, 1852. *Neal* v. *Scott*, 10 U. C. R. 361.

Payment in Kind—*Delivery of Crops.*]—Defendant leased a farm to the plaintiff for five years from the 31st March, 1866. He was to find the team and seed for the first year, "to receive as rent for the first year two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half of the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half." Defendant having distrained on the 16th December, 1867, for the second year's rent:—Held, that the words "when cleaned," &c., applied only to the first year, and that this second year's rent did not become due until the end of the year, i. e., 1st March, 1868. *Nowery* v. *Connolly*, 29 U. C. R. 39.

Semi-annual Payments.]—In replevin defendant avowed justifying under a distress for $140 rent, due 1st May, 1867, under an indenture of lease, by which defendant demised to plaintiff for five years, to be computed from 15th March, 1867, at the yearly rent of $280, payable 1st November and May during the term, excepting the last payment, which was to be made on the 15th March preceding the 1st May. Plaintiff pleaded, setting out the indenture in full, and alleged that only one instalment of rent had become due before action, which he paid defendant before distress. Defendant replied that there were two instalments due before distress, on 1st May and November, 1867, and not one only as alleged:—Held, on demurrer, replication bad, as contradicting the legal effect of the lease. *Brown* v. *McCarty*, 18 C. P. 454.

Suspension of Payment—*Improvements.*]—Tenant agreed with landlord to make certain improvements upon the demised premises, tenant "to get the first three years' rent for said buildings and improvements, providing they are completed in the first two years:"—Held, that the rent was suspended during the two years. *Irwin* v. *Hunter*, 19 C. P. 391.

——— *Improvements—Clearing and Fencing.*]—Under a lease, dated 21st December, 1874, for five years, to commence from the 1st April, 1875, the rent of $80 was to be payable annually on the 1st June in each year, but subject to a proviso that if the lessee "shall yearly and every year during the said term, or earlier, if he shall think proper, chop, clear, and fence in a proper manner six acres of the said land, then the current year's rent shall be considered as paid and satisfied." The rent not being paid on the 1st June, 1875, and the lessee then having three acres cleared, the lessor distrained:—Held, that the rent reserved, payable on the 1st June, 1875, was then due and might be distrained for, and that the effect of the proviso was not to suspend the right to distrain during the currency of the year. *Peacey* v. *Ovas*, 26 C. P. 464.

Yearly Rent—*Payable in Advance.*]—A., by deed dated 27th September, 1862, leased lands to B. for ten years from the 1st January, 1863; yielding and paying yearly during the said term the yearly rent of $720, the first payment to begin and be made on the first January, 1863, next ensuing from the date of these presents. Covenant by lessee to pay said yearly rent, on the said day and time therein limited and appointed for payment thereof:—Held, that the second year's rent was payable on the 1st January, 1864. *Joslin* v. *Jefferson*, 14 C. P. 260.

——— *When Payable.*]—Lease dated 15th December, 1862, for five years, at an annual rent, half payable on 1st January, and half on 1st February following, in each and every year during the term, with an agreement at the end that the first payment of rent should not become due until the 1st January, 1864:—Held, that this agreement did not prevent any rent from falling due in 1863, but was limited to the first payment to be made on the 1st January, 1863, or at most to the rent for the first year; and that two years' rent therefore was due before the 17th November, 1864. *Huskinson* v. *Lawrence*, 26 U. C. R. 570

(c) *Other Cases.*

Award—*Postponement of Payment—Tender.*]—Plaintiff, by indenture, agreed to convey to defendant certain land, the right to purchase which had been assigned by defendant to him, on payment by defendant of certain sums, and that defendant should occupy until default. After default, plaintiff and defendant referred all matters in difference. The award postponed the date of payment as to which defendant had been in default, and before the day so fixed defendant tendered the amount:—Held, that the instrument executed by plaintiff created a demise, or a re-demise, in favour of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference after default, either waived it or postponed the time of payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Black* v. *Allan*, 17 C. P. 240.

Falsa Demonstratio — *Rent Payable in Advance.*]—See *Bell* v. *McKindsey*, 23 U. C. R. 162, 3 E. & A. 9, *ante* VIII. 1.

Question for Jury—*Quarterly or Yearly.*]—Held, under the facts set out in this case, that it was properly left to the jury to say whether the rent was to be paid quarterly or yearly, and that they were justified on the evidence in finding it payable quarterly. *Wilson* v. *Macnamara*, 12 U. C. R. 446.

Rent on Renewal.]—See *In re Geddes and Garde*, 32 O. R. 262; *Re Allen and Nasmith*, 31 O. R. 335, 27 A. R. 536, *ante*, XXII.

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10. *Other Cases.*

Amount of Rent—*Pleading—Variance.*] See *Thompson* v. *Forsyth*, E. T. 3 Vict. (R. & J. Dig. 2065.)

Attachment of, as Debt—*Notice to Tenants to Pay Mortgagee.*]—Held, reversing the decision in 16 P. R. 555, that mortgagees who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of rule 536, "parties affected" by ex parte orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. And semble, that, even without that rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders. Held, also, that the attaching orders ought to be set aside; for (1) although the service of the notice upon the tenants was not in itself sufficient to cause the tenants subsequent to the mortgage to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and (2) the notice signed by the mortgagor under the words "I approve of the above," operated as an assignment of the rents to the mortgagees. An attaching order binds only such debts as the debtor can honestly deal with without affecting the interests of third persons. *Parker* v. *McIlwain*, 17 P. R. 84.

See also ATTACHMENT OF DEBTS, I., *ante* col. 356.

Claim for Reduction — *Quebec Law—Lease of Telegraph Lines — Disturbance of Use — Trespass — Trouble de Droit.*]—See *Great North-Western Telegraph Co.* v. *Montreal Telegraph Co.*, 20 S. C. R. 170.

Executor—*Receipt of Rent.*]—An executor or administrator has no right as such to receive the rents of real estate. As to them he is merely an intermeddler, and will not be entitled to any commission thereon. *Dagg* v. *Dagg*, 25 Gr. 542.

Expiration of Term—*Tenant Holding over — Increased Rental.*] — The evidence in this case shewed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration of their term, and made no demand for an increased rental; but they had notice that if they desired to remain on longer they must pay an increased rental:—Held, that the plaintiff must be deemed to have agreed to allow the defendants to remain for the two months on the terms of paying the rent reserved by the lease, but thereafter only on paying the increased rent. *Hilborn* v. *Gemmell*, 10 O. R. 504.

Ground Rent—*Action for—Mistake as to Position of Property—Fraud.*]—The plaintiff sued defendants for non-payment by defendants of ground rent to the city of Toronto, due on a lease by the city to one B., whose executors had assigned part of the property to defendants. Defendants, in an equitable plea, set up, in substance, that the supposed frontage of the land on Front street constituted its sole value, which frontage was not included in the lease by the city, as they discovered before taking possession, and by reason of such error they had not the land bargained for, &c.:—Held, on demurrer, that the plea afforded no answer, for no concealment or imposition was alleged; and defendants, by calling for the lease, of which they had notice by the assignment, might have ascertained the facts at first. *Talbot* v. *Rossin*, 23 U. C. R. 170.

Imperfect Execution of Lease—*Action on Covenant for Rent.*]—The two defendants and one C. being in possession of premises as assignees of a covenant from the plaintiff for a lease, he caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C. had executed a counterpart thereof, which was not the case, and the lease was never executed by him:—Held, that the evidence, set out in the report, shewed that the intention of both the plaintiff and the defendants was, that C. should be a party to the lease, and that the plaintiff could not recover the rent due in an action upon the covenant in the lease. *Piper* v. *Simpson*, 6 A. R. 175.

Ordnance Lands—*Action for Rent—Pleading.*]—Assumpsit for rent. Plea, that after the demise, the estate became vested in the principal officers of her Majesty's ordnance, by virtue of 7 Vict. c. 11, and thereupon the estate of the plaintiff ceased and was determined; that the said principal officers gave the defendant notice of this change in the title, and not to pay over the rent to the plaintiff; and that defendant is now liable to them for the use and occupation of the premises:—Held, not double, or bad, as amounting to the general issue. Held, also, that it was not necessary to negative in the plea any promise from the said principal officers to the plaintiff of a lease or conveyance of the premises, even if the statute required them to grant it, for that such an interest should have been replied by the plaintiff. *Cunningham* v. *Duane*, 9 U. C. R. 274.

Premises out of Repair—*Action for Rent—Pleading.*]—Covenant for rent due on a lease of a mill alleging that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence. *Wilkes* v. *Steele*, 14 U. C. R. 570.

Promissory Note — *Illegal Demise.*]—Commissioners of a turnpike trust, appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, made a demise beyond the scope of these powers; the tenant was put into possession and enjoyed his term; the commissioners, at the expiration of the term, took a promissory note from the tenant

for the rent, giving time for payment:—Held, that the commissioners, by their clerk, could not sustain an action upon such note, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise. *Ireland* v. *Guess*, 3 U. C. R. 220.

Rent Service — *Rent Seek.*]—See *McCaskill* v. *McCaskill*, 12 O. R. 783.

Sequestration—*Rent Paid to Assignee.*]—Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn; but where the tenant, having been notified by the sequestrator, promised to pay him the rent in future, and afterwards on being indemnified paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator. *Harris* v. *Meyers*, 2 Ch. Ch. 121.

Tavern—*Lease of—License Fee—Proviso for Deduction from Rent—Increase of Fee.*]—The plaintiff leased a tavern to defendant for three years at a rent of $400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was $85; but in the following year was raised to $200:—Held, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only provided it did not exceed such rent. *Writt* v. *Sharman*, 41 U. C. R. 249.

Tolls—*Recovery of Rent—Public Trust—Contract not in Accordance with Statute.*]—A. sues as clerk to commissioners exercising a public trust under an act of Parliament (3 Vict. c. 53) upon an alleged demise of tolls for a year, at a rent payable every fortnight in advance, s. 27 of that Act requiring the rent to be made payable monthly; the lease stated in the declaration is said to be subject to the provisions of the Act:—Held, on demurrer to the declaration, that the plaintiff, as clerk to the commissioners, could not be permitted to recover on such a contract, because it is a contract substantially different from the one which the commissioners are expressly directed by the statute to make. *Ireland* v. *Noble*, 3 U. C. R. 235.

Unliquidated Claim—*Double Value—Overholding Tenant—Preferential Claim.*]—A claim for damages against an overholding tenant for double the yearly value of the land under 4 Geo. II. c. 28, s. 1, is an unliquidated claim, and therefore is not provable against an estate in the hands of an assignee for creditors under R. S. O. 1897 c. 147. A landlord has no preferential claim for rent against such an estate, if there were no distrainable goods on the premises at the time of the assignment. *Magann* v. *Ferguson*, 29 O. R. 235.

Waiver—*Abandonment of Distress.*]—A tenant absconded leaving rent in arrear, whereupon the landlord distrained, but, before selling, the tenant sent to the landlord a power of attorney, authorizing him to dispose of the property; and by letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof and of the plaintiff's claim to remit the balance to the tenant. The landlord then abandoned his warrant, and disposed of the property under the power:—Held, that the landlord by so proceeding had not waived his right to payment of the rent due, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power. *Tyrrell* v. *Rose*, 1 Gr. 394.

Water—*Cutting off Access to—Liability for Rent.*]—The plaintiff leased to defendant land in front of the city of Toronto, with the use of the water adjacent. The corporation in the construction of the esplanade cut off the access to the water:—Held, that defendant was nevertheless bound to pay rent and fulfil his contract. *Lyman* v. *Suarr*, 9 C. P. 104.

XXIV. Short Forms of Leases Act.

[*See* R. S. O. 1897 c. 125.]

Covenant for Quiet Enjoyment—*Acts of Lessor—Reference to Statute.*]—A lease made in 1870 purported to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," being the title of 14 & 15 Vict. c. 8, consolidated in C. S. U. C. c. 92, instead of "in pursuance of an Act respecting short forms of leases," which is the title of the consolidated Act:—Held, nevertheless, a sufficient reference to the consolidated Act, so as to bring the lease within its provisions. Where, therefore, the plaintiff (the lessee) was evicted by title paramount to the lessor:—Held, that he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to acts of the lessor and those claiming under him, nor under an implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment. *Davis* v. *Pitchers*, 24 C. P. 516.

Covenant not to Assign—*Proviso for Re-entry—Departure from Statutory Form—Reference to Statute.*]—A lease dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements," the proper title of the statute then in force, C. S. U. C. c. 92, being "An Act respecting short forms of leases," and it contained the following covenant, "and the said lessee, *for himself, his heirs, executors, administrators, and assigns*, hereby covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sublet without leave." Then followed "proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee:—Held, 1, that the reference to the statute was sufficient, notwithstanding the misdescription of its title; 2, that the covenant could not take effect under the statute, the short form given there omitting the words above italicised; 3, that the proviso for re-entry applied only to the non-performance of positive, not negative covenants; and that

there was, therefore, no right of re-entry here: 4. that there was no material difference between "re-entering," the word used in the lease, and "re-entry," the word used in the statute. *Lee* v. *Lorsch*, 37 U. C. R. 262.

Covenant to Build and Rebuild—*Departure from Statutory Form.*]—In a lease, expressed to be made in pursuance of the Act respecting Short Forms of Leases, the covenants, in place of the words "the lessee covenants with the lessor," were commenced with the words "the said party of the second part covenants with the said party of the first part." Then followed covenants representing the statutory short form covenants, and a covenant to build a house on the demised premises; and another covenant to rebuild in the event of the building so erected during the term being destroyed by fire. This last covenant was introduced by the words, "and the said party of the second part further covenants with the said party of the first part." The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant, and executed a mortgage to the defendant, and on the buildings being burnt down rebuilt them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who assigned the leasehold interest in the property to the defendant, and thereafter the buildings, during the occupation of the defendant, were again destroyed by fire:—Held, reversing the judgment in 27 Gr. 420, that the covenant to rebuild derived no aid from the statute, and was to be read as made by the lessee for himself alone and not for his assigns; and that the covenant, being in respect of something not in esse at the making of the lease, did not run with the land, and did not bind the defendant. 2. That the covenant to build, not being one of the statutory covenants, must be read as being made by the lessee for himself alone and not for his assigns. Remarks on Minshull v. Oakes, 2 H. & N. 793. *Emmett* v. *Quinn*, 7 A. R. 306.

Covenant to Pay Taxes—*Special Rate.*]—An ordinary lease under the Short Forms Act, containing the words "and to pay taxes," covers a special rate created by a corporation by-law as well as all other taxes. *In re Michie and City of Toronto*, 11 C. P. 379.

Proviso for Re-entry — *Addition of Words not in Statute.*]—A lease, purporting to be made in pursuance of the Act respecting Short Forms of Leases, contained this proviso: "Proviso for re-entry *by the said lessor*, on non-payment of rent, *whether lawfully demanded or not*, or on non-performance of covenants, *or seizure or forfeiture of the said term for any of the causes aforesaid*," the words in italics not being in the short form given by the statute:—Held, that the addition of these words did not exclude the application of the statute: and that the proviso extended to covenants after as well as before it in the lease. *Crozier* v. *Tabb*, 38 U. C. R. 54.

See also DEED, III. 10.

XXV. STATUTE OF FRAUDS, OPERATION OF.

Oral Agreement for Lease — *Part Performance.*]—Where defendant had agreed orally to let to the plaintiff certain premises for a year, to commence at a future day, and on the day defendant put the plaintiff into possession of part of the demised premises, but could not give him the possession of the residue, in consequence of which the plaintiff suffered loss, and sued defendant on the agreement:—Held, that he was entitled to recover, and the defendant could not successfully object that the agreement was void under the statute. *Clark* v. *Serricks*, 2 U. C. R. 535.

——— *Interest in Land.*]—The plaintiff sued defendant for damages for refusing to give him possession of premises which the plaintiff alleged that defendant had orally agreed to give him a lease of for sixteen months:—Held, that the evidence did not shew an actual letting, but that even if it did the plaintiff must fail under s. 4 of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land. *Moore* v. *Kay*, 5 A. R. 261.

Oral Agreement Independent of Lease—*Equitable Plea to Action at Law.*]—Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was orally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent oral agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by s. 4 of the Statute of Frauds, might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, or under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

Rent Issuing out of Land.]—Rent issuing out of land is a tenement: it partakes of the nature of land, and is within s. 5 of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. *Hopkins* v. *Hopkins*, 3 O. R. 223.

Void Lease—*Condition of Occupation—Ascertainment.*]—A lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation. *Galbraith* v. *Fortune*, 10 C. P. 109; *Lyman* v. *Snarr*, 10 C. P. 462.

Written Agreement for Assignment of Lease — *Description of Premises—Sufficiency—Terms of Lease—Discretion.*] — The defendant agreed to pay the plaintiff $300 if he would procure a lease of the premises then occupied by him under lease from one W., and adjoining the defendant's, with the

privilege of making a doorway between the two houses, and assign the lease to him. At the plaintiff's request, the defendant wrote him the following letter: "I promise to give you $300 provided you can give me a transfer lease, with privilege to make an opening between your premises and my own. Cash to be paid on completion of transfer lease. This is as I understand it." The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for the $300:—Held, that the defendant's letter was a sufficient memorandum to satisfy the requirements of s. 4 of the Statute of Frauds, within which the agreement fell as being a contract concerning an interest in land; that the premises were described with sufficient certainty; and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff, therefore, was held entitled to recover. *Bland* v. *Eaton*, 6 A. R. 73.

Written Agreement for Lease—*Construction—Length of Term.*]—Upon the following writing not under seal: "Memorandum of agreement for lease. M., for the consideration hereinafter named, agrees to demise and lease to H. the premises, &c., for three years certain, at 10s. cy. per day, payable monthly in advance during said term, and with the privilege to said H. to hold the same for a further period of two years at the same rent, payable as aforesaid. The said H. agrees to take the said premises from the said M. for the price and terms aforesaid, and to pay all taxes upon the said premises; possession to be given whenever the first monthly payment of rent is made:"—Held, to be for a term exceeding three years from the making thereof, and so required to be in writing. *Hurley* v. *McDonell*, 11 U. C. R. 208.

——— *Uncertainty—Assignee for Creditors—Specific Performance—Damages.*]—The plaintiff was the lessee of certain premises used as a factory, and having become insolvent, the lease was forfeited by the lessor, the defendant, though at what particular time did not appear. The plaintiff continued in occupation, and an arrangement was entered into, whereby one F. agreed to purchase the machinery on the premises from the official assignee, giving the plaintiff the option to redeem it within two years. The plaintiff further obtained from the defendant an agreement, as follows:—"Toronto, January 27th, 1880. In the event of Thomas Carroll continuing the occupation of building on Hayter street, I promise and agree to give a new lease at a rental of $600 for five years; also agree to allow," &c., (specifying certain allowances). The defendant refused to sign a lease of the premises to the plaintiff, and an action being brought for specific performance:—Held, dismissing the action, that the agreement was not sufficient to satisfy the Statute of Frauds, as it did not appear from it with certainty when the term was to begin, nor to whom the lease was to be given. Semble, that the official assignee should have been made a party, and that in any event it would have been a case for damages, not for specific performance. *Carroll* v. *Williams*, 1 O. R. 150.

Written Memorandum not under Seal — *Term to Commence from a Future Time.*]—See *Kaatz* v. *White*, 19 C. P. 36, *ante*, VIII. 1.

XXVI. Surrender of Lease.

1. *Generally.*

Effect of Surrender—*Privilege in Lease.*]—The owner of land with a saw mill thereon leased the mill, with a right to cut timber during his lease. The lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold:—Held, that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill. *Stegman* v. *Fraser*, 6 Gr. 628.

Overdue Rents — *Accord and Satisfaction.*]—Quære, whether a surrender, besides necessarily discharging all rents not yet due, may not also be pleaded equitably by way of accord and satisfaction of rents overdue. *Bradfield* v. *Hopkins*, 16 C. P. 298.

Statute of Frauds—*Writing—Operation of Law.*]—The surrender of a term must, under the Statute of Frauds, be in writing, signed by the party surrendering, or by operation of law. *Doe d. Burr* v. *Denison*, 8 U. C. R. 185.

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2. *By Act and Operation of Law.*

Acceptance by Lessor of Surrender—*Acts Relied on.*]—Plaintiff leased from defendant for a term of years, but having got into difficulties said to defendant, "I can do nothing here, as I am going to give the place up, as soon as I get rid of the few things I have; I am going to leave as soon as a relation of mine comes." He then asked, "To whom shall I give the key?" Defendant replied, "To P." Plaintiff then assented, and both then proceeded to fasten the windows. Defendant expressed his desire that plaintiff should remain, and offered to assist him, but plaintiff left and did not afterwards return. Defendant, after plaintiff left, placed P. in charge; but plaintiff had previously given P. the key, and had instructed him not to deliver it to defendant without an order from him. Defendant did, however, subsequently get the key and placed a man in possession of the place:—Held, that what took place constituted neither a surrender in law, nor an executed contract by which the relation of landlord and tenant was put an end to. Held, also, that neither the giving up of the key nor the abandoning possession would of itself have been a surrender in law; but semble, that the taking possession by defendant and cultivating the farm as his own absolute property would have amounted to a complete surrender in law, or would have been evidence of it, just as would the sale of the premises by defendant, or his grant of a lease thereof to a third person. *Carpenter* v. *Hall*, 16 C. P. 90.

Acts relied on as shewing the acceptance by the landlord of the surrender of a lease and as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlords' office, putting up a notice that the premises are "to let," making some trifling repairs, and cleaning the premises, are ambiguous acts which are not sufficient for this purpose. *Ontario Industrial Loan and Investment Co.* v. *O'Dea*, 22 A. R. 349.

Acceptance of New Grant from Crown—*Record—Invalid Title.*]—A tenant in fee may surrender his estate back to the Crown by operation of law, as by accepting a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record founded on an invalid title, is insufficient. *Doe d. McDonell* v. *McDougall*, 3 O. S. 177.

Acceptance of Rent from Third Person in Occupation.]—Defendant leased to F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendant on account of rent, for which defendant gave receipts as for premises leased to F. On pleas of rien en arrière from F. and non tenuit:—Held, that there had been no surrender of the term of F. by operation of law. *McLeod* v. *Darch*, 7 C. P. 35.

Acquiescence of Lessee in Sale of Part to Third Person.]—Plaintiff held certain premises, including those in dispute, under a lease for five years. After the execution of the lease, the landlord and the plaintiff agreed orally that the latter should give up four or five acres of the land leased to him, and take other land in lieu thereof, which was pointed out, and of four acres of which the plaintiff entered into possession; the landlord sold to defendant the premises to recover possession of which this action was brought, and defendant entered into possession thereof, and erected buildings thereon, and the plaintiff for and at the request of the defendant ploughed the land in question, and by other acts evinced his consent to, and acquiescence in, the sale to the defendant, and the possession taken by him:—Held, in ejectment for the premises sold by the landlord to the defendant, that the facts constituted a surrender by operation of law. *Horton* v. *Macconnichy*, 9 C. P. 186.

Agreement to Sell to Lessee—*Incomplete Agreement.*]—A. rented a house to B. by lease dated the 1st September, 1854. B. took possession, and on the 17th May following agreed with A. for purchase: "the one-fourth of the purchase money to be paid by approved indorsed notes at three months from date, the remainder to be paid in four equal annual instalments, with interest on the amount unpaid at each time of payment; agreement to be drawn and possession given on the 1st June next, from which time payment of instalments commences." An agreement was prepared before the 1st June, but was not executed, owing to a misunderstanding about the note, B. not being prepared with such a note as A. would accept:—Held, that there had been no surrender by operation of law, and that A. might distrain for his rent. *Grant* v. *Lynch*, 14 U. C. R. 148.

——— *Non-performance of Conditions.*]—An agreement in writing, whereby A. agreed to rent to B. for three years from date for £50 per annum, with taxes, payable quarterly during occupation, B. to expend £25 in improvements, is a lease, and not a mere agreement for a lease. Held, also, that such lease was not surrendered by operation of law, by A. afterwards agreeing in writing to sell the premises to B., upon certain conditions to be afterwards performed, but which were not performed at the time appointed, nor was B. ready to perform them. *Grant* v. *Lynch*, 6 C. P. 178.

Arbitration Bond—*Award.*]—Plaintiff held from defendant a lease of a farm unexpired. Plaintiff and defendant, with D. and M., became bound to each other by bond in £200, with a condition reciting that "the parties agreed to separate and cancel all arrangements heretofore made, and leave all controversies between them to the arbitration of T. and P.; and should they not agree, to choose an umpire, whose decision should be final." The four signed the bond, but it had only two seals, which all four touched. The two arbitrators not agreeing appointed an umpire, who awarded that defendant should release and give up to the plaintiff "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay, and that the lease then held by both parties of said farm be immediately cancelled:"—Held, that the bond was not in itself a surrender of the term; that even if so intended by the parties, the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vict. c. 7, s. 4; that the award would not amount to a deed of surrender by the defendant; and therefore that the plaintiff could not eject the defendant. *O'Dougherty* v. *Fretwell*, 11 U. C. R. 65.

Assignment by Lessee—*Leaving Country—Return—Re-entry.*]—Defendant avowed for rent under a demise to G., to which the plaintiff pleaded non tenuit. It appeared that during the term G. had left the country and assigned to one M., who sold to C., and that G. had afterwards returned, and entered under C., and was living there when the distress was made:—Held, clearly not to amount to a surrender of the term, or deprive defendant of his right to distrain. *Elsworth* v. *Brice*, 18 U. C. R. 441.

Cancellation of Lease—*Subsequent Conduct—Implication — Estoppel.*]—The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered:—Held, that the subsequent conduct of the tenant in this case (as mentioned in the judgment of the court) must be taken to be, on the principle of estoppel, an implied surrender of his lease. *Doe d. Burr* v. *Denison*, 8 U. C. R. 185.

Conveyance to Lessee in Fee.]—A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors, is as between the lessor and lessee a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession. *Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449.

Crown—*Surrender to, by Third Party—Pleading.*]—In covenant by landlord against tenant, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff) to the Queen, and that therefore the land at the expiration of the lease did not belong to the plaintiff. *Russell* v. *Graham*, 6 U. C. R. 497.

Delivery up of Copy of Lease—*New Demise to Stranger — Acquiescence — Subsequent Registration of Lease.*]—In ejectment

for a village lot, the plaintiff claimed under a lease from K., one of the defendants, which the defendants alleged had been surrendered by operation of law. The lease was made in 1873, for ten years, to the plaintiff, who took possession, and built a house on the lot, and the house in October, 1875, was destroyed by fire, and in February, 1876, the plaintiff became insolvent. There was rent in arrear, which the plaintiff could not pay. K.'s attorney said he was willing to take the place off their hands; and either the plaintiff or his wife delivered to him a copy of the lease, which he supposed to be the original, saying the lease was given up; plaintiff's wife afterwards told K. that the lease was given up, and K., promised to lease to her a shop in a block she was then building. K. then leased this land to the other defendants, who at once proceeded to expend about $3,000 in building upon it, which the plaintiff, though aware of, made no objection to; but when the foundation was nearly completed he registered the lease. A difficulty arose as to the other lease promised to the plaintiff's wife, and the plaintiff brought ejectment. The trial Judge held that there had been a surrender of the lease by operation of law, and that the plaintiff was precluded by his acquiescence from disputing defendants' title, notwithstanding the alleged notice to them by registration of the lease:—Held, that the finding was right upon both points, and that the plaintiff could not recover. *Acheson* v. *McMurray*, 41 U. C. R. 484.

Increase or Reduction of Rent—*Fixtures.*]—An engine and boiler put into a carpenter's shop and manufactory of agricultural implements:—Held, to be trade fixtures as between landlord and tenant, and removable by the tenant. Held, also, that neither the increase nor reduction of the rent in this case, under the circumstances, operated as a surrender of the term and an acceptance of the new tenancy so as to prevent the tenants from claiming the fixtures. *Pronguey* v. *Gurney*, 37 U. C. R. 347.

New Demise—*Assignee of Reversion.*]—Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law, and the right to distrain is gone. 12 Vict. c. 71 does not alter the law so far as regards a surrender in law. *Lewis* v. *Brooks*, 8 U. C. R. 576.

——— *Pleading — Reply.*] — Where, in trespass qu. cl. fr. et de bonis asportatis, the defendant justified the seizure of goods on a distress for rent under a demise to one A., and the plaintiff replied that before the rent distrained for became due, A. died, and the defendant and A.'s executor joined in the demise of the same premises to the plaintiff, under which the plaintiff entered and occupied —the replication was held good, as the demise to A. was surrendered and determined by the new demise to the plaintiff. *Strathy* v. *Crooks*, 6 O. S. 587.

——— *Pleading — Special Traverse.*] — Where, in trespass for taking goods, defendant having justified under a distress for rent, the plaintiff replied a new lease by which the demise by defendant was surrendered and determined by operation of law, and defendant rejoined specially traversing the surrender, it was held that the special traverse was bad, as it was matter of law. *Strathy* v. *Crooks*, 1 U. C. R. 44.

——— *Rights of Intervening Mortgagees.*]—One L., by an instrument not under seal, dated 31st October, 1857, leased to S. O., one of the defendants, for five years. On 31st March, 1858, he mortgaged the premises to the plaintiffs, redeemable as therein set forth, and on the 8th June, 1858, by indenture, he again leased the same premises for five years to S. O. Upon ejectment brought by the mortgagees:—Held, that although the indenture of June, 1858, as between the parties to it, extinguished the tenancy from year to year created by the instrument of 31st October, 1857, yet it did not entitle the plaintiffs as mortgagees to succeed, they not being parties to it. *Caverhill* v. *Orvis*, 12 C. P. 392.

New Demise of Part to Stranger.]—One C. B. had leased from the plaintiff part of the property, and being in possession gave it up for $60 to defendant, who claimed it as her own:—Semble, the plaintiff having let part of the premises held by C. B. to B. B., who went into possession, and no rent being apportioned for the remainder, that this operated as a surrender of C. B.'s lease. *Kyle* v. *Stocks*, 31 U. C. R. 47.

——— *Estoppel — Husband and Wife — Felony—Imprisonment.*]—Ejectment by H. C. and E. C., his wife. The defendant S. limited his defence to two shops erected on the lands sued for, and defendant G. to one of said shops as tenant of S. It appeared that while H. C. was in prison for felony, and on the 29th October, 1869, S. leased the premises to E. C. for two years from the 1st June, 1870, at $200 a year, and S. covenanted to erect on the premises by the 1st June, a tavern worth at least $1,000. Afterwards S. proposed to erect, and did erect without opposition from E. C., a more expensive hotel, with two shops under it (which were the shops referred to), and made other important alterations, at a total expense of $3,000. Defendant G. applied to E. C. for a lease of one of the shops, and was referred to S., and S., after seeing E. C., who said she did not want the shops, leased one to G. E. C. afterwards refused to give up possession until paid for delay in getting possession of the tavern until after the 1st June. The amount was left to arbitration, and E. C. said she would allow G. to take possession, but after he had placed some of his goods in the premises she put them out and locked the doors, which the defendants then forced open and took possession. H. C. was during these transactions still undergoing his sentence:—Held, that during her husband's imprisonment for felony E. C. could contract, at all events as to what might be regarded as goods and chattels, as a feme sole. Semble, that a married woman may execute a deed without her husband joining during the imprisonment of the husband as a felon. Held, also, that the facts above set out, and more fully appearing in the report, constituted a surrender, by operation of law, by E. C., or at all events estopped all parties from saying that S. had not the right to lease to G. *Crocker* v. *Sowden*, 33 U. C. R. 397.

New Demise of Part to Wife—*Acquiescence—Payment of Rent.*]—The plaintiff, who was tenant of a farm of the defendant, having

absconded, his wife disposed of some of the cattle to one D., surrendered the lease to defendant, the landlord, for $120, and accepted a lease from the landlord of the dwelling house at a rental of fifty cents a month. The plaintiff subsequently returned and resided with his wife in the dwelling house, and some three months afterwards notified defendant that he refused to recognize the surrender, tendering back the money paid therefor. He still continued to reside in the dwelling house, and three months' rent therefor was paid under the threat of a distress, and six months' rent afterwards. The plaintiff having brought an action against defendant for entering the land, and seizing and selling the crop:—Held, that, assuming that the wife had no authority to make the surrender, the plaintiff, by his conduct after his return and the payment of the rent of the dwelling house, was precluded from recovering; that the acceptance of the new tenancy of a part of the originally demised premises, and payment of the rent thereon, was tantamount to a surrender of the term. *Ramsay* v. *Stafford*, 28 C. P. 229.

Partnership — *Co-tenants — Dissolution — Subsequent New Demise.*]—A. and B. were partners, occupying premises as co-tenants under a yearly tenancy on the terms of an expired lease. Before the nomination day for a municipal election they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from the same landlord:—Held, that B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.

——— *Change in Firm—Occupation—Estoppel.*]—The plaintiffs by their agent, in June, 1881, orally leased to S. and W. for three years certain premises in which the latter carried on business in partnership for about a year, when W. sold out his interest to one D., who in partnership with S. carried on the same business for about ten months, when S. withdrew from the partnership and sold out his interest to D., who agreed with S. to pay all rent then due or to become due in respect of the premises, which he continued to occupy and pay rent for. The plaintiffs without authority drew for a quarter's rent on S. and D., who refused to accept it; and, a fire having occurred on the premises, the plaintiffs expended the insurance money in repairs, with D.'s consent. Default having been made in respect of six months' rent due on the 15th December, 1883, the plaintiffs instituted proceedings against S. and W. for the recovery thereof:—Held, that although the plaintiffs were cognizant of the several changes in the partnership and the occupation by D. of the premises, these acts were not evidence of a surrender in law, and that they were not estopped from enforcing payment of the overdue rent against S. and W. *Gault* v. *Shepard*, 14 A. R. 203.

Pleading.]—The mere allegation in a plea "of a surrender of a term of years to the defendant by the plaintiff," obliges the defendant to prove an actual surrender. A surrender by operation of law must be so pleaded. *McNeil* v. *Train*, 5 U. C. R. 91.

Re-entry by Lessor — *Common Occupation—Evidence — Pleading.*]—To an avowry for rent the plaintiff pleaded that before the distress he surrendered his interest in the term to defendant, and the said tenancy was put an end to and ceased, by the defendant entering on the said premises, by act and operation of law. A lease for five years was proved at $150 a year, under which the plaintiff entered, and it appeared that before the end of the second year, and before the distress, defendants, having offered the plaintiff $50 to allow him to take possession, went to live in the house. Defendant afterwards told a witness that he had let the place again to the plaintiff on shares, he, defendant, living on it as owner. He afterwards got the lease from this same witness, with whom it had been deposited by both parties, saying that it was of no use. The plaintiff also lived in the house, but the agreement was that defendant, and not he, should have the right of possession. These arrangements were oral:—Held, that the facts proved clearly shewed a surrender by operation of law, and the plea, though inartificially framed, was in substance an averment that the term was thus surrendered before the distress; and that the plaintiff was entitled to recover. *Coffin* v. *Danard*, 24 U. C. R. 267.

Sub-lease—*Whole or Part of Lands.*]—A lease to the defendant, dated 1st April, 1885, for ten years, at an annual rent of $120, payable quarterly in each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before 1st January in any year. The defendant for his own business only occupied part of the premises, and sublet the remainder. In November, 1891, the part sublet by the defendant being unoccupied, the defendant orally notified the lessor that unless the premises were repaired he would have to surrender. The lessor treated this as a valid notice under the lease, and after negotiations with the defendant it was agreed that the defendant should have the portion of the premises occupied by him at $24 a year, to take effect on 1st April following, but with a right to the lessor, should he sell, to cancel the same:—Held, that what had taken place constituted a surrender in law of the whole of the premises, and not merely of the part not occupied by the defendant. *Seldon* v. *Buchanan*, 24 O. R. 349.

Term Created by Deed.]—The doctrine of surrender by act and operation of law applies as well to a term created by deed as to one created by parol. Lawrence v. Faux, 2 F. & F. 435, distinguished. *Gault* v. *Shepard*, 14 A. R. 203.

See Wheeldon v. *Milligan*, 44 U. C. R. 174; *Laur* v. *White*, 18 C. P. 99, *post*, XXVIII.

XXVII. USE AND OCCUPATION.

Agreement for Lease—*Form of Action.*]—Held, under the special facts stated in this case, there being only an agreement for a lease, that debt for use and occupation, and not debt on the demise, was the proper form of action. *McLean* v. *Young*, 1 C. P. 22.

Conveyance of Land as Security.]—The defendant made over to the plaintiff a

farm in part payment of a debt, stipulating for a re-conveyance on payment in three years. Before this the farm was leased to one F., who continued in possession, paying rent to defendant:—Held, that defendant was not liable to the plaintiff for use and occupation. *Matthie* v. *Rose*, 9 U. C. R. 602.

Devisee in Trust—*Right to Recover—Parties—Cesser of Occupation.*]—One of the devisees in trust under a will refused to accept the trust:—Held, that he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due. Defendant was tenant from year to year of the premises in respect of which the rent in question was sought to be recovered, being for three quarters accruing due after the death of the lessor. No notice to quit was given, nor was the tenancy determined by the consent of the parties entitled; on the contrary, the defendant recognized the continuance of the tenancy by the payment of rent falling due after the lessor's death:—Held, that the tenancy was not determined by the death of the lessor, and that the plaintiffs, the devisees in trust under the lessor's will, were entitled to recover the three quarters' rent in use and occupation. Held, also, that it was no answer for the defendant that he had ceased to occupy, for he still held by the plaintiffs' permission, and might have occupied had he so pleased. *Hughes* v. *Brooke*, 43 U. C. R. 609.

Estoppel—*Judgment in Replevin.*]—To an action for use and occupation defendant pleaded, by way of estoppel, that one C. sued the plaintiff for taking his goods on the same premises: that the plaintiff avowed under a demise to the present defendant for twelve months' rent in arrear; that issue was taken on such avowry, and C. recovered judgment against the now plaintiff for £28, for such wrongful taking and costs: that C. was in possession at the time of said taking under and from the now defendant, and with his privity; and that the amount of alleged arrears of rent distrained for was the amount now claimed for use and occupation:—Held, on demurrer, plea bad as shewing no estoppel, for the judgment pleaded did not necessarily shew that no rent was due at the time of the distress mentioned, but might have been obtained on some other ground. Quære, whether judgment in replevin could be a bar to an action for use and occupation. Quære, also, whether defendant in this case could plead the judgment recovered by C. as an estoppel in his own favour. *Crooks* v. *Bowes*, 22 U. C. R. 219.

Executor of Factor—*Right to Recover.*]—The land in question belonged to the estate of one S., who went abroad about 1815, and had not been heard of. B. and his father had managed the property as agents for many years, and defendant had held this land under and paid rent to them in succession; but the evidence shewed that they had never claimed the land as their own, and had received and credited the rent as on account of the S. estate, not knowing who were the owners:—Held, that the executors of B. were entitled to recover, for use and occupation, though the money when received would not form part of the assets of B.'s estate. *Baldwin* v. *Foster*, 21 U. C. R. 152.

Executor of Owner—*Payment in Produce.*]—Executors may sue for use and occupation of testator's land during his life-time, but not where the agreement has been that the tenant should pay in produce not in money. *Wallis* v. *Harold*, 23 U. C. R. 279.

——— *Right to Recover.*]—H. leased to defendant in 1849, for ten years, and died nine months after the expiration of the term, leaving rent for two years unpaid, and defendant still in possession:—Held, that his executor might recover for the nine months' use and occupation as well as the rent due under the lease. *Seymour* v. *Graham*, 23 U. C. R. 272.

Insolvency of Tenant—*Occupation by Assignee—Resumption by Tenant—No Written Reconveyance.*]—The plaintiff sued defendant for the use and occupation of a shop from the 1st April to the 1st July, 1875. The defendant had made an assignment under the Insolvent Act of 1869, on the 20th April, but the assignee only occupied the shop while removing the goods to another shop which the defendant owned, when he returned the key to the defendant. On the 1st May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon its confirmation. The deed was confirmed on the 14th June, when defendant was allowed to continue on his own account the business which, since his assignment, he had nominally conducted on behalf of the assignee; but no written reconveyance was ever made. It was proved, however, that persons who wished to see the shop applied to the defendant, and were shewn over it by his son; that the plaintiff's agent had recognized defendant as having possession by sending people who inquired about the shop to him as being the person who had it to dispose of; that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequence of the deed of confirmation, and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st July:—Held, that the action for use and occupation would lie against the defendant, notwithstanding the assignment, as the evidence shewed an occupation with the recognition of the plaintiff as landlord and the defendant as tenant, and a sufficient transfer from the assignee to the defendant. *Blackburn* v. *Lawson*, 2 A. R. 215.

Lease under Seal—*Defence to Action.*]—Where the plaintiff proved his case by admissions of defendant, who on his defence put in a lease under seal from the plaintiff, which he contended was for the same premises, but there was no distinct evidence of identity, and the jury found for the plaintiff, the court afterwards, on affidavits shewing that these were the only premises demised by plaintiff to the defendant, ordered a new trial without costs, unless the plaintiff would elect to enter his judgment for the amount of his verdict only without costs, and make no claim under the lease. ***Boulton*** v. *Defries*, 2 U. C. R. 432.

——— *Recovery after Term Expired.*]—On 1st November, 1856, one S., being seised in fee of certain lands in two lots, demised the same to defendant for five years from date. In July, 1857, S. mortgaged one lot, No. 42, to one C. in fee, and in February, 1858,

mortgaged lot No. 43 to St. in fee. In June, 1861, C. and St. assigned their respective mortgages to plaintiff. In April, 1860, the sheriff, under execution, sold and conveyed the interest of S. in these lands to one T., who in April, 1860, conveyed to plaintiff. The plaintiff on 10th February, 1862, brought this action against the defendant for use and occupation:—Held, that, the demise in this case to defendant being by deed, an action for use and occupation would not lie, but, as the term expired in November, 1861, plaintiff was entitled to recover since that date. *McFarlane* v. *Buchanan*, 12 C. P. 591.

Municipal Corporation—*Hire of Court-room.*]—The plaintiff sued for the use and occupation of a room in his hotel as a court-room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges:—Held, not recoverable. *Dark* v. *Municipal Council of Huron and Bruce*, 7 C. P. 378.

Occupation under Another.]—As a defendant in ejectment is estopped from denying the title of the person through whom he claims, so one who occupies under another may be liable for use and occupation. *Burrows* v. *Gates*, 8 C. P. 121.

Oral Agreement—*Entry under — Performance of Conditions.*]—Action for use and occupation. Equitable plea, that defendant entered upon an agreement (not in writing) for a lease for 42 years, under which no rent was to be paid until certain conditions were performed by plaintiffs, which had never been so performed:—Held, a good legal defence. *Toronto Hospital Trustees* v. *Heward*, 8 C. P. 84.

——*Holding over*——*Want of Corporate Seal.*]—The defendant company, who had occupied certain premises under an oral agreement and paid rent for a year, continued in possession after the year and then went out, paying rent for the time they were actually in possession:—Held, that, as there was no lease under seal, the company were not liable as tenants from year to year but only for use and occupation while actually in possession. *Hyslop* v. *Bristol and Exeter R. W. Co.*, 7 Ex. 409, discussed and followed. *Garland Manufacturing Co.* v. *Northumberland Paper and Electric Co.*, 31 O. R. 40.

Pleading — *Declaration—Sufficiency.*]—It is no ground for arresting the judgment that the declaration does not shew that A. B., who occupied, was tenant to defendants, or that they held under the plaintiff. In assumpsit for use and occupation, an averment that one A. occupied the premises at the special instance and request of defendant, was held to imply a sufficient allegation of a permission by the plaintiff to occupy, on a motion in arrest of judgment. *Moffatt* v. *Macrea*, Dra. 11.

Principal and Agent—*Assignee for Creditors—Debtor as Agent—Right to Recover—Question of Fact for Jury.*]—In an action for use and occupation it appeared that the plaintiff was assignee of R. M. & Co., in trust to secure payment by instalments of a certain dividend to their creditors, who instructed him not to interfere with the property until default. F., one of the firm, orally leased the premises in question, which were included in the assignment, to defendant, and said he believed he mentioned to him at the time the plaintiff's name as owner, and referred defendant to him with regard to a proposition to purchase. Afterwards the firm and defendant had dealings together, and defendant claimed that after crediting the rent they were still indebted to him. The plaintiff, being examined, swore that he had no knowledge of defendant's occupation, or of the premises, but that F. was authorized to rent the place, and to use his name in the suit:—Held, that it was properly left to the jury to say whether defendant had taken the premises from the plaintiff through F. as his agent, or from the firm; and that the evidence warranted a verdict for defendant. *Crawford* v. *Fraser*, 21 U. C. R. 518.

Repudiation of Ownership—*Demand.*]—The land in question was sold to plaintiff in 1853, under a power of sale in a mortgage, defendant being in possession. Plaintiff repudiated his purchase, and a suit in chancery took place, which resulted in his accepting the deed in 1855. In the meantime, and soon after the sale, defendant applied to the plaintiff for a lease, but the plaintiff said he was not in possession, and would do nothing; and defendant then leased the place to one M., to hold until plaintiff should demand possession. No demand was made until plaintiff received his deed, when M. went out:—Held, that defendant was not liable for use and occupation. *Osborne* v. *Jones*, 15 U. C. R. 296.

Sub-lease—*Forfeiture.*]—It is no defence that the plaintiff is himself the lessee of the premises under a lease which he has forfeited by breach of covenant in subletting to defendant, there being no averment that the plaintiff's lessor had taken any advantage of the forfeiture. *Henderson* v. *Torrance*, 2 U. C. R. 402.

Substitution of Tenant — *Assignee.*]—In an action for use and occupation, it appeared that F. held a lease of the premises from the plaintiff. F. assigned his stock-in-trade to defendant, who took possession, and he or his brother paid plaintiff one quarter's rent, and plaintiff's son swore that before the next quarter fell due, defendant's brother said to the plaintiff, "We have paid for the last quarter's rent, and I suppose we must pay for this quarter." The lease was in existence during the time for which plaintiff claimed:—Held, that it was properly left to the jury to say whether there was a substitution of defendant as tenant in place of F., and that they were justified in finding for plaintiff. *Darch* v. *McLeod*, 16 U. C. R. 614.

Third Person — *Occupation under.*]—Where it is quite evident that defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third person, the plaintiff will be nonsuited. *McDonald* v. *Brennan*, 5 U. C. R. 599.

Title — *Possession — Attornment — Contract.*]—The plaintiff proving a legal title to the premises, and a mere naked possession by defendant, is entitled to a verdict. He need not prove an attornment or contract between himself and defendant. *Price* v. *Lloyd*, 3 U. C. R. 120.

——— *Rent—Attornment.*]—Upon the evidence in this action for use and occupation:—Held, that the plaintiff could not recover; that the rent spoken of between the parties was the rent payable under the lease, not rent for the occupation under the plaintiff, for it did not appear that the plaintiff had ever asserted title to the land as landlord; that the evidence pointed to defendant's willingness to attorn to the right claimant of the land, not to the fact that he was occupying under plaintiff; and that the promise was to pay the rent under the lease, and was not therefore evidence to shew an occupation under plaintiff, but an assertion of holding by deed, which by the statute precluded this form of action. Semble, that if plaintiff had at that time asserted title in himself, or had claimed the land, what passed would have been evidence of attornment; but that if defendant had attorned this action would not lie. *Thompson* v. *Bennett*, 17 C. P. 380.

Wharf—*Agreement—Tolls.*]—D., by permission of the commissioner of Crown lands for Ontario, built a wharf on the waters of Toronto bay at the island near Hanlan's point; and claimed a sum of money from C. for the use and occupation by him of the wharf in landing passengers from the steamer:—Held, that there could be no recovery; for the evidence failed to shew any agreement by C. to pay wharfage, &c., or that tolls had been usually collected or charged, while the relationship and dealing of the parties would raise the inference that no charge was contemplated. *Clendinning* v. *Turner*, 9 O. R. 34.

See XXIII. 3.

XXVIII. Miscellaneous.

Canal—*Lease of—Action to Set aside—Parties—Tolls.*]—Persons who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the attorney-general was a defendant) to have the lease declared void. *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Cancellation of Lease—*Effect of—Rent—Distress—Sub-tenant.*]—One I. leased premises for a term to B., who sublet a portion of them to plaintiff. Afterwards, by indorsement on the lease from I. to B., after reciting that they had mutally agreed to release each the other from the covenants and agreements contained therein, it was declared that said lease was therefore wholly cancelled at and from that date, and B. authorized I. to collect the rent under the lease from him to plaintiff. Subsequently I. distrained upon plaintiff for two quarters' rent under B.'s lease to him. At the time of the distress plaintiff had paid all rent due for one quarter, being the first distrained for, to one C., under an agreement with B. so to do, with the exception of a small amount still unpaid. There was a second distress for the other quarter, the time of payment of both quarters having elapsed; and there was also in arrear at this time six months' rent under the lease from I. to B. Plaintiff thereupon brought trespass against I.:—Held, that the action must fail. 1. As the term created by the lease from I. to B. continued to exist notwithstanding the cancellation of the lease, the rent which was incident to that term could be distrained for; that that rent being unpaid might be set up in this action of trespass, as shewing defendants had a right to take the goods, being on the demised premises, as a distress for the rent due, just as they might have avowed for it had the action been replevin. 2. The rent being due under the lease from B. to plaintiff, and B. having authorized I. to collect and receive it, defendants might set that up under the facts shewn as justifying the distress. Held, also, that if the cancelling of the lease by I. and B. merged the term created by it, the right of I. to distrain was preserved by C. S. U. C. c. 90, s. 7. *Laur* v. *White*, 18 C. P. 99.

Entry of Lessee—*Possession.*]—A defendant in ejectment relying upon a lease to a third person as shewing title out of the plaintiff, need not shew an entry by the lessee under the lease, for until some one else be shewn in possession, holding out the lessee, he must be regarded as possessed of the term. *Doe d. King's College* v. *Kennedy*, 5 U. C. R. 577.

Estoppel—*Demand of Rent.*]—Held, that the mere demand of rent by the successor of the lessor of rectory lands (after the expiration of the term) was not such an affirmance of the covenants in the lease as could estop him from disputing them. *Kirkpatrick* v. *Lyster*, 13 Gr. 323, 16 Gr. 17.

Holding over—*Tenant not a Disscisor.*]—*Doe d. Charles* v. *Cotton*, 8 U. C. R. 313.

Husband and Wife—*Lease to—Estates Taken—Effect of Married Woman's Acts thereon—Repudiation and Non-execution by her.*]—See *Britton* v. *Knight*, 29 C. P. 567.

Lease of Fishery.]—See *The Queen* v. *Robertson*, 6 S. C. R. 52.

Mining Lease—*Provision for Royalty—Lessee a Purchaser for Value—Prior Voluntary Conveyance.*]—A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:—Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Gr. 541.

Mortgage of Lease.]—See *Kelly* v. *Imperial Loan and Investment Co.*, 11 A. R. 526.

Nuisance—*Liability for.*]—Held, that the landlord and tenant were both liable for damages arising from a nuisance created by the landlord in the house, and continued to be used by the tenant while occupying it. *McCallum* v. *Hutchison*, 7 C. P. 508.

If a nuisance exist at the time of letting, both tenant and owner are liable. If it arise after the tenancy is created, the tenant only is responsible. *Regina* v. *Osler*, 32 U. C. R. 324.

Order for Possession—*Parties.*]—On moving for an order for delivery of possession, it must be shewn that the defendant is in possession. No order will be made against a

tenant or third party in possession, not a party to the cause. *McKenzie* v. *Wiggins*, 2 Ch. Ch. 391.

Postponing Lease to Mortgage.]—A., the owner of certain lands, executed a lease under the Short Forms Act to the plaintiff and two others for twenty years, which was registered. The lessees covenanted to plant the premises with fruit trees, and keep the premises during the term as an orchard. The lessor covenanted for quiet enjoyment; and that if during the term the premises were for sale, the lessees should have the refusal, and if the lessees could not on the expiration of the term get a renewal, they were to be allowed a fair valuation for the orchard and improvements. The lessees went into possession and planted the fruit trees. Afterwards, to enable the lessor to procure a loan from an investment company, the lessees entered into an agreement, which was registered, to postpone their lease to a mortgage to the company, so that the mortgage would be a first and prior incumbrance on said lands, and in default of the payment of the mortgage money, the lease was to be forfeited and void; and the company might, without any notice, &c., enter and hold the lands freed from the lease, &c. The lessor then executed two other mortgages to different mortgagees of the property, which were past due at the commencement of this action. The lessor subsequently and during the continuance of the lease made default in payment of the mortgage to the company, who sold the land, and after satisfying their mortgage, paid the balance of the purchase money into court:—Held, that by the agreement postponing the lease to the company's mortgage, the lessees were placed in no worse position than if the mortgage had been made prior thereto, so that the lessees merely held subject to the mortgage, and the subsequent mortgagees to the lease; and that the lessees were entitled to damages for breach of the covenant for quiet enjoyment. Held, also, that the plaintiff, having an estate in the land, had a claim on the fund in court prior to the subsequent mortgagees, and was entitled to a declaration for payment out of the value of her interest in the unexpired term, namely, one-third of the net annual value or profit which would have been derived therefrom had the lessees been permitted to remain on the land during the term, and that such value must be computed with reference to the agreement that on non-renewal the lessees were to get the value of the trees and improvements; and in such view it was not necessary to consider the question of the breach of the covenant to renew. *Anderson* v. *Stevenson*, 15 O. R. 563.

Railway—*Lease of—Powers of Company.*]—A railway or canal company cannot lease the concern or delegate its powers for a specified term, without the sanction of the legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its Act of incorporation. *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Reversioner — *Prejudice — Acts of Tenant.*]—Held, that any act of the tenant without the knowledge or sanction of the landlord could only affect his interest as tenant, and could not prejudice the reversioner. *Dixon* v. *Cross*, 4 O. R. 465.

Tenants in Common—*Lease by One.*]—One of two tenants in common of land leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Gr. 614.

Trespass — *Action by Tenant — Damages.*] — In trespass to land, where the plaintiff is a tenant only, the duration of his term must be shewn, the measure of damages being the diminished value of his interest. The trespass complained of was removing a fence in May, 1866. The plaintiff's landlady swore that she leased the place to the plaintiff in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year, taxes and statute labour." There was no further evidence as to the nature of the lease or duration of the term:—Held, that the damages should not, as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession. *Fisher* v. *Grace*, 27 U. C. R. 158.

See DISTRESS—FIXTURES, II.—LIMITATION OF ACTIONS, II. 18—TROVER AND DETINUE, I. 1 (a)

LAPSE.

See WILL, IV. 12.

LARCENY.

See CRIMINAL LAW, IX. 28.

LATERAL SUPPORT.

See BUILDINGS—EASEMENT.

LAW SOCIETY OF UPPER CANADA.

Barrister — *Misconduct — Inquiry by Committee of Benchers—Evidence not Taken on Oath—Disbarring.*]—By s. 44 of R. S. O. 1887 c. 145, "An Act respecting the Law Society of Upper Canada," whenever a barrister or solicitor has been or may be found guilty of professional misconduct by the benchers, "after due inquiry by a committee of their number or otherwise," it shall be lawful for the benchers in convocation to disbar any such barrister, and, by s. 36 of that Act, upon any inquiry by committee the benchers or committee shall have power to examine witnesses under oath. In calling the committee together, no notice of the meeting was sent to the treasurer of the society, an ex officio member thereof, he being in Europe, and the notice to the other members did not state the purpose of the meeting. Subsequently the committee reported to convocation that the complaint had been fully

established, and recommended that the plaintiff be disbarred:—Held, reversing the decision in 17 O. R. 300, and restoring that in 16 O. R. 625, that the plaintiff having appeared before convocation and substantially admitted the charge, and the propriety of the report of the committee, could not be permitted to say that the defendants had acted without "due inquiry," or to set up any irregularities there might have been in the preliminary proceedings. Discussion and difference of opinion on the question whether the discipline committee of the Law Society were bound to take the evidence on oath, and whether the plaintiff had waived his right to have it so taken. *Hands* v. *Law Society of Upper Canada*, 17 A. R. 41.

Bencher—"*Retired Judge*."]—Held, affirming the judgment in 17 O. R. 104, that a Judge of a superior court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the practice of his profession, is a "retired Judge" within the meaning of R. S. O. 1877 c. 138, s. 4, and as such an ex officio bencher of the Law Society of Upper Canada. *Macdonell* v. *Blake*, 17 A. R. 312.

By-Laws—*Term Fees.*]—As to the power of the Law Society of Upper Canada to make by-laws imposing term fees. See *Law Society* v. *Dougall*, 9 U. C. R. 541.

Covenant—*Maintenance of Court Buildings — Estoppel — Statutes.*]—In the year 1846 the Law Society of Upper Canada entered into a covenant with the Crown, in conformity with 9 Vict. c. 33, to provide, at their own cost, and without further charge to the Province, for all time to come, fit and proper accommodation for the superior courts of law and equity for Upper Canada, as then existing or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the Crown to repair, &c., and the outlay to become a charge on the society's land. On the execution of this covenant £6,000 was paid over to the society by the government, and proper accommodation was provided by the former for the then existing courts. Subsequently the court of common pleas was established, and it became necessary to enlarge the buildings in which the courts were held, at a greatly enhanced outlay. 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, were passed for raising funds for the purpose, and the moneys authorized thereby were expended in the erection of Osgoode Hall for the accommodation of the courts. In 1865, at the request of the society, a certain sum was supplied by the government for necessary repairs to the building, and by subsequent arrangement with the Ontario government the latter agreed to pay the society annually $3,000 for the purpose of heat and light:—Held, that notwithstanding the greatly increased expense, since the establishment of the court of common pleas and the passage of the Acts 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, of repairing and maintaining the buildings at Osgoode Hall, the society was nevertheless bound by its express covenant entered into in conformity with 9 Vict. c. 33, to repair and maintain them, and was not impliedly, much less expressly, released therefrom in consequence of the legislation that had taken place in relation thereto; that the effect of 33 Vict. c. 9 (O.) was to entitle the Law Society to have the government account to them annually for the sum of $29,000, and that this sum must be considered as a provision to enable them to perform their covenant, and that consequently the same was in full force. *The Queen* v. *Law Society of Upper Canada*, 20 C. P. 490.

Held, affirming the above judgment, that the Law Society were not released, under the facts and circumstances there set forth, from their covenant, and that no estoppel arose, in favour of the society against the Crown, in consequence of the several Acts of the legislature. *S. C.*, 21 C. P. 229.

See BARRISTER—SOLICITOR.

LAW STAMPS.

Fees for Examination—*Deputy Clerk of Crown.*]—Where an examination of parties pursuant to R. S. O. 1877 c. 50, s. 161, takes place before a deputy clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark* v. *McConaghy*, 8 P. R. 136.

Fees on Reference to County Judge.]—The fees on a reference to a county Judge from the superior court, such as an examination of a judgment debtor, must be paid in stamps, not in cash. *James* v. *Jones*, 4 P. R. 194.

Filings—*Separate Documents — Fees — Computation.*]—An appeal bond and the affidavit of execution thereof are separate documents, and must be stamped as such when filed. The Act respecting law stamps has made no alteration in the practice of the court as to the mode of computing the proper amount of fees. *Macbeth* v. *Smart*, 1 Ch. Ch, 269.

Necessity for, to Complete Appearance.]—An appearance to a writ in the common pleas was filed in the office of the deputy clerk of the Crown, who was also clerk of the county court, but by mistake was put with the county court papers, and a stamp necessary for an appearance in the superior court was not affixed. The plaintiff signed judgment as on default of appearance:—Held, that the appearance was a nullity, and was absolutely void under the Stamp Act, and leave was refused to have the stamp affixed as of the day of filing, or to take it off the county court files. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Necessity for, to Complete Judgment.]—Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered. *Smith* v. *Logan*, 17 P. R. 219.

LEASE.

See Deed, VII. 4—Infant, III.—Landlord and Tenant—Mines and Minerals, IV. — Mortgage, VI., XII. 7 — Railway, XVI. — Registry Laws, III. 2.

LEASE OF TOLLS.

See Way, VIII. 2.

LEASE OR LICENSE.

See Landlord and Tenant, III. 3.

LEAVE AND LICENSE.

See Trespass, II. 6—Water and Watercourses, XII. 3.

LEAVE TO APPEAL.

See Appeal—Courts—Court of Appeal. II. 3.

LEGACY.

See Will, IV. 13.

LEGISLATIVE POWER.

See Constitutional Law, II. 1, IV.

LETTERS OF ADMINISTRATION.

See Executors and Administrators, V.

LETTERS PATENT.

See Crown, II. 6—Scire Facias and Revivor, III.

LETTERS PROBATE.

See Executors and Administrators, V.

LETTERS ROGATORY.

See Evidence, IX.

LIBEL.

See Criminal Law, IX. 30—Defamation.

LICENSE.

I. Easements.

1. *Grant*, 3902.

2. *Revocation*, 3905.

II. Other Cases, 3908.

I. Easements.

1. *Grant.*

Entry — *Crops — Condition—Default.*]—Trespass to south parts of lots 14 and 15, and taking and converting wheat and straw of the plaintiff. Plea, leave and license generally. In support of this plea, defendants proved a deed made by plaintiff, 20th February, 1846, whereby, in consideration of £28 received from defendant T., he "bargained and sold" to him, among other things specified, "twenty acres of wheat then growing on the south part of lot 14, and in the plaintiff's possession," with the right of ingress and egress into and from lot 14, to harvest and remove the said twenty acres of wheat. Then followed a proviso that if plaintiff should pay to T. £28 with interest, on a day named, the deed should be void. Plaintiff covenanted to pay the money, and it was stipulated that, until default, plaintiff might retain in his possession and use the goods and premises mortgaged, unless he should before the day of payment be sued by any other person, in which case T. might take and enjoy the said goods as his own:—Held, that defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15. Semble, that if the license to enter on lot 14 gave a right to enter on lot 15 as being necessary to the privilege granted with respect to lot 14, they should have in a special plea set forth the necessity. Held, that defendants must fail, also, because the license was not to enter and take the plaintiff's wheat, but to enter for the purpose of taking the defendants' wheat. Semble, also, plea bad, as the license proved was conditional and not absolute; there should have been a special plea shewing default in payment by plaintiff on the day named. Semble, that the only right the deed gave the defendants was to cut and carry away the wheat of the plaintiff; the defendants had no right to enter on the plaintiff's land and take the wheat away by force, after it had been cut and stacked by plaintiff. *Lunn* v. *Turner*, 4 U. C. R. 282.

——— *Crops — Trespass — Agreement—Justification.*] — See *McGinness* v. *Kennedy*, 29 U. C. R. 93, *ante* Landlord and Tenant, XXV.

——— *Fixtures — Detachment—Sheriff—Execution.*] — Trespass against a sheriff for taking plaintiff's goods under a fi. fa. The goods in question, an engine and boiler, had been in a saw-mill which was burned down, and remained there, set in brick and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ, the execution debtor sold them orally to the plaintiffs, who detached them from the mill and removed them to another place, where the sheriff followed and sold under a ven. ex.:—Held, that the first attempt at sale was clearly illegal, as the goods were then

fixed to the freehold and could not be taken as chattels. Quære, whether the oral sale was effectual, or whether the Statute of Frauds would apply. Semble, that it would not, but that the sale would, in effect, amount only to a license to the vendee to enter on the land and detach the goods; and quære, whether, on being so severed, the fi. fa. would not attach upon them. *Walton* v. *Jarvis*, 13 U. C. R. 616.

——— *Timber — Possession — Trespass.*]—The plaintiff had purchased from the Canada Company all the merchantable timber on a certain lot, and held a letter from them authorizing him to enter upon the land and mark whatever trees he might choose, and afterwards to cut and carry them away:—Held, that he had not such a possession as would enable him to bring trespass. Quære, what remedy he could have for trespasses on the land; whether he could support an action on the case against the trespasser for interfering with his privilege, or would be compelled to look to the company, treating their letter as an agreement. *Perry* v. *Buck*, 12 U. C. R. 451.

Erection of Dam — *Tort—Damages.*]—Semble, that though a license given by plaintiff to defendant not under seal did not create an easement, it might be sufficient as a license to prevent the plaintiff from recovering damages for the erection of a dam as a wrongful act. *Robinson* v. *Fetterly*, 8 U. C. R. 340.

Evidence — *Long Possession.*]—Case for overflowing plaintiff's land. Quære, whether long possession of an easement in land, though it may not supply evidence of grant, may be received in support of a plea of leave and license. *Brown* v. *Street*, 1 U. C. R. 124.

Fences — *Cattle — Railway.*] — M., the owner of land adjoining a railway, took down the fence separating it from the track, with the assent of the railway company, in order to supply them with wood cut upon the land. He then sold the land to one C., stipulating that he should retain one or two acres on which this wood was piled. C. afterwards leased to the plaintiff the east half of the land, containing part of the land retained by M., and C. allowed the plaintiff's cattle to run on the west half, there being no line fence between the two halves. The plaintiff's cattle escaped from this west half on to the railway where the fence had been removed by M., and were killed:—Held, that the plaintiff could not recover, for the facts shewed a license by implication from C. to leave the fence as it was, and the plaintiff, as C.'s licensee, could have no better right than C. *Kilmer* v. *Great Western R. W. Co.*, 35 U. C. R. 595.

Mining Rights—*Assignment of Lease—Validity of.*]—The holders of a license to dig for ore made a voluntary transfer of their right to another, and subsequently the licensor duly conveyed, for value, a like privilege to others, who also purchased from the original licensees their interest, and entered upon and worked the lands. Nearly three years afterwards, the assignee of the first license filed a bill seeking to enforce an exclusive right to dig. The court, under the circumstances, dismissed the bill with costs. A person to whom a license to dig for ore (the grantor being entitled to a royalty of one-twentieth part) was granted, was described in the instrument as a miner, and he subsequently transferred his right to another, without authority from the owner of the soil:—Held, that the personal quality of the grantee, formed a material ingredient in the contract, and therefore the right could not be assigned. *Ross* v. *Fox*, 13 Gr. 683.

——— *Lease or License.*] — Defendant leased to M. a lot of land for 25 years, for the purpose of boring for oil, salt, or minerals, with right of ingress and egress in a certain designated manner. M. was to pay an advance of $35 on oil, and one-eighth part, every three months, of all oil obtained, and was to be allowed two years for testing the oil bearing character of the land, when, if oil was not found in paying quantities, the lease was to be null and void, and plaintiffs were to return the $35 advanced. Defendant was to have the free use of the premises for agricultural purposes, except such portions as should be required for the oil operations. Quære, whether the instrument in question amounted to a lease, or was a mere license to bore for oil, salt, or minerals. *Burnside* v. *Marcus*, 17 C. P. 430.

Overflowing Land—*Permission—Extent—Company—Agent — Authority.*]—Case for overflowing land of the plaintiffs. Defendant produced a letter to one S., under whom he claimed, from the plaintiffs' agent, saying that the land would be sold to him for the purpose of erecting a saw-mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, and that he should furnish the company, or their settlers, with lumber at a reasonable rate:—Held, that this letter could not be construed as a license to defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam was known to and contemplated by the parties at the time:—Held, also, that the plaintiffs as a corporation could not be bound with respect to such an injury as was shewn in this case, by anything done by their ordinary agents without special authority. *Canada Co.* v. *Pettis*, 9 U. C. R. 669.

——— *Oral Agreement — Condition — Specific Performance.*] — A bill was filed by the owner of a mill, alleging an oral agreement with the proprietor of land adjoining, for the right to pen back a stream running through his land, which was used for driving the plaintiff's mill, in consideration of which he was to open up a road across his farm, for the use and convenience of such land-owner; but no writing was ever drawn up evidencing the agreement. The vendee, the owner of the land, instituted proceedings against the mill-owner for damages by penning back the water, which overflowed a considerable portion of his land. The evidence being positive as to the agreement to permit the penning back of the water, and the road across the plaintiff's farm having been used by the proprietor of the land, and his vendee, the court decreed a specific performance of the parol agrement, but, under the circumstances, without costs. *Nicol* v. *Tackaberry*, 10 Gr. 109.

Way — *Written Agreement — Necessity for.*]—Trespass q. c. f. Plea, liberum tenementum. Replication, demise to defendant

from plaintiff from year to year. Rejoinder, that after the demise, it was consented and agreed that defendant and his servants, &c., should have leave to pass and re-pass in and over the close, in which, &c.:—Held, that to support this rejoinder, a written agreement at least, if not one under seal, should be proved. *Brougham* v. *Balfour*, 3 C. P. 297.

See also next sub-head.

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2. *Revocation.*

Diversion of Water—*Mill-pond—Parol License.*]—One J. S., being owner of the east half of one lot, and the west half of another adjoining, by deed, expressed to be in pursuance of the Act respecting short forms of conveyances, conveyed to G. S. in fee the west half, without express mention of any rights, easements, &c. There were then on the west half a saw-mill and factory, which then, and for some years before, during the unity of title to both lots, were driven by the waters of a river, which was dammed back, to form a pond on both lots, by a dam and embankment extending on to both. At the time of conveyance, also, there was on the west half a building intended for a grist mill, ready for the reception of machinery, and the embankment of the mill-pond was partly cut through to carry the water therefrom to another pond partly begun, from which the grist-mill was to be supplied. After the conveyance, G. S. cut through the embankment at the place where the cutting had been begun, carried the water required from one pond to the other by a flume, and thus worked the grist-mill which he had completed, and which could not otherwise have been worked. By this he diverted the water from the first pond, and from the east half to a greater extent than it had been diverted before the conveyance. Such diversion and working of the mill were with the parol license of J. S. The cutting, flume, and grist-mill pond, were all on the west half, and the water was returned from the mill to the river below the east half:—Held, that, apart from any question of implied grant, by necessity, as the Act referred to included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purposes of the saw-mill and factory, to the same extent as before the conveyance. But held, that no right or easement passed in respect of the grist-mill; and, also, that the parol license was revocable; but that plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S., and those claiming under him, from interfering with the right claimed respecting the grist-mill. *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63.

Entry—*Sheriff—Sale of Goods Seized.*]—Where the sheriff had seized goods under a fi. fa. and allowed them to remain on defendant's premises on the understanding that they should be sold there on a future day if the money were not paid before, the license thus given to enter on the premises and sell the goods accordingly, cannot be revoked by defendant. *McGillis* v. *McMartin*, 1 U. C. R. 145.

——— *Ploughing—Revocation by Entry of Owner.*]—See *Stubbs* v. *Broddy*, 27 C. P. 234.

Erection of Building — *Acting on License.*]—Declaration: first count, trespass for breaking and entering plaintiff's close, breaking down plaintiff's wall, carrying away part of the material, and building a house against the wall. Second count, for obstructing an ancient light of the plaintiff's. Plea, leave and license. To which, so far as it applied to the second count, the plaintiff replied a revocation of the leave before any of the grievances were committed. It appeared that the plaintiff and defendant owned adjoining shops in a city, and that defendant, wishing to improve his own premises, obtained the plaintiff's leave to build on the partition wall owned by plaintiff. It was understood that defendant should pay for this, but the price was never fixed. Defendant finished his building without any objection being made, but afterwards they disagreed as to the sum to be paid, and the plaintiff brought this action, having first served a notice revoking the license and requiring defendant to remove the building:—Held, as to the first count, that the plaintiff must fail, for the gravamen of the charge was the breaking and entering the close, the rest being merely aggravation, and no trespass was shewn to be done after the leave was revoked. Held, also, as to the second count, that the evidence proved the plea of leave and license, and that the replication setting up a revocation before the commission of any of the grievances was not proved. Semble, that the license having been acted upon, and expense incurred by the defendant, it could not be revoked. *Morgan* v. *Lailey*, 33 U. C. R. 369.

Erection of Dam—*Parol License—Personal License—Assignment.*]—G., owning lot 24, obtained a parol license from the plaintiff, owner of lot 25, to erect a dam across a stream running from lot 25 through lot 24, and thereupon erected a dam; and, in further consequence of such license, built a mill on said lot, to be worked by means of said dam. Defendant purchased the lot, mill, &c., from G., and in order to work the mill, upheld said dam, and thereby overflowed plaintiff's land. Plaintiff sued, and defendant pleaded the license to G., and that defendant having purchased the lot, &c., from G., for the purpose, &c., upheld said dam, &c.:—Held, on demurrer, plea bad: 1. Because the license being coupled with the grant of an easement, the grant not being by deed, was void, and the license consequently revocable. 2. Because it was a license, for all that appears, given to G. personally, and being revocable was not assignable. 3. Because the right to overflow plaintiff's land was claimed as incident to the possession of the mill on lot 24; but the plea did not shew that the right formed such an incident, either by the manner of its creation or otherwise. *Beaver* v. *Reed*, 9 U. C. R. 152.

Erection of Shop Fixtures—*Agreement not under Seal—Consideration—Estoppel.*]—The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such ac-

ceptance, an independent and collateral parol agreement, separate and distinct from and not part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto; but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it. *McKenzie* v. *McGlaughlin*, 8 O. R. 111.

Mining Rights — *Instrument not under Seal—Revocation.*]—The owner of lands supposed to contain valuable ores authorized two persons by an instrument in writing (intended to be, but by mistake not sealed), to dig for minerals in the land, they agreeing to give to the owner of the soil one-twentieth part of all the minerals they might find or take:—Held, 1. that the interest intended to be conveyed was an incorporeal freehold or tenement, and could only be created by deed; 2. that if it was intended to operate as a license only, it would be revocable, and the court would not make a decree to establish a right or interest which might be immediately revoked. *Ross* v. *Fox*, 13 Gr. 683.

Occupation of House — *Termination—Notice—Time for.*]—The plaintiff owned lot 11 and defendant lot 10 adjoining. There was a house situate partly on each lot, and it appeared that the plaintiff and one A., under whom defendant claimed, had mutually agreed that A. should occupy part of the house, which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to defendant:—Held, that defendant must be regarded either as tenant at will to or as occupying under a license from the plaintiff, and could not be ejected without notice or a revocation of the license; and that in either case he would be entitled to a reasonable time to remove what he might have in the house. *Keys* v. *Guy*, 36 U. C. R. 356.

Occupation of Land — *Parol License—Revocation by Sale — Trespass—Possession.*]—The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867 according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved the fence to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and new line, and in 1868-69 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff in 1872 moved the fence to the new line, and the defendant immediately replaced it, for which the plaintiff brought trespass:—Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole* v. *Brunt*, 35 U. C. R. 103.

Removal of Timber—*Parol Revocation—License under Seal — Obstruction.*]—Debt on bond conditioned that the defendant, his heirs and assigns, should permit the plaintiff to cut down and carry away all the fire-wood from certain lands without let, suit, hindrance, &c. Plea, that defendant always permitted, &c. Replication, that defendant conveyed the land in fee to a stranger, who would not permit plaintiff to cut the wood, &c.:—Held, had on demurrer, as shewing no breach, the bond being a license under seal binding on defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no actual obstruction. *Fowcke* v. *Fothergill*, 4 O. S. 185.

——— *Written Agreement—Revocation of Implied License.*] — Defendant, in writing, agreed with the plaintiff to take a certain saw mill according to the terms of a certain lease, and with a provision that defendant was to take the pine off the land known as "the Sammis lot," first, as the said plaintiff was bound to take off the same. The plaintiff subsequently purchased the fee simple of Sammis's land:—Held, that the plaintiff was entitled to revoke any license implied by such agreement, and to maintain trespass against defendant for removing, from the lot formerly owned by Sammis, pine saw logs, after he had received notice forbidding such removal. *Campbell* v. *Howland*, 7 C. P. 358.

Way.]—See *Duncan* v. *Rogers*, 15 O. R. 699, 16 A. R. 3.

——— *Deed—Acting on—Railway.*]—See *Nelson* v. *Cook*, 12 U. C. R. 22, *post* RAILWAY.

——— *User of — Revocation at Law — Equitable Right.*]—A. being entitled at his own expense to make a road for himself across B.'s farm at the most convenient point, it was agreed between them that A. should use B.'s road on certain terms:—Held, that this agreement was a mere license, not coupled with any interest, or incident, or auxiliary to a sale or grant, and was therefore revocable; and being revoked at law, no equity arose to interfere with A.'s legal right, on the ground of encouragement on the part of the one or forbearance and irreparable inconvenience on the part of the other. *Fielder* v. *Bannister*, 8 Gr. 257.

II. OTHER CASES.

Assault — *Challenge to Fight.*]—Assault and battery. Plea, leave and license. Defendant contended that because the plaintiff

had previously challenged him to fight, the plea was sustained, and the plaintiff should have replied an excess or unfair advantage if he relied thereon:—Held (admitting the general principle), that it did not apply, for a challenge to fight at once could not primâ facie authorize the attack by defendant after some time with a club. *St. John* v. *Parr*, 7 C. P. 142.

Covenant — *Breach.*] — In an action of covenant, a plea of leave and license by parol to commit the breach, is bad. *Gwynne* v. *Brock*, H. T. 5 Vict.

A plea of leave and license is no answer to an action of covenant. *McDonald* v. *Great Western R. W. Co.*, 21 U. C. R. 223.

——— *Breach—Absence of Apprentice.*]—The plaintiff, in covenant against the father, alleged as a breach that the apprentice unlawfully absented himself on a certain day, and from thence hitherto remained and continued absent from the service of the plaintiff. Plea, as to the absenting, that the apprentice did depart and absent himself by plaintiff's leave and license:—Held, sufficient, without pleading a license to continue absent, as the plea only professed to answer the absenting. Held, also, that the plea need not shew that the license was by deed or in writing. *Black* v. *Stevenson*, 3 U. C. R. 160.

Entry — *Completion of Work.*] — The plaintiff declared in assumpsit on an agreement with the defendant to make 100,000 bricks, averring that he had nearly 68,000 of them, and prepared in part 30,000 more, but that defendant would not allow him to complete them, but absolutely discharged, hindered, and prevented him from doing so. Defendant pleaded, that the plaintiff entered upon a close of the defendant to complete the work there, and that defendant prevented him, as he lawfully might, which was the same hindering and preventing. The plaintiff replied leave and license:—Held, replication good. *Tolcman* v. *Crew*, 2 U. C. R. 186.

Fishing — *Exclusive Right—Minister of Marine and Fisheries.*]—See *The Queen* v. *Robertson*, 6 S. C. R. 52.

Sale of Chattels—*Husband and Wife—Evidence of Assent of Wife.*] — See *Halfpenny* v. *Pennock*, 33 U. C. R. 229.

Statutory License—*Corporation—Power to Hold Lands.*]—Semble, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *McDiarmid* v. *Hughes*, 16 O. R. 570.

Use of Chattels — *Revocation.*]—A. demised to B. for a term, with a clause of forfeiture in case the term should be taken in execution, and at the same time delivered certain chattels into B.'s possession upon the terms contained in a memorandum attached to the lease, signed by A., stating that he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family. On an interpleader between A. and C., who had seized the chattels under an execution against B.:—Held, that the memorandum formed no part of the lease, but operated only as a license to use, which was revocable. *Muckleston* v. *Smith*, 17 C. P. 401.

See CROWN LANDS — FERRY—INTOXICATING LIQUORS, IV. 3—LANDLORD AND TENANT —MEDICINE AND SURGERY, I. — MUNICIPAL CORPORATIONS, XXIX.—PATENT FOR INVENTION, VI.—WATER AND WATERCOURSES, XVI.

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I. GENERALLY.

Following Property or Money.] — If the court can trace money or property, however obtained from the true owner, into any other shape, it will secure it for the true owner by holding it to be his in equity or by giving him a lien on it. *Merchants Express Co.* v. *Morton*, 15 Gr. 274.

II. ON CHATTELS.

Brickmaker — *Lien on Bricks Made — Execution Creditor—Priorities.*]—A brickmaker who makes bricks for another person

in a brickyard belonging to that person, and has possession of the brickyard while engaged in making the bricks, is entitled to a lien upon them as against an execution creditor or chattel mortgagee of the owner. Judgment in 25 O. R. 194 affirmed. *Roberts* v. *Bank of Toronto*, 21 A. R. 629.

Builder — *Work—Lien on House—Withholding Key.*]—A builder has no lien for payment upon a house erected by him on the land of his employer. Where A. contracted to build a house for B. and to deliver possession thereof when finished, upon which he was to be paid:—Held, that no action would lie to recover the price until an absolute and unreserved delivery of the house had taken place; and that he had not a right to withhold the key of the house until he received payment, though B. had not acquired any title to the land on which it was built. *Johnson* v. *Crew*, 5 O. S. 209.

Crown — *Lien for Customs Duties—Preference of Crown over Subject.*]—See *Clarkson* v. *Attorney-General of Canada*, 15 O. R. 632, 16 A. R. 202.

Factor—*Goods Consigned.*]—A factor has no lien on goods consigned to him until they actually come into his possession. *Clark* v. *Great Western R. W. Co.*, 8 C. P. 191.

Farrier — *Services—Lien on Horse.*]—Quære, as to a farrier's right of lien on a horse for services rendered. *Nicolls* v. *Duncan*, 11 U. C. R. 332.

Landlord — *Lien for Rent.*]—See LANDLORD AND TENANT.

Livery-stable Keeper — *Stabling and Feed—Lien on Horses.*]—See *Dixon* v. *Dalby*, 11 U. C. R. 79.

Lumberman — *Lien for Freight and Charges — Execution.*] — A lumberman, agreeing to carry lumber for hire at the request of the owner, will be entitled to a lien on the lumber carried by him for his freight and charges, which will be defeated, however, by procuring it to be taken in execution at his own suit. *Re Coombe, Cockburn, and Campbell*, 24 Gr. 519.

Packer—*Work—Lien on Goods Packed.*]—A packer has a lien upon the goods packed by him for the materials used and work done in packing. The plaintiff employed one B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them:—Held, that defendants could legally retain the goods for these charges as well as for their freight. *Hayward* v. *Grand Trunk R. W. Co.*, 32 U. C. R. 392.

Partner—*Lien on Furniture in Hotel.*]—See *Crossman* v. *Shears*, 3 A. R. 583.

Pleading—*Detinue.*]—Semble, a lien may be specially pleaded in an action of detinue. *Riorden* v. *Brown*, 1 C. P. 199.

Where the goods have been replevied under 14 & 15 Vict. c. 64, and the declaration is for detaining merely, the pleadings should be as in detinue. In such an action a lien cannot be given in evidence under a plea denying the plaintiff's property. *Stephens* v. *Cousins*, 16 U. C. R. 329.

Pledgee — *Advance on Work — Article Made.*]—One Robins had agreed to make for Ruthven, the execution debtor, an iron fence, for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking Ruthven's note; and the fence, which was then in Robins's yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written assignment. When the note fell due, Ruthven authorized G. to sell the fence, but it remained until it was seized under an execution against Ruthven:—Held, that the execution could not prevail against G.'s claim, for Ruthven never had been entitled to the fence as his own. *Gurney* v. *James*, 19 U. C. R. 156.

Sheriff—*Costs—Lien on Goods Seized.*]—The sheriff has no lien or claim on the goods seized for his fees. *In re Ross*, 3 P. R. 394.

Trainer of Animal—*Continuing Possession — Discontinuance — Resumption.*]—A continuing right of possession of the animal must accompany the services rendered by a trainer for which he claims a lien on a horse which he has trained in order to render such lien valid. A trainer who had delivered up possession of a horse which he had been training, to the administratrix of the owner, from whom he had received it, and who afterwards resumed possession under a new agreement with the administratrix to take care of the horse, was held to have lost any lien he might have had. *Reilly* v. *McIlmurray*, 29 O. R. 167.

Warehouseman — *Agreement to Replace Goods Removed.*]—Lien of persons who had granted warehouse receipts for coal, under a special agreement that any coal taken out by the receipt-holders should be replaced. See *Re Coleman*, 36 U. C. R. 559.

Wharfinger — *Wharfage and Fuel—Lien on Fittings of Vessel.*]—The plaintiffs' vessel, while under charter to a third party, was moored to defendant's wharf, and some fittings stored on defendant's premises, who afterwards claimed them as against the plaintiffs for wharfage of the vessel, and wood furnished during the currency of the charter-party. The jury having found for defendant, against the weight of evidence, a new trial was ordered. *Provincial Insurance Co.* v. *Maitland*, 7 C. P. 426.

——— *Wharfage and Storage.*] — See *Boyd* v. *Maitland*, 16 U. C. R. 311.

It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading and unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods and protection thereof from the weather; and as such wharfinger he is entitled to a lien on goods unloaded at his wharf, for money due to him for wharfage. Renald v. Walker, 8 C. P. 37, and Llado v. Morgan, 23 C. P. 517, as to the right of lien, referred to, observed upon, and, though doubted, followed. *Sills* v. *Bickford*, 26 Gr. 512.

III. On Land.

Builder's Privilege—*Expert—Duties of—Procès-verbal—Valuation.*]—It is not necessary for an expert, when appointed under art. 2013, C. C., to secure a builder's privilege on an immovable, to give notice of his proceedings to the proprietor's creditors, such proceedings not being regulated by arts. 322 et seq., C. C. P. 2. There was evidence in this case to support the finding of fact of the courts below, that the second procès-verbal or official statement, required to be made by the expert under art. 2013, had been made within six months of the completion of the builder's works. 3. It was sufficient for the expert to state in his second procès-verbal, made within the six months, that the works described had been executed, and that such works had given to the immovable the additional value fixed by him. The words "exécutés suivant les règles de l'art" are not strictissimi juris. 4. If an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation. *Dufresne* v. *Préfontaine, Vallée* v. *Préfontaine*, 21 S. C. R. 607.

——— *Quebec Law — Time—Hypothecary Privilege — Notice — Registration.*] — See *Banque d'Hochelaga* v. *Stevenson*, [1900] A. C. 60.

Deed—*Construction—Interest in Land.*]—In an instrument under seal, the words "and for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land," &c., pass no interest; they only shew an intention to create a charge or lien. *Doe d. Roes* v. *Pope*, 8 U. C. R. 574.

Equitable Lien—*Parol—Effect on Registered Title.*]—If "an equitable lien, charge, or interest" be created by deed or by any writing capable of being registered, actual notice of such deed or interest will, under s. 97 of the Registry Act, 31 Vict. c. 20 (O.), prevent the effect of priority of registration. But as to equitable liens, &c., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud, the stringent observance of the registry law is the wisest rule to adopt. *Peterkin* v. *McFarlane*, 9 A. R. 429. See *Rose* v. *Peterkin*, 13 S. C. R. 677.

——— *Written Orders — Mortgagor's Interest in Lands—Registry Laws.*]—Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee, who held the title under a deed absolute in form, brought into the master's office with his account certain orders, signed by the mortgagor, directing him to pay the parties named in them any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered:—Held, (1) that such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lien-holders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442.

Execution Creditors—*Mortgage Sale—Surplus — Lien Notes — Account.*]—A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them until 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable:—Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest. *Glover* v. *Southern Loan and Saving Co.*, 31 O. R. 552.

Foreign Law—*Lien on Land—Effect of on Contracts.*]—The plaintiffs were a company existing in and chartered by the State of New York, for the purpose of carrying on mutual insurance, in the county of Genesee. The charter provided that the company should have a lien by way of mortgage on the property insured, and upon the right, title, and interest of the assured to the land on which said property stood:—Held, that a foreign legislature could make no law creating a lien on real estate in Canada; and consequently that any contract founded on such a consideration, was void ab initio. *Genesee Mutual Insurance Co.* v. *Westman*, 8 U. C. R. 487.

Sale of Land—*Deposit—Purchase Money—Costs—Lien for.*]—The costs of a suit at law to recover back a deposit paid on account of purchase money, do not form any lien upon the land, although the deposit itself does constitute such a lien. *Burns* v. *Griffin*, 24 Gr. 451.

——— *Attorney — Purchase by—Personal Liability for Charge — Lien on Proceeds of Sale.*]—See *Armstrong* v. *Lye*, 27 O. R. 511, 24 A. R. 543, 27 A. R. 287.

Taxes—*Invalid Tax Sale—Lien for Purchase Money.*] — Under the Act for Quieting Titles, where a contestant sets up a tax sale, which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper percentage to which the owner would have been liable if no sale had taken place. *In re Cameron*, 14 Gr. 612.

The plaintiff's right to a lien on the land under 33 Vict. c. 23 (O.), and the mode of enforcing it, if the tax title had been invalid, remarked upon. *Jones* v. *Cowden*, 34 U. C. R. 345.

——— *Money Paid for — Trust Funds — Misuse of — Lien on Land Assessed.*]—M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered, he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes; M. afterwards died insolvent, and indebted to both estates:—Held, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Gr. 35, 16 Gr. 193.

——— *Mortgage — Priorities — Statutes.*]—The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the Crown:—Held, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed. *O'Brien* v. *Cogswell*, 17 S. C. R. 420.

See Discher v. *Canada Permanent L. and S. Co.*, 18 O. R. 273; *Sanderson* v. *McKercher*, 13 A. R. 561.

Timber Limits.]—See *Grant* v. *Banque Nationale*, 9 O. R. 411.

Vendor's Lien.]—See VENDOR AND PURCHASER.

IV. ON OTHER PROPERTY.

Assets of Company—*Bond—Construction.*]—An incorporated company having executed a bond which, though it contained no direct words of charge, was evidently intended to give a lien on the property of the company:—Held, that the lien was sufficiently created. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Gr. 27.

Bills of Exchange—*Trover—Tender.*]—Where in trover for bills of exchange, the defendant pleaded a lien by agreement, and the plaintiff replied a tender, without averring that the sum tendered was sufficient, the replication was:—Held, bad, on general demurrer. *Conger* v. *Hutchinson*, 6 O. S. 644.

Estate of Deceased Person—*Lien of Secured Creditor—R. S. O. 1877 c. 107, s. 39.*]—See *Chamberlen* v. *Clark*, 1 O. R. 135, 9 A. R. 273.

Municipal Debentures — *Compensation of Trustee.*]—A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway is a trustee within s. 38 of R. S. O. 1887 c. 110, and entitled to compensation, and is also entitled to a lien on the debentures until that compensation is paid. Judgment in 28 O. R. 106 (sub nom. In re Ermatinger) affirmed, but amount of compensation reduced. *In re Tilsonburg, Lake Erie, and Pacific R. W. Co.*, 24 A. R. 378.

Negotiable Security — *Notice.*]—Held, that the settlement of a claim under a negotiable security without the security being delivered up subjected the defendant to such charges as were a specific lien thereon, of which they had notice, or semble, even without notice. *Hall* v. *Griffith*, 5 O. R. 478.

Partnership Assets.]—See *Foster* v. *Russell*, 12 O. R. 136.

Three persons, occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a certain sum of money in liquidation of creditors' claims. They did pay this sum, but out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator:—Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that, no actual notice to them or to the company being shewn, the bank had no lien. *In re Herr Piano Co.*, 17 A. R. 333.

Partnership Profits.]—A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by the partner so retiring, out of the one-fourth of the profits to be derived from the business:—Held, that the retiring partner had a lien on such fourth part of the profits, and a corresponding portion of the capital stock and assets of the partnership, and was entitled to an account of the partnership dealings. *McGregor* v. *Anderson*, 6 Gr. 354.

Railway — *Enforcement of Lien.*] — A mortgagee or judgment creditor of a railway company is not entitled to enforce payment of his demand by sale or foreclosure of the railway; he is only entitled to have a manager or receiver of the undertaking appointed; and quære, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money. *Galt* v. *Erie and Niagara R. W. Co.*, 14 Gr. 499.

Shares—*Lien of Company for Debt.*]—Held, that the Bond Head Harbour Company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore, on that ground, refuse to register the assignment of the stock by S. to the plaintiffs. *McMurrich* v. *Bond Head Harbour Co.*, 9 U. C. R. 333.

Timber — *Severance.*] — Where plaintiff, being the owner of timbered land, orally

agreed to sell growing timber to defendant, and there was a dispute as to price, it was held that the property in the trees passed as soon as severed from the freehold; but that the plaintiff had a lien upon them for the price, and therefore that defendant, without discharging the lien, had no right to remove the timber. *McCarthy* v. *Oliver*, 10 L. J. 130.

But see *S. C.*, 14 C. P. 290.

Warehouse Receipts.]—The Dominion Act 34 Vict. c. 5, s. 47, enables a person making advances to a manufacturer, to stipulate for obtaining a lien on warehouse receipts to be subsequently granted to the manufacturer. *Suter* v. *Merchants Bank*, 24 Gr. 395.

V. UNDER MECHANICS' LIENS ACTS.

[*See* R. S. O. 1897 c. 153.]

1. *Generally.*

Extent of Lien.]—There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution, of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien. *King* v. *Alford*, 9 O. R. 643.

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2. *Claim of Lien.*

Affidavit Verifying Claim—*By Whom Made* — *Assignee of Claim.*] — See *Grant* v. *Dunn*, 3 O. R. 376.

——— *Where Made.*] — The land upon which the lien was claimed was in the county of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered was made in the county of Bruce, and before a commissioner for taking affidavits in that county:—Held, that the affidavit satisfied s. 16, s.-s. 2, of the Act. *Truax* v. *Dixon*, 17 O. R. 366.

Form — *Address of Lien-holder.*] — The name of the town and county in which a lien-holder resides is a sufficient address under s. 11 of 56 Vict. c. 24 (O.) *Dufton* v. *Horning*, 26 O. R. 252.

——— *Name and Residence—Demurrer—Costs.*]—The omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished, provided for by s. 16 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, is fatal to the lien. The objection can be taken by a contractor as against a sub-contractor; and, as in this action it might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off against the costs of a judgment on the pleadings for an admitted debt. *Wallis* v. *Skain*, 21 O. R. 532.

Joinder of Claims—*Separate Buildings — Separate Contracts—Affidavit—Exhibit — Assignment of Claim — Re-assignment.*]—A mechanic, having erected two separate buildings, under two distinct contracts, for the owner of the land on which they were built, cannot register a claim for one gross sum in respect of the two; at all events he cannot do so unless it appears on the face of the instrument how much was claimed in respect of each contract. In registering a claim under the Mechanics' Lien Act, the claimant made an affidavit verifying it, and referred to a statement of claim as marked "A.," but no such mark was upon it:—Held, that this did not invalidate the registry. A mechanic, having a claim for the erection of buildings under a contract, assigned his claim to the plaintiff to secure money due to him, who, for the purpose of enabling the mechanic to register under the Act, re-assigned to him:—Held, that such re-assignment enabled the mechanic to make the claim for registry, notwithstanding the equitable right of the plaintiff. *Currier* v. *Friedrick*, 22 G. R. 243.

——— *Separate Buildings—Separate Owners.*]—Four mechanics worked with a contractor for wages upon two buildings, owned by different persons, and each registered a lien for his services on both the buildings, against the contractor and against both the properties on which they worked and against both the owners, each lien being for the amount of the whole wages claimed in respect of services as to both properties. All four joined in one action against the contractor and the two owners to enforce their liens. Upon a summary application by the contractor, the mechanics' liens and writ of summons were set aside. *Oldfield* v. *Barbour*, 12 P. R. 554

Notice to Owner — *Sufficiency of—Letter.*]—See *Craig* v. *Cromwell*, 32 O. R. 27, 27 A. R. 585.

Omission of Name of Purchaser as "Owner."]—See *Makins* v. *Robinson*, 6 O. R. 1.

Partnership — *Dissolution—"Claimant" —"Person."*]—A claim of lien under the Mechanics' Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved, and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements. Section 16 of R. S. O. 1887 c. 126, under which the lien was registered, speaks of the "claimant" of the lien, and s. 19 of the "person entitled to the lien." The Interpretation Act, R. S. O. 1887 c. 1, s. 8 (13), shews what the word "person" shall include, and does not mention a "firm" or "partnership:"—Held, that the lien attached on the land, and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien. *Bickerton* v. *Dakin*, 20 O. R. 192, 695.

Time—*Statement as to—Necessity for.*]—See *Roberts* v. *McDonald*, 15 O. R. 80; *Truax* v. *Dixon*, 17 O. R. 366.

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3. *Costs.*

Quantum of—*Appeal.*]—Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien

Act, R. S. O. 1897 c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action. Semble, that the costs of such an appeal are within the scope of s. 45. *Gearing* v. *Robinson*, 19 P. R. 192.

Scale of—*Aggregate Amount of Liens.*]—Where the plaintiff's claim in an action to enforce a mechanic's lien was only $142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over $200:—Held, that the action was properly brought in the high court of justice, and the costs should be on the scale of that court, and it made no difference that the other lienholder failed to substantiate his claim. *Hall* v. *Pilz*, 11 P. R. 449.

——— *Amount Recovered — Investigation of Accounts—County Court Costs—Set-off—Amendment.*]—The plaintiffs, sub-contractors, in an action brought in the high court to enforce a mechanic's lien, claimed against the contractor $245.29, and recovered $284.54. They claimed a lien on the land for the amount due them, but upon the investigation of accounts to the extent of upwards of $1,700 between the contractor and the landowner, it was found that the latter owed only $63.79, and the plaintiffs' lien was limited to this amount:—Held, that the contractor could not have sued the landowner in the division court to recover the balance of $63.79, but must have proceeded in the county court, and the plaintiffs, suing upon the same claim, were therefore entitled to county court costs; and, as the plaintiffs' claim was also beyond the jurisdiction of the division court, upon any construction of the meaning of s. 28 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, the plaintiffs could not have brought their action in the division court, and were therefore entitled to tax their costs upon the county court scale. Held, that, as the plaintiffs could not have hoped to establish a case which would have entitled them to high court costs, the defendant landowner should be allowed a set-off of the excess of his costs incurred in the high court over what he would have incurred in the county court; but, as the action was tried without a jury, and con. rule 1172 did not apply, the taxing officer had no power to allow this set-off without the direction of the court; and the judgment of the court was amended so as to meet the case. *Truax* v. *Dixon*, 13 P. R. 279.

——— *Owner — Lien-holders—Charge.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act, it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the master's office. The amount due from the owner to the contractor should be paid into court by the former, less his costs, which should be taxed as to a stake-holder watching the case. The costs of lien-holders establishing their liens should be paid as a first charge on the fund. The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Security for Costs of Appeal—*Court of Appeal.*]—Rule 826 is applicable to an appeal under s. 39 (2) of the Mechanics' Lien Act, R. S. O. 1897 c. 153, by the respondent in the court below from the order of a divisional court reversing the judgment upon the trial of a mechanic's lien action, where the amount in question is more than $100, and not more than $200; and therefore security for the costs of such an appeal must be given, unless otherwise ordered. *Sherlock* v. *Powell*, 18 P. R. 312.

Set-off — *Owner—Payment into Court—Subsequent Order for Costs.*]—In a mechanic's lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lien-holders. Payment of the former sum into court was ordered and made, the amount, however, being insufficient to pay the claims of lien-holders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into court:—Held, that by the payment into court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, 26 O. R. 189.

See Jackson v. *Hammond*, 8 P. R. 157; *Wallis* v. *Skain*, 21 O. R. 532; *Hovenden* v. *Ellison*, 24 Gr. 448.

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4. *Material Men.*

Materials Furnished to Mechanic.]—The Mechanics' Lien Act of 1873, 36 Vict. c. 27 (O.), has not the effect of giving a lien to persons who furnish materials to the mechanic for the purpose of executing the contract entered into by him with the owner of the land. *Crone* v. *Struthers*, 22 Gr. 247.

Non-incorporation of Materials — *Conversion — Damages.*] — Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but were not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the mortgagee sold them to the mill-owner:—Held, that a lien attached on such materials, notwithstanding the absence of incorporation in the buildings, but there having been a conversion, no relief could be granted, for there is nothing in the Act enabling the court to assess damages, which could be made applicable to lien-holders. *Larkin* v. *Larkin*, 32 O. R. 80.

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5. *Mortgaged Properties.*

(a) *Priorities.*

Increased Value.] — R. S. O. 1877 c. 120, s. 7, gives a contractor a lien for work done and materials furnished upon land subject to a mortgage, in priority to the mortgagee, on the amount by which the selling value of the property has been increased by

the work and the materials of the party furnishing the same; but a bill filed for the purpose of enforcing such a claim, must state distinctly the dates of the creation of the incumbrances. *Douglas* v. *Chamberlain*, 25 Gr. 288.

Where buildings or other improvements are placed upon land subject to a mortgage, by reason of which the value of the land is increased, the contractor is only entitled to a lien on the property to the extent of such increase in the value of the land, irrespective of the buildings or other improvements, or of the amount expended in their construction. Where property was sold under a decree of the court for $1,000, and the master certified the value without the improvements to be $600, a contractor who held a lien under the Act was restricted to his proportionate share (with other lien-holders) of the $400 increase in value, and that although it was shewn that the contract price for the buildings had been $1,950. *Broughton* v. *Smallpiece*, 25 Gr. 290. *See S. C.*, 7 P. R. 270.

Each lien under the Mechanics' Lien Act stands on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of the work and materials. *Bank of Montreal* v. *Haffner*, 3 O. R. 183.

Where there is a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, the mortgage retains its priority only to the extent of the value of the security before the work began, in respect of which the lien attaches, and the lien has priority only to the extent of the additional value given by the subsequent improvements. And where the owner of a mill subject to a mortgage, intending to have certain improvements effected, which, although as regards the work of a lien-holder fully carried out, were otherwise only partly complete, and left the mill in an unfinished state; —Held, that the lien-holder was not entitled to priority for the work done, it not clearly appearing that the selling value of the property had been increased thereby. *Kennedy* v. *Haddow*, 19 O. R. 240.

"Prior mortgage," in s. 5, s.-s. 3, of the Mechanics' Lien Act, means one existing in fact before the lien arises, though not necessarily prior in point of registration. Under a mortgage, advances were to be made from time to time as buildings progressed. Part of the work was done, and the mortgage was registered, the buildings completed, and the further advances made, before a lien was registered, and without actual notice of it:—Held, that the mortgage had priority over the lien both as to prior and subsequent work, and as to the latter each further advance under the mortgage attracted to itself the advantage of the Registry Act so as to gain priority over the concurrent unregistered lien. The increased value in such a case is not a benefit added to the pre-existing mortgage, but the periodical increase of value calls forth the periodical payments. *Cook* v. *Belshaw*, 23 O. R. 545.

Under the Act to Simplify the Procedure for Enforcing Mechanics' Liens, 53 Vict. c. 37 (O.), the remedy of a lien-holder as against a mortgagee is confined to the increased value, as provided by s. 5, s.-s. 3, of R. S. O. 1877 c. 126, and he cannot question the priority of the mortgage. *Dufton* v. *Horning*, 26 O. R. 252.

Where on a reference in a mechanic's lien proceeding, it is found as between a lien-holder and a prior mortgagee, that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lien-holder, who under s.-s. 3 of s. 5 of the Mechanics' Lien Act, is declared entitled to rank on such increased value in priority to the mortgage, and pending the proceedings the premises are destroyed by fire, the claim of the lien-holder is at end so far as the interests of the mortgagee are affected by it. Semble, the amount of the increased value to which the lien-holder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold. *Patrick* v. *Walbourne*, 27 O. R. 221.

See Bank of Montreal v. *Haffner*, 29 Gr. 319, 3 O. R. 183, 10 A. R. 592 (*post* 6).

Registration.]—The owner of land created incumbrances thereon for $20,000, to be advanced from time to time as certain buildings, then in course of erection thereon, were proceeded with:—Held, that a mechanic who had performed work upon the buildings and supplied material therefor, was not entitled to any lien in respect thereof in priority to the registered mortgage, although part of the mortgage money was advanced to the mortgagor after the execution of the work in respect of which such lien was claimed, but without notice of such claim. *Richards* v. *Chamberlain*, 25 Gr. 402.

In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the same during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but registered prior to such lien. *Hynes* v. *Smith*, 27 Gr. 150, 8 P. R. 73.

In an action to enforce a mechanic's lien under R. S. O. 1877 c. 120, a reference in the usual form was directed to the local master at Chatham to inquire whether any person besides the plaintiffs, other than prior mortgagees, had any incumbrance, &c., upon the premises in question. In proceeding under this reference, the master made a number of persons, including the appellants, parties in his office, and caused them to be served with notice "T," which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order, upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action. It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiff's lien:—Held, that the appellants, claim was prior to that of the plaintiffs, and that they were not proper parties to the action, being excepted by the terms of the

judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work. Richards v. Chamberlain, 25 Gr. 402, and Hynes v. Smith, 27 Gr. 150, referred to. *McVean* v. *Tiffin*, 13 A. R. 1.

The plaintiff worked on a barn belonging to the defendant up to 9th August, 1887, and did some further work on 25th October following. The defendant mortgaged his land to A. S., by mortgage dated 21st October, and registered 24th October. Plaintiff registered his lien 25th October, and having brought his action against defendant only, obtained the usual judgment with a reference to the master, who made A. S. a party to the suit in his office, and A. S. thereupon petitioned to have the master's order set aside:—Held, following McVean v. Tiffin, 13 A. R. 1, that the mortgage was not a subsequent but a prior mortgage as regarded the plaintiff's lien, and that A. S. should not have been added as a party. *Reinhart* v. *Shutt*, 15 O. R. 325.

See Graham v. *Williams*, 9 O. R. 458; *McNamara* v. *Kirkland*, 18 A. R. 271; *Cook* v. *Belshaw*, 23 O. R. 545; *Re Wallis and Vokes*, 18 O. R. 8; *Wanty* v. *Robins*, 15 O. R. 474.

(b) *Other Cases.*

Account—*Action against Mortgagee—Jurisdiction of Inferior Courts—Summary Application.*]—Section 23 of R. S. O. 1887 c. 126, which allows proceedings to recover the amount of a mechanic's lien to be taken under certain circumstances in county courts and division courts, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those courts cannot entertain an *action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

Mortgage Action — *Parties — Master's Office—Lien-holders—Costs.*] — See *Jackson* v. *Hammond*, 8 P. R. 157 (*post* 7).

See Finn v. *Miller*, *Rathbone* v. *Miller*, 26 C. L. J. 55 (*post* 10).

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6. *Owner.*

Lessor—*Repairs.*]—The lessor, in a lease which provides that certain repairs shall be done by the lessee and the cost deducted from the rent, is not, as regards persons employed to do such repairs, an "owner" within the meaning of s.-s. 3 of s. 2 of R. S. O. 1887 c. 126, the Mechanics' Lien Act. *Garing* v. *Hunt*, 27 O. R. 149.

Mortgagee—*Time.*]—The plaintiffs instituted proceedings to enforce a mechanic's lien assigned to them, which had been duly registered, and a suit thereon prosecuted. The plaintiffs claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred, on the ground that he was an owner of the land, within the meaning of R. S. O. 1877 c. 120, s. 2, and that proceedings had not been taken against him within the time specified by the Act:—Held, that he was not such an owner, not being a person upon whose request or upon the credit of whom, &c., the work had been done. *Bank of Montreal* v. *Haffner*, 29 Gr. 319. See *S. C.*, 3 O. R. 183, 10 A. R. 592; affirmed by the supreme court, *Cassels' Dig.* 526.

Person Interested — *Direct Dealing with Contractor.*]—A person is not an "owner," within the meaning of s.-s. 3 of s. 2 of the Mechanics' Lien Act, R. S. O. 1897 c. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of or consent to the work being done or the materials being supplied, is not enough; there must be a request, either express or by implication from circumstances, to give rise to the lien. *Gearing* v. *Robinson*, 27 A. R. 364.

Purchaser — *Contract of Purchase — Statute of Frauds—Registry Laws.*]—An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties, although not binding under the Statute of Frauds if pleaded, constitutes the person agreeing to buy an "owner" within s.-s. 3 of s. 2 of the Mechanics' Lien Act. Semble, if not an owner under such an agreement, then, by virtue of the Registry Act, no unregistered lien of which he had not notice prior to the registry of the deed to him could prevail against him. *Reggin* v. *Manes*, 22 O. R. 443.

——— *Contract of Purchase — Unpaid Vendor—Privity and Consent.*]—G. supplied bricks to W., who had leased certain land from H. with an option of purchase. The contract for the supply of the bricks was made between G. and W., and on W.'s credit, although H. was aware that they were being supplied, and that buildings were being erected on the land. These buildings were being erected by W. under an oral agreement to that effect between W. and H. subsequent to the lease, and by which agreement H. had agreed to lend part of the money required for the buildings to W., advancing the same as the work progressed, on the security of the property. W. did not exercise his right of purchase under the lease, and G. filed his lien against both W. and H., and brought this action to establish the same against the interest of both of them:—Held, affirming the decision in 8 O. R. 478, that the interest of H. in the property was not charged. It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. 1877 c. 120, s. 2, s.-s. 3. The privity and consent must be in pursuance of an agreement. H. could in no sense be looked upon as a prior mortgagee, and it is only against such that R. S. O. 1877 c. 120, s. 7, gives priority to the lien-holder. *Graham* v. *Williams*, 9 O. R. 458.

An oral agreement, without any condition as to forfeiture on non-payment of the purchase money, was entered into for the purchase of certain lands, it being understood that the purchaser would proceed to erect buildings thereon, which he accordingly did, procuring materials and work from the plaintiff and others, and then became insolvent without having paid anything to the vendor: —Held, that there having been sufficient acts of part performance, the purchaser had become the owner in equity of the lands, and, the plaintiff's lien attaching to his interest, the vendor could only after that hold the lands subject to the burden of the lien. Before the persons claiming liens furnished work and material, they were aware that the purchaser was in difficulties, but the vendor assured them that they would be paid, and urged them to go on with the work, although it was not contended that he actually guaranteed payment himself:—Held, that the work was done and the material furnished with the "privity and consent" of the vendor within the meaning of s.-s. 3 of s. 2 of the Mechanics' Lien Act, R. S. O. 1887 c. 126. *Blight* v. *Ray*, 23 O. R. 415.

——— *Omission of Name in Claim of Lien.*]—See *Makins* v. *Robinson*, 6 O. R. 1 (*post* 8).

See Wood v. *Stringer*, 20 O. R. 148; *Jennings* v. *Willis*, 22 O. R. 439; *McBean* v. *Kinnear*, 23 O. R. 313; *Hall* v. *Hogg*, 14 P. R. 45; *Patten* v. *Laidlaw*, 26 O. R. 189; *Wanty* v. *Robins*, 15 O. R. 474; *Townsley* v. *Baldwin*, 18 O. R. 403; *Craig* v. *Cromwell*, 32 O. R. 27, 27 A. R. 585.

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7. *Parties.*

Execution Creditor—*Master's Office*—*Priorities*—*Time.*]—The appellant's execution against lands was placed in the sheriff's hands shortly after the registration of a mechanic's lien by the plaintiff, who began his action to enforce such lien and registered his lis pendens within the ninety days prescribed by s. 23 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, but did not cause the appellant to be added as a party till the case had been brought into the master's office, which was after the expiry of the ninety days. The appellant contended that as against him proceedings to realize the plaintiff's lien had not been instituted within the proper time, and therefore his execution had gained priority over the lien, and he was improperly added as a subsequent incumbrancer in the master's office. Section 29 of the Act provides that the lien may be realized in the high court according to the ordinary procedure of that court: —Held, that the effect of ss. 23 and 29 is that the lien shall cease after ninety days unless in the meantime proceedings are instituted in the high court according to its ordinary procedure, to realize the claim; the practice or procedure of the court is as much the law of the land as any other part of the law; and the making the appellant a party to the proceedings in the master's office was a regular step in the action, authorized and prescribed by the practice and procedure of the court for nearly thirty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days. White v. Beasley, 2 Gr. 660, Moffat v. March, 3 Gr. 163, and Jackson v. Hammond, 8 P. R. 157, referred to. Juson v. Gardiner, 11 Gr. 23, Shaw v. Cunningham, 12 Gr. 101, McDonald v. Wright, 14 Gr. 284, and Bank of Montreal v. Haffner, 10 A. R. 592, distinguished. Decision in 12 P. R. 584 affirmed. *Cole* v. *Hall*, 13 P. R. 100.

Lien-holders — *Master's Office.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act, it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done when they are added as defendants in the master's office. *Hall* v. *Hogg*, 14 P. R. 45.

——— *Master's Office — Class Rights — Time.*]—Under s. 15 of the Mechanics' Lien Act, R. S. O. 1877 c. 120, suits brought by a lien-holder shall be taken to be brought on behalf of all lien-holders of the same class; and in case of the plaintiff's death, or his refusal or neglect to proceed, the suit may, by leave of the court, be prosecuted by any lien-holder of the same class. A number of unregistered lien-holders brought an action under the Act to enforce their liens against one G., which proceeded to the close of the pleadings, and was then dismissed with the plaintiffs' assent. P., the assignee of a registered lien-holder, relying on the action, took no steps to enforce his lien or to register a certificate within the ninety days, under s. 21. On being informed of the dismissal of the action he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf:—Held, that the applicant should be allowed to intervene and prosecute the action; and that the applicant was of the same class as the plaintiffs, in that they all contracted with or were employed by G. Lien-holders "of the same class" are those who have contracted with the same person, whether their liens are registered or not. *McPherson* v. *Gedge*, 4 O. R. 246.

See In re Scar and Woods, 23 O. R. 474 (*post* 9).

——— *Mortgage Action—Master's Office.*] —A mortgagee filed a bill for sale, making certain lien-holders under the Act parties defendants therein, alleging that the work by virtue of which their liens arose, was commenced after the registration of his mortgage: —Held, that the lien-holders should have been made parties in the master's office; and plaintiff's costs of making them defendants by bill were disallowed on revision of taxation. *Jackson* v. *Hammond*, 8 P. R. 157.

——— *Owner — Master's office — Costs — Class Rights.*] — Where a bill is filed by a sub-contractor against the owner of property and a contractor with him to enforce a claim against such contractor: the owner of the property, and all persons claiming to have liens, are necessary parties in the master's office, whose costs will be ordered to be paid out of the amount found due the contractor, and the balance distributed ratably among the several lien-holders, and a personal order made against the contractor for the deficiency, if any. A suit brought by a lien-holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act, keeps alive all similar liens then existing. *Hovenden* v. *Ellison*, 24 Gr. 448.

Mortgagee.]—See *McVean* v. *Tiffin*, 13 A. R. 1; *Reinhart* v. *Shutt*, 15 O. R. 325; *Finn* v. *Miller, Rathbone* v. *Miller*, 26 C. L. J. 55.

——— *Time.*]—The procedure for the trial of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, is the ordinary procedure of the high court, which is not affected by ss. 35 and 36 of the Act; and, therefore, a prior mortgagee against whom relief is sought must be made a party to the action within the time limited by s.-s. 1 of s. 24. *Larkin* v. *Larkin*, 32 O. R. 80.

Registered Owner—*Persons Liable.*]—In an action to enforce a mechanic's lien, brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract:—Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the court. *Wood* v. *Stringer*, 20 O. R. 148.

8. *Payment.*

Appropriation by Lien-holder — *Notice to Owner.*]—After proceedings commenced to enforce a mechanic's lien, a sub-contractor and material man, who finds that he is not able to support his claim to a lien as to certain items in his account, cannot, to the prejudice of the owner, agree with the contractor to appropriate moneys received from the latter and for which he had given credit, to those items. A material man giving notice to the owner, under R. S. O. 1887 c. 126, s. 11, of an unpaid account against the contractor, is not thereby entitled to dispute the validity of payments afterwards made by the owner to persons having claims for wages, or to persons furnishing materials to be used on the building, who would have refused to furnish the same if he had not, as he did, assumed a personal liability to them for the value thereof. And this also was held to apply to a payment made by the owner by cheque payable to the order of the contractor, but for the specific purpose of the latter indorsing the same over, as he did, to certain persons who refused to supply material unless paid for, and also to a payment made for insurance which the contractor ought to have paid. These sums were not payable to the contractor by virtue of any lien held by him as required by s. 11, but were virtually payments to sub-contractors with him, who thereupon furnished the particular material for which the payments were made. But aliter as to a payment made to an assignee of the contractor who had no lien or claim on the money coming from the owner except as such assignee, and this although the assignment from the contractor was prior in date to the giving of the notice under s. 11. Payments made by an owner to a contractor after notice under R. S. O. 1887 c. 126, s. 9, are only invalid when, if not made, they would have been liable for the satisfaction of the sub-contractor's lien or claim. *McBean* v. *Kinnear*, 23 O. R. 313.

Bills and Notes — *Acceptance of Draft for Part—Waiver.*]—M., having bargained in January with R. and E. to do certain work and supply certain machinery in their mill, did the last of the work and supplied the last of the machinery on the 28th July, filed his lien on the 25th August, and commenced his action 2nd October. On the 24th July R. and E. had sold and conveyed the mill to P., who, not being aware of this claim, registered his conveyance on 29th July. The lien registered made no mention of P. as "owner," and M. had drawn a draft for part of the money at three month, dated 28th July, which had been accepted by R. and E.:—Held, that M. was entitled to his lien notwithstanding the sale to P.; that the omission of P. as owner did not invalidate the lien; and that the drawing of the draft did not operate as a waiver of the lien. *Makins* v. *Robinson*, 6 O. R. 1.

——— *Owner.*]—The word "payment" in s. 9 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, covers the giving of a bill or promissory note; or payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; or tri-partite arrangements by which an order is given by the contractor on the owner for the payment of the material man out of the fund, which, when accepted, fixes the owner with direct liability to pay for the materials. *Jennings* v. *Willis*, 22 O. R. 439.

——— *Suspension of Lien.*]—E. supplied a contractor with materials for building a house for W. and took the contractor's note for $1,100 at thirty days for his account. The note was discounted but dishonoured at maturity, and E. took it up and registered a mechanic's lien against the property of W. While the note was running, W. paid the contractor $500, and afterwards, but when was uncertain, $600 more. In an action by E. to enforce his lien:—Held, that, as the lien was suspended during the currency of the note, it was absolutely gone, there being nothing in the British Columbia Lien Act to shew that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor. *Edmonds* v. *Tiernan*, 21 S. C. R. 406.

Contract Price—*Deductions—Bad Work—Acceptance.*]—In an action to enforce a mechanic's lien, the contest was as to whether anything was due to the contractor. The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship:—Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work. Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad material and that which should have been used, was not an adequate measure of the set-off to which the proprietors were entitled. *Wood* v. *Stringer*, 20 O. R. 148.

——— *Deductions—Delay—Damages.*] — Where a contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion:—Held, that this authorized a deduction as liquidated damages of the amount so "allowed" from the contract price, even as against lien-holders claiming adversely to the contractor, other than those having liens for wages, where such wages liens were less in the aggregate than ten per cent. of the contract price. The amount required to satisfy the wages lien should be deducted from

the contract price remaining unpaid after allowing for the reduction by reason of the non-completion, and cannot be marshalled in favour of a material man by being thrown upon the part of the contract price representing such reduction. *McBean* v. *Kinnear*, 23 O. R. 313.

——— *Part Performance — Quantum Meruit.*]—Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of the fixed sum, as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit. *Sherlock* v. *Powell*, 26 A. R. 407.

——— *Percentage—Deduction.*]—A payment, in excess of the contract price, made to complete a building, owing to the failure of the contractor, should be deducted from the contract price, and the ten per cent., under s. 9 of the Mechanics' Lien Act, is to be calculated on the balance of the contract price after such deduction. Re Cornish, 6 O. R. 259, followed. *Reggin* v. *Manes*, 22 O. R. 443.

——— *Percentage — Owner — Lien-holders.*]—The owner of a building is not prohibited from making payments, before the expiry of thirty days from completion, out of the twenty per cent. reserve required by R. S. O. 1897 c. 153, s. 11, to persons entitled to liens, but he makes such payments at his own risk as against anyone ultimately prejudiced by such payments. *Torrance* v. *Cratchley*, 31 O. R. 546.

——— *Percentage — Sub-contractor.*] — The plaintiffs contracted with one C. for the execution of the stone work upon a certain building which C. had contracted to build. C. never completed the work, but during the progress thereof was paid in good faith the full value of the work actually done by him on the building before he abandoned the contract:—Held, that a sub-contractor with C. could not enforce payment of his claim to the extent of ten per cent. of the contract price under R. S. O. 1877 c. 120, s. 11, as amended by 41 Vict. c. 17, s. 1. Quære, as to the meaning and effect of that clause. *Goddard* v. *Coulson*, 10 A. R. 1.

W. entered into a contract with M. to do certain carpenter work on buildings for a contract price of $2,690, which was afterwards, after taking an account of the extras to and omissions from the contract, increased to $2,781.85. He proceeded with the contract, and did work to the value of $2,350, and received on account $2,125, when he failed and notified W. that he could not proceed with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of $525.88. Certain sub-contractors and employees of M. filed liens, and W. moved to have them vacated on the ground that he was entitled to apply the ten per cent. drawback in completing the contract:—Held, that the amount upon which the ten per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed and abandoned the work. *Re Cornish*, 6 O. R. 259.

The last of the materials in respect of which the plaintiffs, as sub-contractors, claimed a lien under the Mechanics' Lien Act upon the estate of the landowner, were delivered on the 16th September, 1887, and the claim of lien was not registered nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till 29th October, 1887:—Held, that under ss. 9 and 10 of R. S. O. 1887 c. 126, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor. Goddard v. Coulson, 10 A. R. 1, followed. *Truax* v. *Dixon*, 17 O. R. 366.

——— *Percentage — Wages-earners.*] — The words used in ss. 7 and 9 of the Mechanics' Lien Act, R. S. O. 1887 c. 126, as amended by 53 Vict. c. 38, "the price to be paid to the contractor," and other like expressions in the same sections, all mean the original contract price, and not that part of the contract price to the extent of which the contractor has done work or supplied materials. And where the owner has, in good faith and without notice of any lien, paid the contractor the full value of the work done and materials furnished, and such value does not exceed the statutory percentage of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner in favour of any one. Wages-earners are not, by virtue of s. 9, s.-s. 3, and s. 10, as amended, entitled to the percentage of the contract price necessary to be retained, if it never becomes payable by the owner to the contractor. Goddard v. Coulson, 10 A. R. 1, followed. Re Cornish, 6 O. R. 259, not followed. *In re Sear and Woods*, 23 O. R. 474.

Under s. 10 of the Mechanics' Lien Act, 59 Vict. c. 35 (O.), it is the duty of the owner to retain out of the payments to be made to the contractor, as the work progresses, twenty per cent. of the value of the work done and materials provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract. Goddard v. Coulson, 10 A. R. 1. Re Cornish, 6 O. R. 259, and In re Sear and Woods, 23 O. R. 474, are not now applicable. *Russell* v. *French*, 28 O. R. 215.

Payment into Court.]—Amount due from owner to contractor to be paid into court, less costs. *Hall* v. *Hogg*, 14 P. R. 45.

Where amount so paid in, owner discharged from liability, and money not available for subsequent costs ordered to be paid by contractor to owner. *Patten* v. *Laidlaw*, 26 O. R. 189.

See Finn v. *Miller*, *Rathbone* v. *Miller*, 26 C. L. J. 55 (*post* 10.)

Sub-Contractors—*Rights of—Construction of Contract.*]—In a building contract for the erection of a church, the contractor agreed with the building committee to settle with all other persons doing work upon or furnishing materials for the construction thereof, and stipulated that neither he nor

they should have any lien upon the building for their work or materials:—Held, binding on the sub-contractors, though made without their knowledge or assent. It was also stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with:—Held, that no trust was thereby created in favour of the sub-contractors as to the sum agreed to be retained; and the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid, that the assignee was entitled to receive twenty per cent. to the exclusion of the sub-contractors. *Forhan* v. *Lalonde*, 27 Gr. 600.

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9. *Proceedings to Realize.*

Defence—*Counterclaim.*]—A defence filed by a lien-holder within the period mentioned in s. 23 of R. S. O. 1887 c. 126, in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed and a certificate thereof duly registered, may be. *McNamara* v. *Kirkland*, 18 A. R. 271.

Proceedings by Other Persons.]—G. & M. agreed with the defendant B. to furnish and put up in his building certain machinery, to be paid for partly by assigning a mortgage for $1,066, held by B., and the residue of the price to be secured by a mortgage to be executed by B., no time being mentioned for which credit was to be given. On the 8th June, 1875, B. discharged G. & M.'s workmen from further work in putting up the machinery, and the remainder thereof was left in the building. On the 2nd July, 1875, G. & M. registered the usual mechanics' lien for $1,030, balance of the price of the machinery so put, and $38.45 for labour, and, on the 7th of the same month, filed a bill to enforce their lien, which on the 19th January following, on motion of the defendant, was dismissed for want of service, but without prejudice to the lien, if any, of G. & M. On the 15th July preceding, the present suit had been commenced by other lien-holders, and on the 19th January a decree was made declaring the plaintiffs entitled to a lien and directing the usual accounts to be taken:—Held, that as against B., G. & M. were entitled to prove for the amount of their claim; and as the plaintiffs did not appeal from the allowance thereof by the master, the court dismissed with costs an appeal therefrom by the assignee of B. *Bunting* v. *Bell*, 23 Gr. 584.

Persons who have registered liens, but have taken no proceedings to realize them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same lands, where the liens of such other persons are not enforceable. *In re Scar and Woods*, 23 O. R. 474.

See Hutson v. *Valliers*, 19 A. R. 154 (*ante* 5 (b)).

See, also, *ante* 6.

10. *Registration.*

Annulling Registration—*Action—Parties—Payment into Court.*]—Mortgagees had advanced most of their moneys to the mortgagor, for purposes of paying off a prior mortgage, and for improvements on the premises, when F. filed his lien for work done and materials provided, and within ninety days began action, not making the mortgagees parties. R. also took like proceedings to enforce a lien, and made the mortgagees parties, but did not serve them. The mortgagees, under power of sale, notified F. and R. and other registered lien-holders, and sold the premises. On motion of the mortgagees, an order was made annulling the registry of all the liens and certificates of lis pendens, the mortgagees being ordered to pay such balance of the proceeds of the premises into court, under the Act respecting the Law and Transfer of Property, as should be in their hands after satisfying the mortgage claim and costs. *Finn* v. *Miller*, *Rathbone* v. *Miller*, 26 C. L. J. 55.

Effect of Non-registration — *Subsequent Purchaser.*]—The law that a lien which arises by virtue of being employed and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance, must be restricted to an innocent purchaser who is entitled to the protection of the Registry Act, i. e., one who has not actual notice of the prior lien before he pays his money and registers his deed. *Wanty* v. *Robins*, 15 O. R. 474.

S. was the owner of a lot upon which he was building four houses, and W. was his plumbing contractor doing the work on all at a specified sum for each house. He commenced his work in September, 1887, and finished about May, 1888. V. was the contractor for the brickwork, and as such was on the premises from time to time as the work was going on, and was not paid by S. V. purchased one of the houses, which was conveyed to him by S. by deed, dated 1st December, 1887, and registered 20th February, 1888. On 24th February, 1888, W. registered his lien on the whole property. Both V. and W. alleged that they knew nothing of the other's transaction. On an appeal from a decision that V. had notice of W.'s claim, and that his summary application to have W.'s lien discharged was properly dismissed by the master, the court was evenly divided. Per Proudfoot, J.—A lien should be registered against any one whose rights are acquired during the progress of the work, and if not so registered it becomes absolutely void, unless proceeding are taken to realize within thirty days; no proceedings were taken within that time by W., and the lien not being registered against the subsequent owner ceased to be a lien at all. Hynes v. Smith, 27 Gr. 150, and McVean v. Tiffin, 13 A. R. 1, followed. Per Ferguson, J.—The real question is not whether there was a valid registration of the lien, but whether the judgment below affirming the refusal of the master to discharge the lien on a summary application was right. The master was justified in so refusing. Wanty v. Robins, 15 O. R. 474, referred to. *Re Wallis and Vokes*, 18 O. R. 8.

Jurisdiction to Annul — *Master in Chambers.*]—The master in chambers has

jurisdiction to entertain a motion under R. S. O. 1877 c. 120, s. 23, to annul the registration of a mechanic's lien when the amount in question is over $200. Re Cornish, 6 O. R. 259, followed. *Re Moorehouse and Leak*, 13 O. R. 290.

Materials — *Assignee of Claim—Affidavit.*] — Where G. claimed, under the Mechanics' Lien Act, a lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof:—Held, that G. had a right to register a claim for the same under the said Act, but the affidavit of verification required by s. 4, s.-s. 2, must be made by himself, and not by the assignor. *Grant* v. *Dunn*, 3 O. R. 376.

——— *Time.*]—When a contractor working for several owners has but a single contract for the supply of materials with the material man, the time for filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for the several owners. *Re Moorehouse and Leak*, 13 O. R. 290.

Merchants supplied materials to the contractor for certain buildings, and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November:—Held, that the time for registering the claim of lien, under s. 21 of R. S. O. 1887 c. 126, began to run from the 22nd November. *Hall* v. *Hogg*, 20 O. R. 13.

Where there is a prevenient general arrangement, although not binding, between a contractor and a supplier of building material, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides, a lien for all material so supplied is in time if registered within thirty days of the furnishing of the last item. *Morris* v. *Tharle*, 24 O. R. 159.

Proceeding to Realize—*Counterclaim.*] —A defence filed by a lien-holder within the period mentioned in s. 23 of R. S. O. 1887 c. 126, in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed and a certificate thereof duly registered, may be. Observations as to the effect of registration of the lien. McVean v. Tiffin, 13 A. R. 1, considered. The defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved, and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings. *McNamara* v. *Kirkland*, 18 A. R. 271.

Work—*Alterations to, after Completion—Time.*]—The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in September, 1878, upon certain terms of credit, which expired on the 25th April, 1879. Registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879:—Held, that the effect of the delay in the registration of the lien was, that the lien under the Act had ceased to exist, notwithstanding the plaintiffs had done some immaterial work upon the machinery late in December, 1878; the thirty days within which the registration was to be effected being to be computed not from the time such alterations were made, or the defects in the machinery were remedied, but from the time when it was supplied and placed, i. e., in September, 1878. Quære, as to the effect of the Act when the credit does not expire until after thirty days from the completion of the work, and there has been no registration of lien. *Neill* v. *Carroll*, 28 Gr. 30.

A lien was claimed for certain steel work done on a building which had been completed by 30th September, 1893, with the exception of the cutting down of certain bolts which it was afterwards found projected out of the walls too far, which was done between 19th October and 25th October, 1893. The lien was registered on 17th November, 1893:—Held, upon the authority of Neill v. Carroll, which is incorrectly reported in 28 Gr. 339, that the lien was registered too late, since the time should have been computed from 30th September, and was not extended by the alterations to the bolts. *Summers* v. *Beard*, 24 O. R. 641.

See Bickerton v. *Dakin*, 20 O. R. 192, 695; *Wallis* v. *Skain*, 21 O. R. 532; *Reggin* v. *Manes*, 22 O. R. 443; *Truax* v. *Dixon*, 17 O. R. 366.

See also ante 2, 5 (a).

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11. *Summary Procedure and Trial.*

Amendment of Claim—*Jurisdiction of Master—Extension of Time.*]—The master or official referee in a proceeding under 53 Vict. c. 37 (O.), an Act to simplify the procedure for enforcing mechanics' liens, should be judicially satisfied that the facts stated before him are sufficient to manifest a valid claim; but if any one element is omitted, he has general power of permitting an amendment if the facts and circumstances warrant it, e.g., as in this case, to permit an amendment of the claim shewing when the work was done or materials furnished. The distinction between the requisites of a claim under the amending Act and one under s. 16 of the original Act, R. S. O. 1887 c. 126, pointed out. A master or referee has power to extend the time for prosecuting the proceedings where the certificate and appointment have not been served within the time named in s. 6 of the Act. *Orr* v. *Davie*, 22 O. R. 430.

Appeal from Report—*Court or Chambers.*]—In summary proceedings under the Act to simplify the procedure for enforcing mechanics' liens, 53 Vict. c. 37 (O.), the appeal to a Judge in chambers under s. 35 is confined to orders and certificates; the final report under s. 13 is not included in the words "orders and certificates;" and the appeal from such a report should be to a

Judge in court under rule 850. *Wagner* v. *O'Donnell*, 14 P. R. 254.

County Court — *Jurisdiction of Local Master—Amendment—Costs.*]—A master of the high court of justice has no jurisdiction as such to entertain a summary proceeding under 53 Vict. c. 37 to enforce a mechanic's lien, launched in a county court. Secord v. Trumm, 20 O. R. 174, followed. Nor can he confer jurisdiction upon himself by subsequently directing an amendment of the affidavits and papers filed, by substituting the high court for the county court. An appeal from an order so amending was allowed, but without costs, as the objection was not taken in limine. *Jacobs* v. *Robinson*, 16 P. R. 1.

High Court—*Joining Liens — Statement of Claim—Amendment.*]—Under the Act to simplify the procedure for enforcing mechanics' liens, 53 Vict. c. 37, it is competent to join liens so as to give jurisdiction to the high court, though each apart may be within the competence of an inferior court. The plaintiffs, in proceeding under 53 Vict. c. 37 to enforce their lien, filed with a master, as the "statement of claim" mentioned in s. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the master thereupon issued his certificate:—Held, that if the "statement of claim" filed was not in proper form, yet, as it contained all the facts required for compliance with the Act, an amendment nunc pro tunc should be allowed. *Bickerton* v. *Dakin*, 20 O. R. 192, 695.

High Court and Inferior Courts — *Application of Statute.*] — Notwithstanding the apparently unlimited provisions of s. 1 of 53 Vict. c. 37 (O.) intituled an Act to simplify the procedure for enforcing mechanics' liens, the intention of the Act is to simplify such procedure in the high court only, leaving the procedure provided for in county courts and division courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Mortgage — *Priorities.*]—Under the Act to simplify the procedure for enforcing mechanics' liens, 53 Vict. c. 37 (O.), the remedy of a lienholder as against a mortgagee is confined to the increased value provided for by s. 5, s.-s. 3, of R. S. O. 887 c. 126, and he cannot question the priority of the mortgage. *Dufton* v. *Horning*, 26 O. R. 252.

Mortgage Account—*Inferior Courts.*]—County courts and division courts cannot entertain an *action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under a mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

Notice of Trial—*Written Appointment.*] —Under s. 35 (1) of the Mechanics' Lien Act, R. S. O. 1897 c. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing; and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer is not effective. The notice of trial must be served at least eight clear days before the day fixed, as provided by s. 36. *McIver* v. *Crown Point Mining Co.*, 19 P. R. 333.

Summary Trial of Issue—*Discretion.*] —The question whether an issue as to a mechanics' lien should be summarily tried or not rests largely, if not entirely, in the discretion of the Judge. *Re Moorehouse and Leak*, 13 O. R. 290.

See Larkin v. *Larkin*, 32 O. R. 80, *ante* 7.

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12. *Time.*

For Commencement of Proceedings to Enforce Lien.] — The effect of the Mechanics' Lien Act of 1874 is, to cancel a lien that had been created under the Act of 1873, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by s. 4 of that Act; no proceeding to realize the claim having been taken for more than thirty days after the machinery, the foundation of the claim, had been supplied; the provisions of the Act of 1873 being inconsistent with and repugnant to the provisions of the later Act, which repeals all Acts inconsistent therewith. *Walker* v. *Walton*, 24 Gr. 209.

The plaintiffs registered a lien under the Mechanics' Lien Act of 1873 on the 14th August, 1874, for the price of machinery furnished on the 12th of the same month. The price was payable in instalments, the last of which fell due on the 4th May, 1875. A bill to enforce the lien was filed on the 7th July, 1875, being within the ninety days "from the expiry of the period of credit" prescribed by s. 4 of the Mechanics' Lien Act of 1873. Section 14 of the Mechanics' Lien Act of 1874, which came into force on the 21st December, 1875, enacted that "Every lien shall absolutely cease to exist at the expiration of thirty days after the work shall have been completed or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act:" and s. 20 repealed all Acts inconsistent therewith:—Held, reversing the decree in the preceding case, that even if the Act of 1874 repealed the Act of 1873, the plaintiffs' lien was saved by s.-s. 34 of s. 7 of the Interpretation Act, which provided that the "repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established . . before the time when such repeal shall take effect." *Walker* v. *Walton*, 1 A. R. 579.

By the terms of a building contract the work was to be paid for by monthly instalments of 85 per cent. of the work done, and the balance in twenty days after the whole was completed, which was to be done on the 15th January, and the work was actually finished on the 20th of that month. For the purpose of securing payment the contractors filed a bill to enforce their lien on the 6th February:—Held, that this proceeding was premature, except as to what remained due to them in respect of the monthly payments; as to these they were offered a reference at the risk of costs. *Burritt* v. *Renihan*, 25 Gr. 183.

Held, that a sub-contractor, though entitled to a lien upon property for the construction of which he has furnished material to an original contractor, or another sub-contractor, must, under the provisions of the Act of 1874, in order to enforce such lien, institute proceedings for that purpose within

thirty days after the material furnished; the lien in such case arising from the furnishing of the material or the doing of the work, not from registration as under the Act of 1873. *McCormick* v. *Bullivant*, 25 Gr. 273.

The plaintiff furnished materials to G. for a building which G. had contracted to erect for the defendants. After the defendants had paid G. all there was due to him, and after G. had abandoned his contract, the plaintiff notified the defendants of his unpaid account against G. for such materials; and filed a bill to enforce his lien more then ninety days after the materials had been furnished. A demurrer for want of equity was allowed, with costs. Semble, that even if the bill had been filed in time, there would not have been any lien. Remarks upon the various provisions of the Mechanics' Lien Act. *Briggs* v. *Lee*, 27 Gr. 464.

The period of ninety days, limited by s. 21 of the Mechanics' Lien Act, R. S. O. 1877 c. 120, for the commencement of proceedings to enforce the lien, applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not been previously taken against the owner within the ninety days. The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner, they brought this action after the lapse of more than ninety days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land:—Held, reversing the judgment in 3 O. R. 183, that the lien had ceased to exist as against the mortgagee. *Bank of Montreal* v. *Haffner*, 10 A. R. 592. See *S. C.*, 29 Gr. 319.

For Registration.]—See *ante* 9.

Impossible Date.] — Where, under a building contract work was to be completed by "November 31st" under penalty of damages:—Held, that this must be construed to mean November 30th. *McBean* v. *Kinnear*, 23 O. R. 313.

When Work Done or Materials Furnished — *Claim of Lien.*] — Where, in an action to enforce a mechanic's lien, the plaintiff purported to set out in his statement of claim the registered lien verbatim, and the same as so set out did not shew that the work was done and the material furnished within thirty days from the registration of the lien, nor the amount due:—Held, on demurrer, bad, but leave given to amend. *Roberts* v. *McDonald*, 15 O. R. 80. See next case.

Section 16 of R. S. O. 1887 c. 126 requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months. It stated, however, that the materials were furnished on or before the 15th September, 1887; and in this and all respects it followed form 1 in the schedule to the Act; and s.-s. 2 of s. 16 provides that the claim may be in one of the forms given in the schedule to the Act:—Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of s. 16. Roberts v. McDonald, 15 O. R. 80, overruled. *Truax* v. *Dixon*, 17 O. R. 366.

See Orr v. *Davie*, 22 O. R. 430; *McBean* v. *Kinnear*, 23 O. R. 313; *Larkin* v. *Larkin*, 32 O. R. 80.

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13. *Other Cases.*

Amendment — *Summary Procedure — Powers of Master or Referee.*]—*See Bickerton* v. *Dakin*, 20 O. R. 192, 695; *Orr* v. *Davie*, 22 O. R. 430; *Jacobs* v. *Robinson*, 16 P. R. 1.

Appeal—*Report—Reference.*]—Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the court:—Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as master. *Kennedy* v. *Haddow*, 19 O. R. 240.

Architect — *Plans — Superintendence — Lien for.*]—Held, on demurrer, that an architect is entitled to register a claim under the Mechanics' Lien Act of 1874 (O.), for money due him for making plans and specifications for, as also superintending the erection of, buildings for the owner. *Arnoldi* v. *Gouin*, 22 Gr. 314.

Artist—*Scenery—Lien for.*]—Semble, a scenic artist is not a "mechanic, labourer, or other person who performs labour, etc.," under s. 6 (1) of the Act. Quære, whether movable scenery and flying stages in a theatre are part of the freehold. *Garing* v. *Hunt*, 27 O. R. 149.

Contract — *Express Waiver of Lien — Binding on Sub-contractors.*] — See *Forhan* v. *Lalonde*, 27 Gr. 600.

Discovery—*Production of Sub-lease.*]—The bill was filed to enforce a mechanic's lien against defendant, whose title to the property in question was under a sub-lease:—Held, that the plaintiff was not entitled to the production of the sub-lease, as it was not necessary before decree to establish his case. *Bryce* v. *McIntyre*, 7 P. R. 134.

Execution Creditors.] — See *Cole* v. *Hall*, 12 P. R. 584, 13 P. R. 100.

Extras—*Written Agreement.*]—Where the contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects:—Held, that extras could not be allowed unless a writing was proved. *Wood* v. *Stringer*, 20 O. R. 148.

"Notice in Writing of such Lien"—*Letter.*]—A letter to the owner from subcontractors furnishing materials, asking him when making a payment to the contractor for the building in question to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day" is sufficient "notice in writing"

of a lien under the Mechanics' Lien Act, R. S. O. 1897 c. 153, s. 11, s.-s. 2. Judgment in 32 O. R. 27 affirmed. *Craig* v. *Cromwell*, 27 A. R. 585.

Petition to Set aside Judgment.]—See *Virtue* v. *Hayes*, *In re Clarke*, 16 S. C. R. 721.

Pleading—*Statement of Claim—Averment of Sum Due by Owner.*]—Held, upon demurrer to a statement of claim in an action to enforce a mechanic's lien brought by a sub-contractor against the owner of the lands and the contractor, that it was necessary for the plaintiff to aver that there was something due from the owner to the contractor. *Townsley* v. *Baldwin*, 18 O. R. 403.

Railway Lands—*Lien not Attaching.*]—The court of chancery will not direct the sale of lands required for the use of a railway company, to enforce the payment of a mechanic's lien for work done on the property; in such a case the decree will only be for payment of the amount found due, with costs. *Breeze* v. *Midland R. W. Co.*, 26 Gr. 225.

Held, following Breeze v. Midland R. W. Co., 26 Gr. 225, that a mechanic's lien does not attach upon an engine-house and turntable built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine-house and turntable, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien. *King* v. *Alford*, 9 O. R. 643.

Sub-contractors—*New Contract with—Validity of Lien.*]—The defendant H. contracted with the defendant C. for the building of a house. A clause in the agreement gave H. a right to dismiss C., and employ others to finish the work, in the event of C.'s failure to carry out the contract. H. acting thereunder dismissed C. and agreed orally with the respective plaintiffs, P. and G., who had sub-contracts under C., that if they would proceed with their respective portions of the work, and finish the same, he (H.) would pay them:—Held, affirming the judgment in 2 O. R. 233, that the agreement with P. and G. was a new and independent contract, not a promise to pay the debt of another, and that P. and G. were entitled to liens for all work done under such agreement with H. as contractors. *Petrie* v. *Hunter*, *Guest* v. *Hunter*, 10 A. R. 127.

Wage-earners—*Payments to.*]—See *McBean* v. *Kinnear*, 23 O. R. 313; *In re Scar and Woods*, 23 O. R. 474.

VI. Waiver or Loss of.

1. *On Chattels.*

Different Claims—*Tender.*]—Where the holder of goods detains them for different claims, as to one of which he has a lien and the other not, the owner must tender the proper amount, unless the holder either expressly or by fair implication dispenses with it. *Kendal* v. *Fitzgerald*, 21 U. C. R. 585; *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283; *McBride* v. *Bailey*, 6 C. P. 523.

Freight—*Delivery of Goods—Tender—Demand.*]—Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford, and Goderich Railway Company, and was shipped from Kingston to Port Colborne, subject to ocean freight, and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to government, where other iron owned by the company was also lying, but separate from this. Afterwards plaintiffs bought out the old company under 19 Vict. c. 21, and arranged for the withdrawal of certain writs of fi. fa. under which the sheriff had seized this and the other iron; and they thereupon demanded the iron in question from the defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay any thing, and replevied:—Held, that the iron could not be considered as having been delivered to the old railway company, when landed, as it was, at Port Colborne. 2. That 19 Vict. c. 21 did not take away the right of lien, nor could anything done by the sheriff have that effect. 3. That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 U. C. R. 283.

Repairs—*Renewal of Chattel—Restoration—Revival.*]—A. sends a waggon to B. to make the wood work. B. having finished the wood work, sends the waggon in A.'s name for the iron work, and gets it back again from the blacksmith's. A. calls for the waggon; B. allows him to remove the box in the highway, but on his returning for the running part, B. refuses to let it go till he is paid his bill:—Held, that B. by sending the waggon to the blacksmith's had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon, and that allowing A. to remove the box into the highway, was no waiver of his lien. *Millburn* v. *Millburn*, 4 U. C. R. 179.

——— *Tender—Evidence.*]—Defendant having an admitted lien upon a buggy for repairs:—Held, on the evidence that there was no sufficient evidence of a tender of the sum, or a waiver of it. *Lake* v. *Biggar*, 11 C. P. 170.

Sale of Goods—*Lien for Price—Removal of Goods.*]—Plaintiff sold to defendant cord-wood lying on the plaintiff's premises, and agreed to remove it to the bank of an adjacent canal, and there deliver it; plaintiff having delivered a portion at the bank:—Semble, that any lien for the price which the plaintiff might before have had upon such wood, was lost by its removal to land neither his own nor under his control. *McNeil* v. *Ketcher*, 15 C. P. 470.

——— *Acceptance and Receipt by Vendee—Effect of Subsequent Affirmance of Lien by Vendee.*]—See *Mason* v. *Hatton*, 41 U. C. R. 610.

Storage—*Bill of Exchange—Suspension of Lien.*]—H. & H. stored wheat in defend-

ants' warehouse at K., and for charges incurred thereon gave them a draft on their firm in M., which the defendants accepted in payment, and receipted the bill. The draft was presented and accepted, but during its currency H. & H. failed. Defendants then refused to give up the remainder of the wheat (having already shipped part of it to Montreal), claiming a lien for their general charges:—Held, that their lien was suspended during the currency of the bill. *Renald* v. *Walker*, 8 C. P. 37.

——— *Warehouseman — Tender.*]—Held, that the mere fact of a warehouseman who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim, as due either to himself or a third person, does not dispense with a tender of the sum due, and amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused; and that in this case the evidence was insufficient for that purpose. The plaintiffs denied that any claim for storage was made, while the defendants asserted the contrary:—Held, that if not made when the goods were demanded, the defendants could not defeat the plaintiffs' claim in trover by afterwards setting it up. *Lindo* v. *Morgan*, 23 C. P. 517.

Wharfage — *Payment.*] — In this case, where defendant claimed a lien on certain goods for wharfage, but it appeared that for many years, including the time when these goods came, defendant and plaintiff had been dealing together, and defendant had charged his claims for wharfage in account current, on which payments had been made from time to time:—Held, that it was properly left to the jury to say whether the wharfage on the goods in question had been paid, and that they were justified in finding that it had been. *Boyd* v. *Maitland*, 16 U. C. R. 311.

Work Done—*Cognovit for Price.*]—A., having taken a likeness for B., agreed to take in payment therefor $20 in cash and a cognovit for $70, payable at a future date. After receipt of $20 and tender of the cognovit:—Held, that the agreement was a waiver of A.'s right to lien, but did not amount to an accord and satisfaction. *Dempsey* v. *Carson*, 11 C. P. 462.

——— *Packing—Delivery of Goods to Carrier.*]—Plaintiff employed B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them:—Held, that B.'s lien was not lost by delivering the goods to defendants for carriage, subject to it, or by accepting the charges from defendants. *Hayward* v. *Grand Trunk R. W. Co.*, 32 U. C. R. 502.

2. *On Land.*

Decree—*Lis Pendens.*]—Where a decree on further directions had been registered against the lands of the defendant, and afterwards the original decree was reversed on rehearing, it was held that the order reversing the original decree destroyed the lien, but that the court could not make an order directly affecting it, or, on an application to discharge the lien created by the registration, discharge a lis pendens in this manner; the only way of getting rid of it is to obtain an order dismissing the bill. *Graham* v. *Chalmers*, 2 Ch. Ch. 53.

Statute—*Railway Lands.*]—19 Vict. c. 21, incorporating the Buffalo and Lake Huron Railway Company, with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

See Makins v. *Robinson*, 6 O. R. 1.

3. *On Other Property.*

Debentures—*Reference to Arbitration.*]—By 16 Vict. c. 22 and c. 124, and 18 Vict. c. 13, certain municipalities were authorized to issue debentures under by-laws of the corporations to aid in the construction of a railway. The contractors for building the road agreed with the company to take a certain amount of their remuneration in these debentures, and the work having been commenced, certain of these debentures were issued to the company. The contractors afterwards failed to carry on the works, and disputes having arisen between them and the company, all matters in difference were left to arbitration, and an award thereunder was made in favour of the contractors for the sum of £27,645, payable by instalments. One of these instalments having become due, and been left unpaid, the contractors filed a bill to have the debentures delivered over to them in the proportion stipulated for according to the terms of the contract:—Held, that although the contractors would have been entitled to a specific lien on these debentures under their original agreement, the fact that they had referred all matters in difference to arbitration, and had obtained an award in their favour for a money payment, precluded them from now obtaining that relief; and a demurrer for want of equity was allowed. *Sykes* v. *Brockville and Ottawa R. W. Co.*, 9 Gr. 9.

Timber—*Promissory Note for Price.*]—M., being the owner of certain land, sold and conveyed the timber and cordwood thereon to McG., who took possession, giving his note as part payment; he then converted the timber into cordwood and sold it to one S. and absconded:—Held, that M. had clearly lost his lien. *Wyatt* v. *Bank of Toronto*, 8 C. P. 104.

See BANKRUPTCY AND INSOLVENCY, I. 6, VI. 6.—INNKEEPER, II. — SHIP, VIII., IX. 1, XIV. 3 — SOLICITOR, VIII. — TIMBER AND TREES, I. 7—TROVER AND DETINUE, II. 1—VENDOR AND PURCHASER, X.—WAREHOUSEMEN AND WAREHOUSE RECEIPTS, IV.

LIEUTENANT-GOVERNOR.

See CONSTITUTIONAL LAW, II. 1—TRIAL, XVII.

LIFE INSURANCE.

See INSURANCE, V.

LIGHT.

Grant—*Derogation from—Discharge of Mortgage—New Estate—Interference with Light—Jury—Registry Laws.*]—The plaintiff was the owner of lot 8, and the defendant of the adjacent lot (9). At the time the plaintiff's lot was conveyed to him it had a house upon it with windows looking over lot 9, which was then vacant, and was also the property of the plaintiff's grantors, subject to a mortgage. The equity of redemption in lot 9 was afterwards conveyed to one through whom the defendant acquired title; and G., the immediate predecessor in title of the defendant, satisfied the mortgage, and obtained and registered a discharge of it. Buildings were erected on lot 9 by the defendant and his predecessors, and the plaintiff complained of the interference by such erections with the access of light to his house on lot 8, contending for an express or implied grant of light over lot 9, and invoking the principle that a grantor cannot derogate from his grant:—Held, reversing the judgment in 11 O. R. 33, that by payment of the mortgage and registration of the discharge G. did not acquire a new and independent estate such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors. Booth v. Alcock, L. R. 8 Ch. 663, and Lawlor v. Lawlor, 10 S. C. R. 194, distinguished. The jury were asked: "Did the defendant's house interfere injuriously with the light of the plaintiff's house?" They answered, "Yes, but not injuriously:"—Held, that in effect a question of law had been submitted to the jury and that the finding was too uncertain to support a judgment for the defendant. Held, also, per Patterson, J.A., and Ferguson, J., that there was an express grant to the plaintiff by the conveyance to him of lot 8, which was, under the Short Forms Act, of all light used and enjoyed with the house; but per Patterson, J.A., that upon the evidence the defendant's house intercepted no light to which the plaintiff was entitled. Per Burton and Osler, JJ.A., that the grant of light was an implied one, the conveyance of the house carrying with it all those incidents necessary to its enjoyment, which it was in the power of the vendors to grant; and the general words in the conveyance did not enlarge or limit the grant. Per Burton, J.A., that under the conveyance to the plaintiff he became entitled to the enjoyment of the right to the light from the vacant land to the same extent as enjoyed by his grantors at the time of the conveyance. Held, also, per Patterson, J.A., that the conveyance to the plaintiff was, as regards lot 9, unregistered, and in the event of the plaintiff proceeding to another trial the defendant should be allowed to set up the registry laws as a defence. *Carter* v. *Grasett*, 14 A. R. 685.

But see *Israel* v. *Leith*, 20 O. R. 361.

Obstruction—*Injunction — Shop Window.*]—The owner of two adjoining shops leased one to plaintiff and the other to defendant. The plaintiff's shop window had been so constructed as to present a side view to persons coming along the street, the object being to attract their attention, and obtain their custom for the wares displayed in the shop; and the privilege was shewn to be a very important one. The tenant of the adjoining shop having placed a show case in an open space or door-way of his shop, so as to intercept the view of the plaintiff's window, was restrained by injunction from continuing the obstruction. *Brummel* v. *Wharin*, 12 Gr. 283.

——— *Injunction—Title.*]—The plaintiff filed his bill to restrain certain of the defendants from closing windows which looked across a lane, of which plaintiff claimed to be owner, and on which defendants were erecting a building some time before the commencement of the suit. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that the lane would never be built on. At the hearing the plaintiff was allowed to amend his bill, by striking out the part claiming title to the lane; and a perpetual injunction was granted, restraining defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for—with costs, less those occasioned by plaintiff's claiming title to the lane. *Biggar* v. *Allan*, 15 Gr. 358.

Prescription—*Change of Position.*]—Defendant in 1855 or 1856 built a house on his lot adjoining the plaintiff's, having three windows looking out on the plaintiff's land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was thus entirely changed:—Held, that he had acquired no right under C. S. U. C. c. 88, s. 38, for that he had not enjoyed the access or use of the light at the same place for the statutory period. *Hall* v. *Evans*, 42 U. C. R. 190.

——— *Interruption.*]—Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months. The propriety of such a rule in this Province remarked upon and questioned. Flight v. Thomas, 11 A. & E. 688, 8 Cl. & F. 231, followed. *Burnham* v. *Garvey*, 27 Gr. 80.

See EASEMENT.

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1. CLAIMS BY AND AGAINST THE CROWN.

Moneys in Court—*Payment out of Court—Mistake—Restitution.*]—Statutes of limitation have relation only between subject and subject—the Crown cannot be bound by them. The supreme court of judicature for Ontario is a public trustee as to all moneys and securities in its hands. Moneys in court are in custodiâ legis, in this case tantamount to custodia Regis, and to such a fund and such a custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of time in their application for payment out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution, if they have improperly or fraudulently received moneys from the court to which they have no just claim. Restitution was ordered after a period of fourteen years, without interest, as the mistake was that of an officer of the court. *Allstadt* v. *Gortner*, 31 O. R. 495.

Negligence of Servant—*Petition of Right — 50 & 51 Vict. c. 16—Retroactive Effect.*]—Held, that even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable for an injury caused by negligence of its servants, such injury having been received more than a year before the filing of the petition, the right of action was barred under arts. 2262 and 2267, C. C. Per Patterson, J.—The Crown is made liable for damages caused by the negligence of its servants operating government railways by 44 Vict. c. 25 (R. S. C. c. 38), but, as the petition of right in this case was filed after the passing of 50 & 51 Vict. c. 16, the claimant became subject to the laws relating to prescription in the Province of Quebec, and his action was barred. *The Queen* v. *Martin*, 20 S. C. R. 240.

Public Work—*Petition of Right—50 & 51 Vict. c. 16—Retroactive Effect.*]—Held, following The Queen v. Martin, 20 S. C. R. 240, that the exchequer court has no jurisdiction, under the provisions of 50 & 51

Vict. c. 16, to give relief in respect of any claim which, prior to the passing of the Act, was not cognizable in the court, and which at the time of the passing of that Act was barred by any statute of limitations. *Penny* v. *The Queen*, 4 Ex. C. R. 428.

Revenue—*Customs Duty.*]—The additional duty of 50 per cent. on the true duty payable for undervaluation under s. 102 of the Customs Act, 1883, is a debt due to Her Majesty, which is not barred by the three years' prescription contained in s. 207, but may be recovered at any time in a court of competent jurisdiction. *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234.

Right to Plead Prescription.]—The Statute of Limitations is properly pleadable under s. 7 of the Dominion Petition of Right Act, 1876. *Tylee* v. *The Queen*, 7 S. C. R. 651.

Tierce-Opposition to a Judgment — *Interest of Opposant — Intervention — Sales of Litigious Rights—Judgment.*]—See *Price* v. *Mercer*, 18 S. C. R. 303.

See Chevrier v. *The Queen*, 4 S. C. R. 1; *Martial* v. *The Queen*, 3 Ex. C. R. 118.

See, also, cases under II. 10.

II. Claim to Realty.

[*See* The Real Property Limitation Act, R. S. O. 1897 c. 133.]

1. *Generally.*

Length of Possession—*Legal Title—Court of Equity.*]—Where a plaintiff files a bill praying relief, on the ground of a legal title in himself, no shorter lapse of time than would be a bar at law is an obstacle to relief in equity. *Connor* v. *McPherson*, 18 Gr. 607.

Person out of Possession—*Actual Possession by Another.*]—The right to land is not barred by forty years' want of possession unless some other person has also been in possession for that time. In this case, where the plaintiff had been out of possession more than forty years and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed had a suspicious appearance, the jury having found in his favour, a new trial was granted. *Ketchum* v. *Mighton*, 14 U. C. R. 99.

In ejectment, where the defendants claimed title by possession, and the plaintiff was found to have been out of possession for twenty years, the jury were directed that to entitle the defendants to a verdict they must shew twenty years' continuous possession in themselves and those under whom they claimed:—Held, a misdirection, for an owner out of possession for twenty years may be barred, though no one of the occupants may have obtained a statutory title. *Kipp* v. *Synod of Toronto*, 33 U. C. R. 220.

To bar a plaintiff in ejectment under the Statute of Limitations he must not only have been out of possession for twenty years, but there must have been actual possession by another. *Lloyd* v. *Henderson*, 25 C. P. 253.

Right to Relief — *Action — Acting on Right.*]—Where a right to relief in respect of lands arises during the progress of a cause, and more than ten years are allowed to elapse before acting thereon, such right will be barred by the Real Property Limitation Act, R. S. O. 1887 c. 108. *Ross* v. *Pomeroy*, 28 Gr. 435.

2. *Acknowledgment of Title.*

Acts or Conduct—*Estoppel by.*]—See *Junkin* v. *Strong*, 28 C. P. 498; *Boys* v. *Wood*, 39 U. C. R. 495.

Agreement to Purchase—*Person in Possession.*]—In ejectment, defendant claiming by length of possession, it appeared that W. S. went into possession in 1855, claiming through J. W. who had been in possession since 1849, but had no other title. In 1861 W. S. released to his daughter G., who was not proved to have ever taken possession, and in 1867 G. and W. S. conveyed to the defendant. In 1863 W. S. being in possession signed an agreement to purchase the land from the plaintiff:—Held, that this, being an acknowledgment of the plaintiff's title by the person in possession, took the case out of the statute, and entitled the plaintiff to succeed. *Cahuac* v. *Cochrane*, 41 U. C. R. 436.

Conveyance to Person in Possession —*Payment of Taxes—Direction.*]—Where A. has been twenty years in possession, a conveyance by B. to A. within the twenty years of part of the lot in dispute would not save the statute, this being no written acknowledgment on the part of A. of B.'s title; and the fact of A.'s paying the taxes by B.'s direction is no bar to the statute. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

——— *Acceptance of—Contingent Estate.*]—In 1830 James Gray took possession of the east half of lot 13 in the first concession of East Hawkesbury. He resided on the west half with his sons and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-8, while his son Adam was working the east half, and in possession, James Gray devised it to him by will, and the land was known as "our Adam's." In 1857 James Gray made a second will, in which he said: "I give and devise to my son John Gray, his heirs and assigns, &c., to have and to hold the premises here described to the said John Gray, his heirs and assigns forever. But if my said son John should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then in such case I will and devise the said, &c., to my son Thomas Gray, his heirs and assigns, to have and to hold the same at the death of the said John Gray." After the father's death Adam remained in possession, and in 1862 he accepted a conveyance with full covenants for title from John. On 15th September, 1868, Adam conveyed to A. McC., one of the respondents, and R., the other respondent, claimed title under A. McC. as landlord. In 1874 John died without leaving any lawful issue, and on the 5th May, 1875, Thomas (appellant) brought ejectment against respondents, but neither at the trial nor in term was any question raised as to the effect of John's deed:—Held, that James Gray, the

father, at the time of his death had acquired a title to the lot by length of possession; that under the will John Gray took an estate in fee with an executory devise over to Thomas Gray, in the event that happened, of John Gray dying without leaving lawful issue; that Adam having recognized, in 1862, John's interest in the land by purchasing from him, by deed of bargain and sale, a limited contingent estate, its effect was to stop the running of the statute, and the respondents could not set up Adam's possession under John to defeat the contingent estate; and that the court of appeal could not refuse to entertain the question as to the effect of John's deed, although not raised at the trial nor in term. Judgment in 1 A. R. 112 reversed. *Gray* v. *Richford*, 2 S. C. R. 431.

Devise to Person in Possession—*Life Estate—Recognition of.*]—A., in 1835, went into possession of land upon the invitation of P., who promised to give him a deed, but subsequently refused to do so. A. thereupon determined to remain upon, and succeeded in making a living from, the land. P. died three years afterwards, having devised the land to A. and his wife for their joint lives, with remainder to J., one of the contestants. A. occupied the land until 1877, when he executed a conveyance thereof in fee to the petitioner:—Held, that A. by his entry had become tenant at sufferance to P., and that as A. was aware of the devise to himself, and never did any act shewing a determination not to take the estate so given to him, the estate for life had vested in him, and that he or his grantee could not claim the fee by virtue of A.'s possession. Some thirty years after A.'s entry he granted part of the land to one B., and J. joined in the conveyance:—Held, a sufficient admission of the title of J. as a remainderman, and so an admission that the will was operative on the land; J. having no claim to the land otherwise than under the will. *Re Dunham*, 29 Gr. 258.

Notice to Quit.]—A notice to quit from C. to B. within the twenty years does not save C. from being barred by the statute. *Doe d. Ausman* v. *Minthorne*, 3 U. C. R. 423.

Offer of Money for Deed.] — The defendant, who was held to have a title by possession, after action brought, offered the plaintiff $100 if he would give him a warranty deed:—Held, that this could not affect his title by possession. *Beigle* v. *Dake*, 42 U. C. R. 250.

Oral Acknowledgment.] — An oral acknowledgment of title made during the twenty years will not save the statute. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

Payment of Mortgage—*Contribution by Person in Possession — "Rent."*]—See *Henderson* v. *Henderson*, 27 O. R. 93, 23 A. R. 511.

Payment of Rent — *Evidence—Bond—Agreement—Priority.*]—The plaintiffs claimed title through R., one of the children and devisees of C. The defendant claimed through R. and the other devisees of C. and by length of possession. C. died in 1843, having by his will made in 1841 devised this land to his children in fee. R. died in 1851. Neither she nor any one on her behalf had any possession since 1848. It was proved that in 1848 one F., who was then on the lot, and through whom defendant claimed, told one M. that he had R.'s share of the lot, and was to pay the rent to C., the solicitor for the plaintiffs in a chancery suit, brought by F. and by R. and other plaintiffs, for partition of C.'s property, on account of the costs of that suit; and that he afterwards, in 1850, told the eldest son of R., who went to him for rent, that he kept it back to pay the costs. It also appeared that F. had paid money about 1857 to the town agent of C. in that suit on account of the costs. It was sworn, however, that F. occupied under a brother of R., whose right he had purchased, not under R., and no lease was proved from R., nor any authority from her for the payment to C.:—Held, not sufficient evidence of payment of rent to R. to take the case out of the statute. The defendant, in bond to F. dated in 1856, recited that he (defendant) had bought in the estate of all the owners of this lot except the estate of the family of F., and of such other of the claimants as were under disability, which class would include the plaintiffs, which defendant was to get in; and an agreement in writing was made between F. and another and the defendant, in 1855, by which defendant agreed to buy in all the interest of the children of the late C. in this lot:—Held, not an acknowledgment under the statute, not being given to the plaintiffs or their agent. *Ruttan* v. *Smith*, 35 U. C. R. 165.

Payment of Taxes—*Rent—Written Acknowledgment after Statutory Period.*]—A tenant agreed to pay for certain premises six dollars a month and taxes, and for some eighteen years remained in possession, paying the taxes to the municipality and paying nothing else. The tenant after the expiration of this period gave to his landlord an acknowledgment of indebtedness for rent for the whole period:—Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession by giving to the landlord an acknowledgment of indebtedness in respect of rent. Davis v. McKinnon, 31 U. C. R. 564, observed upon. Judgment in 16 O. R. 393 reversed. *Finch* v. *Gilray*, 16 A. R. 484.

——— *Entry — Vacant Possession.*]—In 1857 or 1858 J. entered upon the land in question in this action as tenant to the true owners, upon the terms that he should pay the taxes, and he cultivated the land during his occupation. In the autumn of 1864 he gave up the place to the plaintiff, who paid him something for improvements; and in the spring of 1865 the plaintiff began to work upon it, living upon and occupying an adjoining lot of land, separated by a fence. The plaintiff disclaimed any knowledge of J.'s tenancy, and alleged that he entered as a purchaser of J.'s rights as a squatter, with the intention of acquiring a title by possession. In 1868 the true owners pulled down an old fence and put up a new one upon part of the land in question. In 1877 the plaintiff executed a writing under seal, whereby he agreed to lease the land from the true owners, and to pay as rent the taxes thereon and to give up possession when requested. From the time the plaintiff bought out J. till 1884, when he ceased to use or occupy the land, he grew

crops and vegetables upon it in the summer and did nothing at all in the winter except draw manure upon it, which he spread in the spring:—Held, following Finch v. Gilray, 16 A. R. 484, that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him; but what was done by the owners in 1868 was an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being, before the statute then in force had given a title to the plaintiff, and it furnished a new starting point; and, further, that what the plaintiff did upon the land did not shew such a possession as entitled him to assert that he had acquired a title as against the true owners. The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter; and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff. *Coffin* v. *North American Land Co.*, 21 O. R. 80.

Sufficiency of Acknowledgment — *Mortgage — Evidence.*]—Where a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever lent to the mortgagor by the mortgagee was the sum so advanced on the mortgage:—Held, sufficient to take the case out of the statute. *Barwick* v. *Barwick*, 21 Gr. 39.

Trustee.] — An acknowledgment to a party's trustee is sufficient to take a case out of the statute. *McIntyre* v. *Canada Co.*, 18 Gr. 367.

Written Acknowledgment—*Fraud.*]—In ejectment, it appeared that the defendant, shortly before she and those under whom she claimed had been in possession for twenty years, signed a written acknowledgment of the title of the Canada Company, to whom the land belonged. She stated that she did not understand the effect of the instrument, but signed it as she thought it was for her own good to do so, and on the agent's representation that it was to renew her claim to the land with the company. The agent stated that he read over and explained the paper to defendant, telling her that he came to renew the company's claim, and that unless she signed she would be dispossessed. It was left to the jury to say whether defendant's signature was obtained by fraud, and, if so, to find for the defendant, which they did:—Held, that there was nothing to support such a finding, for the agent stated nothing but the truth, and even if he had stated what was untrue, the instrument itself, containing only the truth, could in no way prejudice defendant, but rather benefit her, by procuring her permission to remain in possession. *Ferguson* v. *Whelan*, 28 C. P. 112.

——— *Mortgagee in Possession—Rents—Interest.*]—Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows: "The amount due me in November, 1853, on your mortgages was as follows" (stating the amounts). "No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest":—Held, a sufficient acknowledgment of title to give a new starting point to the statute from the date of the letter. *Miller* v. *Brown*, 3 O. R. 210.

Written Acknowledgment after Statutory Period.]—An acknowledgment in writing after the twenty years will not revive a title which the twenty years' possession has extinguished. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486; *McDonald* v. *McIntosh*, 8 U. C. R. 388; *McIntyre* v. *Canada Co.*, 18 Gr. 367.

Written Application for Leave to Cut Timber — *Mortgage.*]—The father of the defendant was in wrongful possession of land from 1844 to 1862, when P., the owner, mortgaged to A., who assigned to the plaintiff, and interest was regularly paid thereon by the mortgagor until two years before the institution of this suit. In 1865 the defendant wrote to P. concerning a purchase of some timber on the lands, and P.'s agent went over and measured the timber cut, which was sold to the defendant; and in 1866 P. sold timber on the land to strangers:—Held, (1) that such entries upon the land, which were sufficient to constitute trespass if unlawful, interrupted the running of the statute in favour of the defendant, who was tenant at will; and that the written application of the defendant to P. was a sufficient acknowledgment of title to prevent the running of the statute as against P.; and (2) that the possession of the defendant before the creation of the mortgage, which was insufficient at that time to bar the mortgagor, did not run against the plaintiff. An acknowledgment of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute. *Hooker* v. *Morrison*, 28 Gr. 369.

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3. *Actual or Constructive Possession.*

(a) *Mistake in Boundaries.*

Enclosure — *Production of Erroneous Line.*]—Where A. had improved on the front of his lot, and put up a division fence between himself and his neighbour, so far as his improvements extended, which fence was found, upon a correct survey, to enclose part of the adjacent lot:—Held, that, though the statute might bar the owner of the adjacent lot from regaining possession of the portion of his lot which he had suffered his neighbour to enclose for more than twenty years, yet that would not affect the right to any other portion of his land not actually enclosed, as he could not be held to be constructively dispossessed of that portion of his lot which the erroneous fence, if produced, would embrace. *Doe d. Beckitt* v. *Nightingale*, 5 U. C. R. 518.

Although a man, by erecting and maintaining for twenty years a fence between his and

the adjoining lot, may acquire a right to hold thereby, notwithstanding such fence does not stand on the true line of division according to the original survey, and may after twenty years of such occupation successfully resist an action of ejectment brought by the owner of the adjoining lot to recover the land encroached on, yet such encroachment will not be extended by any application or constructive possession beyond the limits fenced in, nor give the right to insist on the course of that fence as establishing the course of the line of division between the lots further than the fence has been maintained for twenty years. Twenty years' mutual acquiescence in a boundary line, although differing from that set out in the original survey, is binding upon the owners of adjoining lots, especially if upon this assumed boundary each owner have his full complement of land. The principles laid down in the last case, and in Dennison v. Chew, 5 O. S. 161, affirmed. *Bell* v. *Howard*, 6 C. P. 292.

If two parties owning respective halves of a lot, agree to a division line which is not the true boundary, possession by one party of a portion of land according to such line for twenty years, will not give him any right by constructive possession to the whole as if this line were carried out. *Ferrier* v. *Moodie*, 12 U. C. R. 379.

Non-enclosure — *Blazed Line — Wild Land.*]—Thirty or forty years before action a blazed line had been run between the lots of plaintiff and defendant by S., a surveyor, along part of which a fence had been erected. The parties respectively cut timber and exercised acts of ownership on the lands on each side of and up to the blazed line. The plaintiff swore that, although he and his father had been governed by this line and never claimed or went beyond it, it was always their intention to dispute it when they should be able to establish the true line. The Judge at the trial found that there was sufficient evidence of defendant's occupation of the land up to the blazed line to extinguish the plaintiff's title:—Held, that the verdict was right. Title by possession to wild land can be made out otherwise than by actual enclosure. *Steers* v. *Shaw*, 1 O. R. 26.

See cases under 6 (b).

See Weld v. *Scott*, 12 U. C. R. 537.

(b) *Wild Land—Occupation of Part.*

Caretaker—*Employment to Protect the Whole.*]—The possession for twenty years of part of a lot of land by a caretaker, expressly employed to protect the whole, on behalf of one claiming such whole, and which is accordingly so protected from all other intruders, may be a sufficient possession of the whole to establish a title under the statute, and such possession will not be confined to the part actually enclosed and occupied. *Heyland* v. *Scott*, 19 C. P. 165.

Clearing—*Claim of Right.*]—To prove title by possession the plaintiff shewed that a person under whom he claimed had at an early date cleared part of the lot in question; but there being no evidence that he did so under any claim of right, it was held that such clearing was not constructively a possession of the rest of the lot. *McMaster* v. *Morrison*, 14 Gr. 138.

Defective Title—*Treatment of Wild Part — Taxes.*] — Where a bonâ fide purchaser claims a whole lot, of which a portion is cleared, under a title which turns out to be defective, and while cultivating such portion treats the wild and uncultivated part as owners under such circumstances usually do, there is evidence to go to a jury to sustain his title by possession to the whole. In this case the grantee of the Crown died in 1838, having by his will devised to his wife his personal property only. Supposing that it passed the real estate also, she registered the will, leased this land, one hundred acres, and received the rents until 1843, when she sold it, for its full value, to one L., who sold to defendant in the following year, there being then about thirty-five acres cleared. Defendant took possession on his purchase, built a house, and had occupied it ever since, having cleared about twenty acres more. The heir-at-law of the patentee, who was six years old when his father died, brought ejectment in 1868, so that the statute had clearly run against him as to all of which there had been possession. The jury found that defendant had held possession of the whole one hundred acres for more than twenty years:—Held, that such verdict was warranted, and that the plaintiff could not recover. Payment of taxes on the whole is an important fact in such a case. *Davis* v. *Henderson*, 29 U. C. R. 344.

Depredations on Other Part.]—To enable the statute to operate in bar of the true title, there must be an actual occupation, to the exclusion of the real owner. Where, therefore, a person having permission given him to occupy the west half of the lot, did confine himself, so far as residence and cultivation went, to that half, and only committed depredations on the other half:—Held, that he could not be considered as having exclusive possession of both halves. *Doe d. McDonell* v. *Rattray*, 7 U. C. R. 321.

Devisee—*Mistaken Belief.*]—A son of the testator went upon a farm of 86 acres, believing that it had been devised to him by will, and remained in possession for more than ten years:—Held, upon the evidence, that he had acquired a good title by virtue of the statute, to the whole 86 acres, though only part was cleared and cultivated. *Re Bain and Leslie*, 25 O. R. 136.

Inference as to Remainder—*Jury.*]—Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot. It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing, and cultivating, has been limited to a portion; and in this case there was evidence legally sufficient to warrant such inference. Semble, that a squatter will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not merely desultory acts of trespass, in respect of which the true

owner could not maintain ejectment against the trespasser as the person in possession. *Dundas* v. *Johnston*, 24 U. C. R. 547.

Occupation of Other Parts for Less than Statutory Period—*Belief of Title.*]—Where a person having in fact no title has occupied part of a lot of land for twenty years, and other parts for a less period, he is entitled only to the first mentioned portion as against the true owner; and it can make no difference that he acted under a belief of title honestly entertained. *Young* v. *Elliott*, 25 U. C. R. 330.

See, also, *Wishart* v. *Cook*, 15 Gr. 237; *Low* v. *Morrison*, 14 Gr. 192.

Sufficiency of Evidence.]—The principle laid down in the last case and in Davis v. Henderson, 29 U. C. R. 344, as to the exercise of acts of ownership over wild land, sufficient to establish a possession under the Statute of Limitations, recognized and acted upon. Held, that the evidence was sufficient to shew a title by possession to the south half of the lot, though about twenty-five acres only had been actually occupied. *Mulholland* v. *Conklin*, 22 C. P. 372.

Trespasser.]—The judgment in Harris v. Prentiss, 30 C. P. 484, affirmed as regards the right of the defendant under the Statute of Limitations to that portion of the land of which actual possession had been shewn for forty years; but varied by entering judgment for the plaintiff for the rest of the land sued for. The doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period. *Harris* v. *Mudie*, 7 A. R. 414.

See, also, *Hartley* v. *Maycock*, 28 O. R. 508, *post* (c).

——— *Fencing*—"*State of Nature.*"]—The expression "state of nature," in s.-s. 4 of s. 5 of R. S. O. 1887 c. 111, is used in contra-distinction to the preceding expression, "residing upon or cultivating," and unless the patentee of wild lands, or some one claiming under him, has resided upon the land or has cultivated or improved it or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit. Merely fencing in a lot, without putting it to some actual, continuous use, is not sufficient to make the statute run. *Stovel* v. *Gregory*, 21 A. R. 137.

——— *Tax Title.*]—A person claiming title by possession to land derived through prior trespassers, and by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period. Sub-section 4 of s. 5 of the Real Property Limitation Act, R. S. O. 1887 c. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to a title acquired under a sale for taxes. *Brooke* v. *Gibson*, 27 O. R. 218.

Vendee.]—Where a vendee takes possession with the knowledge and concurrence of the vendor, and pays his purchase money, he is to be regarded as in possession of the whole lot, and not merely of such part of it as he may actually occupy and improve; and after twenty years' possession by him and his successors, the title of the vendor will be extinguished. *McKinnon* v. *McDonald*, 13 Gr. 152.

See Steers v. *Shaw*, 1 O. R. 26, *ante* (a).

See cases under 6 (b).

(c) *Other Cases.*

Discontinuance of Constructive Possession.]—Discontinuance may be of a constructive as well as of an actual possession, and in this case there was evidence to go to the jury to find whether the plaintiff had not discontinued the constructive possession which he acquired by descent on the death of the patentee. *Pringle* v. *Allan*, 18 U. C. R. 575.

Disseisin—*Paper Title—Joint Possession—Acts of Ownership.*]—A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's county, N. S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg county, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a son of C., then about 24 years old, who resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly afterwards married, and went to live on the Queen's county portion. He died in 1872, and his widow, after living with C. for a time, married P., and went back to Queen's county. P. worked on the Lunenburg land with C., for a few years, when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg county to his wife. On one occasion P. sent a cow upon the land in Lunenburg county, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry, the title to the land was not traced back beyond the deed executed in 1856:—Held, that C.'s son not having a clear documentary title, his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him; that neither he nor his successors in title ever had actual possession of the land in Lunenburg county; that the possession of C. was never interfered with by the deeds executed; and, having continued in possession for more than twenty years, C. had a title to the land in Lunenburg county by prescription. *Parks* v. *Cahoon*, 23 S. C. R. 92.

Mortgagor—*Possession against Mortgagee—Unoccupied Lots.*]—Where several lots of land are mortgaged, and the mortgagor and his heir remain in possession of one of them for more than twenty years, so as to bar, under our statute 4 Wm. IV., the mortgagee's title:—Held, that the mortgagor's title by possession is not, like that of a mere trespasser, confined to the land which he actually occupies, but covers the whole land included in the mortgage, as well the lot upon which

the mortgagor lives as the other unoccupied lots. *Doe d. Dunlop* v. *McNab*, 5 U. C. R. 280.

Seisin—*Presumption.*]—Seisin in fee cannot be presumed from a mere constructive possession but from an actual visible possession only. *Doe d. Morgan* v. *Simpson*, 5 O. S. 555.

Trespasser—*Visible Possession — Uncleared Lands.*]—The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seised in fee simple and in possession. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1880 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell:—Held, that the widow entered as a trespasser, and so, in order to extinguish the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous; and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass. Harris v. Mudie, 7 A. R. 414, followed. In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but stayed in the neighborhood, and the work of the farm went on as usual:—Held, that during this interval her possession was a visible one, by reason of the building operations and the farm work. Agency Co. v. Short, 13 App. Cas. 793, and Coffin v. North American Land Co., 21 O. R. 80, distinguished. The fact that the heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents; 25 Vict. c. 20. Therefore, in 1874, the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished. The widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or, at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date. *Hartley* v. *Maycock*, 28 O. R. 508.

Vendee—*Occupation of Part—Evidence.*]—In 1811 P., the owner of certain land, agreed to sell it to D., who went into possession and occupied till 1827 or 1828, when he was turned out by the sheriff under legal proceedings taken by Dufait, who was put in possession, and remained in possession until 1864, when he conveyed to O., through whom the defendant claimed. D.'s actual possession had been only of about ten acres:—Held, that D.'s possession was of the whole land; and that he could not be treated as a squatter so as to enable him only to acquire a title to the ten acres actually occupied. The plaintiff objected that the evidence of the recovery by legal proceedings was inadmissible, because no judgment was proved; and not being proved was no evidence against him, but:—Held, that though this might be so if the plaintiff's title were being inquired into, it was admissible for the defendant in respect of his possessory title. *Robertson* v. *Daley*, 11 O. R. 352.

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4. *Adverse Possession.*

Agreement—*Permissive Occupation.*]—Where a line had been agreed on by the proprietors of adjoining lots, by which they agreed "to abide as long as we live, and if our children find it wrong they may correct it:"—Held, that this was a permissive occupation, and could not be considered as an adverse holding. *Doe d. Murray* v. *Mathews*, 6 O. S. 461.

Consent to Possession.]—Quære, as to the effect of the statute when the twenty years' possession has not been adverse, but with the consent of the plaintiff, as an act of kindness on his part, though paying no rent, and acknowledging no title. *Doe d. Smyth* v. *Leavens*, 3 U. C. R. 411.

Conveyance in Face of Person in Possession—*Promise to Leave.*]—A., the owner, agreed to sell to B., who went into possession and failed in making his payments. A. then conveyed to C. in B.'s presence, who said that he would at once leave the place. B. nevertheless continued in possession for more than twenty years, paying C. no rent, and making no acknowledgment of C.'s title:—Held, that B.'s possession gave him the legal title. *Doe d. Ausman* v. *Minthorne*, 3 U. C. R. 423.

Parent and Child—*Conveyance to Son—Resumption of Possession by Father—Death of Son—Heir-at-law Living on Property with Grand father.*]—One A. F., being the owner of a full lot of 200 acres, in 1823 conveyed the west half, in fee, to his son I., who went into possession. In 1827 or 1828, I. removed, and died out of actual possession in January, 1829 or 1830, leaving a son R., born in 1824. After I.'s removal, A. F. took possession. On the death of I., A. F. brought I.'s son, R., to live with him on the land, where he continued to reside till A. F.'s death in 1841. In March, 1839, A. F. made a conveyance of the west half in fee, to another son of his, N. P. F., who died in possession in March, 1831, devising the same to his son J. F., one of the defendants. The mother of J. F. married one L., and continued to reside on the lot with her husband till 1848 or 1849.

After A. F.'s death, the deed to L. was found among his papers with the seals torn off. In 1847 R., the son of L., brought ejectment against L. and wife for this west half, which suit was compromised by R. agreeing to convey in fee to J. F., the son of N. P. F., the west half of the said west half, and by L., on behalf of J. F., agreeing that J. F. should, on his coming of age, convey in fee to R. the east half of said west half of the lot. R. conveyed the portion to J. F., but J. F. never conveyed to R. the east half of the west half, the subject of this action. In 1847, after this settlement, R. conveyed the portion in question to one D. R., through whom the plaintiffs claimed, while L. and wife were in possession of the lot:—Held, 1. that the nature of A. F.'s possession was for the jury to determine; 2. that while R. was living with A. F. on the land, he could not be treated as out of possession. A verdict for the plaintiffs was upheld. *Fraser* v. *Fraser*, 14 C. P. 70.

Parcl Agreement—*Clearing and Cultivating—Profits.*]—The owner of land put his father in possession in 1847, under a parol agreement that the father should clear up and cultivate the land, taking to his benefit the profit thereof. The father remained in undisturbed possession until his death in 1870:—Held, that the father had obtained a title by length of possession, and a bill filed to obtain the delivery up of certain deeds executed between the father and another son, was dismissed with costs. *Truesdell* v. *Cook*, 18 Gr. 532.

Patentee — *Dispossession — Estate by Curtesy.*]—In an action for the recovery of land it appeared that the land was granted by the Crown in 1838 to plaintiff's mother, who was then a married woman, and who had by her husband issue born alive and capable of inheriting the estate. The patentee died in 1856, her husband lived till 1883. Neither of them, nor any of their heirs-at-law, were ever in possession. Defendant claimed by possession, which began in 1853, and had continued thenceforward without interruption:—Held, following Doe Corbyn v. Bramston, 3 A. & E. 63, that the patentee having been dispossessed within the terms of R. S. O. 1877 c. 108, s. 5, in 1853, more than twenty years before this suit was commenced, the action was barred by s. 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of plaintiff's father. *Hicks* v. *Williams*, 15 O. R. 228.

Possession Originated by Permission.]—Where A. has been twenty years in possession, paying no rent, and signing no written acknowledgment of title in another, such possession, whether it originate adversely to the claims of the true owner, B., or with his permission, operates under the statute to extinguish the title of B. and vest the title in A. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

Understanding as to Real Ownership.]—Where a son has been allowed by his father to remain in possession for twenty years, and it cannot be shewn that he was there as the servant or agent of his father, or has paid rent within the twenty years, or acknowledged the father's title in writing, the father will lose his title, no matter what the understanding of both parties as to the real ownership may have been. *Doe d. Quinsey* v. *Caniffe*, 5 U. C. R. 602.

Will — *Devise — Possession of Testator's Widow — Conveyance by Testator, Unregistered.*]—A deed of the land in question from the testator, under whose will the plaintiffs claimed, to one P., was produced by defendant unregistered. P. had never taken possession, the testator having retained possession till his death, and his widow and devisee for life having continued in possession under the will, which she registered, in all a period of twenty-seven years:—Held, that the title of the plaintiffs was not defeated by the deed to P., for whatever estate was conferred by it was lost by the twenty-seven years' adverse possession. *Hamilton* v. *Lightbody*, 21 C. P. 126.

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5. *Avoidance by Process.*

Amendment of Bill—*Misdescription of Land — Relation back.*]—Although, according to the ruling in Adamson v. Adamson, 25 Gr. 550, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the west instead of the east half of the lot was conveyed, it would seem that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. But the bill having been amended in one part of it in this respect, leaving the erroneous description of the land in the earlier part of it, the court on rehearing held that the suit had not been instituted with regard to the east half so as to prevent the defence of the Statute of Limitations being set up, and affirmed the judgment in 25 Gr. 552. *Dumble* v. *Larush*, 27 Gr. 187.

Commencement of Action—*Hab. Fac. Poss.—Relation back.*] — The bringing of an action, not the recovery of possession, stays the operation of the statute; therefore, where possession was taken under a hab. fac. poss., though after ten years from the recovery of judgment:—Held, that the possession so taken related to the date of bringing the action, and that the intervening ten years' possession would not enure to the benefit of the tenant, so as to assist him in claiming title under the statute. *Turley* v. *Williamson*, 15 C. P. 538.

——— *Judgment—Hab. Fac. Poss.*] — In ejectment by plaintiffs, claiming a possessory title as heirs-at-law of one W., it appeared that in 1873, before the statutory period had elapsed, the owner had brought ejectment against W., and that, on proof of an agreement by W., in 1861, to give up possession on demand, and under pressure thereof, a compromise was effected after the record had been entered for trial in 1876, by the owner paying a small sum of money and W. giving up possession, a written memorandum of such compromise being drawn up at the time:—Held, that the plaintiffs could not recover; that the commencement of the action of ejectment prevented the operation of the statute; and that it was immaterial therefore that the plaintiff in it had not entered until 1876, after the ten years required to give a title had expired; and had not entered judgment or taken possession under a hab. fac. poss. *Young* v. *Hobson*, 30 C. P. 431.

Judgment—*Dispossession.*]—A judgment in ejectment recovered by C. against B. within twenty years, but upon which B. had never been dispossessed, does not save B. from being barred by the statute. *Doe d. Ausman* v. *Minthorne*, 3 U. C. R. 423.

See also *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

——— *Will—Dower.*]——In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff in this action, the widow of the testator, was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land, of which the action also sought to deprive her, and a decree was made declaring that the devisee, one of the defendants in this action, was entitled to the land in fee simple, subject to the dower of the plaintiff:—Held, that the decree did not prevent the running of s. 25 of the Real Property Limitation Act, R. S. O. 1887 c. 111, so as to bar the remedy of the plaintiff. *Cope* v. *Cope*, 26 O. R. 441.

Petition—*Quieting Titles Act.*] — *The* filing of a petition under the Act for Quieting Titles is not such a proceeding as will save the rights of a party contestant otherwise barred by the statute. *Laing* v. *Avery*, 14 Gr. 33.

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6. *Boundaries—Disputed or Mistaken.*

(a) *Survey Acts, Effect of.*

59 Geo. III. c. 14.]—The operation of the Statute of Limitations was not suspended by the Survey Act, 59 Geo. III. c. 14. Where twenty years' possession has followed a division of adjacent lots, ejectment will not lie, although the division may have been inaccurate. *Doe d. Stewart* v. *Radich*, Tay. 494.

Twenty years' possession according to a certain boundary line will bar an ejectment brought to disturb such boundary, unless a new survey can be made strictly in accordance with 59 Geo. III. c. 14. *Doe d. Morgan* v. *Simpson*, T. T. 1 & 2 Vict.

Where parties run the side lines between their respective lots, and possess the land on either side, according to such side lines, for twenty years and upwards, such possession is confirmed by the Statute of Limitations, although on a survey made according to the statute of 1818, it may turn out that the lines run in the first instance, and according to which the possession has been held, are erroneous. *Dennison* v. *Chew*, 5 O. S. 161.

23 Vict. c. 102.]—The plaintiff and defendant were owners of adjoining lots in the township of Vaughan. An Act of the Legislature of Canada (23 Vict. c. 102) had been passed providing for a new survey of the township; and, according to a survey made under the provisions of that Act, a strip of land containing about two acres and three-tenths, occupied by the defendant, it was alleged belonged to the plaintiff. On that strip there had recently been standing nine pine trees, seven of which the defendant had cut down. It appeared that some years before 1851 a fence from the front or easterly side of these lots, for a distance of about 60 or 70 rods, had been put up and was then standing on the supposed division line between the two lots; and also another fence running from the rear or westerly side of the lots to a distance of about 25 or 30 rods, leaving a space of about 600 yards in the centre unenclosed: but the parties respectively in occupation of the lots had always used the land on either side of the supposed line as belonging to them, up till about the year 1858, when the father of the plaintiff and the then owner of the defendant's lot procured a survey to be made, and a fence to be erected on the division line then laid out, which was paid for jointly by them, and which corresponded with a line which had been run and blazed by the same surveyor in 1851. The plaintiff, in 1873, filed a bill seeking to restrain the further cutting of timber, and for a declaration that the strip in question was his property:—Held, that there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations, even if the survey made and fence erected in 1858 were not sufficient acts to compel the parties to abide by that line as the true boundary. Held, also, that the statute of 1860, directing a survey of the township to be made, had not the effect of creating any new right or title, as between parties who had been in undisturbed possession for the statutable period of twenty years before action or suit brought. *Bernard* v. *Gibson*, 21 Gr. 195.

25 Vict. c. 28.]—Held, that s. 6 of 25 Vict c. 28, confirming a certain survey in the township of Scarborough, had not the effect of divesting any title acquired by the Statute of Limitations. *Palmer* v. *Thornbeck*, 28 C. P. 117.

29 Vict. c. 72.]—The plaintiff owned lot 28 and the defendant lot 27, in the third concession of Hamilton, between which there was no road allowance, and the plaintiff, previous to the survey of that concession, made under 29 Vict. c. 72, had occupied the land in question for more than twenty years. By this survey, it belonged to lot 27:—Held, that the effect of such survey was to fix conclusively the division lots between the lots; but that the plaintiff's title by possession was not taken away by it. *Taylor* v. *Croft*, 30 U. C. R. 573.

(b) *Other Cases.*

Alien Act — *Confiscation—Sale—Interruption of Possession.*]—A. and B. having received grants from the Crown for adjoining lots, A. inadvertently occupied a portion of B.'s lot, believing it to be his own. Some years after, B.'s lot was confiscated under the Alien Act, 54 Geo. III. c. 9, and sold under 59 Geo. III. c. 12. A., and those claiming under him, had held the disputed tract for upwards of twenty years at the time of action brought, but not at the time B.'s estate was confiscated, and the Crown became seised by inquest of office:—Held, that A.'s occupation did not work a disseisin of B.; that B. continued seised so as to entitle the Crown to that portion of his lot in A.'s possession; and that the bargainee of the Crown commissioners could maintain ejectment against the occupiers thereof. *Doe d. Howard* v. *McDonnell*, Dra. 374.

Common Error — *Effect of.*]—The fact that both plaintiff and defendant were under

a common error as to the true boundary of their lands will not prevent the statute from running against the true line, though it would be otherwise if it had been agreed upon between them that a certain line should govern whether correct or not. *Martin* v. *Weld*, 19 U. C. R. 631.

Conventional Boundary — *User—Evidence.*]—In an action for damages by trespass by McI. on M.'s land, defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. At the trial the parties agreed to try the question of boundary only:—Held, that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favour of establishing a title to the land in question in the defendant, and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years. Semble, that if it was open to him such user was not proved. *Mooney* v. *McIntosh*, 14 S. C. R. 740.

Exchange — *Discovery of Error—Necessity for Deed — Evidence—Corroboration.*]—In ejectment the plaintiff claimed, under a deed from her father, a piece of land constituting part of the defendants' lot, which the father claimed to have acquired by length of possession. For the defence P., one of the defendants, stated that on a survey being made some 17 years previously, and during the time the statute was alleged to have run, it was found that the boundary line between the plaintiff's father's lot and the defendants', which adjoined each other, was erroneous, and that each was in possession of a portion of the other's land; and that it was then agreed between the plaintiff's father, who died some two years afterwards, and defendants, that they should exchange the said portions, which was accordingly done, but without any deed or writing between them; that each took possession of his or their piece, but without removing the fence which divided their lots; that on the defendants' piece, being the land in question, he (P.) erected a log-house, and had been in possession ever since, taking the crops off it. The plaintiff herself admitted an exchange at the time stated, in consequence of the parties being so found in the possession of each other's lands and of defendants going into possession and taking the hay; and also, that on the fence being subsequently blown down, she did not erect it on the same place as before, but on the true line. The plaintiff's sister also stated, though she was not quite certain, that she remembered that the exchange took place:—Held, that this was sufficient evidence in corroboration under 36 Vict. c. 10, s. 6 (O.), to render P.'s evidence admissible. Held, also, that under the circumstances the plaintiff could not set up the fact of the exchange not having been by deed. *Findley* v. *Pedan*, 26 C. P. 483.

Inadvertent Possession—*Effect of.*]—A possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of time ripen into a title. *Doe d. Taylor* v. *Sexton*, 8 U. C. R. 264.

License—*Occupation of Boundary Strip—Revocation—Sale.*] — The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867, according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved his fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and the new line and in 1868-9 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to the old line, and sold to defendant. The plaintiff, in 1872, moved the fence to the new line, and defendant immediately replaced it, for which the plaintiff brought trespass:—Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole* v. *Brunt*, 35 U. C. R. 103.

Possession—*Boundary Strip—Concession Line Fence.*]—Between thirty and fifty years before action the owners and occupiers respectively of adjoining lots 16 and 15, through whom plaintiff and defendants claimed, erected and maintained at their equal charge a boundary line fence between their lots, and they had respectively been in possession, during that period, of the land up to the fence. The plaintiff commenced clearing on the north or rear of his lot, continuing in a southerly direction until within about four chains of the concession line in front, when, to protect the land so cleared, he erected a fence across his lot to the boundary fence, leaving the piece to the south up to the concession line open until about seventeen years before action, when he put up a fence along the concession line; but he had always maintained a roadway from the concession along the line of the fence as the means of access to his house. By a recent survey defendants claimed that the boundary fence was erroneous and encroached on lot 15, and that they were entitled to the piece of land in question, lying between the new line and boundary fence, and to the south of the fence first enclosed by plaintiff across his lot:—Held, that the plaintiff had acquired a title by possession to all the land up to the boundary fence, even though such fence might not be on the true line, and encroached on defendants' lot 15; and that, under the circumstances, his only having erected the fence along the concession line within the last seventeen years was of no importance. *Elliott* v. *Bulmer*, 27 C. P. 217.

——— *Boundary Strip—4 Wm. IV. c. 1.*]—A patent was granted to A. of part of lot 4, and to B. of part of lot 5. More than forty years before action a division fence had been put up on the then supposed boundary line between the lots, according to which the proprietors had ever since respectively occupied. C. (the defendant) holding under B., claimed a part of lot 4, not as embraced in the patent, but as being actually possessed by him and others before him in the title of B. as part of lot 5, and so considered by the proprietors of both 4 and 5, until very recently. D. (the

lessor of the plaintiff), claiming under A.'s patent, brought ejectment against C. to recover part of lot 4, notwithstanding C.'s possession of such part for more than forty years: but:—Held, that whatever might have been the effect before 4 Wm. IV. *c.* 1, of possession held under a mistake of boundary, since that Act the statute commenced to run against A. from the time of B.'s possession of the land under the old division line, and therefore the plaintiff was barred. *Doe d. Dunlop v. Serres*, 5 U. C. R. 284.

Possession by Owner of Adjoining Lot — *Effect.*]—Held, that there was sufficient evidence of possession of the land by the defendant and those through whom he claimed to give a good title under the statute, and this although the possession of a portion thereof had been that of the owner of the adjoining lot 25 under the mistake that it was part of his lot, for, on its being ascertained by a survey to be part of lot 24, it was immediately given up to the owner thereof, to whom the owner of lot 25 also subsequently conveyed it. *McCracken v. Warnock*, 43 U. C. R. 214.

Purchaser—*Position as Regards Boundary Strip.*]—In 1847, by a fence intended as a division fence between lots 26 and 25 in the township of Southwold, the land claimed in this action as part of 25 was included with 26, and was occupied by M., the owner of 26, as part of his lot, until 1854, when the error was discovered by a survey. M. assented to the line as then run, and was to have moved his fence, but he continued to occupy until 1856, when he conveyed to the defendant, who entered into possession and occupied up to the fence as M. had done. The deed purported to convey the south half of lot 26, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining, or therewith demised, held, and occupied or enjoyed, or taken or known as part and parcel thereof. By deeds made in 1865 and 1874 M. conveyed all his estate and interest in lot 25. In 1875 the plaintiffs, claiming under these conveyances, brought ejectment against the defendant for the part of 25 which had been enclosed with 26, as above stated, contending that M., notwithstanding the deed of 1856 and the delivering up of possession to the defendant, still retained a right of entry, either because the defendant was his tenant at will and so estopped from denying his title, or by virtue of his prior possession:—Held, in the common pleas, that whatever interest M. had in the land in question, whether it was part of 26 or of 25, passed to the defendant under the deed to him of lot 26, together with the appurtenances, &c., therewith occupied, &c. Held, on appeal, that no part of 25 passed by M.'s deed to defendant: but that the plaintiffs could not recover, for the defendant, when he took possession, did not enter as acknowledging any remaining right in M., and therefore, not being tenant at will to M. of this piece, or estopped from denying M.'s title, he had acquired title as against the plaintiffs under the statute. *McNish v. Munro*, 25 C. P. 290.

Survey—*Possession in Accordance with—Line Fence — Production of.*]—The plaintiff owned the east three-quarters and the defendant the west quarter of lot 25 in the 11th concession of Euphrasia. Sixteen years before suit, L., a surveyor, was employed by both plaintiff and defendant to ascertain the true division line between their lands. The parties cleared up to the line run by L. on each side of it, and a fence was gradually built along the line as the clearing proceeded, but did not extend through the lot, and had not all existed for more than ten years. The plaintiff had notified defendant that, if any of his timber fell into the plaintiff's clearing, the defendant must remove it. Two years before suit another survey was made, at the plaintiff's instance, throwing the division line two chains ten links further west than L.'s line. On this line the plaintiff erected a fence, which the defendant took down, and the plaintiff brought trespass:—Held, that there was ample evidence of the defendant's possession of the land bounded by the line run by L., so as to entitle him to claim according to that line produced from front to rear of the lot, and a verdict in his favour was upheld. *Shepherdson v. McCullough*, 46 U. C. R. 573.

——— *Possession in Accordance with—Division Line.*]—The plaintiff and M., his next adjoining neighbour, in 1868 employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the said line, and he and the owners of the adjoining land recognized it as the division line:—Held, that this was sufficient occupation by the plaintiff to give him a good title by possession up to the said line, whether it was the correct line or not. Harris v. Mudie, 7 A. R. 414, distinguished. *McGregor v. Keiller*, 9 O. R. 677.

——— *Possession in Accordance with — Acts of Ownership.*]—Actions for trespass to land, defended on the ground of want of title in the plaintiffs and title by possession in the defendant. At the trial evidence was given on behalf of the plaintiffs of a survey of their land and the defendant's land adjoining, made in 1869, by one B., in which, as he reported to the Crown lands department, he had made a mistake, and which he corrected by moving the posts he had planted as the line was traced. The defendant contended that the line as first run by B. was the true line. As to possession, the evidence was that the defendant had cut timber on the land in dispute for many years, and also tapped maple trees for sugar, but had not fenced the land until some six or seven years before action. The trial Judge found that the plaintiffs had respectively proved title to their lands, and that the acts of ownership shewn by the defendant were mere acts of trespass, committed either wilfully or in ignorance as to boundaries, and not such as would enable his possession to ripen into a title. His decision was affirmed by the court of appeal for Ontario and by the supreme court of Canada. *Horton v. Casey, Horton v. Humphries*, 22 S. C. R. 739.

See Cain v. Junkin, 6 O. R. 532, 13 A. R. 525; *Palmer v. Thornbeck*, 27 C. P. 291.

See, also, cases under 3 (a) and (b).

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7. Caretaker.

Servant of Owner—*Use and Benefit.*]—Semble, that if defendant can be shewn to

have been occupying the land as the servant of the owner during the twenty years, and not for his own use or benefit, the statute will not run. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

Tenant at Will—*Exclusive Possession—Receipt of Profits—Pasture for Cattle.*]—While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant:—Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour. *Rennie* v. *Frame*, 29 O. R. 586.

——— *Termination of Tenancy.*] — In 1849 the plaintiff's father, who owned a block of 400 acres of land, offered him the choice of 100 acres, if he would live on it and take care of the remaining 300 acres. The plaintiff selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block, till 1864, when he sold his 100 acres and moved on to the north half of this lot 1, where he had resided ever since. The father died in 1877, having devised the north half of this north half to the defendant, another son, and the south half thereof to the plaintiff. The defendant claiming under the devise entered, whereupon the plaintiff brought trespass, claiming title by possession. It appeared that the plaintiff had erected buildings on the land in question, and cleared and cultivated it, taking the profits to his own use; and since 1865 the lot had been assessed in his name, and he had paid the taxes thereon. The plaintiff occasionally visited his father and told him what improvements he was making on the lot. The defendant swore that in 1871 he was sent by his father to the plaintiff to remonstrate with him for cutting timber and destroying the land, and to tell him that if he did not pay the taxes he would give the land to some one else; and that the plaintiff promised to cut no more and to pay the taxes: —Held, reversing the judgment in 29 C. P. 449, that the plaintiff held the land in question as tenant at will, not as caretaker and agent of his father; that there had been no determination of the original tenancy, without which a new tenancy could not be created; and that he was therefore entitled to recover. *Ryan* v. *Ryan*, 4 A. R. 563.

Title—*Proof of—Purchaser for Value—Recognition of Title.*]—B. entered into possession of a small portion of a lot of land which he had fenced and cultivated, the lot being in a state of nature, and the agent of the owner, discovering B. to be so in possession, suffered him to remain there, he agreeing to look after the property in order to protect the timber; and B. subsequently assumed to sell the whole to one J., his grandson. On a bill filed by the owner, the court held that under the circumstances the Statute of Limitations did not run in favour of B. so as to give him a title by possession, and that J. was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that B. was seised; that J. believed he was seised; that B. was in possession; and that the consideration for the transfer by B. to himself had been paid. Subsequently the plaintiff's agent again visited the property, and obtained B.'s signature to a memorandum agreeing to hold possession and look after the property for the plaintiff: —Held, a sufficient recognition of the title of the plaintiff, and that the defendants could not put him to proof thereof. *Greenshields* v. *Bradford*, 28 Gr. 299.

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8. *Commencement of Statutory Period.*

Married Woman—*Removal of Disability—Statute—Mortgage—Purchaser at Sale.*]—A husband and wife were married in 1841. In 1865 the wife acquired three adjoining lots of land by conveyance from a stranger. The defendant was put in possession of the lands in 1869 by the husband, and in 1870 one of the lots was conveyed by them to him. In 1881 the husband and wife mortgaged the unconveyed lots, which were afterwards purchased by the plaintiff at a sale under the power of sale in the mortgage. The defendant remained in possession of all the lots until 1888. In an action of trespass:—Held, that the wife's disability of coverture having been removed in 1876 by 38 Vict. c. 16, ss. 1 and 5 (R. S. O. 1887 c. 111, ss. 4 and 43), the Statute of Limitations ran against her from that time, and that the defendant had acquired a good title by possession against her. Held, however, that a new right of entry accrued to the mortgagee, and that the statute did not commence to run against him until (as the earliest possible period) the time of the execution of the mortgage, less than ten years before action, and that the plaintiff claiming under him was entitled to succeed. Semble, the plaintiff, as purchaser under the power of sale in the mortgage, acquired a "new title" at the time of such sale, at which time the statute began to run against him. *Cameron* v. *Walker*, 19 O. R. 212.

Purchaser of Farm—*Mortgage by—Possession by Son—Payment of Mortgage—Effect of Discharge.*]—In March, 1881, the plaintiffs' testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,000, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understanding that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid, he should have the farm, subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage, which, the balance being made up by the father, was paid off on the 30th March, 1886, a statutory discharge acknowledging payment by the father being on that day made and registered. The father after this declined to convey the farm to the son, and promised to leave it to him by his will, but died in 1894, leaving a will in favour of the plaintiffs. The son continued in possession of the farm until his death, in 1893, and the defendant, the widow and one of the devisees of his property, continued in possession after his death, this action being brought to eject her. From time to time during the lifetime of the son, the

father had spent a few days at the farm, but had not actively interfered in the management:—Held, per Hagarty, C. J. O., and Osler, J. A., that title had not been acquired as against the father and his devisees. Per Burton and Maclennan, JJ.A., that the execution and registration of the discharge gave, in any event, a new starting point for the statute. Judgment in 27 O. R. 93 reversed. *Henderson* v. *Henderson*, 23 A. R. 577.

Remainderman—*Death of Tenant for Life—Joint Tenancy.*]—By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with remainder as follows: Lot No. 2 to G. A. and lot No. 1 to A. A., to the use of them, their heirs and assigns, as joint tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878 A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before), and brought an action against the defendant for the recovery of the said lot No. 2:—Held, that as there was no time prior to the death of the tenant for life when either the trustee or the remainderman could have interfered with the possession of the lot, the Statute of Limitations did not begin to run against the remainderman until the death of the tenant for life in 1875, and he was therefore entitled to recover. Held, also, that for the purpose of the action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs. *Adamson* v. *Adamson*, 12 S. C. R. 563.

Tax Purchaser — *Redemption.*] — The Statute of Limitations does not begin to run against a tax purchaser until the period for redemption has expired. *Smith* v. *Midland R. W. Co.*, 4 O. R. 494.

Tenant at Will.]—See *Cooper* v. *Hamilton*, 45 U. C. R. 502; *Smith* v. *Keown*, 46 U. C. R. 163; *Re Defoe*, 2 O. R. 623.

——— *One Year from Entry.*]—H. purchased the land in question, and took a deed dated 30th April 1870. His brother, the defendant, paid a small portion of the money, and immediately went into possession. H. occasionally visited the place. On the 30th November, 1874, H. mortgaged to the plaintiff, who issued his writ on the 25th February, 1881. Defendant claimed title by possession:—Held, that in any event the statute would not commence to run in defendant's favour until a year from his entry and that he therefore had acquired no title. *Grant* v. *O'Hara*, 46 U. C. R. 277.

Tenant by the Curtesy—*Conveyance of Estate—Mistake—Effect of.*]—Some time before 1863 the defendant M. at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same, relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to M. of the whole 300 acres, which M. executed as grantee. The father died in 1873, and M. continued to reside on the property with the knowledge of his several brothers and sisters until 1877, when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1866 had not effectually conveyed the portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the court, being satisfied that the same had been obtained improperly, set it aside with costs; but ordered that M. should be allowed for his improvements, as having been made under a bonâ fide mistake of title, he accounting for rents and profits since the death of the father:—Held, that under the circumstances M. could not avail himself of the statute, as up to the death of his father in 1873, he was rightfully in possession under the deed from the father, which stopped the running of the statute against the heirs of the mother, and which, though void as a deed in fee, was effectual to convey the father's interest as tenant by the curtesy. *McGregor* v. *McGregor*, 27 Gr. 470.

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9. *Continuous Possession.*

Conflict of Evidence—*Acts of Ownership—New Trial.*]—In ejectment, defendant claimed by length of possession by herself and ancestor. The evidence as to her possession being continuous was conflicting, and for part of the time it appeared to have been by such acts as keeping the key of the house, and leaving upon the premises one or two trifling articles, with an occasional return to the place. The whole case was left to the jury on the evidence, with a direction from the Judge that he could not say there had not been a keeping of possession shewn by defendant. It also appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had been already two verdicts against her. The court refused to protract the litigation by granting a new trial. *Lewis* v. *Kelly*, 17 C. P. 250.

Heir of Patentee—*Breaks in Occupation.*]—In ejectment, the plaintiffs proved a paper title, and defendant, the heir-at-law of the patentee, claimed by possession. It appeared that one B. in the spring of 1834 took possession of an acre of the same lot, which he agreed to purchase from one M., through whom the plaintiffs claimed, and built a house on it, in which he lived till 1844. The land in dispute lay between his acre and the river, and he was allowed to occupy and enclose it by the owner, whose title he always acknowledged, though not in writing. He left in 1844, and his house continued vacant for two years, the land in question remaining enclosed as before. The house and acre were then taken by a tenant under B., and occupied for three years together with this land,

and after being vacant for three months two other tenants came in succession, and occupied the house until June, 1855, holding this land in the same way as B. and the others had done, when defendant brought ejectment for the house and acre, and having recovered a verdict took possession of the land in question as well:—Held, that the possession of B. and those succeeding him must be treated as continuous, notwithstanding the breaks in the occupation, and that a verdict was properly found for defendant. *McLaren* v. *Morphy*, 19 U. C. R. 999.

Presumption from—*Conveyance from Patentee.*]—In ejectment, it appeared that the patent issued in 1823 to the plaintiff's mother, the daughter of an U. E. Loyalist. She died in 1846, and her husband in 1857. Neither of them ever asserted any title, and the plaintiff never heard of the land in the family until about three years before action, when he was informed by a stranger that it was his. The defendants produced the patent, and two deeds executed by one F. in 1828 and 1829, for the north and south halves of the lot, respectively, with a series of conveyances tracing title from F. to the defendants. There was evidence that F. did the settlement duties in 1821 or 1822, and made the affidavit of their performance, and that he lived on the lot for some years, but it seemed doubtful whether in fact possession was taken by any one until one W. entered in 1858. There had, however, been undisputed possession from that time, and the taxes had been paid by the respective occupants. F.'s daughter, who found the patent, proved that some of F.'s papers had been destroyed by her after his death, and some burned during his lifetime, though she thought no deed was among them. The Judge was against the defendants on the question of possession (forty years' possession being required), but left the case to the jury, saying that, under the circumstances, it was competent for them to presume a conveyance from the patentee; and they found for defendants:—Held, that there was some evidence for the jury on both points, and the court refused to interfere. Remarks as to the doctrine of presumption in such cases, and its application under the circumstances of this country. *McLeod* v. *Austin*, 37 U. C. R. 443.

See Kipp v. *Synod of Toronto*, 33 U. C. R. 220, *ante* I.

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10. *Crown, Possession against.*

Generally.]—The Statute of Limitations does not run against the Crown. *Doe d. West* v. *Howard*, 5 O. S. 462.

Information for Intrusion—"*Not Guilty*"—*Crown Lease—Evidence—Title.*]—On an information for intrusion upon land of the Crown:—Held, there being no proof that the Crown had been out of possession for twenty years, that under "not guilty" defendant could not give evidence of title under a Crown lease. Held, also, that the Crown on this plea was not entitled to judgment at once, but must go down to trial to shew the intrusion and damages: because defendant under the plea might shew the Crown out of possession for twenty years, and thus put the Crown to proof of title. *The Queen* v. *Sinnott*, 27 U. C. R. 539.

Lessees from the Crown.] — Plaintiff and defendant held the north and south halves of a lot respectively as lessees from the Crown. Defendant entered and held possession up to a certain line for more than twenty years, and the plaintiff had held the remainder for some sixteen years. They then each obtained patents for their halves, and on discovering that the lot overran, and that the defendant's fence encroached upon his half, plaintiff brought ejectment:—Held, that he was entitled to recover: that the possession by defendant could not affect the title derived under the patent, for the statute did not run while the fee was in the Crown. *Jamieson* v. *Harker*, 18 U. C. R. 590.

The plaintiff held a lease of a lot from the Crown, which would expire in 1845, and in 1837 allowed defendant, his son-in-law, to go upon a portion of it, which he held for more than twenty years. In 1839 the plaintiff agreed to purchase from the government, and paid an instalment, and in 1856 obtained his patent, when he brought ejectment against the defendant:—Held, following the last case, that defendant's possession could not avail him while the title was in the Crown, and the plaintiff must recover. *Dowsett* v. *Cox*, 18 U. C. R. 594.

Locatee — *Partition — Improvements — Private Rights.*]—A locatee of Crown lands left the Province in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also, from time to time, till 1887. There were two other children who had not been in possession of the land for more than ten years before action, which was brought in 1895:—Held, that the locatee must be presumed to have been dead by 1884, and the defendant had acquired a title by possession as against the children other than the plaintiff, whose claim as to one-quarter was as good as his, and in making partition the Crown should recognize his right to the improvements. The Statute of Limitations, R. S. O. 1887 c. 111, applied because the rights involved upon the record were merely private rights not affecting the pleasure or the sovereignty of the Crown. Even in the case of unpatented lands, declaratory relief may in a suitable case be given, which will work practically the result of a partition of the property, subject to the Crown being willing to act upon the judgment of the court. *Pride* v. *Rodger*, 27 O. R. 320.

Navigation Rights.] — The plaintiff set up that he had a right by prescription to keep and use a boathouse in front of his lot on the bank of the Ottawa river without being interfered with:—Held, that any structure on the water, even if existing for twenty years, would be an interference with the free use of the river reserved by the Crown, and the right to so interfere could not be acquired by lapse of time. The action was therefore dismissed. Warin v. London and Canadian Loan and Agency Co., 7 O. R. 706, distinguished. *Ratté* v. *Booth*, 10 O. R. 351.

See S. C., sub nom. *Booth* v. *Ratté*, 15 App. Cas. 188.

Nullum Tempus Act — *Unsurveyed Lands.*]—The Nullum Tempus Act, 9 Geo. III. c. 16, is in force in this Province, but

it does not apply to the unsurveyed waste lands of the Crown. Pointe au Pelee Island, in Lake Erie, and forming by law part of the township of Mersea, had been occupied by defendants and those under whom they claimed, without interruption, since 1789. It was not shewn that the possession held had been other than that of trespassers, nor that the Crown had ever taken charge of or received any rents from the island, nor that it had been surveyed, nor the title of the Indians extinguished, and it had never been assessed or returned as assessable:—Held, that the Crown was not barred by such possession. *The Queen* v. *McCormick*, 18 U. C. R. 131.

Seigneurie—*True Root of Title.*]—Held, in an action of ejectment by the Crown, with regard to the claim of the company, defendants, to hold the whole of the land in suit by prescription and immemorial possession, that inasmuch as the company had disclosed the true root of its title, the law of prescription did not apply. *Labrador Co.* v. *The Queen*, [1893] A. C. 104.

Trustee.] — The Statute of Limitations does not run against the Crown, and it makes no difference that the land is vested in the Crown as trustee. Where, therefore, in ejectment by the Crown for land held as trustee for the University of Toronto under C. S. C. c. 62, s. 65, it appeared that defendant had held possession for twenty-seven years, the plaintiff was nevertheless:—Held, entitled to succeed. *Regina* v. *Williams*, 39 U. C. R. 397.

The Statute of Limitations was held not to be a bar to an action though brought by the Crown in its capacity as trustee of the land in question in the suit. Regina v. Williams, 39 U. C. R. 397, followed. *Attorney-General* v. *Midland R. W. Co.*, 3 O. R. 511.

II. *Discontinuance and Dispossession.*

Abandonment — *Absence from Province — Disability.*] — Ejectment. The plaintiff in 1814, being charged with high treason, fled from the Province, leaving his family on the property in question, and they afterwards joined him in the enemy's country:—Held, that the circumstances of his leaving should have been considered by the jury as conclusive of an intention to abandon the possession; and that it could not be said that leaving his family in possession was the same as remaining himself; that the discontinuance commenced when they left; and that, being abroad then, the plaintiff was entitled to the benefit of the disability. *Butler* v. *Donaldson*, 12 U. C. R. 255.

Actual Entry.]—Semble, that under the evidence the plaintiff was entitled to a verdict; for either S., under whom she claimed, was never in possession in respect to the patent under which he claimed, and therefore could not be said to have been dispossessed, in which case the statute never began to run against him; or, if in possession at all, it must have been by virtue of his actual entry in 1830 and 1832, since when twenty years had not elapsed. *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310.

Constructive Possession—*Absence from Province.*] — Possession follows the conveyance of the estate, and such constructive possession will be presumed to continue until proof of actual entry by a stranger, or of discontinuance by some distinct act evincing intention to do so. Absence from the Province and the want of actual occupation for more than twenty years by the owner, is not a discontinuance of possession, within s. 17 of 4 Wm. IV. c. 1. *Doe d. Cuthbertson* v. *McGillis*, 2 C. P. 124.

——— *Descent.*]—It was proved that the plaintiff's father, the son of the patentee, had put a brother of the plaintiff on the lot in 1835 or 1836, but how long he remained was not shewn; and that in 1837 or 1838 the plaintiff told one H. that M., under whom defendants claimed, owned this lot; and the same witness swore that the plaintiff had worked on the land for one of the defendants. There was no proof of possession for twenty years:—Held, that discontinuance may be of a constructive as well as of an actual possession, and in this case there was evidence to go to the jury to find whether the plaintiff had not discontinued the constructive possession which he acquired by descent on the death of the patentee. *Pringle* v. *Allan*, 18 U. C. R. 575.

Devisee — *Dispossession — Evidence — Jury.*]—Held, that upon the evidence in this case, the jury were warranted in finding that there had been no dispossession by C., one of two devisees of the land in question, more than twenty years before this action, and therefore that the plaintiffs claiming under F., the other devisee, were not barred. *Ingalls* v. *Arnold*, 14 U. C. R. 296.

Sale—*Adverse Claim—Title—Extinguishment.*]—On 8th April, 1854, the plaintiff acquired by conveyance the fee simple of a vacant piece of land, but did not enter. Shortly afterwards a railway company surveyed and staked out a portion of it, with other land required for their railway, and the sum to be paid by them to the plaintiff was settled by arbitration under the statute, but the company never paid or took possession. On 31st December, 1857, the plaintiff recovered judgment against the railway company, and under proceedings in chancery sold their interest in the land to the defendant P., who did not take actual possession, though he went upon the land prior to 1860, and examined the clay to see whether it was fit for brick making. He did not fence or cultivate it, though it was fenced on two sides by the adjoining proprietors. He also put up a board on it with an advertisement that the lot was for sale, signed by him, but when was not shewn, and it was knocked down and not replaced. In 1876 P. sold the land to the defendants, who immediately went into possession and made valuable improvements. The railway company and the defendants paid the taxes from 1853:—Held, that neither the railway company nor P. had such a possession of the land as extinguished the title of the plaintiff, who was therefore entitled to recover the land. *Walton* v. *Woodstock Gas Co.*, 1 O. R. 630.

——— *Part not Sold by Mistake—Action by Vendor to Recover.*]—The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front

three-quarters" to one K. Supposing that he had parted with all his land, he moved off the lot; it turned out, however, that, owing to an error in running the lines, a small surplus, not covered by the deeds, was left between the parts sold; and after a lapse of more than thirty years the plaintiff brought ejectment to recover this portion:—Held, that to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance was not more than twenty years before action brought. *Doe d. Taylor* v. *Proudfoot*, 9 U. C. R. 503.

See Ketchum v. *Mighton*, 14 U. C. R. 99, *ante* 1; *Lloyd* v. *Henderson*, 25 C. P. 253, *ante* 1.

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12. *Easements.*

Injury to Easement — *Railway.*]—See *Wells* v. *Northern R. W. Co.*, 14 O. R. 594.

Lateral Support—*Unity of Seisin*—*Acquiescence.*]—The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built upon oak planks laid about one foot under the ground by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term. In 1856, however, he acquired the fee, and in 1870 he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H., from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way:—Held, that owing to the unity of the seisin of S., there had not been twenty years continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant. *Backus* v. *Smith*, 5 A. R. 341.

Light.]—See *Burnham* v. *Garvey*, 27 Gr. 80; *Carter* v. *Grasett*, 11 O. R. 331, 14 A. R. 685, *ante* (LIGHT.)

Nuisance — *User.*] — Held, that twenty years' user will legitimate an easement affecting private property, but not a nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

Party Walls.] — See *James* v. *Clement*, 13 O. R. 115.

Water Pipes — *Railway.*]—Nearly forty years before the commencement of the action, the predecessors in title of the defendants laid pipes for conveying water along the railway line of the plaintiffs' predecessors, using them for such purpose almost continuously up to the time the action was brought:—Held, that the defendants, not having used and enjoyed their easement for forty years, had not acquired a title thereto by prescription under R. S. O. 1887 c. 111, s. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

Water Rights.] — See *Ellis* v. *Clemens*, 21 O. R. 227, 22 O. R. 216.

——— *Interruption — Unity of Possession.*]—A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended. *Stothart* v. *Hilliard*, 19 O. R. 542.

Way.]—See *Maughan* v. *Casci*, 5 O. R. 518; *Duncan* v. *Rogers*, 15 O. R. 699, 16 A. R. 3.

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

——— *Interruption.*]—Held, that the Ontario Act (R. S. O. 1877 c. 108), reducing the

period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel* v. *Doyle*, 45 U. C. R. 65.

See *McKay* v. *Bruce*, 20 O. R. 709.

——— *Interruption — Unity of Possession.*]—The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner. *Innes* v. *Ferguson*, 21 A. R. 325; *Ferguson* v. *Innes*, 24 S. C. R. 703.

——— *Railway Crossing—Acquisition by Prescription.*]—See *Guthrie* v. *Canadian Pacific R. W. Co.*, 27 A. R. 64.

See, also, cases under EASEMENT.

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13. *Entry.*

(a) *When Sufficient to Stop Running of Statute.*

Agent Obtaining Acknowledgment.]—In February, 1853, after the expiration of a lease by the plaintiffs to R. for ten years, R. continued in possession; and in 1854 defendant, who had married R.'s daughter, came to reside with R., under an oral agreement, as he asserted, whereby R. handed over the possession to him; but the evidence shewed that R. and his wife still remained on the place until his death in 1869. After R.'s death, his widow and defendant continued to reside on the premises; but the defendant was frequently absent working for others. In 1882, while defendant was so absent, and the widow alone in actual visible possession, S., the plaintiffs' agent, entered, and the widow signed a written instrument, witnessed by S., confessing that she was on the land merely on sufferance of the plaintiffs, and undertaking to give them possession whenever they might require it. Afterwards defendant returned to the premises; and in 1886 the plaintiffs brought ejectment:—Held, that the plaintiffs' entry and the acknowledgment signed by the widow in 1882 put an end to defendant's former possession, if any, so that the Statute of Limitations would run only from that period; and that they therefore were not barred. *Canada Co.* v. *Douglas*, 27 C. P. 339.

Enclosing with Other Land.]—Where one was in possession of the land, claiming as assignee of a bond for a deed, made by the owner in fee, whose estate B. took by devise:—Held, that an entry by B., animo possidendi, and enclosing the land with a field of his own adjoining, caused the statute to cease to run as against B., and that the right of entry of B. and those claiming under him dated from an entry thereafter made by the defendants upon B.'s possession so obtained. *Clements* v. *Martin*, 21 C. P. 512.

Going on Land—*Arrangement as to Improvements—Profits.*]—R., in 1861, permitted the defendant L. to occupy certain lands upon an alleged agreement that in lieu of rent he should make improvements such as were required for L.'s trade, but not defined as to extent or value, of which R. would obtain the benefit, and that L. would give up possession when R. required it—there being no agreement for any term. R., between 1867 and 1879, went occasionally on the place and spoke to L. about the improvements, telling him to make such improvements as he chose. In 1879, after L. had become financially involved, he restored the possession of the premises to R.:—Held, that L. could not have set up a title under the Statute of Limitations; nor could the plaintiffs, his creditors, claim the land as having been so acquired by him. *Workman* v. *Robb*, 7 A. R. 389, 28 Gr. 243.

——— *Consent to House Remaining on Land.*]—One G., owning land, allowed a school house to be built upon it in 1840, and a school was kept there until 1851, when a new site was obtained, and the trustees sold the old house. Before doing so, however, they sent for G. to get his consent; and he came to the house, and said the purchaser might live in it until the land was cleared up around it. In ejectment against defendant claiming under the purchaser:—Held, that there was evidence of an entry by G. in 1851, from which time only possession would run; and that the plaintiff, therefore, was not barred. *Henderson* v. *Harris*, 30 U. C. R. 360.

——— *Procuring Acceptance of Lease.*]—In 1860 D. M., the then owner of certain lands, conveyed to A., who in 1861 conveyed to N., through whom plaintiff claimed. D. M. continued in possession, and, at his request, his sister M. B. came and resided with him, and took charge of the house and their sister S. M., who was subject to fits, which to some degree affected her mind. In 1862 D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868 defendant, the sister's nephew, came to reside with them, M. B. giving him charge of the place, upon which he subsequently erected buildings. In 1875 N. went upon the land in assertion of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favour of M. B. and S. M., which was accepted by S. M., who executed the lease, but not by M. B., who refused to do so; S. M., M. B., and defendant still continuing to reside on the premises. M. B. died in 1879 and S. M. in 1886. The defendant continued to reside thereon. In 1887 the plaintiff brought ejectment against defendant, who claimed a title by possession:—Held, that N. having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and that of his successors in title; and, therefore, plaintiff was entitled to recover. *Arnold* v. *Cummer*, 15 O. R. 382.

Portion of Land.] — Where the true owner of land in exercise of his right enters upon any portion of the land which is not in the actual possession of another, the entry is deemed to refer to the whole land. *Great Western R. W. Co.* v. *Lutz*, 32 C. P. 166.

Putting up Sale Notice.] — Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter

upon the land so as to put himself in legal possession of it. Held, that putting up boards on the land stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain trespass. *Donovan* v. *Herbert*, 4 O. R. 635.

Putting up New Fence — *Tenancy — Vacant Possession.*]—See *Coffin* v. *North American Land Co.*, 21 O. R. 80.

Removal of Fence — *Replacing — Interval.*]—In this case it appeared that over twenty years before action a fence was mutually erected by plaintiff and defendants' father, who then occupied lot 32, as a line fence along the course of an old blazed line, though for what purpose such line had been run did not appear. The fence continued to be used as a line fence until 1862-3, when, in consequence of the survey made under 24 Vict. c. 64, and 25 Vict. c. 38, the plaintiff claimed that the line was incorrect, and he procured the surveyor who had made the survey to run the line. The surveyor divided equally the space in the block containing these two lots between the road monuments planted several years previously by himself at the front angles of the side road allowances; but there was no evidence to shew how he ascertained the position of such side roads in making that survey, or of any search for the original monument. In 1865-6, after this new line had been run, the plaintiff pulled down a piece of the old fence and removed it to the new line, where it remained for two or three days, until put back by the defendants to the original line, where it had remained ever since. Semble, that the plaintiff's entry in 1865-6 was sufficient to stop the running of the Statute of Limitations. *Palmer* v. *Thornbeck*, 27 C. P. 291.

Removal of Structure—*Permission.*]—In order to gain convenient access to the upper rooms of their house the plaintiffs constructed a wooden platform, stairway, and landing, on the outside of the house on the defendant's land. The structure was composed of planks laid upon blocks or scantling resting upon the ground, but the head of the stairs was supported upon posts which rested upon the ground. The platform and stairway were open to every one, including the defendant, and there was no bar or gate to prevent defendant from entering on his property. The defendant took no proceedings against the plaintiffs until the expiration of ten years:—Held, reversing the judgment in 26 Gr. 503, that the plaintiffs had not such possession of the land covered by the structure as by force of the Statute of Limitations to vest in them a title in fee simple; but that even if the statute had commenced to run it was stopped by the fact, as stated in the evidence, that during the ten years the defendant had temporarily taken up the platform, and used the land for his own purposes. It was held on the evidence that this was not shewn to have been done by the plaintiffs' permission; but quære, whether if it had been it would not still have interrupted the operation of the statute. *Griffith* v. *Brown*, 5 A. R. 303.

Visits to Relatives — *Infant—Heir-at-Law.*]—The lessor had died in 1878; it was said that he left one son, who, when very young, in 1880, was taken by his aunt, one of the plaintiffs, to the house upon the land, where he stayed one night; and the aunt said that she told her sister the defendant, that he was the heir to the property:—Held, that, even if the boy were the true owner, this was not an entry upon the land, as owner, sufficient to stop the running of the statute. *Brock* v. *Benness*, 29 O. R. 468.

——— *Mortgage—Reservation—Tenancy at Will — Commencement of Statutory Period.*]—Ejectment for three acres and one acre, separate parcels of lot 36 in the 2nd concession of Lochiel. On the 16th June, 1839, McD., mother of the plaintiff, became owner of the whole lot by conveyance from the grantee of the Crown. On the 6th April, 1847, she conveyed the whole lot to W., her son, by a deed which was to be given to him when he should give security for her support. This he did by bond, and the deed to him was registered on the 20th April, 1857. On the 16th April, 1849, however, she conveyed to the plaintiff, another son, the three acre parcel, by a deed registered on 2nd October, 1849. On the 10th June, 1851, W. conveyed the one acre parcel to plaintiff. On the 17th May, 1862, W. gave a mortgage on the lot to plaintiff, registered 23rd September, 1862, to secure advances made by plaintiff to pay off a previous mortgage to defendant, which mortgage to plaintiff contained a reservation of four acres already made by deeds of conveyance to the party of the third part (plaintiff) from McD. and W. This mortgage was discharged before this suit was commenced. On the 28th December, 1868, W. conveyed the whole lot to defendant, without any reservation of the three or one acre parcels. W. lived on the lot and used it as owner from the date of the conveyance to him in 1847 till he sold it in 1868. The plaintiff went to the United States in 1849, but came back yearly and stayed on the lot, where his mother also lived with W. In his evidence W. said he always considered the four acres to be his brother's, and did not hold them adversely, but made no difference in working them:—Held, as to the three acre parcel, that the plaintiff was barred by the Statute of Limitations, notwithstanding his annual visits to the land. Held, also, that the reservation in the mortgage to the plaintiff by the defendant, dated 17th May, 1862, was not an acknowledgment of the plaintiff's title at that time to the lands so reserved. Held, also, as to the one acre conveyed to plaintiff by W. on 10th June, 1851, that W. being allowed to remain in possession was a tenant at will, and his tenancy ended on the 10th June, 1852, and the action having been commenced on the 14th June, 1871, the plaintiff was not barred. *Williams* v. *McDonald*, 33 U. C. R. 423.

——— *Payment of Taxes — Tenants in Common.*] — The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seised in fee simple and in possession. Another nephew of the deceased resided with the widow upon the land for about two years after she entered, but at that time had no interest in it, his father being then alive; and he made occasional visits to it in subsequent years, and paid the taxes on it for 1872, but during all this time he made no claim to any interest in the land:—Held, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but merely as

the guest of his aunt, and in paying the taxes he did so on her behalf, and not as having or claiming an interest for himself or any one else; and therefore it could not be said that the possession was not hers, or that it was a possession by his license. And, even if what happened amounted to an entry, that entry did not operate in favour of the plaintiff's co-tenants, for an entry by one tenant in common is not an entry by his co-tenant. *Hartley* v. *Maycock*, 28 O. R. 508.

See Handley v. *Archibald*, 30 S. C. R. 130; *Dumble* v. *Larush*, 25 Gr. 552, 27 Gr. 187.

(b) *Other Cases.*

Accrual of Right — *Coventure—Disability—Time.*]—See *Ingalls* v. *Reid*, 15 C. P. 499.

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

Sub-section 8 of s. 5 of R. S. O. 1887 c. 111, applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, and not in default, is, therefore, not to be deemed to be a tenant at will to his vendor within the meaning of s-s. 7. Warren v. Murray, [1894] 2 Q. B. 648, applied. Judgment in 28 O. R. 92 affirmed. *Irvine* v. *Macaulay*, 24 A. R. 446.

Deed —*Acceptance — Effect.*] — See *Gray* v. *Rochford*, 1 A. R. 112, 2 S. C. R. 431.

Necessity for Entry — *Mortgage — Vacant Lands.*]—See *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

——— *Where Action of Ejectment Brought.*]—See *Young* v. *Hobson*, 30 C. P. 431.

See Cahuac v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 251; *Building and Loan Assn.* v. *Poaps*, 27 O. R. 470.

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14. *Exclusive Possession—By or among Relatives.*

Brother and Sister—*Joint Interest and Occupation—Sole Control.*]—The plaintiff was jointly interested in the estate of her father, who died in 1865, and she continued to reside upon the homestead with her brother, who exercised sole control as to renting and working the property, up to within ten years of the filing of a bill for partition:—Held, that such residence with her brother was a joint occupation by both, and as such sufficient to prevent her right being barred. *Foley* v. *Foley*, 26 Gr. 463.

Husband and Wife—*Possession of Husband.*]—The son of an intestate and his wife having been in undisturbed possession of land of the intestate long enough to give title to one or the other; and it appearing that it was farmed and improved by the husband, and assessed in his name; that the claim of the wife thereto had not been set up until after her husband had fallen into difficulties; and that such claim rested only upon the statement of the intestate, made after the title had ripened in some one, that he had, in his waggon, conveyed the wife of his son to the land, while the son was absent, and left her in possession:—Held, that the possession was that of the son; and that his title vested in his assignee in insolvency. *Filman* v. *Filman*, 15 Gr. 643.

Parent and Child — *Conveyance to Infant—Sale under Execution against Parent.*] —Defendant's father had for sixteen years been in possession of land to which he had no title, legal or equitable, and the legal owner then conveyed it to defendant, a youth about twelve years old, who was living on the lot with his father, and continued to do so for eleven years thereafter, when the property was sold on an execution against the father:—Held, that the possession, after the execution of the deed, was the possession of the son: that the father acquired no title thereby against the son; and that the sheriff's deed was void against the son, and should be set aside as a cloud on his title. *McKinnon* v. *McDonald*, 11 Gr. 432.

——— *Heir-at-Law — Tenants in Common.*]—Two brothers, tenants in common in fee, maintained their father with them on the property. One of the brothers died intestate, leaving his father his heir; the father continued to live with the surviving brother on the property, and to be maintained by him: the father did not affect to be the owner of the property:—Held, that this living on the property was sufficient to prevent the statute from running against the father, as respected his undivided moiety. *Holmes* v. *Holmes*, 17 Gr. 610.

——— *Heir-at-Law — Widow — Life Estate.*]—The patentee of land devised it to his wife for life, and afterwards to one of his sons in fee, but the will was void. The widow, nevertheless, lived upon the land with her children, claiming a life estate. Her eldest son remained with her for some years and then removed, leaving the defendants (two younger brothers), who continued until her death (more than twenty years), one of them managing the farm during seven years of that time:—Held, that their possession was not such as to give them the title against their elder brother, the heir-at-law. *McArthur* v. *McArthur*, 14 U. C. R. 544.

——— *Intention to Convey—Inconsistent Acts.*]—A father, being desirous of assisting his sons, put them in possession of portions of his real estate, and frequently expressed his determination to convey such portions to the sons. During the continuance of such possession, however, the father was frequently on the premises assisting with his advice and directing the actions of his sons in improving the property, and conveyed an acre to one of his sons, and subsequently sold a valuable portion of the premises occupied by the same son. By his will the father devised his lands to be divided among all his children:—Held, that the sons had not, under the circumstances, acquired a title under the statute. *Foster* v. *Emerson*, 5 Gr. 135. See, however, *Keffer* v. *Keffer*, 27 C. P. 257.

——— *Manager — Mortgagee.*]—Defendant's mother was in possession of a farm at the time of her second marriage, and defendant, her son by a former marriage and a minor, lived with her. On the death of her second husband, the defendant, who had just become of age, continued with his mother on the farm and managed it:—Held, that he could not claim the farm against a person to whom the mother subsequently mortgaged it. *White* v. *Haight*, 11 Gr. 420.

——— *Oral Promise of Conveyance — Payment of Taxes.*]—In ejectment, it appeared that the mother of defendant, owning the land, lived upon it until her death in 1854. Defendant, the eldest son, and four other children, then lived with her, and there were four others, making nine, entitled to inherit. In 1858 the defendant conveyed one-ninth to his brother-in-law, who conveyed to the plaintiff, and the plaintiff's title to this was admitted; but the defendant claimed the remaining eight-ninths by possession. He swore that when he came of age in 1846, his mother orally gave him the land, and promised to deed it to him, and that he had been assessed for it ever since; but she had lived on it with him until her death, which was within twenty years:—Held, that defendant had no possession as against the mother during her life, and that he therefore must fail. *Orr* v. *Orr*, 31 U. C. R. 13.

——— *Possession of Part of Land.*]—In 1851 the defendant's father bought for defendant the land in question, and in pursuance of his instructions, to prevent the defendant disposing of the land, the deed, which was registered, was made to defendant's son W., then about twelve years old. The defendant and his family thereupon took possession, and lived there up to the time of the action, the defendant being assessed and paying the taxes. The family residence, with the garden and orchard, which was fenced off from the rest of the land, and comprised from two to four acres, was always deemed to be the defendant's special property, and he had always exclusive possession thereof, with the consent of the others. W. resided with his father for several years, and then went to the United States, but returned in 1869, when he conveyed by deed in fee simple, which was registered, to one H., his step-brother, who had full knowledge of all the facts and circumstances, and who had been working the land on shares with the defendant and another. Defendant complained to him of the sale, and denied W.'s right to sell, whereupon it was arranged that things were to go on as before, and defendant was to have his share. H., in 1870, and again in 1874, without the defendant's knowledge, mortgaged the land, by mortgages duly registered, to the plaintiffs, who had no notice or knowledge of any of the circumstances, or of the defendant's possession. In February, 1881, ejectment was brought by the plaintiffs:—Held, that the plaintiffs being purchasers for value without notice, claiming under the registered paper title, were, under R. S. O. 1877 *c.* 111, s. 81, entitled to recover, except as to the house and plot, to which the defendant by his exclusive possession had acquired a title under the Statute of Limitations. *Canada Permanent Loan and Savings Co.* v. *McKay*, 32 C. P. 51.

——— *Possession of Part of Land—Mortgage—Estoppel.*]—In 1870 the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, and remained in possession sixteen years. The exact nature of the agreement did not appear, but it pointed to the ownership in defendant of the portion occupied. In 1876 the father executed a mortgage of the whole of the farm to the L. and C. Co., which was witnessed by defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs, also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by defendant:—Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period so as to acquire a title thereto by possession; and the fact of his being a witness to the mortgage to the L. and C. Co., and its subsequent registration, under the circumstances, did not by virtue of s. 78, R. S. O. 1877 *c.* 111, create an estoppel. *Western Canada Loan Co.* v. *Garrison*, 16 O. R. 81.

——— *Tenancy at Will.*]—In ejectment, it appeared that a son of plaintiffs' ancestor had, some three years before the latter's death in 1850, at his instance, moved on to the land in question, for the purpose of working it for him. No rent appeared to have been ever paid by the son:—Held, that there was nothing in this evidence to shew a tenancy at will between father and son, and that the Statute of Limitations did not therefore begin to run against the father during his lifetime; and, consequently, that the plaintiffs, his grandchildren, who were then infants, and claimed under the eldest son, were not affected by it. *Rumrell* v. *Henderson*, 22 C. P. 180.

——— *Tenancy at Will—Mortgage—Notice — Registry Laws — Commencement of Statutory Period.*]—The plaintiff's father, being in possession of a farm under an unregistered agreement for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon repayment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April 1886, the father assigned all his interest in the land to the plaintiff for valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the original vendor conveyed the land to the father, the purchase money having been paid in full; and the conveyance was registered. In February, 1892, the mort-

gagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate; and this conveyance was also registered. In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title:—Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and son both being on the place, the possession would be attributed to the son. 2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession. 3. That after the plaintiff went away in July, 1888, his father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898. 4. That the plaintiff, having the equitable title and having the owner of the legal estate before the court, was entitled to recover possession of the land. *Cope v. Crichton*, 30 O. R. 603.

——— *Widow — Heir-at-Law — Devise — Will — Registration — Mortgage.*] — The owner of real estate, held under a registered title, devised a portion thereof—his homestead—to his wife in fee, but the will, although known to all the members of the family, never was registered. At the death of the testator (1831) the eldest son and heir-at-law was residing on the farm of seventy-five acres which his father had conveyed to him, with one of his brothers, but after the death of his father he went with his wife and children, and his brother, to reside on the homestead with his mother; and some years afterwards, by arrangement among some of the members of the family, he conveyed the farm of seventy-five acres to the brother, who thereupon took possession of and occupied it; but the heir-at-law continued on the homestead until his mother's death, which occurred twenty-four years after the death of the testator, during all which time he acted as apparent owner of the homestead, building on and improving it, the taxes therefor being assessed in his name, and he voting at elections upon it. About eight years after the death of his mother, and in the year 1862, the heir-at-law, who continued to occupy the homestead, created a mortgage thereon, which was duly registered, in favour of a person who was ignorant of the existence of the will. On a bill filed to enforce the mortgage:—Held, that, under the circumstances the possession must be treated as that of the heir-at-law; that his brothers and sisters could not, as against a bonâ fide purchaser or mortgagee, allege the possession to have been that of the widow, and thereby set up a title under the statute; and that as against such purchaser or mortgagee the will, under the registry laws, must be treated as fraudulent and void. *Stephens* v. *Simpson*, 12 Gr. 493; 15 Gr. 594.

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15. *Fraud.*

Crown Patent — *Decision of Commissioner — Delay.*] — One through whom the plaintiff claimed obtained in 1855 from the commissioner of Crown lands a receipt on sale of a certain lot of land. In 1868 B., in whose possession this receipt was, handed it back to the Crown lands officer, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872 the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the commissioner till the 14th March, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land:—Held, that the plaintiff's right of action was not barred by any statute of limitation. Even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased. *McLure* v. *Black*, 20 O. R. 70.

Entry under Fraudulent Instrument—*Title.*]—A. and B., being the owners in fee of certain lands, sold them to C., and in 1836 executed conveyances, but continued in possession as before. In 1850 D., claiming to hold a deed for the lands, executed by the heir-at-law of C., then dead, got possession of the lands from A. and B., under the belief that he was the grantee of C.'s heir-at-law. D. then conveyed the lands to defendants, or to persons under whom they claimed. These went into possession in 1850 or 1851, and continued in possession till 1868, when the real heiress of C. brought ejectment against them, who claimed by possession. It appeared that the deed executed by D. was a fraudulent instrument not executed by C.'s heir-at-law, but by some stranger:—Held, that the title of C. was barred by the statute. *Butterfield* v. *Mabee*, 22 C. P. 230.

Sheriff's Sale — *Purchase by Husband of Tenant in Common—Collusion—Possession.*]—The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The court, on a bill filed by the other tenants in common asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill with costs. Whether the sale under execution was operative or not, the defendant having held possession ever since, claiming the premises as absolute owner, the title by virtue of the Statute of Limitations ripened into a title in his favour. *Kennedy* v. *Bateman*, 27 Gr. 380.

Voluntary Conveyance — *Judgment Creditor—Action to Set aside.*]—One G. in 1873 made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance, brought this action to have the said

conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Boyer* v. *Gaffield*, 11 O. R. 571.

——— *Subsequent Creditor—Prior Debt Barred.*]—A subsequent creditor cannot uphold an action to set aside a voluntary conveyance under 13 Eliz. c. 5, merely on the ground that a debt of prior date to the conveyance is still unpaid, if such prior debt has become barred by lapse of time. *Struthers* v. *Glennie*, 14 O. R. 726.

See McGregor v. *McGregor*, 27 Gr. 470; *Faulds* v. *Harper*, 11 S. C. R. 639.

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16. *Infants, Possession by or against.*

Acquisition of Title.]—Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. Quinton v. Frith, Ir. R. 2 Eq. 415, considered and not followed. Decision in 8 P. R. 207 reversed. *In re Taylor*, 28 Gr. 640.

Guardian — *Majority of Infant.*]—A guardian of an infant, appointed by the surrogate court under R. S. O. 1887 c. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period. Switzer v. McMillan, 23 Gr. 538, not followed. During such minority the guardian is a trustee of the lands for the infant, and cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him. Hickey v. Stover, 11 O. R. 106, followed. *Clarke* v. *Macdonell*, 20 O. R. 564.

——— *Tenant by the Curtesy.*]—A man, married in 1854, conveyed in 1870 certain lands to his wife by deed under the Short Forms Act, with the usual covenants, for the expressed consideration of "respect and of one dollar." The husband and wife remained in possession of the lands until the wife died in 1872, leaving a will by which she devised her real estate to two daughters of herself and this husband, aged respectively seventeen and twelve. The husband remained in possession till his death in 1890. This action was then brought by the younger daughter and the son of the elder daughter to recover possession from the devisee of the husband:—Held, reversing the decision reported in 20 O. R. 158, that the Real Property Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and this being so, his possession and receipt were the possession and receipt of his wife, and, after her death, of his children and those claiming under them; and the statute, therefore, never began to run. Wall v. Stanwick, 34 Ch. D. 763, In re Hobbs, 36 Ch. D. 553, and Lyell v. Kennedy, 14 App. Cas. 437, followed. Hickey v. Stover, 11 O. R. 106, and Clarke v. Macdonell, 20 O. R. 564 not followed. *Kent* v. *Kent*, 20 O. R. 445, 19 A. R. 352.

Mortgage—*Redemption — Disability.*]—The respondent filed his bill to redeem a mortgage made by his father in 1835, payable on the 4th February, 1837. The mortgagor remained in possession until his death in May, 1858, and his heir (then an infant) continued until some time in 1839, about a year after the death of the mortgagor, when the mortgagee obtained possession. In 1842 the mortgagee sold to one of the appellants. The respondent's bill was filed on the 18th October 1859:—Held, that the respondent was entitled to redeem. 2. That disabilities apply to the redemption of mortgages the same as to actions to recover land or rent, and that the statute was no bar to the relief sought by the respondent. *Hall* v. *Caldwell*, 7 L. J. 42.

Running of Statute — *Continuance against Infant.*]—The plaintiff proved possession of nine acres of land cleared by him since 1847, more than twenty years. Defendant's father died in 1850, defendant being then only about four years old:—Held, that the plaintiff as to this portion was clearly entitled by possession, for the statute having begun to run against defendant's father, would continue as against defendant, notwithstanding her infancy. *Wigle* v. *Stewart*, 28 U. C. R. 427.

Trustees—*Possession for Infant.*]—Trustees, under a will executed by a woman who afterwards married, received on behalf of an infant devisee the rent of certain lands from the tenant. When the infant came of age the tenant paid the rent to her. Subsequently and after more than ten years had expired, since the trustees first received the rent, the heir-at-law of the testatrix claimed the land, on the grounds that the will was revoked by the subsequent intermarriage of the testatrix, and that the Statute of Limitations did not run for or against an infant:—Held (without deciding as to the revocation of the will), that the possession of the trustees was the possession of the infant, and she thus acquired a good statutory title to the land. *Re Goff*, 8 P. R. 92.

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17. *Land in Trust.*

Agreement—*Constructive Trustee—Right to Call upon for a Conveyance — Costs.*]—The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but, instead of his conveying to

the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age:—Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the court, on dismissing the bill, refused to give defendant his costs. *Ferguson* v. *Ferguson*, 28 Gr. 380.

Guardian—*Express Trustee—Caretaker.*]—Held, that J. L. having been appointed by the surrogate court guardian of her son, T. L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J. L. dealt with the land in question as her own for some twenty-two years, she had acquired a good title to it by possession as against T. L. Held, also, that T. L., having in his pleading set up that J. L. had been in possession for the said twenty-two years as his tenant, could not now obtain a new trial on the ground that he could shew by evidence that she had been in as caretaker for him. Semble, that if J. L. had, after the minority of T. L., continued to manage the property for his benefit, she would then have been a constructive trustee for him, not an express one. *Hickey* v. *Stover*, 11 O. R. 103. Followed in *Clarke* v. *Macdonell*, 20 O. R. 504, but not followed in *Kent* v. *Kent*, 20 O. R. 445. See these cases, *ante* 16.

Marriage Settlement — *Possession Adverse to Trustees.*]—On 25th July, 1853, J. M., by marriage settlement, conveyed certain property, including an hotel, to trustees to permit him to receive the rents for his life, excepting a life annuity to his wife, and on his death, subject to such annuity, to pay annuities to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of the children of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a decree in chancery, W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on the 11th March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of the same by his will. On 10th May, 1882, a judgment of the high court was pronounced, directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, &c., and all other assets, both real and personal, now vested in W. as such trustee, be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the hotel and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the said hotel property, upon trust to pay the rents to his wife for life, and after her death to divide the same equally among his children. In 1888 an action was brought by three of his children to have it declared that the hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, &c.:—Held, that the action could not be maintained, for that when R. D. M. took possession of the hotel in 1870, he did not go in under the trustees, but adversely to them, and continued to so hold till his death, and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and the trust estate vested in them, could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner, and put it back into the trust estate. *Murchison* v. *Murchison*, 17 O. R. 254.

Will — *Constructive Trustee.*]—J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows" &c.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs and assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1858, leaving H. and three children him surviving. P. took out probate. In 1846 H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which was retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held, that P. could not be said to have been an express trustee within R. S. O. 1877 c. 108, s. 30, and that being so, the plaintiff's action was barred by the Statute of Limitations. *Johnston* v. *Kraemer*, 8 O. R. 193.

——— *Express Trustee — Possession by.*]—A son of the testator and one of the executors and trustees named in a will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate, and remained in possession over twenty years, and until the period of distribution arrived, and then claimed to have a title under the Statute of Limitations:—Held, affirming the decision in 18 A. R. 25, that as he held under an express trust by the terms of the will, the rights of the other devisees could not be barred by the statute. *Houghton* v. *Bell*, 23 S. C. R. 498.

——— *Purchase by Executor—Trustee for Devisee.*]—Judgment was recovered against the executors of an estate on a note made by D. M., one of the executors, and indorsed by the testator for his accommodation. In 1849 land devised by the testator to A. M., another son, was sold under execution issued on the judgment, and purchased by D. M., who,

in 1853, conveyed it to another brother, W. M. In 1885 it was sold under execution issued on a judgment against W. M., and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof, and D. M. brought an action against him for possession:—Held, that the sale in 1849 being for his own debt, D. M. did not acquire title to the land for his own benefit thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1885. Held, also, that if D. M. was in a position to claim the benefit of the Statute of Limitations, the evidence did not establish the possession necessary to give him a title thereunder. *McDonald* v. *McDonald*, 21 S. C. R. 201.

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18. *Landlord and Tenant.*

Encroachment by Tenant—*Effect of.*]—Where a landlord places a tenant in possession of lot 1, and the tenant knowingly encroaches on lot 2:—Held, that the tenant's occupation does not enure to create for the landlord a title to 2. *Doe d. Smyth* v. *Leavens*, 3 U. C. R. 411.

When Statute Begins to Run.]—Held, following Doe d. Davy v. Oxenham, 7 M. & W. 131, that where, in the case of a lease for twenty years, the lessor permits the lessee to continue during the term without payment of rent, the statute does not begin to run against the lessor and those claiming under him until the determination of the lease. *Lincy* v. *Rose*, 17 C. P. 186.

See Bruyea v. *Rose*, 19 O. R. 433; *Brock* v. *Bennett*, 29 O. R. 468.

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19. *Mortgagor and Mortgagee.*

Foreclosure — *Suit for — Recovery of Land.*]—A suit of foreclosure or for the sale of mortgaged premises in default of payment, is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon the land within s. 24 of C. S. U. C. c. 88. *Barwick* v. *Barwick*, 21 Gr. 39.

The remedy by way of foreclosure or sale in mortgage suits is a proceeding to recover lands within the meaning of R. S. O. 1877 c. 108, s. 4. Therefore, when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debt, possession, and foreclosure:—Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment. *Fletcher* v. *Rodden*, 1 O. R. 155.

——— *Suit for — Settlement—Promissory Notes — Default — Revivor—Parties.*]—The plaintiffs, the administrator and heirs-at-law of a mortgagee, filed their bill against the mortgagor on or before the 20th October, 1864. After service, and on the 15th November, 1864, an agreement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years, whereupon proceedings on the mortgage were suspended. The defendant made a payment in June, 1867, and died in 1869. The notes were not paid. The suit on 29th August, 1879, was revived against the infant heir of the mortgagor:—Held, that the claim was barred by R. S. O. 1877 c. 108, s. 23; but in case of the plaintiffs desiring to obtain the fruits of a judgment recovered against the original defendant, the bill was retained for a year as against the infant defendant, as he would be a proper party in a proceeding against the personal representative of his ancestor to enforce the judgment. *Ross* v. *Pomeroy*, 28 Gr. 435.

Heirs of Mortgagor in Possession—*Mortgage before Patent.*] — C., being the locatee of the Crown, in 1860 mortgaged the north half and the south half of the land by two mortgages to McM. In 1865 he died. In 1870 and 1874 McM. assigned the mortgages respectively to D. In 1875 the patent for the north half issued to one Campbell, who paid the purchase money due to the Crown on the whole lot, at the request of M. and A., the widow and son of C., and the patents for the east and west halves of the south half, issued to M. and A. respectively, without any intention (as shewn by the memorandum in the Crown lands department) to cut out the right, if any, of D. under his mortgage. In 1876 D., under the power in his mortgages, sold to L., who, in 1876, made a mortgage to the plaintiff, on which this suit was brought. M. and A. had, in the meantime, always occupied the land without paying principal or interest, and they claimed title by possession:—Held, affirming the judgment in 27 Gr. 253, that M. and A. had, under the Statute of Limitations, acquired a title by possession. *Watson* v. *Lindsay*, 6 A. R. 609.

Mortgagee in Possession—*Administration Order.*]—A mortgagee having obtained possession by ejectment has a good title after twenty years, notwithstanding that during these years an order for the administration of the estate of the person, not being the mortgagor, entitled to the equity of redemption, has been obtained. *Crooks* v. *Watkins*, 8 Gr. 340.

——— *Conveyance by—Benefit of Possession—Transmission of.*]—Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns for ever, all and singular" the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same:"—Held, sufficient to pass the fee to the grantees. Held, also, that the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees, and, coupled with their own subsequent possession for the necessary period, conferred on them an absolute title to the land by virtue of R. S. O. 1877 c. 108, ss. 15, 19. *Bright* v. *McMurray*, 1 O. R. 172.

——— *Entry after Extinguishment of Title—Trespasser—Right of Action — Insolvency of Mortgagor — Assignment.*] — When the right of action for entry or foreclosure is taken away by virtue of R. S. O. 1877 c. 108, s. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears. A mortgagee, who has suffered the statute to run before he asserts his right

of entry, cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser. *Court* v. *Walsh*, 1 O. R. 167.

Held, affirming the judgment in 1 O. R. 167, that an assignment under the Insolvent Act, 1875, by an insolvent mortgagor, does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *S. C.*, 9 A. R. 294.

Mortgagor in Possession—*Benefit of Mortgagee.*]—The statutory title gained by the mortgagor enures to the benefit of the mortgagee's title. *Re Bain and Leslie*, 25 O. R. 136.

——— *Presumption of Payment.*]—When the mortgagor is in possession, a mortgage may be presumed satisfied after twenty years from the payment of the mortgage money. *Doe d. McGregor* v. *Hawke*, *Doe d. McGregor* v. *Crow*, 5 O. S. 496. See, also, *Mahar* v. *Fraser*, 17 C. P. 408.

Under the old Statute of Limitations, 21 Jac. I., the possession of the mortgagor, when not adverse, would not bar the mortgagee. When interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently that the mortgagee has no subsisting title. *Doe d. Dunlop* v. *McNab*, 5 U. C. R. 289.

Where a mortgagee has neither taken possession of the land after default, nor received interest within twenty years, the title is in the mortgagor, and the mortgagee, in ejectment against a third party, may be nonsuited. *Doe d. McLean* v. *Fish*, 5 U. C. R. 295.

Mortgagor and Wife in Possession—*Title of Mortgagee — Estoppel.*]—H., being seised of land subject to a mortgage to L., dated 14th October, 1863, and to a mortgage to one M., dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H., to the use of his, the grantor's, wife, his co-defendant, the consideration mentioned being $250, which was credited on the mortgage. On 12th April, 1869, L. assigned his mortgage to M. and B., who, on 28th March, 1873, assigned it to W. In 1879 H., having procured assignments to himself of most of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that M. and B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 29th April, 1880, of all the right, title, and interest of the insolvent in the land; and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. H. attended at the sale, and objected to the sale of the land, and bid for the same; but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H., as assignee, for the claims against his estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency:—Held, that, upon the evidence, the possession of H. and his wife must be considered to have been the possession of H.; that the title of the first mortgagee was not extinguished; and that defendants were estopped by their conduct from disputing the plaintiff's title. *Miller* v. *Hamlin*, 2 O. R. 103.

Mortgagor's Cestui que Trust in Possession—*Notice—Registry Act—Entry.*]—The relationship arising out of an agreement for the sale of land, on payment of the purchase money and the taking of possession by the purchaser, is that of trustee and cestui que trust, and, as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the cestui que trust. The principle of the decision in Warren v. Murray, [1894] 2 Q. B. 648, applied. A mortgagee from the trustee, under the above circumstances, who takes and registers his mortgage in ignorance that any one other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the cestui que trust, is entitled to set up the provision of the Registry Act, which is retrospective, and to plead it, if it is necessary to do so. Bell v. Walker, 20 Gr. 558, and Grey v. Ball, 23 Gr. 390, followed. *Building and Loan Association* v. *Poaps*, 27 O. R. 470.

Notice — *Good Faith—Possession—Pleading — Evidence.*] — See *Baker v. Société de Construction Métropolitaine*, 22 S. C. R. 364.

Payments — *Person Entitled to Make—Joint Obligor — Commencement of Statutory Period.*]—The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being security only, H. being bound to pay principal and interest, and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all:—Held, in a suit for foreclosure, that the period of limitation prescribed by s. 30 of C. S. N. B. c. 84, ran in respect of both mortgages from the date of the last payment of interest by H. Judgment of supreme court, 9 S. C. R. 637, reversed. *Lewin* v. *Wilson*, 11 App. Cas. 639.

——— *Subsequent Mortgagee.*] — The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but, notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—Held, on a case stated in the action for the opinion of the court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of s. 19 of the Insolvent Act of 1865 had been complied with;

that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior incumbrances; and that therefore his payments kept alive the plaintiffs' rights. Judgment in 21 O. R. 571 reversed. *Trust and Loan Co. of Canada* v. *Stevenson*, 20 A. R. 66.

Redemption—*Suit for—Equity Entire—Infants — Preservation of Rights — Sale — Fraud—Trustee for Sale—Express Trust—Acquiescence.*]—The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage. Hence in a redemption suit, where the mortgagor died intestate in 1858, leaving children, the plaintiffs therein, some of whom, if alone, would have been barred as to redemption by R. S. O. 1877 c. 108, ss. 19, 20:—Held, that since some of the children had not been adult for five years preceding the filing of the bill, none of the plaintiffs were barred by the statute. R. S. O. 1877 c. 108, s. 43, applies to mortgage cases as well as other cases. Hall v. Caldwell, 8 U. C. L. J. 93, followed. Forster v. Patterson, 17 Ch. D. 132, and Kinsman v. Rouse, 17 Ch. D. 104, not followed. *Faulds* v. *Harper*, 9 A. R. 537, 2 O. R. 405. But see the next case.

In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to L., one of the defendants to the suit, a bonâ fide purchaser, without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age:—Held, reversing the judgment in 9 A. R. 537, that the suit being one impeaching a purchase by a trustee for sale, the Statute of Limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. 1877 c. 108, s. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L. Held, also, that, as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants. *S. C.*, 11 S. C. R. 639.

——— *Suit for—Recovery of Land.*]—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act. *S. C.*, 9 A. R. 537.

Stranger in Possession—*Payment of Interest by Mortgagor.*] — The possession of a stranger which has not ripened into a title as against the owner of land, will not enure to the benefit of him so in possession as against the mortgagee, so long as his interest is regularly paid by the owner. *Chamberlain* v. *Clark*, 28 Gr. 454.

Vacant Lands — *Constructive Possession—Presumption of Payment—Arrears of Interest.*]—Where a right of entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired, by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands; the mortgage being in default and no presumption of payment arising. An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land. R. S. O. 1887 c. 111, s. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle. In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.: in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

——— *Re-demise — Presumption of Payment—Remedy on Covenant—Bar.*] — Where there is no re-demise to the mortgagor until default, and the land is vacant at the execution of the mortgage: — Semble, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment after twenty years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account. The mere fact that the mortgagee is barred by the statute of his remedy on the covenant for the money will not establish a payment so as to re-convey the legal title to the mortgagor. *Mahar* v. *Fraser*, 17 C. P. 408.

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20. *Nature and Proof of Possession.*

Absentee—*Possession of Wife and Paramour—Estoppel.*]—The plaintiff left his wife and home more than thirty years before action, and went to the United States, where he remained until a short time before action. He held no communication with his wife or friends while absent, and was, until his return, believed to be dead. Several years after his departure, his wife, acting on this belief, married again and lived with her new husband, D., on plaintiff's farm. They both mortgaged the farm to a building society, which sold it under a power of sale in the mortgage. On his return the plaintiff brought ejectment against the purchaser from the

company:—Held, affirming the judgment reported in 43 U. C. R. 407, that he was not estopped by his conduct from claiming the land, and that he was not barred by the Statute of Limitations, as the possession of his wife was his possession. The second marriage was illegal, and the possession of D. along with the wife was no more than if he was her bailiff, or working the farm with her on shares. *McArthur* v. *Eglesom*, 3 A. R. 577.

Acts of Ownership—*Constant, Visible Possession.*]—The defendant lived on the lot adjoining the land in question, and there was conflicting evidence as to the nature of the possession held, and the acts of ownership exercised by him over this land:—Held, that it should have been left to the jury to say whether, under the evidence set out in this case, the possession held by the defendant was of that constant and visible kind which would be sufficient under the statute. *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310.

——— *Enclosure—Use of House—Cultivation of Land—Payment of Taxes.*]—In 1868 B., being the owner and occupant of the east half of lot one in the village of Oil Springs, took possession of the garden, &c., on the west half of such lot, on which there was a dwelling-house occupied by a tenant, and enclosed the land by a fence with his own lot; and in 1872, the house having been deserted by the tenant or occupant, took possession of that also, repaired it, and used it as a workshop. In the same year A., who was at one time the owner of such west half, removed the doors and windows of the dwelling, and never afterwards returned to the premises. Thenceforward B. remained in undisturbed possession of the house and land, repairing and cultivating the same, and also paying the taxes levied thereon until in October, 1884, he sold the property to the defendant:—Held, that by virtue of such possession and through B.'s conveyance to him, the defendant had acquired a good title under the Real Property Limitation Act. *Scale* v. *Johnston*, 13 A. R. 349.

——— *Equivalent of Possession.*]—A person seeking to invoke the aid of the statute against a claim in respect of lands must shew that he, and those under whom he claims, have been in possession of the land, or what in law is equivalent to possession. *Armer* v. *McKenna*, 9 Gr. 226.

——— *Knowledge of True Owner—Verdict —New Trial.*]—Held, that the evidence was insufficient to establish satisfactorily a title in defendants by possession; and that there was less, if any, proof that the grantee, or some one claiming under him, was aware of such possession. The jury having found in their favour, a new trial was therefore granted, with costs to abide the event. *Young* v. *Elliott*, 23 U. C. R. 420.

——— *Occasional Trespasses.*]—Held, that, upon the evidence of title by possession in this case, the jury properly found for defendant as to the cleared, and for plaintiff as to the uncleared, land, as to which latter he proved only chopping trees and cutting wood at different times, amounting only to occasional acts of trespass. *Allison* v. *Rednor*, 14 U. C. R. 459.

Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the Judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. To acquire such title there must be open, visible, and continuous possession, known, or which might have been known, to the owner, not a possession equivocal, occasional, or for a special or temporary purpose. Doe d. Des Barres v. White, 1 Kerr N. B. 595, approved. *Sherren* v. *Pearson*, 14 S. C. R. 581.

——— *Vacant Land—Deposit of Building Materials—Contract to Purchase—Estoppel.*]—In 1853 M., the owner of the land in question, conveyed it to P. D., who in 1859 conveyed it to L. D. Neither P. D. nor L. D. ever entered into occupation of the lot, which was a vacant one. In 1855 the defendant, who was a builder, with the knowledge and consent of P. D., used the lot for depositing his building materials on, and had continued to do so ever since, but with the like knowledge and assent of L. D. after his purchase. In 1876 L. D. fenced the lot, leaving a gate for defendant's convenience; he also planted a small portion of it, and allowed soil to be taken from it to level it. In 1877 P. D. was declared insolvent, and S., the assignee in insolvency, filed a bill in chancery to set aside the deed of 1859 from P. D. to L. D., as having been made in fraud of creditors. In 1879 defendant contracted to purchase the lot from L. D. for $2,400, on which he paid $300. In 1880 a decree was obtained setting aside the deed of 1859, which was affirmed on rehearing. This was affirmed on appeal, defendant being surety for L. D. for the costs of the appeal. He had never paid any taxes on the lot. In 1880 nine feet of the lot were sold for taxes, and defendant became the purchaser; but it was redeemed:—Held, under these circumstances, that the defendant's possession was not such as to give him a title under the Statute of Limitations; that the plaintiff was not shewn to have been dispossessed, or to have discontinued the possession; that the agreement by defendant to purchase was evidence to preclude him from setting up a title by possession against the plaintiff, as was the fact of his having become security for L. D. in supporting his, L. D.'s, title. *Donovan* v. *Herbert*, 4 O. R. 635.

Actual Possession—*Continuous and Visible—Necessity for.*]—In an action of trespass quare clausum fregit for the purpose of trying the title to land, the defendants pleaded not guilty; and 2nd, that at the time of the alleged trespass the land was the freehold of the defendants M. E. McC. and J. L. McC., and they justified breaking and entering the close in their own right, and the other defendants as their servants, and by their command:—Held, that the defendants, on whom the onus lay of proving their plea of liberum tenementum, had not proved a valid documentary title, or possession for twenty years of that actual, continuous, and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict. *McConaghy* v. *Denmark*, 4 S. C. R. 609.

Actual or Constructive Possession.]—See cases under sub-head 3.

Encroachment — *Tenant — Benefit of Landlord—Third Person.*]—A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and claimed to have acquired title from his landlord by possession to the said part, and brought this action of trespass against the present owner of the rest of the said adjoining lot:—Held, that his action must be dismissed, for, although a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed primâ facie to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons. *Bruyea* v. *Rose*, 19 O. R. 433.

Estoppel—*Adverse Possession — Consent to Conveyance—Tenant at Will—Entry.*]—By an arrangement made within ten years before an action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability:—Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party. *McDiarmid* v. *Hughes*, 6 O. R. 570.

Evidence—*Lease—Copy.*]—In an action of ejectment by a son against his father, the plaintiff claimed under a deed from the defendant. There was evidence to shew that since this deed the defendant had been more than twenty years in possession, without any recognition of the plaintiff's right. The plaintiff, to repel this evidence, attempted to shew that during a part of that period the defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in the defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which the defendant claimed to have held adversely. At the foot, but not in the defendant's writing, was written the plaintiff's name, and the word "copy." No proof was offered respecting this paper, except that it was in the defendant's handwriting:—Held, on motion for a new trial, that such paper should have been received. *McQueen* v. *McQueen*, 10 U. C. R. 193.

Infant—*Possession of Land of—Effect.*]—See *Re Taylor*, 8 P. R. 207; *Re Goff*, 8 P. R. 92.

Length of Possession — *Statute — Change in Statutory Period—Amendment of Bill.*]—See *Dumble* v. *Larush*, 25 Gr. 552, 27 Gr. 187.

——— *Tenants in Common—Possession of One.*]—In ejectment it appeared that the lot in question had been granted in 1812, with other lots, to M. A. P., M., and P. In order to prove the alleged conveyance of the 13th February, 1816, by M. C. to W., which had been lost, the plaintiffs put in a memorial thereof, registered 19th December, 1826, signed by the grantee, including an undivided moiety in all the land in the patent with other lands. It was shewn also that W., in 1827, had mortgaged all the lands in this memorial, with other lands, to a bank, which, in 1829, reconveyed them to the trustees under W.'s will; that in 1833 R. took a conveyance from the devisee of W. of three of the lots mentioned in the memorial, not including the lot in question; and that in 1834 proceedings were taken in partition on the petition of the devisee of W., under which this lot was assigned to W. Possession had been held of this lot, not in accordance with the alleged lost deed, but by persons claiming under R.: but the court held that the evidence failed to prove such possession for forty years, or that it was taken with the knowledge of W. or his devisee. The plaintiffs claimed under a deed from such devisee executed in 1873:—Held, that the plaintiffs claiming under W. were protected under C. S. U. C. c. 88, s. 3, as against the possession of R., his co-tenant, for less than forty years. *Van Velsor* v. *Hughson*, 45 U. C. R. 252, 9 A.R. 390.

Payment of Taxes.]—Semble, that the payment of taxes in itself signifies nothing in making good a title by possession. *Doe d. McDonell* v. *Ratray*, 7 U. C. R. 321.

But see, contra, *Davis* v. *Henderson*, 29 U. C. R. 344. See, also, *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

——— *No Actual Possession.*]—Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property did not shew such a possession as is required to bar the right of the owner under the Statute of Limitations. *In re Jarvis* v. *Cook*, 29 Gr. 303.

Successive Occupants.]—Quære, as to the effect against the true owner of a succession of trespassers taking possession of deserted land at intervals, some of them before 4 Wm. IV. c. 1, and not claiming under each other. *Doe d. Baldwin* v. *Stone*, 5 U. C. R. 388.

——— *Conveyances between—Necessity for.*]—The fact of there being no conveyances between successive occupants of land does not prevent a possessory title being acquired by virtue of their combined periods of possession, provided the possession has been of a continuous character against the true owner, and provided that the successive occupants claimed under each other in some sufficient way, as in this case by virtue of a sale for value. The Statute of Limitations speaks of possession without reference to conveyances. *Simmons* v. *Shipman*, 15 O. R. 301.

——— *Privity — Interruption.*]—Under the Nova Scotia Statute of Limitations (R. S. N. S., 5th ser., c. 112) a possession of land in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period, the law will attribute it to the person having title. Possession by a series of persons during the period will bar

the title, though some of such persons were not in privity with their predecessors. *Handley* v. *Archibald*, 30 S. C. R. 130.

Temporary Structure—*Possession not Exclusive.*] — See *Griffith* v. *Brown*, 26 Gr. 503, 5 A. R. 303, *ante* (13*a*).

Tenant — *Possession not Exclusive.*] — Held, under the facts of this case, that the plaintiff had not acquired any rights by virtue of the Statute of Limitations, inasmuch as his possession was that of a tenant, and was not exclusive of the mortgagor. *Russell* v. *Romaes*, 3 A. R. 635.

Tenant by the Curtesy—*Possession of.*] — In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died in 1871, seised of certain lands, of which L. remained in continuous possession, until 1883, the time of action brought:—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heirs-at-law of the wife. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685.

Tenants in Common — *Possession by One.*]—See *Ryerse* v. *Taylor*, 44 U. C. R. 8.

Uncertainty — *Use of Strip for Special Purpose.*]—Defendant claimed title by possession for ten years to a small strip of the plaintiff's land, thirty-four inches in width, adjoining the rear of his own, having used it for the purpose of banking up his cellar:—Held, that this claim was properly found against him, such possession being too uncertain, and insufficient. *Hall* v. *Evans*, 24 U. C. R. 190.

Widow — *Possession of Whole Lot—Acknowledgment — Dowress—Heirs-at-law.*] —C. R. died intestate in 1864, seised in fee simple of the land in question, leaving his widow and several heirs-at-law. The widow remained in possession from the time of his death until her own decease in 1881, and cultivated the farm. There was some evidence of her declarations that she kept possession with the consent of the heirs for them, claiming only her dower, but no evidence of a written acknowledgment of their title. She devised the land to the plaintiff:—Held, that the possession of the widow was not a possession quâ dowress, even of one-third of the land, and that the title of the heirs-at-law to the whole had been thereby barred. *Johnston* v. *Oliver*, 3 O. R. 26. Affirmed by the court of appeal, and by the supreme court of Canada, *Cassels' Dig.* 653.

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21. *Possession as against Patentee—Effect of Statutes.*

[By 4 Wm. IV. c. 1, s. 17, until the person deriving title as the grantee of the Crown, or his heirs or assigns, shall have taken actual possession, by residing on the land or cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee, or any person claiming under him, to bring an action for the recovery of such land, unless it can be shewn that such grantee or person, while entitled to the land, had knowledge of the same being in the actual possession of some other person not claiming under the grantee of the Crown (such possession having been taken while the said lot was in a state of nature,) in which case the right to bring such an action shall be deemed to have accrued from the time that such knowledge was obtained.

C. S. U. C. c. 88, s. 3, is similar to this.

By 27 & 28 Vict (C.) c. 29, s. 1, the following words are added: "Provided always that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid."

By s. 2, this Act was to take effect from the 1st January, 1865.

By s. 3, nothing contained in the Act was to affect any suit or action actually pending at the time of the commencement of the Act.]

Application and Operation—*Retrospective Effect—Burden of Proof.*]—4 Wm. IV. c. 1, s. 17, has a retrospective operation. In ejectment the burden of proof to shew that the statute of 4 Wm. IV. c. 1, s. 17, is inapplicable, is thrown upon defendant. *Doe d. McKay* v. *Purdy*, 6 O. S. 144.

Effect—*Power to Devise.*]—The effect of the exception in 4 Wm. IV. c. 1, s. 17, in favour of a grantee of the Crown who has never gone into possession, is, that while ignorant of the fact of his land being in the possession of some other, he is not to be regarded as disseised, and consequently may devise. *Doe d. McGillis* v. *McGillivray*, 9 U. C. R. 9.

——— *Grantee Unaware of his Title.*]—And it protects the grantee of the Crown, even though it should appear that he was unconscious of his title, and believed that he had disposed of his land. *Doe d. Pettit* v. *Ryerson*, 9 U. C. R. 276.

Jus Tertii—*Claim by Length of Possession—Defendant not in Privity with Patentee.*]—In an action for the recovery of land, proof of possession is prima facie evidence of title, and in the absence of proof of title in another is evidence of seisin in fee; if, however, it be proved that the title is in another, although the defendant does not claim under or in privity with such other, the plaintiff's action will fail. Where, in such an action, the plaintiffs claimed to have acquired a title by possession, originally that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him:—Held, under 27 & 28 Vict. c. 29, s. 1, that in order to bar the right of the patentee forty years' possession at least was necessary; and the action therefore failed as against the defendant in possession though not claiming through or in privity with the patentee. *Donnelly* v. *Ames*, 27 O. R. 271.

Knowledge—*Bargainee of Patentee.*]—A person holding a bond for a deed from the patentee of the Crown is not so "entitled to the land," that his knowledge of an adverse possession takes the case out of the statute. *Johnson* v. *McKenna*, 10 U. C. R. 520.

——— *Evidence of Entry—Agent—Jury—New Trial.*] — In ejectment for land in the township of Mono, the plaintiff claimed under a deed from M., the patentee of the Crown; the defendant by adverse possession. M. had conveyed to the plaintiff in 1873, being

then eighty-four years old. It appeared that in January 1835, one H., describing himself as attorney to M., and asserting himself to be fully empowered by M. to locate and settle 100 acres to which M. was entitled for militia services, petitioned that the location might be made in the township of Mono or Caledon. In March, 1835, a location ticket was issued in the name of M., for the land in question, but stating that no patent should issue until a resident settler had been established on the lot, who should occupy and improve the same within six months from the date of the ticket; and in December, 1835, a patent issued to M. Being examined as a witness, M. swore that he never knew H. or gave him any authority, and that he knew nothing of the lot, until the plaintiff applied to him for a conveyance:—Held, that there was evidence for the jury that M., by himself or his agents, had entered upon the land after the issuing of the patent, or was aware that it had been so entered upon, and that evidence should have been received of the acts and statements of H. relative to clearing the land, so as to enable the statute to run; and as this evidence was withdrawn from the jury, and the only question submitted was as to the identity of the patentee with the plaintiff's grantor, a new trial was granted. On appeal, upheld. *Armstrong* v. *Stewart*, 25 C. P. 198.

——— *Husband and Wife—Leases by Husband—Amendment to Statute—Application to Cases Arising before Act.*]—In 1823 adverse possession was taken by trespassers of land in a state of nature, without any notice to or knowledge thereof by the owners, several tenants in common claiming under the grantees of the Crown. In 1842 the husband of one of such tenants, seised in right of his wife, usurping the right of the other tenants, made leases of the whole land to the trespassers:—Held, that the knowledge acquired by the husband, when he gave the leases, of the possession of the trespassers, was the knowledge of his wife, under 4 Wm. IV. c. 1, s. 17, so as to prevent her or those claiming under her from setting up the protection afforded by that statute to the owner of lands so taken possession of; and therefore, on the determination of the leases in 1853, when the right of entry accrued, the Statute of Limitations commenced to run against her, and the title of the plaintiff claiming under her was barred by a twenty years' subsequent possession. Held, also, that under s. 24, the leases so made by the husband were made in his separate right, to the exclusion of the other co-tenants, and not for their benefit. Held, also, that 27 & 28 Vict. c. 20, s. 3, making forty years an absolute bar, even as against grantees of wild lands taken possession of while in a state of nature, without their knowledge, applies to cases arising before as well as after the Act. *Harris* v. *Prentiss*, 30 C. P. 484. Varied in *Harris* v. *Mudie*, 7 A. R. 414.

——— *Inference of Claimant under Supposed Heir.*]—A person going into possession under a deed from one who is supposed to be the heir of the grantee of the Crown, but who is found by the jury not to have been such heir, is not a person claiming to hold under the grantee within the meaning of C. S. U. C. c. 88, s. 3, so as to be relieved from shewing that the grantee, or some one claiming under him, had notice of his possession. *Turley* v. *Williamson*, 15 C. P. 538.

Married Woman — *Disability—Tenancy by the Curtesy.*]—See *Farquharson* v. *Morrow*, 12 C. P. 311.

Petitioner under Quieting Titles Act.]—A petitioner under the Quieting Titles Act, claiming title by length of possession against the patentee of the Crown, must shew that the patentee or his heir had knowledge of such possession, or he must shew a forty years' possession. *Re Linet*, 3 Ch. Ch. 230.

Possession after Patent.]—The possession of land by a person deriving title from the Crown, which will enable the statute to run against him, must be a possession after the patent has issued. *Stewart* v. *Murphy*, 16 U. C. R. 224.

See, also, *Mulholland* v. *Conklin*, 22 C. P. 372.

——— *Settlement Duty.*] — Quære, whether the occupation of the patentee in this case, merely for the purpose of performing settlement duty, would have been sufficient, even after the patent, to deprive him of the benefit of the statute. *Stewart* v. *Murphy*, 16 U. C. R. 224.

Possession before Patent.] — Quære, whether when the Crown grants lands of which another is in possession and continues in possession twenty years, the grantee who has never been in possession is barred. *Hill* v. *McKinnon*, 16 U. C. R. 216

——— *Information of Intrusion—Conveyance of Crown's Right of Entry.*] — The patentee may maintain ejectment against a person who has been in adverse possession for upwards of twenty years before the patent, and it is not necessary that the Crown should proceed by information of intrusion in such a case before the grant, or that the grant should specially convey the Crown's right of entry on the land to the grantee. *Doe d. Fitzgerald* v. *Finn*, *Doe d. Fitzgerald* v. *Clench*, 1 U. C. R. 70.

Possession of Part.]—In ejectment for twenty-five acres, the north half of the north-east quarter of a 200-acre lot, it appeared that D., the patentee of the north half of the lot, entered upon it before 1837, built a house on the south-west part, and lived there, clearing and cultivating a few acres, and while there sold seventy-five acres, all but the land in dispute. About 1840 she left the country, but after many years she returned, and died about 1863. It remained vacant until some time between 1849 and 1855, when one A., having a title to the seventy-five acres sold by D., took possession of it, as well as of the twenty-five acres in dispute, cut timber on it, and cultivated it and repaired the fences—the twenty-five acres being then in a state of nature. He remained about ten years, and sold his right for $10 to the defendant, who succeeded him:—Held, that the plaintiff, claiming under D., the patentee, was not entitled to the protection of C. S. U. C. c. 88, s. 3, amended by 27 & 28 Vict. c. 20, for D. had taken actual possession of this part within the meaning of the Act. Held, also, that the plaintiff was barred by the statute (the action having been begun on the 22nd March, 1876), for there had been possession for twenty years after a discontinuance of possession by the patentee. *Beigle* v. *Dake*, 42 U. C. R. 250.

Purchaser at Tax Sale—*Application of Statute to.*]—In ejectment, the plaintiff claimed under a tax deed made in 1842, coming within 3 Vict. c. 46. Defendant proved a paper title from the patentees, and gave evidence of possession held from 1846, for more than twenty years before this action. The jury having found for the defendant:—Held, without deciding the validity of the tax sale, that he had acquired a good title under the Statute of Limitations, against which the plaintiff was not protected by s. 3 of C. S. U. C. c. 88. *Cushing* v. *McDonald*, 26 U. C. R. 605.

Purchaser — *Completion of Purchase by Another — Knowledge of Patentee—Offer to Buy Claim.*]—In ejectment, it appeared that B., the patentee, agreed to sell the land, in 1837, to A. R., giving him a bond for a deed. A. R. took possession, and died on the land in 1839. His widow then went to Scotland, and in 1840 his brother, P. R., came out and took possession, with the knowledge of B., to whom he paid the balance of the purchase money. In 1842 his mother, with her grandchild, the daughter of A. R., came out and lived with P. R. until 1850, when he sold out to his mother, who remained until her death in 1854, and devised it to her daughter, who died, leaving the defendant, her husband, in possession. The plaintiffs claimed under the heir of the patentee, and under the heirs of A. R.:—Held, that they were barred by possession; for as to the patentee, he had been out of possession since 1840, when P. R. entered with his knowledge; and as to the heirs of A. R., he, A. R., had never the legal estate, and there was no proof that P. R. had entered under them or recognized their right. There was some evidence of an offer by defendant to purchase plaintiffs' claim; but held, that this could avail only if defendant had no title, not to defeat a good title. *McGregor* v. *LaRush*, 30 U. C. R. 299.

——— *Void Conveyance — Computation of Time — Date of Patent.*] — A., being a widow, and having a son, J. R., marries B. in or about 1796. In 1803 a patent for the land in question issues to A. At the time of marriage, and for a year afterwards, they lived on the lot. They then left it, having sold to one S. R., who took possession, and he or those claiming under him remained in possession till the bringing of this action. In June, 1812, A. and B. jointly conveyed (with no certificate of examination of the married woman) to S. R. A. died about 1840, and B. in 1846 or 1847. T. R., the son, died before this action, having in October, 1843, executed a power of attorney to J. W. to convey the land in question, to bring ejectment, and to defend actions therefor, &c. Under this power J. W., as attorney for T. R., conveyed to M., one of the plaintiffs. A. had issue by her marriage with B.:—Held, that, more than forty years having elapsed since the time of taking possession by S. R., (taking the patent or receipt as the date), the action must fail. *Myers* v. *Greely*, 9 C. P. 297.

——— *Void Conveyance — Knowledge of Adverse Possession.*] — Ejectment. The land was granted to one M. McD., who, with her husband, executed a deed to one M., in 1831, but her name was not mentioned in it as a granting party, and there was no certificate of examination indorsed. The plaintiff claimed title through this deed, by a conveyance to him in 1860, from the heir-at-law of one J. R., and he held also a deed from the heir-at-law of the patentee, executed in June, 1861. Defendants claimed through one W., who in 1845 purchased under an execution against J. R., and by possession. It was proved that in 1834 J. R. went upon the land, and lived there till his death in 1843. His widow and family soon afterwards went to Scotland, leaving one K. in charge, who in 1845 accepted a lease for five years from W., and at the expiration of the term was ejected by W.'s vendee, under whom defendants came in and held until September, 1861, when this action was brought. The husband of the patentee died in May, 1841, and the jury found that she had then knowledge of some one being in possession. She lived until 1851:—Held, that defendants were entitled under the Statute of Limitations, for the conveyance executed by her passed nothing, and twenty years had elapsed since her husband's death, during which possession had been held by persons with whom the plaintiff had no privity. *Matlock* v. *Derivan*, 22 U. C. R. 54.

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22. *Tenants at Will.*

Creation of Tenancy—*Entry with Consent of Owner — When Statute Begins to Run.*]—Held, that where A. commenced his possession by the permission of B., and upon a contract to purchase, B. must be held as in the actual possession of the land, through his tenant at will A., and as being dispossessed at the end of the first year's tenancy; and that therefore s. 17 of 4 Wm. IV. c. 1 would apply so as to bring B. within its operation. *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486.

A. entered into possession in 1833, and in 1834 agreed to purchase from B., the owner, the purchase money being payable by instalments with interest, the last of which would fall due in 1839, when a deed was to be given. Nothing was said in the agreement about possession or the right to it, and A. continued to hold for more than twenty years without making any payment:—Held, that A. was only tenant at will; that the will determined at the expiration of a year from the execution of the agreement; and that B. bringing ejectment in 1857 was barred. *Jones* v. *Cleaveland*, 16 U. C. R. 9.

B. entered with the consent of the owner, and the evidence shewed possession in B. and his successors for twenty-one years from B.'s entry:—Held, that the statute began to run at the expiration of a year, and the plaintiff, claiming under the owner, was barred. *McLaren* v. *Morphy*, 19 U. C. R. 609.

In ejectment, defendant claimed under a deed from one C. The land had been granted to A., a married woman, and C. proved that in 1825 he got a deed, since lost, from her and her husband, on which was indorsed a certificate of A.'s examination and acknowledgment by two magistrates, both dead, before whom he took her for that purpose. He bought out the interest of one K., who was in possession under an agreement to purchase from A. and her husband, and he paid the balance due to them by K., from whom he received possession. A. and her husband having died within the last five years, their heirs brought ejectment:—Held, that the plaintiffs were not

barred by the statute, for that C., under the circumstances, entered as a purchaser from A. and her husband; that their deed to him being void, he held as tenant at will; and the statute did not begin to run for a year, since which forty years had not elapsed. Quære, as to the effect of the statute if K. had been merely a trespasser, and C. had obtained possession from him, getting nothing from A. but a void deed. *Amey* v. *Card*, 25 U. C. R. 501.

Interruption of Statute — *Creation of New Tenancy—Entry—Consent.*] — One L., in 1822, obtained a patent for a lot on which he had previously lived for several years; but before the patent issued he had removed to another part of the country. After his removal one M. made some agreement with him to purchase the lot, and lived on it till 1823, when he died. M.'s wife, soon after his death, disposed of the place, or her right in it, to W., defendant's father, who occupied the adjoining lot. It did not appear that M. ever had any interest beyond an agreement to purchase, or what were the conditions of his agreement, or what his wife received from W., or that she gave him a writing of any sort. W. built a house on the lot, which was occupied by himself, his widow and sons, in succession, until 1825, after which it remained vacant. The defendant lived on the lot adjoining, and there was conflicting testimony as to the nature of the possession held, and the acts of ownership exercised by him, over the land in question, up to this action. The above facts were relied on as entitling him under the Statute of Limitations. The plaintiff proved that in 1824 L. conveyed to S., her husband, under whom she claimed as devisee; that S. had gone twice expressly to see the land, in 1830 and 1832, on each occasion taking with him persons to whom he proposed to sell; that on the first visit they saw the defendant, who made no objection when told by S. he had come to take possession, and that he was going to sell the property; and that on the second visit defendant agreed to purchase the land from S., but afterwards failed in the payments which he had promised to make:—Held, that the tenancy by defendant up to 1830 could be considered only as a tenancy at will, as the widow of M., under whom he claimed, could, for all that appeared, have given no better right; and that the entry in 1830 was sufficient to determine the will; that the defendant's agreement to purchase in 1832 constituted a new tenancy at will, and the statute began to run at the expiration of a year from that time. *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310.

On the 9th January, 1844, one W. took possession of the land in question under an indenture of lease for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th January in each year, the first payment to be made on the 9th January, 1845; and if the purchase were carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second, but the person in whom the legal estate was vested having died it was not paid, and nothing more was done. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since:—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that the fact of the son shewing to the defendants, when he sold to them, a letter written by C.'s attorney at the time of his father's purchase to the person then in charge of the land, to deliver possession to his father, did not create a new tenancy at will between the defendants and C. Held, also, that the execution of a deed in 1862 by W.'s heir-at-law to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

In ejectment it appeared that in March, 1859, the plaintiff told his son, then over 22 years of age, and married, and who had up to that time lived with and assisted the father, to go and live on a certain fifty acres of the lot, the land in question, which had been previously measured off and was wild, and make a living there. The son accordingly entered into possession, cleared nearly all, erected two dwelling houses and a barn, &c., on it, expending some $500 of his wife's money in so doing, and had lived on it ever since, the land being assessed in his name and the taxes paid by him; without any demand of possession ever having been made by the father, or any claim for rent until about a week previous to 1st July, 1876, when the son refused to pay anything, claiming the land as his own. The father stated that he intended it to be the son's after his death, though he did not so inform him; while the son stated that he entered under the expectation and belief that it was to be his, and would not otherwise have done so. It also appeared that in February, 1865, the son, wishing to raise some money on the land, procured his father to execute a mortgage on it for $550, for his, the son's, benefit, he receiving the amount and undertaking to pay it off, which he did, together with the yearly interest as it accrued due, and on the 30th January, 1871, the mortgage was discharged. There was no evidence of any communication between the son and the mortgagee. In September, 1876, this action was commenced:—Held, the case having been tried without a jury, that, as a matter of law, the son became upon entry tenant at will to his father, so that the statute began to run in a year from that time; that, as a matter of fact, when the mortgage was executed, neither father nor son intended thereby to make any change in the nature of the son's possession, or to create any new tenancy, for which there was no necessity in the interest of the mortgagee; that the existing tenancy at will therefore was not thereby determined, nor any new tenancy at will created; that, even if it had been so created, the statute would have begun to run again in February, 1866; and that the plaintiff therefore suing after ten years was barred under 38 Vict. c. 16 (O.) Foster v. Emerson, 5 Gr. 135, contra, commented upon, and not followed. *Keffer* v. *Keffer*, 27 C. P. 257.

A., in 1817, agreed with B. to purchase land, and was let into possession. B. died before 4 Wm. IV. c. 1. C., the son of A.,

made a bargain with D., the husband of the lessor of the plaintiff, to whom B. had devised the land, and failed in his payments, upon which ejectment was brought to dispossess him, and was discontinued at his request in 1834; after this, the lessor of the plaintiff brought her action of ejectment:—Held, upon these facts, that A. became a tenant at will to B. in 1817; that upon B.'s death, his tenancy at will determined; that that relation being at an end before 4 Wm. IV. c. 1 was passed, the time which thus elapsed was not to be taken into account as a part of the twenty years; that the ejectment in 1834, while it determined the tenancy at will, gave no new starting point, and had no retrospective operation: that the lessor of the plaintiff, by her consenting to defendant's remaining on the land, after the interview of 1834, revived the tenancy at will; and that as twenty years had not elapsed since, the lessor of the plaintiff was entitled to recover. *Doe d. Kingsbury* v. *Stewart*, 5 U. C. R. 108.

The plaintiff's father, who lived in the township of T., owned a block of 400 acres of land, consisting of lot 1 in the 13th and lot 1 in the 14th concession of the township of W. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon the whole, to take what timber he required for his own use or to help him pay the taxes, but not to give any timber to any one else, or to allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one M. K. In December following he moved to the north half of this lot 1, and had remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north fifty acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The Judge at the trial found that the plaintiff entered into possession and so continued merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that, within the last seven years before the trial, the defendant, as agent for the father, was sent up to remove plaintiff off the land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father:—Held, reversing the judgment in 4 A. R. 563, which had reversed that in 29 C. P. 449, that the evidence established the creation of a new tenancy at will within ten years. *Ryan* v. *Ryan*, 5 S. C. R. 387.

John C., being owner in fee of the land in question, some time after 1854 placed his brother James C. in possession, rent free. In 1867 defendant, having married a daughter of James C., went to live with the latter and occupied part of the house, at the instance of John C., who wished his niece to remain in the house and take care of her infirm mother. John C. died 2nd September, 1874, having devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year later, and the defendant and wife continued in possession. In 1875 one G. went to the house with the plaintiff's husband, with the view of renting it, when defendant shewed them over the house, and said if it was going to be rented he would rent it himself and pay as much for it as any one, and he spoke of buying it. The plaintiff having brought this ejectment in March, 1879:—Held, that plaintiff was entitled to recover as against defendant, who set up the Statute of Limitations. Per Hagarty, C.J.—The defendant was never tenant to John C. during the lifetime of James C. and his widow; and the statute did not begin to run in his favour till a year after the death of the latter. Per Armour, J.—The entry of the defendant in 1867 by John C.'s authority determined the tenancy at will of James C., theretofore existing, and a new tenancy at will by defendant and James C. thereupon began, which was determined by the death of James C.'s widow, when defendant became tenant at sufferance to the plaintiff, and her entry, by her husband, with G., acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute. *Cooper* v. *Hamilton*, 45 U. C. R. 502.

An entry upon land under assertion of right, and oral submission by the occupant, and consent to remain as tenant for the owner, create a new tenancy at will, and give a fresh point of departure under the statute. Where the attention of the jury had not been sufficiently called to the question whether this took place on the premises, a new trial was granted. *Smith* v. *Keown*, 46 U. C. R. 103.

Whenever a new tenancy at will is created, this forms a fresh starting point for the running of the Statute of Limitations. Therefore, where A. was let into possession of certain lands as tenant at will to B., in 1870, and B. died in 1878, having devised the lands to trustees in trust for A. for life, and then in trust for C., which devise A. in no way refused, but continued in possession ostensibly as before, and now claimed title by length of possession against the said trustees and C.:—Held, that A. must be presumed to have accepted the devise, and his retention of possession must be attributed to his rightful title under the devise; and therefore, even if A. could be considered as tenant at will to his trustees, and capable of acquiring title by possession as against them and C., which under R. S. O. 1877 c. 108, s. 5, s-ss. 7, 8, he could not, yet on the death of B. a new tenancy at will was created, and a new period commenced for the running of the statute, which had not, at the time of action brought, continued long enough to give the plaintiff title by possession. *Re Defoe*, 2 O. R. 623.

See Rennie v. *Frame*, 29 O. R. 586 (*ante* 7); *Cope* v. *Crichton*, 30 O. R. 603 (*ante* 14).

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23. *Tenants for Life.*

Merger — *Remainderman — Commencement of Statute.*]—Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held, that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainderman till the death of the tenant for life. *Sladden* v. *Smith*, 7 C. P. 74.

See Adamson v. *Adamson*, 28 Gr. 221, 7 A. R. 592, 12 S. C. R. 583; *Roan* v. *Kronsbein*, 12 O. R. 197; *Young* v. *Midland R. W. Co.*, 16 O. R. 738.

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24. *Tenants in Common.*

Caretaker of one Tenant—*Partition—Adverse Possession.*]—The defendant was placed in possession of certain property as caretaker by one tenant in common, who was managing the piece of property in question, and other property, for the benefit of himself and his co-tenants. In 1865 a decree was made declaring that this co-tenant was a trustee for himself and the other co-tenants in certain proportions, and he was ordered to convey to the other co-tenants their shares, to be ascertained by the master. Various proceedings were taken under the decree, and the shares of the different co-tenants were ascertained, the property in question being allotted to the plaintiffs in 1868, but no conveyances were executed. An order vesting the share of the plaintiffs in them was made in 1888:—Held, by the court of appeal, that the effect of the decree and the ascertainment of the shares was to sever the interests in the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, after such time, contend that he was in possession as their caretaker; and therefore that he had acquired title by possession. Held, by the supreme court, reversing the previous judgment, that the defendant had been in possession for over twenty years; that he was originally in as a caretaker for one of the owners; that afterwards the property was severed by judicial decree, and such owner was ordered to convey certain portions to the others; that after the severance the defendant performed acts shewing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways; and that the severance of the property did not alter the relation between the owners and the defendant; that no act was done by the defendant at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker, and he had acquired no title by possession. Ryan v. Ryan, 5 S. C. R. 487, followed. *Heward* v. *O'Donahoe*, 18 A. R. 529, 19 S. C. R. 341.

Ejectment — *Possession Prior to — Tenants out of Possession.*]—A. W., a spinster, owner in fee, died in 1858, intestate, leaving two sisters of the whole blood, of whom the plaintiff was one, and a sister and three brothers of the half blood her surviving. The plaintiff R., on the death of A. W., entered and continued in sole possession till 1872, when by ejectment against her husband she was dispossessed by her sister, who obtained and continued in sole possession till the sale by her in 1875, to the defendant, who remained in possession thereafter. R. in January, 1877, obtained conveyances to her from the brothers and sisters of the half blood, and filed a bill in chancery claiming five-sixths of the land:—Held, that the defendant was not entitled to tack to the possession of himself and his grantor that of R. prior to the ejectment, so as to bar the interests of the other tenants in common conveyed to the plaintiff. Held, also, following Dixon v. Gayfere, 17 Beav. 421, that the defendant, not having by himself and his grantor the length of possession to constitute a bar, the plaintiff coming clothed with the rightful title to five-sixths was entitled to succeed, even though the owners of four of those shares, who conveyed to her, had been out of possession for more than ten years. *Ryerse* v. *Teeter*, 44 U. C. R. 8.

Entry by one Tenant—*Benefit of Co-tenants — Commencement of Statutory Period.*] — Where one of several tenants in common enters and dispossesses a trespasser, he is, as regards his co-tenants, in possession simply as any stranger would be; and such possession does not enure to the benefit of his co-tenants. Per Cameron, J.—The act of one co-tenant in so taking possession would be by virtue of his legal estate, and his so doing would enure to the benefit of his co-tenants; thus giving a fresh starting point for the statute to begin to run against them. Shepherdson v. McCullough, 46 U. C. R. 573, remarked upon, and as applied to the facts of this case, approved. *Harris* v. *Mudie*, 7 A. R. 414, 30 C. P. 484. See, also, *Hartley* v. *Maycock*, 28 O. R. 508.

Partition — *Assignment of Share.*]—When a co-heir has assigned his share in a succession before partition, any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment, and such claim is imprescriptible so long as the partition has not taken place. *Baxter* v. *Phillips*, 23 S. C. R. 317.

——— *Discontinuance by One and Possession by the other.*]—Where, by mutual arrangement between the plaintiff and his brother, two tenants in common of certain land sought to be partitioned in this action, the former discontinued possession, and the latter retained exclusive possession thereof, making extensive improvements and receiving the rents and profits for the statutory period of limitation, and the plaintiff removed to another lot, which they also held as tenants in common, he also retaining the possession, &c., thereof for the statutory period, the only apparent dispute between the parties being as to a claim which had been made by the plaintiff that it was agreed that an alleged excess in value of the lot taken by his brother should be accounted for:—Held, that the action could not be maintained, as a good title to the lot had been acquired under the Statute of Limitations, and that the evidence failed to establish the agreement to pay the alleged value; the remedy for which in any event was also barred. *Haig* v. *Haig*, 20 O. R. 61.

Possession by One—*Ejectment by Both—Interruption.*]—Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession. Judgment in 32 N. S. Rep. 1 affirmed. *Handley* v. *Archibald*, 30 S. C. R. 130.

Right of Entry—*Time.*]—W. S., by will, devised to his wife, R. S., the one-third of lot 2, that is to say, the part on which the orchard stands, during her life; and to his three youngest sons, A., J., and U., the whole of the said lot 2, to be equally divided between

them, after the decease of their mother. The plaintiff claimed one undivided third of the whole, as eldest brother and heir-at-law of T.:—Held, that the right of entry of T. to the two-thirds, upon which there was no estate for life created, and of those claiming under him, accrued upon his majority, and twenty years' possession by defendants had barred that right; and therefore that the plaintiff could only succeed as to the undivided one-third of the orchard or centre third. *Shaw* v. *Shaw*, 8 C. P. 270.

——— *Time.*]—Where there are several tenants in common of land, of whom all but one are in possession, and before the ten years have run the latter acquires another undivided share from or under one of those in possession, the Statute of Limitations runs as to both shares from the time the last one was acquired. *Hill* v. *Ashbridge*, 20 A. R. 44.

——— *Time — Possession of Part.*]—A. devised lands to his 39 grand-children, as tenants in common. A division took place by mutual understanding, there being no written conveyances, and each one took possession of a certain piece of land. The portion taken by the grand-child through whom defendant claimed, afterwards turned out not to belong to the testator, and in lieu thereof he took a certain other lot, which for some reason had not been allotted to any of the devisees. This action was commenced 25 years after he or those claiming under him had taken possession, by one of the 39 grand-children:—Held, that the plaintiff was barred. Held, also, that, as the person through whom the defendant claimed was one of several tenants in common of the whole lot, possession of part must be considered as possession of the whole, and the case did not therefore come within the decision of Doe d. Hill v. Gander, 1 U. C. R. 3. *Meyers* v. *Doyle*, 9 C. P. 371.

Will—*Mistake—Rents and Profits—Partition.*]—A testator, by his will, made on the 14th August, 1850, devised certain land to his widow for life, and, after her death, to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vict. c. 6, was passed on the 2nd August, 1851, and came into force on the 1st January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870. Upon the death of the testator's widow, the three surviving children of the deceased nephew (one daughter had died a short time before, intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made, in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales received by the brother and sister repaid to him:—Held, affirming the judgment in 16 O. R. 341, that, as there was no consideration therefor, and no compromise or settlement of any disputed question, the partition deed and other dealings could not be supported as in the nature of family arrangements. Held, also, reversing the judgment in 16 O. R. 341, that the eldest son, having always received a share of the rents and profits of the undivided moiety, was in law always in possession of the whole of that moiety, and, therefore, that no title had been acquired against him by the brother and sister under the Statute of Limitations. *Baldwin* v. *Kingstone*, 18 A. R. 63.

Affirmed as to the first point by the judicial committee of the privy council. See 18 A. R., Appendix.

See Kennedy v. *Bateman*, 27 Gr. 380; *Van Velsor* v. *Hughson*, 45 U. C. R. 252, 9 A. R. 390.

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25. *Tenant in Tail.*

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser:—Held, that the statute did not begin to run until the death of the grantor. *Re Shaver*, 3 Ch. Ch. 379.

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26. *Other Cases.*

Acceptance of Lease—*Estoppel—Adverse Title—Overholding Lessees—Tenants in Common.*]—In an action of ejectment it appeared that the father of the defendant died intestate in 1849, the owner of the fee and in possession of the lands in question. He had been twice married, but none of the children of his first marriage had been heard of since 1853. His widow continued in possession after his death with her children; she married again in 1852, and her husband lived with her upon the land until her death, intestate, in 1871. At this time her husband and the youngest daughter of her first marriage, the defendant, were the only members of the family upon the land. Soon after her death the eldest son made a lease of the land to his stepfather and his sister, the defendant, for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which was executed by the lessees, the lessor was described as the eldest son and heir-at-law of his father, the original owner. This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption, until 1892, when the stepfather died intestate, leaving a son, one of the plaintiffs, surviving him, and since that time the defendant had been in possession, also without acknowledgment or interruption, until this action was brought in 1897, by the surviving brother and sister of the defendant and her half-brother:—Held, that the defendant and her stepfather,

being in possession without any title, and accepting a lease from the eldest son of the second marriage, as the heir-at-law, were estopped from setting up the adverse title of the real heir-at-law, the eldest son of the first marriage, as against the lessor, or persons claiming under him. 2. The plaintiffs' claim to possession under a conveyance from the alleged heir-at-law of the lessor could not be allowed, because there was no evidence that he was the heir-at-law, and because his title, if he had any, had been barred by the possession of the defendant and her stepfather since 1876, when the lease expired. 3. The title acquired by the defendant and her stepfather by length of possession was acquired by them as tenants in common, and not as joint tenants, and therefore, upon the death of the latter, his undivided half descended to his son. Ward v. Ward, L. R. 6 Ch. 789, distinguished. *Brock* v. *Benness*, 29 O. R. 468.

Amendment—*Pleading—New Defence.*]—The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others:—Held, following Williams v. Leonard, 16 P. R. 544, 17 P. R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so. Brigham v. Smith, 3 Ch. Ch. 313, referred to, however, as laying down a more reasonable and just practice. *Patterson* v. *Central Canada Savings and Loan Co.*, 17 P. R. 470.

——— *Pleading—Statute—Intervention—Alteration of Statutory Period—Entry.*]—The claimant out of possession attained her majority in 1860, having been for some time previously aware that persons in possession claimed title adversely to her. After several fruitless attempts to obtain possession, she, in June, 1875, made a conveyance of the west half of the land to the plaintiff, who filed his bill on the 13th March, 1876, praying for a declaration of his rights as to the west half. After the bill was filed it was discovered that there had been a mistake, and on the 12th June, 1876, a conveyance was made of the east half, which was that really claimed. On the 20th of the same month the bill was amended by reciting the error and stating that the land in question was the east half, but the allegation of title in the west half was not altered until September, 1876, when another amendment was made. The new Real Property Limitation Act came into force on the 1st July, 1876:—Held, affirming the judgment in 25 Gr. 552, that there was not a suit properly constituted and pending on the 1st July, 1876, bringing into question the title to the east half, and therefore the shorter statutory period prescribed by the new Act applied, and the claimant's right was barred. Remarks on the effect of occasional visits to the land. *Dumble* v. *Larush*, 27 Gr. 187.

——— *Stay of Action — Benefit of Statute.*]—When an action of ejectment, brought under the old practice in 1848, had been stayed owing to an order for security for costs, and the demise had expired nine years since, the court refused an amendment by enlarging the term, which would have deprived the defendant of a title acquired under the Statute of Limitations. *Doe d. Day* v. *Bennett*, 21 U. C. R. 405.

Annuity—*Charge on Land—Arrears—Disability.*]—See *Trusts and Guarantee Co.* v. *Trusts Corporation of Ontario*, 31 O. R. 504.

Defence of Statute not Favoured.]—A defence under the statute against a clear title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the honesty of the case, and there has been no misdirection, the defendant must shew very strong grounds to entitle him to a new trial on the evidence. *Hemmingway* v. *Hemmingway*, 11 U. C. R. 237.

Disabilities—*Time.*]—Forty years are allowed for the bringing of actions for land or rent in case of disabilities. The term of forty years, however, is not a universal bar. Twenty years forms the regular bar. But the twenty years run only from the time the first right accrued. *Petre* v. *Mailloux*, 8 C. P. 334.

Equitable Estates.]—Held, affirming the judgment in 28 Gr. 221, upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life. Per Burton, J.A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of the trustee. The provisions of the Statute of Limitations as regards equitable estates considered. Per Patterson, J.A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate. *Adamson* v. *Adamson*, 7 A. R. 592, 12 S. C. R. 563.

Estoppel—*Mortgage.*]—In ejectment, it appeared that W. W., owning the land in question, left it in 1852 in possession of his father, the defendant; and that in 1859, he, in the presence and with the consent and approval of his father, mortgaged it to R., through whom the plaintiff claimed:—Held, that defendant could not, as against the plaintiff, set up any title founded on his possession before the execution of the mortgage. *Boys* v. *Wood*, 39 U. C. R. 495.

Evidence—*Prior Possession — Rebuttal—Tenancy.*]—Semble, that a plaintiff in ejectment relying in the opening of his case upon a primâ facie title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew that the possession of the defendant is that of a tenant to him (the plaintiff) as landlord. He should go into his case fully in the first instance. *Doe d. Osborne* v. *McDougall*, 6 U. C. R. 135.

Foreign Lands—*Jurisdiction — Redemption — Constructive Trustees.*]—Action to

have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1893 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—Semble, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but held, that the court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country. *Gunn* v. *Harper*, 30 O. R. 650.

Future Estate—*Deed of Appointment—Accrual of Right.*]—On the 25th October, 1870, the plaintiffs' testator purchased certain lands and procured a deed to be made to the grantees named therein, to hold to such uses as he should by deed or will appoint, and in default of such appointment, and so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she so continued up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, residing with her, and after her death continuing to reside on the land, and remaining in possession until action brought. On the 1st November, 1892, the plaintiffs' testator, in the alleged exercise of the power of appointment, executed a deed appointing and conveying the lands to another person, who then reconveyed to him. He subsequently died, having devised the property to the plaintiffs, and on the 19th March, 1897, an action to recover possession was brought by them:—Held, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses, subject to be divested on the exercise of the power of appointment, and that the deed of the 1st November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of s. 5, s.-s. 11, of the Real Property Limitation Act, R. S. O. 1897 c. 133, which came into possession on the execution of the deed of the 1st November, 1892; and that the plaintiffs, not being barred by effluxion of time, were entitled to recover. *Thuresson* v. *Thuresson*, 30 O. R. 504.

Husband and Wife—*Life Estate of Wife—Possession of Husband.*]—Though a man has been in possession for twenty years of land granted to his wife for life, he does not thereby acquire an absolute title, for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will pass an estate for his own life only if his wife should so long live. *Nolan* v. *Fox*, 15 C. P. 565.

Interruption of Statute—*Temporary Possession — Oral Gift — Conveyance by True Owner to Donee.*]—P., being in possession of land of which he was not the owner, made an oral gift of the land to C., but afterwards ejected him. C. then obtained a conveyance from the owner. More than twenty years had elapsed from the time that the statute began to run in favour of P. against the true owner:—Held that C.'s possession did not interrupt in C.'s favour the running of the statute; and that the owner being barred, C., his grantee, was barred also. *McIntyre* v. *Canada Co.*, 18 Gr. 367.

Lunatic—*Conveyance by—Possession of Grantee—Caretaker.*]—In 1822 A., a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829. He died in 1829, and his brother and heir, D., the lessor of the plaintiff, became of age in 1831, and brought ejectment against B., on the ground that his father was non compos at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after 4 Wm. IV. c. 1:—Held, that D., under these facts, was barred; and, also, that B. could not be considered in possession as the servant or bailiff of the lunatic. *Doe d. Silverthorn* v. *Teal*, 7 U. C. R. 370.

Nuisance.]—See *Regina* v. *Brewster*, 8 C. P. 208 (*ante* 12).

Partition.]—See *Heward* v. *O'Donahoe*, 18 A. R. 529, 19 S. C. R. 341; *Haig* v. *Haig*, 20 O. R. 61; *Baxter* v. *Phillips*, 23 S. C. R. 317; *Baldwin* v. *Kingstone*, 18 A. R. 63.

Purchaser of Legal Estate—*Laches.*]—A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir:—Held, that lapse of time, falling short of the statutory bar, was no defence to a purchaser from the heir-at-law. *Smith* v. *Bonnisteel*, 13 Gr. 29.

Quieting Titles Act.]—Where the petitioner, under the Quieting Titles Act, seeks to establish title by possession, the possession under which a title is claimed must be uninterrupted possession, as owner of the land, and should be in accordance with the title set up. *Re Bell*, 3 Ch. Ch. 239.

A petitioner, under the Act for Quieting Titles, claiming by length of possession, must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness. *Re Caverhill*, 8 L. J. N. S. 50.

Rector—*Incumbency.*]—A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Hill* v. *McKinnon*, 16 U. C. R. 216.

Rent—*Devise of — Invalidity—Wrongful Receipt of Rent by Executor.*]—A testator devised land (subject to a lease) to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will:—Held, that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it.

Rent issuing out of land is a tenement; it partakes of the nature of land, and is within s. 5 of the Statute of Frauds, and hence is also within 25 Geo. II. c. 6, s. 1. Held, further, that the reception of the rent by the executor was from the outset "wrongful" within R. S. O. 1877 c. 108, s. 5, s-s. 5, and C. H. had acquired a good title by possession. *Hopkins* v. *Hopkins*, 3 O. R. 223.

Restoring Possession—*Title Acquired.*]—Quære, if B., in undisturbed possession for twenty years, voluntarily restores possession to C., can B. turn C. out again by reverting to his title under the Act? *Doe d. Ausman* v. *Minthorne*, 3 U. C. R. 423.

Road Allowance—*Municipal Corporation.*]—The public cannot release their rights; and there is no extinctive presumption or prescription. Therefore, where an original allowance for road had been taken possession of and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:—Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same. *Nash* v. *Glover*, 24 Gr. 219.

Sale of Land—*Vendor Retaining Possession of Part Conveyed—Effect of—Assertion of Right by Purchaser.*]—When a person, by deed, has granted a piece of land to another, though he may retain possession of part of the land granted, and though the grantee may suppose his grant does not cover such part, yet if the deed does actually cover the land, the grantee is entitled to it, if he asserts his right within twenty years from the date of the grant. *Styles* v. *Taylor*, 14 C. P. 93.

Sheriff's Deed—*Nullity—Equivocal Possession—Quebec Law.*]—See *Lafeunteum* v. *Beaudoin*, 28 S. C. R. 89.

Substitution — *Registration — Quebec Civil Code—Bona Fides—Title Deeds—Recitals—Translatory Title.*]—See *Meloche* v. *Simpson*, 29 S. C. R. 375.

Tax Sale—*Setting aside—Time Limit—Actual Sale.*]—The statute 32 Vict. c. 36, s. 155, limiting the time for bringing suits for setting aside a sale for taxes, applies only where an actual, though irregular, sale of lands has been effected. *Greenstreet* v. *Paris*, 21 Gr. 229.

Tenant by the Curtesy—*Right of Action—Heir-at-law—Bar.*]—In ejectment, the plaintiff claimed as heir-at-law of his mother, T., a daughter of H. H. died in 1839, having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then eighteen, and they lived with her mother, he working the land until 1844. T. died in 1848. About 1868 the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title to the land by length of possession:—Held, that the estate of the plaintiff's father in right of his wife being one for which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during his father's life. Semble, that on the father's death he would still be barred, though he had never been in a position to sue. *Trickey* v. *Seeley*, 31 U. C. R. 214.

III. Disabilities.

1. *Absence from the Country.*

[By 25 Vict. c. 20, this ground of disability was abolished. See R. S. O. 1897 c. 72, ss. 4-8.]

25 Vict. c. 20 abolishes all exceptions and distinctions in favour of absentees. *Love* v. *Morrison*, 14 Gr. 192.

See the following cases before the Act:—*Forsyth* v. *Hall*, Dra. 291; *Hart* v. *Wilson*, 6 O. S. 19; *Hannay* v. *Bell*, 6 O. S. 235; *Johnson* v. *Buchanan*, 1 U. C. R. 171; *Greig* v. *Baird*, 1 U. C. R. 472; *Simpson* v. *Privat*, 2 U. C. R. 265; *Lane* v. *Stennett*, 4 U. C. R. 440; *Lane* v. *Small*, 4 U. C. R. 448; *Crosby* v. *Collins*, 5 U. C. R. 545; *Torrance* v. *Privat*, 9 U. C. R. 570.

See, also, *Boulton* v. *Langmuir*, 24 A. R. 618; *Hartley* v. *Maycock*, 28 O. R. 508; *Bugbee* v. *Clergue*, 27 A. R. 96.

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2. *Other Cases.*

Commencement of Bar—*Continuance.*]—When the statute once begins, it continues to run, notwithstanding any subsequent disability. *Doe d. Dixon* v. *Grant*, 3 O. S. 511.

Coverture—*Action in Respect of Separate Property.*]—Notwithstanding R. S. O. 1877 c. 125, s. 20, a married woman is still entitled under 21 Jac. I. c. 16, to bring an action in respect of her separate property within six years after becoming discovert. *Carroll* v. *Fitzgerald*, 5 A. R. 322. See *Re Laws, Laws* v. *Laws*, 28 Gr. 382.

——— *Joint Action—Bar—Time.*]—After the expiration of more than twenty years from the accrual of the husband's right to make an entry or bring an action, the statute will operate as a bar during the coverture to any action by husbands and wives jointly for land owned by the wives. *Ingalls* v. *Reid*, 15 C. P. 490.

——— *Patentee—Heir-at-law—Time for Entry—Tenancy by the Curtesy.*]—Ejectment. The plaintiff claimed as heir-at-law of E. F., his mother, the patentee of the lot in question, under a patent issued the 13th August, 1836. It appeared that J. F., plaintiff's father, died in April, 1850, and his mother, the patentee, about two years before. Defendant had been in possession since 1836. This writ was issued the 10th September, 1861:—Held, that the patentee having died under the disability of coverture, the plaintiff, under C. S. U. C. c. 88, s. 47, had ten years from her death, or twenty years from the time when her right accrued in 1836, and that both the periods having expired before the issue of the writ, the plaintiff was barred. The fact of the father being for two years tenant by the curtesy would not give the plaintiff twenty years from his father's death. Wigle v. Merrick, 8 C. P. 307, remarked upon. *Farquharson* v. *Morrow*, 12 C. P. 311.

Imprisonment—*Insurance Policy—Time for Bringing Action—Felony—Pleading.*]—A. insured with a mutual insurance company, by a policy expiring on the 26th June, 1863. 29 Vict, c. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the Act, if the loss had happened before, saving the rights of the parties under legal disability. To a plea that the loss happened before the Act, and that the action was not commenced within one year from its passing, defendant replied, that when the Act was passed A. was in prison (not saying for felony), and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death:—Held, no answer to the plea. *Tallman* v. *Mutual Fire Ins. Co. of Clinton*, 27 U. C. R. 100.

Infancy.]—See cases under II. 16, IV. 6.

See Petre v. *Mailloux*, 8 C. P. 334 (*ante* II. 26).

Lunacy—*Annuity by Will—Charge on Lands—Arrears.*]—A testator, who died in 1872, by his will devised land to two of his sons, their heirs and assigns for ever, subject to the payment of $200 per annum for the benefit of another son (a lunatic) for his life, payable to the person who might be his guardian. Payments were made to the mother for the support of the lunatic son from 1880 to 1889, the last of which was made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898:—Held, that the annuity was charged on the land, and that the right to recover out of the land was not barred as to future payments. Hughes v. Coles, 27 Ch. D. 231, followed. Held, also, that the payments made were discharges pro tanto of the annuity. Held, also, that, as the son was under disability until the plaintiffs' appointment, and as the action was brought within twenty years, they were entitled to recover the annuity from February, 1889, and the annuity being an express charge on the land, it might be sold to satisfy the arrears. *Trusts and Guarantee Co.* v. *Trusts Corporation of Ontario*, 33 O. R. 504.

See Trickey v. *Seeley*, 31 U. C. R. 214 (*ante* II. 26.)

IV. Personal Actions.

1. *Accounts.*

(a) *Partnership Accounts.*

Commencement of Statutory Period.]—In partnership suits the defence of the statute is not available unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased. *Storm* v. *Cumberland*, 18 Gr. 245.

——— *Payment of Profits.*]—Where in an action for a partnership account on a contract for work done on a canal, it appeared that the business had been closed, the books made up, a final estimate obtained, and the plant sold, more than six years before the commencement of the action:—Held, that the plaintiff was barred by the Statute of Limitations, and the fact that, within the six years, a certain sum had been paid over to the plaintiff's solicitors, but without his knowledge, as the full amount of the partnership profits due to the plaintiff, could not operate to take the case out of the statute. *Cotton* v. *Mitchell*, 3 O. R. 421.

Form of Decree.]—In a partnership suit it was held that the defence of the statute could not be raised under the common decree, directing an account of the partnership dealings and transactions. *Carroll* v. *Eccles*, 17 Gr. 529.

Laches — *Presumption.*] — A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations, and by laches and acquiescence, from setting up such claim:—Held, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners, considering their relationship and the apparent concert between them. *Toothe* v. *Kittredge*, 24 S. C. R. 287.

Parties—*Liability of Partner Barred.*]—Where a member of a partnership, whose accounts the master was directed to take, was by order made a party in the master's office, but on subsequent inquiry it appeared that all liability on his part was barred by the statute, the master, on the application of the party added, discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence. *Kline* v. *Kline*, 3 Ch. Ch. 161.

(b) *Other Cases.*

Exception.] — The exception in the statute extends to actions of account, not to actions of assumpsit on open accounts. *Russell* v. *Robertson*, 1 U. C. R. 235.

Judgment Creditor — *Balancing of Accounts — Appropriation of Payments—Interest.*]—S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E. for money lent and as a holder of certain notes. After the assignments S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor of E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G. set up the Statute of

Limitations. On a reference to a master he found: (1) that the judgment was an answer to the defence of the Statute of Limitations; (2) that there had been a balancing of accounts between J. E. and E. H. E. as to the account before E. H. E.'s assignment and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations; (3) that before the assignments and within six years of action brought E. H. E. paid several sums to J. E. on general account, and that such payments, as far as the general account outside of the notes was concerned, prevented the operation of the Statute of Limitations; (4) that E. H. E. agreed to pay interest to J. E., and he allowed it to him; (5) he disallowed some of the items of the judgment as not having been proved outside of the judgment; (6) he disallowed certain sums of money omitted from the plaintiff's claim, although proved to his satisfaction, as outside the scope of the reference:—Held, that the judgment recovered against E. H. E. after his assignment, in an action to which G. was not a party, was not even primâ facie evidence against G. Eccles v. Lowry, 23 Gr. 167, considered. That the balancing of accounts, before the assignments, upon the general account, and also the payments on account were sufficient to prevent the operation of the statute. That the balancing of accounts, after the assignments, as to the notes, did not prevent the operation of the statute. That, by reason of the payments made on general account being appropriated to the account of the whole indebtedness including the notes, the latter were not barred by the statute. That the interest was properly allowed, as it was included in the balancing of accounts, and the notes were payable with interest. *Stewart* v. *Gage*, 13 O. R. 458.

Open Account—*Later Items—Effect on Earlier.*]—Quære: When can an account be considered an open unsettled account, so as to defeat the Statute of Limitations by the later items drawing the others with them? *Hamilton* v. *Matthews*, 5 U. C. R. 148.

The principle that the later items of an account draw the others after them, and thus save all from the statute, does not apply where quarterly payments (i. e., for rent or tuition) are made and received, as for a late specific independent quarter due at the time of payment, unmixed with items for any earlier quarter; the presumption in such a case is, unless the contrary is shewn, that the earlier quarters have been all paid and satisfied. *King's College* v. *McDougall*, 5 U. C. R. 315.

Particulars — *Set-off.*] — Where part of plaintiffs own demands, stated in his particulars, are barred by the statute, he has a right to place against these the items of set-off appearing in his particulars to be beyond six years. *Ford* v. *Spafford*, 8 U. C. R. 17.

Promissory Note — *Security — Deed — Novation — Interruption — Quebec Law.*]—See *Paré* v. *Paré*, 23 S. C. R. 243.

Residuary Legatees — *Executors — Deficiencies — Legacies — Residue — Assets Retained.*]—Where A., one of two residuary legatees and executors, left the collection of the outstanding assets of the deceased entirely to B., the other residuary legatee and executor, under an agreement between them, by which B. was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained or could have been ascertained within a year from the testator's death:—Held, that A.'s claim to what was so collected more than ten years before action brought was barred by the Statute of Limitations, but, as to what was got in by B. afterwards, A. was entitled to recover. Held, also, that the fact of the fund in B.'s hands having been from time to time drawn upon to make good deficiencies in the general legacies, so that the residue was not precisely and for all purposes ascertained, did not prevent the bar of the statute; neither was there any fiduciary relationship between A. and B., such as to have that effect. Quære, whether, if the money collected by B. could have been specifically traced and followed, the court would allow this to be done, notwithstanding the lapse of ten years. Held, lastly, that the bar of the statute applied not only to assets distributed by B. but also to assets retained by him. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 3 O. R. 361.

——— *Executors — Rents and Profits—Produce—Period of Limitation.*]—One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee (19 C. L. J. 95). Some of the moneys so got in were re-invested, and afterwards came again into the hands of such co-residuary legatee in administering the estate:—Held, as to the latter moneys, that the relationship of debtor and creditor applied, but that by reason of the Statute of Limitations the account could not extend further back than six years. Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rents and profits of:—Held, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenant's just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim. *Re Kirkpatrick, Kirkpatrick* v. *Stevenson*, 10 P. R. 4.

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2. *Acknowledgment or Payment.*

[The Provincial statute 13 & 14 Vict. c. 61, s. 1, (see R. S. O. 1897 c. 146, s. 1) enacts, among other things, that in all actions on simple contract (*of* the nature mentioned in the preamble *of* the Act) no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, to take any case out of the Statute of Limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, signed by the party to be chargeable thereby.]

(a) *Application and Operation of Statute.*

Proviso—*Absence of.*]—Semble, that the omission in our Act 13 & 14 Vict. c. 61, s. 1,

of the proviso which is contained in the English statute 9 Geo. IV. c. 14, will not operate to take away from the fact of payment any effect which it would have had before. *Notman* v. *Crooks*, 10 U. C. R. 105.

Retroactivity — *Pending Action.*]—The plaintiff sued, in 1849, on a debt accrued more than six years before. A new trial was granted in 1850, but the second trial was delayed until 1852:—Held, that 13 & 14 Vict. c. 61, which came into operation in January, 1852, precluded him from recovering on an oral promise. The court, under the circumstances, allowed defendant to claim the benefit of that statute, though he had not insisted upon it at the trial, but had objected to the sufficiency of the evidence on other grounds. *Grantham* v. *Powell*, 10 U. C. R. 306.

Quære, has the Statute of Limitations, 13 & 14 Vict. c. 61, a retrospective effect? *Crooks* v. *Crooks*, 4 Gr. 615.

(b) *By or to Executors or Administrators.*

Admission by Executor — *Conditional Promise.*]—An admission by an executor that a note barred by the statute is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient. *Lampman* v. *Davis*, 1 U. C. R. 179.

——— *Necessity for Express Promise—Account Stated.*]—An admission by an executor of a debt due by his testator is not sufficient in an action against the executor without an express promise on his part to pay the debt admitted; but an account stated by an executor, of a debt due by his testator, which had never before such accounting been ascertained or determined, is sufficient to charge the executor as for a substantive debt, without any promise to pay. *Watkins* v. *Washburn*, 2 U. C. R. 291.

Admission to Administrator—*Before Letters of Administration.*]—An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate, and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations. *Robertson* v. *Burrill*, 22 A. R. 356.

Executor de Son Tort.]—An executor de son tort cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his, give a new start to the statute as against the rightful administrator, or the parties beneficially interested in the estate. *Grant* v. *McDonald*, 8 Gr. 468.

Promise to Administrator—*Pleading.*]—In an action by an administrator, a replication of a promise to the intestate, in answer to a plea of the statute, is not supported by proof of a promise to the administrator. *Wright* v. *Merriam*, 6 O. S. 167.

Promise to Third Person — *Action by Administrator — Promise before Letters of Administration.*]—The plaintiff, as administrator, sues the defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. The defendant pleads that he did not promise in manner and form, &c. Upon the trial it was proved by a witness, not shewn to have been the plaintiff's agent or in any way privy to the cause of action, that he came from the United States in 1842, to speak to the defendant about these notes; that the defendant then said to him, "Get me the large note you speak of and shew that to me and I will pay the whole:" that he brought him the note when he came the second time, in 1844, and after much discussion the conversation ended in the defendant saying, that he, witness, must see a third person to whom the defendant referred, intimating that he would not engage to pay until something had been ascertained through this reference; that he (the witness) made the reference to this third person, that nothing resulted from the interview, and that an action was therefore brought:—Held, upon these facts, that if the admissions to the witness could be construed into an absolute promise to pay, still being made before the plaintiff had received his letters of administration, they could not support the issue raised. Quære, whether the admissions in evidence supported an absolute promise to pay, supposing them to have been made to the administrator himself; and if they did, whether the fact of their being made to the witness, instead of to the administrator, made any difference. *Beard* v. *Ketchum*, 5 U. C. R. 114.

Revival of Liability—*Agent of Executor—Letter to Third Person—Admissibility.*]—The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. 1897 c. 146, s. 1, as would revive the liability; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts. Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—Held, that this was not such a recognition as amounted to a promise or undertaking to pay. Just before this action was brought, the executor wrote to the plaintiff's solicitors asking them not to take any further step till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing and they are anxious to get their estate settled up:"—Held, insufficient as an acknow-

ledgment, and that the letter to a third person—not the creditor—was not admissible. Goodman v. Boyes, 17 A. R. 528, followed. *King* v. *Rogers*, 31 O. R. 573.

(c) *Joint Contractors.*

Acknowledgment by One.]—Where in consideration of the sale of a vessel to A., B. joined with him in an agreement to deliver lumber:—Held, that this was a joint contract, although B. was only a surety, and that it was not therefore necessary that the consideration should appear on the face of the agreement; and that the promise of A. was sufficient to take the case out of the statute as against B. *Thompson* v. *Cummings*, M. T. 4 Vict.

A promise to pay by one of several joint and several makers of a note, would take the case out of the statute. *Sifton* v. *McCabe*, 6 U. C. R. 394. But see R. S. O. 1897 c. 146, s. 2.

(d) *Payment.*

Payment or Set-off.] — The plaintiff wrote to defendant, who had a demand against one C., saying that C. had asked him to settle the claim with defendant, and requested him, therefore, to charge it to his, the plaintiff's, account. It was not proved that any account had been rendered by defendant in which he took credit to himself for this as a payment on any particular account:—Held, that this must be considered merely as an item of set-off, and not as a payment; and, therefore, that the plaintiff was not entitled to credit it as a payment of that part of his demand which was barred by the statute. *Notman* v. *Crooks*, 10 U. C. R. 105.

Payments on Account—*Application of Credit—Assent of Debtor.*]—The plaintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by the statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them, the plaintiff told him or his clerk that he had credited it against his, the plaintiff's, account, to which defendant assented. In 1875 the plaintiff wrote to defendant sending his account and asking for payment, and stating that he had credited defendant's account rendered. The defendant's clerk answered repudiating the claim:—Held, that there was no evidence of any payment on account to take the case out of the statute, there being no act on defendant's part amounting to payment. 2. That the letter, if it had contained any acknowledgment, would have been inoperative, not being signed by defendant himself. *Ball* v. *Parker*, 39 U. C. R. 488.

Held, affirming the above judgment, that there was no evidence of defendant's assent to the application of the price of the goods as a payment on the plaintiff's account, sufficient to take the case out of the statute. *Ball* v. *Parker*, 1 A. R. 593.

——— *Appropriation of.*] — In an action by an executor for services rendered by the testator as a labourer, on a monthly hiring, extending over many years, it appeared that payments had been made on account, at irregular intervals, both to the testator and to the plaintiff after his death, without any specific appropriation either by the defendant or the payee:—Held, that the plaintiff was entitled to have such payments applied to the earlier items which had become barred by the statute. Quære, there being only the one claim, for continuous services, whether a jury might not infer that such payments were made on account, so as to take that part of the claim prior to the six years out of the statute. *Cathcart* v. *Haggart*, 37 U. C. R. 47.

In November, 1861, defendant made his promissory note in favour of the plaintiff for $510, payable on demand, with "interest to be paid at the rate of $10 per week." There being other dealings between the parties, defendant, in March, 1867, paid plaintiff $2,000 upon his indebtedness generally, and by an agreement in writing the plaintiff extended the time for paying the balance for 1, 2, 3, and 4 years, but in default of any instalment the whole might be sued for. Default having been made in payment of the instalment due in 1868, the plaintiff, in 1872, appropriated a portion of the $2,000 to the discharge of the $510 note, no appropriation of the money so paid having been made by the defendant:—Held, notwithstanding the fact that the plaintiff on receipt of the $2,000 had entered the same in his books to the credit of the defendant generally, that he was at liberty to apply the payment to such note. *St. John* v. *Rykert*, 26 Gr. 249.

Upon appeal, the finding of the vice-chancellor that $2,000 was advanced by the plaintiff to the defendant upon a mortgage for that amount, instead of $500, as contended by the defendant, was affirmed, but the master's finding, which the vice-chancellor had adopted, that the note for $510 had not been paid, was reversed. *S. C.* 4 A. R. 213. See, also, *S. C.*, 10 S. C. R. 278.

A promissory note made by the purchaser, and indorsed by his son, was given as security for the payment of land sold to the defendant, on which note a payment had been made by the indorsers:—Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute. *Slater* v. *Mosgrove*, 29 Gr. 392.

To make a part payment take a debt out of the bar raised by the Statute of Limitations, it is sufficient if the payment be made in respect of a larger debt which is the one sued on. The payment of part is an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time of such part payment. In an action to recover the balance of an alleged debt to which the statute was pleaded as a bar, the debt was proved, as also that several payments were made by the defendants thereon:—Held, that an implied promise to pay the balance might be inferred; and therefore the statute did not apply. *Boultbee* v. *Burke*, 9 O. R. 80.

Application of unappropriated payments the effect of which is to take the debts out of the statute. *Wilson* v. *Rykert*, 14 O. R. 188.

After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it, out of his own moneys and on his own account, was made by the surviving maker, who was the sole executor of his deceased co-maker:—Held, that such payment did not take the debt out of the Statute of Limitations as regarded the estate of the latter. *Paxton* v. *Smith*, 18 O. R. 178.

Whether Made on Account of Defendant.]—Action on a note made by the defendant and L., payable to C., and by him indorsed to the plaintiff, due in July, 1859. Plea, Statute of Limitations. To take the case out of the statute, plaintiff proved that one T. C., owing defendant $30, got an order, with defendant's assent, from C., who then held the note, on L., requesting L. to pay defendant $30, which he, C., would credit on the note; and this sum was accordingly so paid, and credited:—Held, clearly a payment by L. on his own account, and not by or for defendant, so as to take the case out of the statute as against defendant. *Cowing* v. *Vincent*, 29 U. C. R. 427.

(c) Sufficiency of Acknowledgment.

Evidence — *Circumstances—Documents.*]—To take a case out of the statute, slight evidence is sufficient, but the recognition of liability must be unequivocal, or the promise must be unconditional, or the condition performed. *Carpenter* v. *Vanderlip*, E. T. 3 Vict.

A statement of a person upon being presented with an account, "that he was satisfied the amount had been paid to the plaintiff's agent, that the agent had been in the habit of having large transactions with him, and was more frequently in debt than otherwise, but that he could not see how the matter stood, as he had not his books to refer to:"—Held, not sufficient. *McCormick* v. *Berzey*, 1 U. C. R. 388.

A statement by a defendant that he did not think he owed the money, and that, if he did, the statute would prevent the recovery; but that he would give the plaintiff $50 rather than have any trouble about it, is not sufficient. *Spalding* v. *Parker*, 3 U. C. R. 66.

A conversation in which the defendant admitted that the plaintiff had a judgment against him, that he, defendant, had no means of paying it, but that if they would be reasonable he thought his friends would assist him; adding that he was entitled to some credits, which the plaintiffs had not allowed him, and that if they would accept land, he thought he could manage to pay them £1,000 in that way, coupled with a letter in which defendant proposed to the plaintiffs to make over to them for their claim against him about 6,000 acres of land:—Held, a sufficient admission of a debt of £1,000, under the account stated, to take the case out of the statute. *Russell* v. *Crysler*, 5 U. C. R. 484.

Held, that the following admissions of defendant: "The notes are genuine; that is, I made them; but I am under the impression that they were paid through A. and B., and I don't think I am called upon to have any further conversation with you about them:" were not sufficient. *Grantham* v. *Powell*, 6 U. C. R. 494.

The following answer of an attorney to his client, when demanding payment of moneys left for collection, "that the debt had not been paid, and that the defendant had no property, and that he, the attorney, could not help the debt being unpaid," not containing an express promise to pay, or admission from which a promise could be implied:—Held, not sufficient, though it was subsequently proved that at the time of such answer the attorney had collected the client's debts. *Dougall* v. *Cline*, 6 U. C. R. 546.

In an action on a note the plaintiff proved the following acknowledgment by defendant: "I received your letter, dated 31st January. I am sorry to say I cannot do anything for you at present, but shall remember you as soon as possible:"—Held, not sufficient to import a promise to pay on request, the question of defendant's ability not having been raised or left to the jury. *Gemmell* v. *Colton*, 6 C. P. 57.

Defendant, one of three partners who had contracted a debt which was barred by the statute, wrote to his agent that he wished to pay his share of the debts of the firm, and offered the creditors 6s. 8d. in the £, on their giving him a release. Some of the creditors accepted and were paid, but the plaintiff refused and sued for the whole:—Held, that the letter was not sufficient to take the case out of the statute. *Barnes* v. *Metcalf*, 17 U. C. R. 388.

The plaintiff proved the following letter written by one of the defendants, the partner of the other, both being concerned in the business carried on at Hamilton: "Kingston, 12th April, 1848. Your account (482 currency) has been handed us by D., and we shall write our Hamilton friends to have the amount placed at your credit. Of course you are aware that they have an account against you for damages, &c., done to their vessel:"—Held, to import a promise to pay on request; and there being no proof of request before action, that interest should not be allowed. Held, also, sufficient to take the case out of the statute. *Jones* v. *Brown*, 9 C. P. 201.

Plaintiff in March, 1859, rendered to the Misses T., daughters of defendant, an account of goods apparently furnished by him to them. Most of the items in the account were entered against the name of the individual daughter for whom they seemed to have been ordered, but several articles were entered without its appearing for whom they were ordered; the defendant's name did not appear in the account at all. In February, 1864, plaintiff by his agent presented to the defendant and one of her daughters the following memorandum, which they signed: "To the executors of the late G. T. Gentlemen,—Being indebted to J. L. of T., for goods, &c., furnished to us, in the sum of, &c., as shewn in the annexed statement, we authorize you to pay this amount to him as soon as you may deem

practicable. A portion of this account is strictly chargeable against our younger sister and brother, which portion we are willing should be charged against our interests in the estate, we assuming the whole obligation:"—Held, that the signing of the memorandum by defendant was evidence to warrant the jury in finding that defendant was primarily liable for the account to which the memorandum related; and, though the court would have been better satisfied had the verdict been the other way, still, in the absence of an affidavit by defendant denying such liability, they did not feel justified in granting a new trial. Held, also, that the memorandum was an acknowledgment sufficient to raise an implied promise to pay, being in effect made to plaintiff's agent and delivered to him to be presented to the executors for payment; and that it was, therefore, sufficient to take the case out of the statute. Secus, had the memorandum been sent direct to the executors, without the intervention of plaintiff or his agent? Quære, whether a bill of exchange, drawn by defendant on the executors and payable to plaintiff, would have shewn any greater privity between the parties as to the acknowledgment than the memorandum in question. Petch v. Lyon, 9 Q. B. 147, referred to as to the proper course to have been pursued by defendant in order to repel the presumption of liability arising from the signing of the memorandum. *Lyon* v. *Tiffany*, 16 C. P. 197.

In an action on the common counts, the plaintiff relied upon two letters written to him by defendants, as an answer to the statute. The first contained this sentence: "Since getting your letter I have been contriving a measure by which I hope to realize enough to make a settlement with you by next October, but before then I can do nothing, as it is quite enough for me to realize a living up here at present; and it is a fearful sacrifice that I am entering into, the scheme to pay you, no less than give up my practice and all my little effects to a medical man, who is to give me what will materially aid in carrying out my project." &c. The second letter, written sixteen months afterwards, offered an acre of land, if defendant would take it, free of incumbrances, and certain goods, adding, "I am as anxious as you are to have a settlement. If this should meet with your approbation I will go up to Georgetown and give you a deed of it. Let me hear from you soon:"—Held, affirming the rule in Smith v. Thorne, 18 Q. B. 134, that the acknowledgment must support a promise to pay on request, either by shewing on the face of it an unconditional promise, or, if conditional, by proving the condition performed; that the first letter shewed only a promise dependent on effecting the scheme set forth, and that the second was clearly insufficient. *Young* v. *Moore*, 23 U. C. R. 151.

A note not properly stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations. *McKay* v. *Grinley*, 30 U. C. R. 54.

In an action on a note made by defendant payable to the plaintiff for $4,000, it was proved that when the note was given, an account was stated between plaintiff and defendant, the sum found due being $4,000, the amount of the note, which was made up of the principal sums advanced from time to time, and of the interest on those sums, which it was then agreed should be converted into principal:—Held sufficient to take the case out of the Statute of Limitations. Held, also, however, that the statute never applied at all, as it was proved that in 1866, before the lapse of six years, the plaintiff and defendants met together and stated an account in writing, at $1,923; and that when the second accounting took place in 1872, being within six years of the former accounting, it was agreed that in the new account the former account should constitute an item, the written acknowledgment of which was given up to the defendant and burned. *House* v. *House*, 24 C. P. 526.

A suit for foreclosure or for the sale of mortgaged premises in default of payment, is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon land within s. 24, C. S. U. C. c. 88. Where, therefore, a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security;" and there was evidence shewing that the only money ever lent to the mortgagor by the mortgagee was the sum so advanced on the mortgage:—Held, sufficient to take the case out of the statute. *Barwick* v. *Barwick*, 21 Gr. 39.

To an action on a promissory note defendant pleaded the Statute of Limitations. Five years after the note was made, defendant signed an agreement written on the note, that it "should continue a good security notwithstanding the Statute of Limitations." Leave to strike out the plea was refused, but the plaintiff was allowed to put in a special replication, so that the question could come up on demurrer. *Post* v. *Leys*, 7 P. R. 357.

The plaintiff's testator was chief engineer of the defendant company from its inception until arrangements made by the company with one B. for the completion of the road by B., he paying all expenses, &c., including the engineer's salary. In 1881 the testator wrote a letter to the solicitor for the Grand Trunk Railway Company, which company was about to resume control of the defendant company's railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the period from 1875 to 1880 or 1881 he performed services as engineer for the defendant company, certifying to work done, that the company might obtain bonuses, attending meetings and deputations. He also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.:—Held, that there was evidence to go to the jury of a continuing employment of the testator subsequent to 1875, and of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only: and that any inference to be drawn from the

writing of the letter was for the jury and not for the Judge to draw; and a nonsuit was set aside. The effect of letters written by the company's president after the original claim had been barred, and of reports made to the company of claims against them in which the plaintiff's claim was included, discussed as to their sufficiency to revive the claim. *Shanly* v. *Grand Junction R. W. Co.*, 4 O. R. 156.

In an action for a debt, to which the defendant pleaded the Statute of Limitations, the plaintiff gave in evidence, as constituting acknowledgments: (1) a letter from the defendant in which he said, "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up;" (2) portions of the examination of the defendant, signed by him and taken in a certain other action brought for the administration of the son's estate, having reference to a claim set up by the defendant against the estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff, who was an executor for it. There was evidence, also, that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim:—Held, that the letter was a sufficient acknowledgment under the statute, and meant that on the son's estate being wound up, the defendant would pay, and the estate having been wound up, anything conditional in the letter had been ascertained. Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action. Smith v. Poole, 12 Sim. 17, followed. *Roblin* v. *McMahon*, 18 O. R. 219.

An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations, must be made to the creditor or to his agent. A general acknowledgment of liability or an acknowledgment to a third person, is not sufficient. *Goodman* v. *Boyes*, 17 A. R. 528. See *King* v. *Rogers*, 31 O. R. 573, *ante* (b).

Two letters written by a debtor to his creditor were held to take the debt out of the operation of the Statute of Limitations. They were in part as follows: "I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up that would enable me to pay you. . . . When the times get better I will make some arrangements to pay you your money. . . . I regret very much keeping it from you so long; however, I hope the time will soon come when I will be able to pay you." Second letter: "I am in receipt of yours of the 31st May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate. . . . I have now my debt nearly paid, and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. . . . Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me." *Grant* v. *Cameron*, 18 S. C. R. 716.

See Ball v. *Parker*, 39 U. C. R. 488, 1 A. R. 593; *Darling* v. *Brown*, 1 S. C. R. 360; *Colquhoun* v. *Murray*, 26 A. R. 204.

(f) *Other Cases.*

Arrears of Annuity.]—On the 19th October, 1866, the owner of real estate granted an annuity thereout of $40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant, claiming ten years' arrears, with interest thereon:—Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of an annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a puisne incumbrancer who had duly registered his conveyance. *Crone* v. *Crone*, 27 Gr. 425.

Judgment on Acknowledgment—*Voluntary Settlement — Priorities.*] — Where a debt, the remedy for which is barred by the Statute of Limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment, and before the remedy was barred, is void as against a fi. fa. issued on the judgment. *Irwin* v. *Freeman*, 13 Gr. 465.

Mortgage — *Arrears of Interest—Statement in Deed.*]—Upon the sale of a property which was subject to mortgage, the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memorandum, indorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser:—Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an incumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. *Colquhoun* v. *Murray*, 26 A. R. 204.

Validity — *Physical Weakness.*] — Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt. *Emes* v. *Emes*, 11 Gr. 325.

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3. *Avoidance of Process.*

Administration Decree — *Debtors of Estate.*]—Held, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate. *Archer* v. *Severn*, 12 O. R. 615.

Administration Order—*Proof of Claim under.*]—O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed (13 O. R. 70). O., thereupon, re-delivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings:—Held, that the order for administration prevented the bar of the Statute of Limitations. Held, also, that H. & Co. might now assert their title to the notes and prove on them, notwithstanding the former champertous agreement with O. *Re Cannan, Oates* v. *Cannan* (2), 13 O. R. 705.

Alias Writ — *Service of—Return of Original Writ.*]—Quere, is the statute saved by a writ issued before the expiration of the six years, though defendant was not served with such writ, but had been served with an alias writ issued after the six years had expired, and though the first had not been returned until after the six years? *Holman* v. *Weller*, 8 U. C. R. 202.

——— *Pluries — Service of Summons—Issue of Original Writ.*]—Where an action for services rendered was commenced by writ of summons, which was succeeded by an alias and pluries writ, each of which was placed in the sheriff's hands, but not served or intended to be served, and defendant was afterwards served with an alias pluries summons, it was held at nisi prius that the statute would bar only such demands as had accrued six years before the issuing of the first process. *Notman* v. *Crooks*, 10 U. C. R. 105.

——— *Pluries—Service of—Return—Filing.*]—In an action on a note, due 4th September, 1847, the original writ was issued on the 15th April, 1853, and returned non est inventus, and filed 3rd September, 1853. On the same day an alias writ was issued, which was also returned non est inventus, but was not filed until the 12th May, 1854; nor was any memorandum indorsed on it, specifying the date of the first writ. A pluries issued on 12th May, and was served on 31st July. Plea, the Statute of Limitations:—Held, that 12 Vict. c. 63, s. 25, not having been complied with, defendant was entitled to succeed. *Ford* v. *McGoey*, 12 U. C. R. 505.

Ca. Re.—*Commencement of Action.*]—The commencement of an action may be proved by the production of the writ of ca. re. *Upper* v. *McFarland*, 5 U. C. R. 101.

——— *Issue of Several Writs — When Action Commenced—Return.*]—Where there have been several writs of ca. re. sued out, and the last served, the plaintiff, to have the action considered as being commenced by the first writ, must shew at the trial that it was returned. Semble, that the continuance between the intermediate writs may be entered at any time. *McLean* v. *Knox*, 4 U. C. R. 52.

Renewal of Writ — *Expiration—Discretion—Appeal.*] — The renewal of a writ of summons after its expiration is matter of judicial discretion, and when a county court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations, and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a divisional court on appeal from the judgment in the action, refused to entertain an objection to the validity of the writ. *Butler* v. *McMicken*, 32 O. R. 422.

——— *Withholding of Evidence — Rescission of Order.*]—Where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of Limitations had, but for the renewals, barred the plaintiff's claims, the orders were rescinded, upon an application by the defendant under rule 358, after the orders had come to his knowledge. Doyle v. Kaufman, 3 Q. B. D. 7, 340, and Hewett v. Barr, [1891] 1 Q. B. 98, followed. *Mair* v. *Cameron*, 18 P. R. 484.

Statement of Claim — *Extension by—New Cause of Action.*]—By the indorsement of his writ the plaintiff claimed upon a foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration, a promissory note:—Held, that it was too late to object to this at the trial, and that, as the period of limitation upon the note had not expired at the time of the issue of the writ, the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim. *Bugbee* v. *Clergue*, 27 A. R. 96.

See Gooderham v. *Moore*, 31 O. R. 86.

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4. *Commencement of Statute.*

Account—*Purchase Money—Sale of Land—Date of.*]—See *Curry* v. *Curry*, 4 A. R. 63.

Conversion—*When it Takes Place.*]—In April, 1846, certain mares, the property of the plaintiff, strayed to defendant's farm. The defendant advertised them, but no owner appeared, and the defendant began to use them about a year afterwards. In July, 1846, the same mares, being supposed to be on the plaintiff's pasture, were sold by the sheriff, under an execution against the plaintiff, to one S., who never obtained possession of them, but hearing, in the year 1852, that they had foaled and were in the defendant's possession, made a written demand on the defendant for them and their progeny in September of that year. A year afterwards S. made over his interest to the plaintiff as a gift, without consideration or any delivery taking place. In 1855 the plaintiff made a demand on the defendant for the mares and their colts, which was refused. Pleas, not guilty, not possessed, and Statute of Limitations:—Held, that the conversion took place in 1847, and that the action was barred by the statute. *Scott* v. *McAlpine*, 6 C. P. 302.

Costs—*Action by Attorney—Costs of Litigation — Judgment — Date of.*]—The plaintiffs, attorneys, sued in 1870 for bills of costs in suits brought for the defendant, in which suits judgments were entered, respectively, in

1859 and 1861, and executions which were issued in 1863 had been renewed yearly, at defendant's request, until 1870:—Held, that the plaintiffs could not recover for any costs incurred before and in the entry of the judgments; for they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute, which then began to run. Harris v. Quine, L. R. 4 Q. B. 657, distinguished. *Lizars* v. *Dawson*, 32 U. C. R. 237.

Executors and Administrators — *Accrual of Cause of Action.*]—Where a cause of action accrues in the lifetime of the debtor, the statute begins to run against his estate notwithstanding that there is no executor or administrator; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative who can sue and be sued. *Grant* v. *McDonald*, 8 Gr. 468.

On a purchase of land the vendee gave his note payable in a year, with interest, for part of the purchase money. The vendor died before the note became due, and letters of administration to his estate were not issued for eleven years. In a suit commenced a year afterwards by the administrators, it was held that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Gr. 570.

Foreigner out of Province.]—The defence of the Statute of Limitations was held of no avail, because the statute began to run in favour of the defendant, a foreigner, only when he came within the Province, a short time before the issue of the writ in this Province. *Bugbee* v. *Clergue*, 27 A. R. 96.

Fraudulent Misrepresentation.] — In case for fraudulent misrepresentation, the statute begins to run from the time of misrepresentation, not from its discovery by the plaintiff, nor from the time that damage accrued. *Dickson* v. *Jarvis*, 5 O. S. 694.

Indian Lands—*Timber—Sale.*]—An action against a commissioner of Indian affairs for seizing and selling timber cut on Indian lands, must be brought within six months from the seizure, not from the sale. *Jones* v. *Bain*, 12 U. C. R. 550.

Legatees—*Action by—Judgment for Administration.*] — Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. *Uffner* v. *Lewis, Boys' Home* v. *Lewis*, 27 A. R. 242.

Malicious Prosecution.]—See *Crandall* v. *Crandall*, 30 C. P. 497.

Malpractice.]—See *Miller* v. *Ryerson*, 22 O. R. 369.

Promissory Note—*Fraudulent Renewal Note—Action on Original.*]—A. gave B. and C. a note signed by himself, which they discounted. When it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on that faith accepted, and he delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person of the same name unknown to the holder:—Held, that A. could not take advantage of this fraud; that his liability in respect of the note still existed in equity; and that the holder could sue within six years from the discovery of the fraud. *Irwin* v. *Freeman*, 13 Gr. 465. See *McIntyre* v. *McGregor*, 21 C. L. T. Occ. N. 25.

Sale of Goods—*Breach of Warranty—Time of Delivery.*]—The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, stating in the sale agreement that they were "No. 1 peaches, warranted true to name:"—Held, that this was merely a warranty that the trees were of the varieties contracted for; that the trees not being of the varieties contracted for, the warranty was broken at the time of the delivery; and that in the absence of fraud an action for damages for its breach brought more than six years after the delivery was barred, although, until the trees came into bearing, between three and four years before the action, it was impossible to tell that they were not of the varieties contracted for. *Bogardus* v. *Welington*, 27 A. R. 530.

Seduction.]—Where an action for seduction is brought by the brother of the girl, not by the parents, the statute 7 Wm. IV. c. 8 does not apply, and proof of service must be given. The Statute of Limitations begins to run from the time of seduction, not from the birth of the child. *McKay* v. *Burley*, 18 U. C. R. 251.

See Boulthee v. *Gzowski*, 28 O. R. 285, 24 A. R. 502, 29 S. C. R. 54.

See cases under 8 (*post*).

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5. *Executors, Administrators, and Trustees.*

Acknowledgment by or to.]—See cases under 2 (b).

Commencement of Statute as against.] — See *Grant* v. *McDonald*, 8 Gr. 468, *ante* 4.

Express Trust — *Conduct of Executors.*] —A testator directed a sum of money to be invested, the interest whereof was to be employed in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C. The executors took the bond of the persons liable to pay the amount to the estate, and subsequently an instalment payable under such bond was recovered by the executors and paid over to M. C. Afterwards the balance was recovered by one of the executors, who invested it in his business, and sought to defeat a suit to compel payment of the amount at the instance of the personal representative of M. C., by setting up the Statute of Limitations; more than ten years having elapsed since M. C. had become entitled to

the bequest:—Held, affirming the decree in 27 Gr. 397, that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred, and that C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him. *Cameron* v. *Campbell*, 7 A. R. 361.

——— *Investment.*]—In 1877 defendant B., who was engaged in a general business of collecting and investing money, having become aware that plaintiff held some promissory notes of one F., for whom B. was effecting a loan, suggested that plaintiff should hand over the notes to him, as money was going through his hands for F., and that he would collect them and save the amount for herself and children. Plaintiff having acted on such suggestion, and the money having been received by B. in that year, it was retained by him until 1886, when he became insolvent and made an assignment under the Act to trustees, who in distributing the assets refused to recognize the plaintiff's claim, and pleaded the Statute of Limitations to an action brought to enforce payment:—Held, reversing the judgment in 13 O. R. 173, that the transaction was such as created the relation of trustee and cestui que trust between the plaintiff and B., and that the right to recover from B.'s estate was not barred by the lapse of time. *Coyne* v. *Broddy*, 15 A. R. 159.

——— *Investment—Quebec Law.*]—See *Moodie* v. *Jones*, 19 S. C. R. 266.

——— *Statute not a Bar.*] — In an action by the plaintiff against the defendant, as administrator of his deceased brother W. G., to recover a sum of $800 which the plaintiff alleged that W. G. received for her from another brother, S. G., also deceased, the evidence shewed that S. G. at the time of his death directed W. G., to whom he left the rest of his property, to pay the plaintiff the $800, and W. G., after S. G.'s death, informed the plaintiff that he was taking charge of the money for her:—Held, that W. G. was a trustee for the plaintiff under an express trust, and therefore, that under the O. J. Act, s. 17, s.-s. 2, the Statute of Limitations would not constitute a bar to the claim. *Cook* v. *Grant*, 32 C. P. 511.

Implied Promise of Testator—*Arrears.*]—Held, that the plaintiff was entitled, under the circumstances in evidence, to recover from executors remuneration for the board, lodging, and care of their testator for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross* v. *Cleary*, 29 O. R. 542.

Right of Retainer.]—An executor has a right to retain a debt barred by the Statute of Limitations. *Crooks* v. *Crooks*, 4 Gr. 615.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established, and though his claim would otherwise be barred by the statute. The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Klive* v. *Kline*, 3 Ch. Ch. 161.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Gr. 385.

Trustee Act—*Notice—Added Party—Service of Writ.*]—Before the commencement of an action against the purchasers, one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under s. 25 of R. S. O. 1897 c. 129, the Trustee Act, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator de bonis non had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—Held, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred. *Gooderham* v. *Moore*, 31 O. R. 86.

——— *Negligence—Agent's Fraud.*] — Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands:—Held, that the executors were protected by s. 32 of the Trustee Act, R. S. O. 1897 c. 129. Held, also, that payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, did not keep alive the right of action against the executors. Judgment in 30 O. R. 532 reversed. *Clark* v. *Bellamy*, 27 A. R. 435.

——— *Negligence—Trustee Relief Act.*]—Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the limitation provision of the Trustee Act, R. S. O. 1897 c. 129, s. 32, does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession. Judgment in 30 O. R. 110 affirmed. After judgment had been given in the court below against the executors in this case, the Act for the Relief of Trustees, 62 Vict. c. 15 (O.), was passed:—Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 27 A. R. 423.

6. *Infants—Actions by.*

Medical Practitioner—*Action against.*]—Infancy does not prevent the running of the statute R. S. O. 1887 c. 148, s. 40, in favour of a medical practitioner in an action for malpractice. *Miller* v. *Ryerson*, 22 O. R. 369.

Work and Labour — *Period of Limitation.*]—Under 21 Jac. I. c. 16, s. 7, an infant has six years after attaining his majority to bring an action for work and labour performed by him during his infancy; and s. 5 of R. S. O. 1877 c. 135 in no way interferes with such right. *Taylor* v. *Parnell*, 43 U. C. R. 239.

See Hughes v. *Hughes*, 6 A. R. 373.

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7. *Judgments and Other Specialties.*

(a) *Period of Limitation.*

Action on Covenant in Mortgage.]—Held, reversing the judgment in 41 U. C. R. 567, that s. 11 of 38 Vict. c. 16 (O.) merely limits suits which directly affect the land or its proceeds to ten years; but an action on a covenant in a mortgage for the payment of the mortgage money may still be brought within twenty years under C. S. U. C. c. 78. *Allan* v. *McTavish*, 2 A. R. 278

Held, that an action on a covenant in a mortgage for payment of the mortgage money, does not come within R. S. O. 1877 c. 108, s. 23, limiting suits for the purpose therein mentioned to ten years. Allan v. McTavish, 2 A. R. 278, followed in preference to Sutton v. Sutton, 22 Ch. D. 511, and Fearnside v. Flint, 22 Gr. 579. *McDonald* v. *Elliott*, 12 O. R. 98.

Action on Foreign Judgment.]—Held, that a plea to an action on a foreign judgment setting up that the cause of action on which the judgment was recovered did not accrue within twenty years before the commencement of the foreign action, was bad, in not stating that twenty years was the period of limitation according to the foreign law. *Fowler* v. *Vail*, 27 C. P. 417.

To an action on a foreign judgment recovered in the supreme court in New York, the defendant set up as a defence that the cause of action arose more than six years before the commencement thereof:—Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the lex fori, and not by the lex loci contractus. *North* v. *Fisher*, 6 O. R. 206.

Action on Judgment.]—Held, reversing the judgment in 28 C. P. 506, that s. 11 of 38 Vict. c. 16 (O.) does not apply to judgments, and an action may still be brought on a judgment within twenty years, under C. S. U. C. c. 78, s. 7. *Boice* v. *O'Loane*, 3 A. R. 167.

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead, and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. 1887 c. 90, s. 1:—Held, that the widow was the person primarily entitled to administer, and, as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed. Semble, also, that an objection raised at the trial that L. was not before the court was a valid one; for an action on a joint judgment is not different in principle from an action on a contract against joint contractors. *Chard* v. *Rae*, 18 O. R. 371.

Notwithstanding R. S. O. 1877 c. 108, s. 23 (see R. S. O. 1897 c. 133, s. 23), twenty years is the period of limitation applicable to an action on a judgment of a court of record. Boice v. O'Loane, 3 A. R. 167, and cases following it, followed in preference to Jay v. Johnstone, [1893] 1 Q. B. 25, 189. *Butler* v. *McMicken*, 32 O. R. 422.

Issue of Execution.]—Judgment was recovered in 1856. On the 23rd October, 1869, an order was made by a Judge in chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under rule 355, O. J. Act, for leave to the plaintiff to issue execution:—Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. 1877 c. 61, and not ten years under R. S. O. 1877 c. 128, which relates to judgments as liens on land. Allan v. McTavish, 2 A. R. 278, and Boice v. O'Loane, 3 A. R. 167, commented on and followed. Quære, whether there is any period fixed by the statute beyond which the court may not have power to allow execution to be issued. *McCullough* v. *Sykes*, 11 P. R. 337.

The plaintiff recovered judgment against the defendants on the 3rd November, 1863, and the last execution issued thereon was returned in September, 1865. More than twenty years afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period:—Held, that if the motion was necessary it had been rightly refused. Quære, whether it was necessary to obtain leave to issue execution upon, or to revive the judgment, execution having been in fact issued and returned within six years from its recovery. Allan v. McTavish, 2 A. R. 278, and Boice v. O'Loane, 3 A. R. 167, commented on. *McMahon* v. *Spencer*, 13 A. R. 430.

The limit of twenty years being fixed by R. S. O. 1887 c. 60, s. 1, after which, in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution. An issue directed under rule 886, to try the question of liability upon a judgment more than twenty years old, is an action within the meaning of R. S. O. 1887 c. 60, s. 1, and the Statute of Limitations would be a good defence. *Price* v. *Wade*, 14 P. R. 351.

Revivor of Judgment—*Time—Notice.*]—In 1894 the plaintiff obtained ex parte (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money, which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on præcipe reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant:—Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed. The order made in 1894 reviving the judgment should have been made on notice, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order. Held, also, following Mason v. Johnston, 20 A. R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run. Boice v. O'Loane, 3 A. R. 167, as to the lifetime of a judgment, followed in preference to English decisions. *Allison* v. *Breen*, 19 P. R. 119, 143.

Satisfaction of Judgment.]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. 1887 c. 60, s. 1. In view of the amendment made in R. S. O. 1877 c. 108, s. 23, by the revision of 1887, R. S. O. 1887 c. 111, s. 23, the English authorities, such as Jay v. Johnstone, [1893] 1 Q. B. 189, and cases there cited, do not apply. Boice v. O'Loane, 3 A. R. 167, followed. *Mason* v. *Johnson*, 20 A. R. 412.

See Doe d. McGregor v. *Hawke*, 5 O. S. 496, and *Mahar* v. *Fraser*, 17 C. P. 408, *ante* (II. 19).

(b) *Other Cases.*

Calls—*Liability for—Not a Specialty.*]—The English Companies Act, 1862, makes the liability for calls a debt "in England and Ireland of the nature of a specialty:"—Held, that this did not make it a specialty debt in this country; and that pleas of "never indebted," and that the debt did not accrue within six years, were therefore good. *Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256.

Surety—*Assignment of Judgment to—Direct Cause of Action Barred.*]—Held, that an assignment of a judgment to a trustee for one of the defendants who had paid the debt, such defendant being surety for another defendant, was valid, notwithstanding that it was made six years after such payment and when the surety's direct cause of action against the principal debtor had been barred by the statute. *Smith* v. *Burn*, 30 C. P. 630.

See Stewart v. *Gage*, 13 O. R. 458.

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8. *Torts.*

Criminal Conversation — *Continuing Wrong — Damages.*]—Criminal conversation is a continuing wrong, and where the wife is enticed away more than six years before, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; recovery in respect of the enticing away and of anything else which happened prior to the six years being barred by the Statute of Limitations. *Bailey* v. *King*, 27 A. R. 703.

Injury to Land — *Commencement of Period—Continuing Damage.*]—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time. *Kerr* v. *Atlantic and North-West R. W. Co.*, 25 S. C. R. 197.

Injury to Person—*Action against Municipality — Quebec Civil Code — Failure to Plead Prescription — Waiver.*]—See *City of Montreal* v. *McGee*, 30 S. C. R. 582.

Libel and Malicious Prosecution.]—See *Mayor of Montreal* v. *Hall*, 12 S. C. R. 74.

Malpractice — *Commencement of Statute.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill-effects of the treatment developed but more than a year from the date when the professional services terminated:—Held, that the action was barred under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 40. *Miller* v. *Ryerson*, 22 O. R. 369.

Negligence—*Road Companies—Period of Limitation.*]—Where the defendants, a road company, incorporated under the General Road Companies' Act, R. S. O. 1887 c. 159—s. 99 of which requires them to keep their road in repair—constructed a culvert across it, with post and rail guard at the mouth thereof, in such an improper manner that, the wheel of the plaintiff's carriage striking the post, he was thrown out of it into the open ditch at the end of the culvert and injured:—Held, that the construction of the culvert and the guard was a thing "done in pursuance of the Act" within the meaning of s.

145, and that therefore the time for bringing the action was limited to six months after the date of the accident. *Webb* v. *Barton and Stoney Creek Consolidated Road Co.*, 26 O. R. 343.

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9. *Other Cases.*

Absence beyond the Seas — *Return from beyond the Seas.*] — The expression "beyond the seas" in 4 & 5 Anne c. 3, s. 19, is not to be construed literally, but means, when applied to a defendant sued in this Province, "out of the Province of Ontario." To make the statute run in the defendant's favour, his return from beyond the seas must be open and of sufficiently long duration to have enabled the creditor, if he had known of it, to bring an action, though the creditor's knowledge is not essential. *Boulton* v. *Langmair*, 24 A. R. 618.

Administration—*Statute a Bar, in Absence of Fraud.*]—The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on the father's death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him:—Held, that the plaintiff was barred by the Statute of Limitations, and by a release executed by him. *Hughes* v. *Hughes*, 6 A. R. 373.

Amendment — *Adding New Claim — Terms.*]—Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction, with a statement of claim, pursuant to an order under rule 271 (1309), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained. Holland v. Leslie, [1894] 2 Q. B. 346, 450, followed. Held, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment. *Hogaboom* v. *MacCulloch*, 17 P. R. 377.

——— *Leave to Bring New Actions—Terms.*]—Upon the defendants' application, in a case of misjoinder of plaintiffs, under rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out. But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants nunc pro tunc as of the date when the writ in the original action was issued, there being no power to alter the date of the issuance. Clarke v. Smith, 2 B. & N. 753, Naser v. Wade, 1 B. & S. 728, and Doyle v. Kaufman, 3 Q. B. D. 7, 340, followed. Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations. Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to. *Huthnance* v. *Township of Raleigh*, 17 P. R. 458.

Assignment in Trust for Creditors—*Proof of Claims under — Time.*] — Where a debtor made an assignment to trustees for the benefit of those creditors only who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and neglected to sign it, but had notified one of the trustees of his assent; and another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it:—Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse. *Gunn* v. *Adams*, 8 C. L. J. 211.

Attorney—*Claim against Client—Bar—Revival—Fi. fa.—Sale.*]—In an action by an attorney against his client for costs, it appeared that the claim was barred by the statute, but that the lands of the defendant in the suit had been sold under a fi. fa. sued out within six years, and bought in by this defendant, under his own execution:—Held, that this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his use, but that only the costs of the fi. fa. could be recovered. *Jones* v. *Hutton*, 11 U. C. R. 554.

——— *Client's Claim — Executors.*] — Semble, that the court has authority to prevent an attorney pleading the statute to defeat a client's just claim, but that this power does not extend to his executors. *Dougall* v. *Cline*, 6 U. C. R. 546.

Breach of Promise of Marriage.]—See *Costello* v. *Hunter*, 12 O. R. 333; *Grant* v. *Cornock*, 16 O. R. 406, 16 A. R. 532.

Calls—*Liability for.*]—See *In re Haggert Bros. Mfg. Co., Peaker and Runions' Case*, 19 A. R. 582.

Collateral Securities—*Promissory Notes —Purchase Money of Land — Action for— Notes Barred—Quebec Law.*]—See *Mitchell* v. *Holland*, 16 S. C. R. 687.

Disavowal — *Petition—Attorney.*]—The only prescription available against a petition in disavowal of an attorney is that of thirty years. McDonald v. Dawson, 11 Q. L. R. 181, approved. *Dawson* v. *Dumont*, 20 S. C. R. 709.

Fraud—*Suffering Judgment on Barred Claim.*]—The suffering a judgment by default in a case where the plea of the statute would have been a bar to the action, is no proof of fraud in the defendant. If such judgment be fraudulent as giving a preference to one creditor over another, it can only be objected to on that ground by a creditor. *Sloan* v. *Whalen*, 15 C. P. 319.

Fraudulent Mortgage—*Registration—Quebec Law.*]—See *Brossard* v. *Dupras*, 19 S. C. R. 531.

Indemnity.]—Where, in assumpit on a promise to indemnify, the defendant pleaded that more than six years had elapsed since the promise accrued, the plea was held bad on general demurrer. *Ives* v. *Ives*, T. T. 3 & 4 Vict.

See Boulthee v. *Gzowski*, 28 O. R. 285, 24 A. R. 502, 29 S. C. R. 54.

Interest.]—Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley* v. *Ledyard*, 10 P. R. 182.

See Crone v. *Crone*, 27 Gr. 425.

Laches.]—See *Toothe* v. *Kittredge*, 24 S. C. R. 287.

Money Charged upon Land.]—See *McDonald* v. *Elliott*, 12 O. R. 98; *Allan* v. *McTavish*, 2 A. R. 278; *Crone* v. *Crone*, 27 Gr. 425; *Simpson* v. *Corbett*, 5 O. R. 377, 10 A. R. 32; *Mitchell* v. *Holland*, 16 S. C. R. 687.

Money Had and Received.]—See *Baldwin* v. *Kingstone*, 16 O. R. 341, 18 A. R. 63.

Municipal Corporations—*Clerk—Omission of Statutory Duty.*] — The period for bringing an action against a clerk of a municipality for omitting names from the collector's roll is not limited to two years under R. S. O. 1877 c. 61, s. 1. *Town of Peterborough* v. *Edwards*, 31 C. P. 231.

——— *Negligence—Sewers.*]—To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months:—Held, bad, as s. 491 of the Municipal Act, R. S. O. 1877 c. 174, did not apply. *Sullivan* v. *Town of Barrie*, 45 U. C. R. 12.

See, also, MUNICIPAL CORPORATIONS.

Novation.]—See *Paré* v. *Paré*, 23 S. C. R. 243.

Occupation Rent.]—The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Coldwell* v. *Hull*, 9 Gr. 110.

Salvage—*Subsequent Bonâ Fide Purchaser—Notice of Claim.*]—An action in rem against a tug was brought to recover $800 for salvage under an alleged agreement made in the Province of Ontario with the master of the tug at the time the salvage services were rendered. Subsequently, but before action was brought, the tug was sold by the Quebec Bank, under a mortgage held by the bank, to a purchaser who it was alleged had notice of the claim. The purchaser paid part cash and gave a mortgage on the vessel to the bank for the balance which remained unpaid. The action was not begun until after ninety days from the time when the alleged claim accrued. The purchaser claimed in his defence the benefit of s. 14, s.-s. 5, of the Maritime Court Act (R. S. C. c. 137), re-enacted by s. 23, s.-s. 4, of the Admiralty Act, 1851 (54 & 55 Vict. c. 29) as a bar to the plaintiff's claim:—Held, that as against a bonâ fide purchaser, the plaintiff's claim (if any) was barred, and the lien on the vessel (if any) destroyed, even though the purchaser had actual notice of the claim at the time of, or before, his purchase. *The "C. J. Munro" and the "Home Rule,"* 4 Ex. C. R. 146.

Set-off—*Pleading—Foreign Law—Period of Limitation.*]—Declaration on an agreement to pay $450 by a promissory note; breach, non-payment. Sixth plea, set-off on two notes made by plaintiff and indorsed to defendant. To this plea, plaintiff replied the Statute of Limitations. The defendant rejoined, in substance, to the second replication to the seventh plea, that in the former suit the same subjects of demand and set-off were in dispute; that the former suit was commenced on the 6th December, 1862, and was kept pending until the plaintiff, on his own mere motion, discontinued it on the 8th October, 1868; that when the plaintiff commenced this suit on the 9th October, 1868, the statute had operated against the set-off; and that defendant, on the 15th March, 1869, and within a reasonable time, to wit, within one year, from the discontinuance of the former action, pleaded the said set-off in this action:—Held, that the rejoinder was good, for that in this Province a set-off, on which the defendant may recover a balance, is as much within the equity of the statute as an action for the same demand would be. The plaintiff also surrejoined, that the two notes were drawn and payable in the Province of Quebec, and by the law there the cause of action thereon became extinguished after five years from the accruing thereof, and that such cause of action became extinguished pending the former action:—Held, bad, as a departure. *Parsons* v. *Crabb*, 34 U. C. R. 136. See *S. C.*, 31 U. C. R. 434.

Sheriff — *Money Levied by—Assumpsit for.*]—To a plea of the statute in assumpsit, a replication that the defendant was a sheriff, and that the amount claimed was an overplus remaining in his hands of money levied under a fi. fa.:—Held, bad, on general demurrer, although the plaintiff might have evaded the statute had she declared in case, setting out the circumstances specially. *Ruggles* v. *Beikie*, 2 O. S. 370.

V. PUBLIC OFFICERS.

Collector.]—Held, that a collector who committed a trespass while acting under a warrant issued by a competent authority, was entitled to notice of action, and that the action should be brought within six months. *Spry* v. *Mumby*, 11 C. P. 285.

Division Court Bailiff.]—A division court bailiff is entitled to notice of an action proposed to be brought upon the statutory covenant for an excessive seizure and sacrifice of plaintiff's goods; such action must be brought within six months; and the objection that notice was not given and the action not brought in time, may be raised under the general issue by statute. *Pearson* v. *Ruttan*, 15 C. P. 79.

Justice of the Peace.]—Owing to a mistake in the Crown office, a rule to return the writ of certiorari, and afterwards a rule for an attachment, issued, although a return had in fact been filed. The conviction was quashed, but more than six months having thus expired since the conviction, the court was asked to allow process to issue against the justice for the illegal conviction, as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Joice*, 19 U. C. R. 197.

Ordnance Officers.] — Actions against the officers of Her Majesty's ordnance, as incorporated under 7 Vict. c. 11, are subject to the limitation provided for in 8 Geo. IV. c. 1. *Denaut* v. *Principal Officers of Her Majesty's Ordnance*, 10 U. C. R. 189.

Pathmaster.]—In an action against a pathmaster, it appeared that the act complained of was done on the 5th November, 1874, and the action was commenced on the 5th May, 1875:—Held, in time. *Crooks* v. *Williams*, 39 U. C. R. 530.

Registrar of Deeds.]—A registrar, being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first incumbrance. In an action against the registrar for this omission in his certificate:—Held, that the registrar was not entitled to notice of action, and that the six months' limitation clause did not apply, for, though an officer within the meaning of the Act C. S. U. C. c. 126, this was not an act committed, but a negligent omission. *Harrison* v. *Brega*, 20 U. C. R. 324.

School Trustees.]—Held, in deference to former decisions of this court, that a school trustee who is sued for any act done in his corporate capacity is entitled to notice of action, and that the action must be brought within six months. And that a school trustee, acting in the discharge of his duty as such, is entitled to the protection of, and comes within, 16 Vict. c. 180, notwithstanding he should have signed a warrant individually instead of in his corporate capacity. *Spry* v. *Mumby*, 11 C. P. 285.

Sheriff.]—To a declaration against a sheriff for an escape from arrest under a capias, defendant pleaded, that the action did not accrue within two years; that the plaintiff did not declare in the cause in which the arrest was made within one year, and did not prosecute the said suit:—Held, on demurrer, both pleas bad. *Wilson* v. *Munro*, 20 U. C. R. 18.

Surveyor of Streets.]—A surveyor of streets, appointed under the Provincial statute 4 Geo. IV. c. 9, does not come within 50 Geo. III. c. 1, s. 34, which requires actions for anything done under the authority of that Act to be brought within three months. *McFarlane* v. *McDougall*, 3 O. S. 73.

VI. Rent or Interest—Arrears of.

Legacy — *Interest—Express Trust.*]—A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children, or child, if there should be but one, "the sum of £1,500, due to me by C., and secured by a certain mortgage," &c.:—Held, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the statute therefore not applying to the case. *Loring* v. *Loring*, 12 Gr. 374.

Mortgage — *Action — Dispute Note.*]—Where a defendant in a mortgage action desires to prevent the plaintiff from recovering interest for a longer period than six years, he need not set up the defence of the Statute of Limitations: merely filing the usual disputing note is sufficient for this purpose. Judgment below, 24 Gr. 457, reversed. *Wright* v. *Morgan*, 1 A. R. 613.

See Cattanach v. *Urquhart*, 6 P. R. 28.

Mortgagee—*Lien — Covenant — Heirs-at-law.*]—During the lifetime of a mortgagor the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest, though he may have a personal action on the covenant for more; but in this country, as well as in England, after the mortgagor's death the mortgagee, to avoid circuity, may, as against the heirs, tack to his debt all the interest recoverable on the covenant. *Carroll* v. *Robertson*, 15 Gr. 173.

——— *Promissory Note—Interest.*]—A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hand of the assignee of the mortgage, and a suit having been instituted upon the mortgage by the trustee and the party interested in the note:—Held, that, to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run. *Scatcherd* v. *Kiely*, 22 Gr. 8.

——— *Redemption.*]—Since the A. J. Act, 36 Vict. c. 8 (O.), and to avoid circuity of action, the court will allow interest to a defendant for more than six years in a suit to redeem. *Howeren* v. *Bradburn*, 22 Gr. 96.

——— *Sale under Power.*] — A mortgagee sold the mortgaged property under a power of sale:—Held, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford* v. *Allan*, 15 Gr. 565.

Mortgagee in Possession—*Occupation Rent.*]—The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Coldwell* v. *Hall*, 9 Gr. 110.

Purchase of Land — *Promissory Note.*]—On a purchase of land the vendee gave his note payable in a year, with interest, for part of the purchase money. The vendor died before the note became due, and letters of administration to his estate were not issued for eleven years. In a suit commenced a year afterwards by the administrator, it was held, that, as the cause of action did not arise until there was some person to sue, interest was

recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Gr. 570.

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

VII. Trustees and Agents.

Assignment for Creditors — *Trustee under—Assenting Creditors—Commencement of Statute—Absconding Debtor.*]—The Statute of Limitations being urged against the admission of claims by creditors under an assignment:—Held, that the relation of trustee and cestui que trust had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in the cases of two of the creditors that the statute had never begun to run, owing to the creditors' rights of action having arisen after the debtor had absconded. *Gunn* v. *Adams*, 8 C. L. J. 211.

Devise — *Charge—Express Trust.*] — Where lands are devised to trustees to sell and divide the proceeds among the residuary legatees, this is not a charge upon land within the meaning of C. S. U. C. c. 88, s. 24, so as to be barred by the lapse of twenty years, but it is a case of express trust within s. 32 of the same Act. Watson v. Saul, 1 Giff. 188, followed. *Tiffany* v. *Thompson*, 9 Gr. 244.

Partnership—*Purchase of Land—Resulting Trust.*]— A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill. Leave was given to amend with a view of shewing that certain land held by the deceased partner, which had descended to his heir-at-law, had been purchased with partnership assets, and that therefore there was a resulting trust in favour of the plaintiff. *McFadden* v. *Stewart*, 11 Gr. 272.

Registrar of Deeds—*Deputy of—Account.*]—A deputy registrar having remitted registration fees to persons who employed him as a conveyancer, the statute was held to be no bar to the claims of the principal for such and other transactions between them. *Smith* v. *Redford*, 19 Gr. 274.

Solicitor — *Conveyance to, by Client.*]—Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. Where these obligations are neglected the suit of the client must be brought within twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief. *Oakes* v. *Smith*, 17 Gr. 600.

VIII. Waiver of Statute by Agreement.

Boundary Strip—*Possession.*]—Defendant acquired the legal title under a deed in December, 1842, in the portion allotted to him of the land in which the plaintiff and defendant, as also one M., had previously been jointly interested; and the strip of land in question in this suit was erroneously included in this conveyance; and the fact was known, but the conveyance was executed notwithstanding. About the same time, the plaintiff and defendant executed a document agreeing to leave this strip for their mutual benefit, the plaintiff to have the timber thereon. Defendant had not actual possession of the strip, which was uncleared, but there was no separation between it and the other portion of the lot which he did occupy under his conveyance:—Held, that this document operated to prevent the defendant from acquiring a title to this strip under the statute. *Moffatt* v. *Walker*, 15 Gr. 155.

Insurance Policy—*Condition.*]—It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants therein after the lapse of one year from the loss, this being a condition also prescribed by 36 Vict. c. 44, s. 54 (O.), relating to mutual fire insurance companies. The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending, and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that, notwithstanding that they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff $500 in full, which they had not paid:—Held, that there was no evidence to go to a jury, either of the agreement alleged, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent the defendants from insisting on the forfeiture. *Davis* v. *Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452.

See Cameron v. *Monarch Assurance Co.*, 7 C. P. 212.

Set-off—*Former Action — Pleading—Accord and Satisfaction.*]—Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for $700, alleging non-payment; and on the common counts. Sixth plea, set-off on two promissory notes

made by the plaintiff, payable to F. and W., and indorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff. Second replication, Statute of Limitations. Equitable rejoinder, so far as the replication relates to the two notes set up in the plea, that on the 6th December, 1862, and before this suit, and before the notes were barred by the statute, the plaintiff sued defendant in the Queen's bench for the same causes of action now sued for; that defendant on the 4th March, 1863, pleaded by way of set-off therein the same notes, which exceeded plaintiff's claim, and which were overdue but not then barred, and required the plaintiff to reply thereto; that the plaintiff did not reply and did nothing in the suit until October, 1868, when said notes had become barred by the statute, and thereupon the plaintiff discontinued said suit and commenced this action. And defendant avers that at the plaintiff's request he did not sign judgment of non pros. in said suit, as he could and would have done; and it was then agreed that, in consideration that he would not sign judgment, the said two notes should be allowed against plaintiff's claim, and they were then mutually set off and allowed against it; that defendant, relying on such request and agreement, took no further step in the suit, or to recover his set-off, but allowed it to be so set off against the plaintiff's claim, which was thereby fully paid and satisfied. And defendant says that it is inequitable that the plaintiff should now be allowed to maintain this action, and defeat defendant's set-off by the statute. Surrejoinder, on equitable grounds, that defendant waived and forfeited his rights under the alleged agreement by giving the plaintiff, before the discontinuance of the former and the commencement of this action, to wit, on the 30th September, 1868, notice of his intention to proceed in the first action by entering judgment of non pros. for want of a replication, and by accepting his costs of defence taxed on the plaintiff's rule to discontinue:—Held, upon demurrer, that the agreement might have been pleaded as an accord and satisfaction to the declaration; but that defendant might nevertheless rely on the set-off, and set up the agreement in answer to the statute. 2. That the rejoinder shewed a good answer to the replication. Semble, that the rejoinder, without reference to the agreement, would have been sufficient if it had alleged that the present set-off was pleaded within a reasonable time for bringing an action for such set-off after the termination of the first suit, to wit, within one year therefrom; for that the previous suit ended by discontinuance was a good answer to the statute. But, semble, also, that without such averment it was bad, and that the dates appearing on the record could not be allowed to supply it. Held, also, that the rejoinder was not a departure from the plea. Held, also, that the surrejoinder was good, for the defendant had lost his right to the costs, if they could be recovered only by signing judgment, which he had agreed not to sign; that the termination of the first action remitted both parties to their original rights, and defeated the accord and satisfaction between them; but that the defendant having broken the agreement, the remission related back only to such rights as they existed when the suit ended. Semble, also, that in no way could the defendant by pleading avoid the replication and rely upon the equity of the statute, for that the agreement and its waiver excluded that ground of defence. *Parsons* v. *Crabb*, 31 U. C. R. 434. See *S.C.*, 34 U. C. R. 136.

See, also, *Butterfield* v. *Mabee*, 22 C. P. 230.

IX. Miscellaneous Cases.

Air—*Right to—Pollution—Acquiescence.*]—It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar the right within a shorter period, there must be such encouragement or other act by the party afterwards complaining, as to make it a fraud in him to object. *Radenhurst* v. *Coate*, 6 Gr. 139.

Building Society—*Forfeiture of Shares—Deceased Member — Administrator.*]—In January, 1864, a non-borrowing member of a building society died intestate. No one administered to his estate until June, 1867. In that interval his shares ran in arrear, and in consequence the society, in November, 1865, declared the shares forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:—Held, that the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal: that they could not do so any more than they could proceed at law to enforce payment of the calls. 2. That the plaintiff, the administrator, was entitled to relief, and that the lapse of time between the attempted forfeiture of the shares and the procuring letters of administration was no answer to the plaintiff's claim. *Glass* v. *Hope*, 16 Gr. 420.

Dismissal of Bill — *Bar of Claim.*]—Held, that filing a replication pending a motion to dismiss is no answer to the motion, the practice here being different from that which prevails in England; nor the mere fact that the plaintiff's claim will be barred by the Statute of Limitations if the bill be dismissed. *Finnegan* v. *Keenan*, 7 P. R. 385.

Expropriation — *Compensation — Statute—Retroactive Effect.*]—Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights. Section 16 of 54 Vict. c. 42 (O.), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation, does not apply to a claim existing at the time of the passage of the Act. *In re Roden and City of Toronto*, 25 A. R. 12.

Forfeiture—*Land Sold by Lottery — Information—Pleading.*]—The plaintiff filed his information to forfeit land sold by lottery, contrary to 12 Geo. II. c. 28, more than five years after the sale complained of:—Held, too late, for the case came within 31 Eliz. c. 5, by which he was limited to one year. *Meeburn* v. *Street*, 21 U. C. R. 498.

Where it appears upon the record in a penal action that it is brought too late, the defendant may take advantage of the objection without having specially pleaded it. *Ib.*

Insurance Policy — *Proofs of Loss—Waiver—New Trial.*]—New trial granted on payment of costs, to enable plaintiffs to give evidence of a waiver of the condition in a policy as to proof of loss, where a nonsuit would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced. *Cameron* v. *Monarch Assurance Co.*, 7 C. P. 212.

Judgment — *Fraud — Executor—Creditors.*]—Where a judgment is successfully impeached on the ground of fraud and collusion between the creditor and the executor of the debtor, it is open to the parties interested in the estate of the deceased to set up the statute to the claim of the creditor, which the executor has omitted or neglected to plead. *Jardine* v. *Wood*, 19 Gr. 617.

Leave to Appeal—*Setting up Statute on Appeal.*]—The court will not relieve a party against the effect of one lapse of time in order to enable him to set up another lapse of time against creditors. Where, therefore, a party applied for leave to appeal after the time for appealing, or for giving notice thereof, had expired, in order to enable him to set up the Statute of Limitations against certain creditors' claims, the court refused the application. *Brigham* v. *Smith*, 3 Ch. Ch. 313.

Mandamus—*Remedy by Action Barred.*]—Semble, that the court would not have interfered in this case by mandamus had not the prosecutor's remedy by suit probably been barred by 16 Vict. c. 99, s. 10. *Regina ex rel. Trustees of St. Andrew's* v. *Great Western R. W. Co.*, 14 C. P. 462.

Master's Report — *Objection—Appeal.*]—An objection of the Statute of Limitations cannot be made by an appellant against the master's report, without having been taken before the master. *Brigham* v. *Smith*, 18 Gr. 224.

Mortgage Action — *Dispute Note—Statute not Available under.*]—An application was made to vacate a præcipe decree taken into the master's office, and to allow, instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was held to be properly made in chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it. The statute cannot be set up as a defence in this way, but must be pleaded. *Cattanach* v. *Urquhart*, 6 P. R. 28.

See Wright v. *Morgan*, 1 A. R. 613.

Municipal Corporation.]—Held, that a person aggrieved by an act of a municipal council, is not bound to commence his action within six months from the committing of the act complained of. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 169.

Negligence—*Water Commissioners—Special Charter.*]—Action against water commissioners for negligence causing death. Special limitation of six months in their charter, held to supersede the twelve months given by C. S. C. c. 78, s. 4. *Cairns* v. *Ottawa Water Commissioners*, 25 C. P. 551.

Payment out of Court—*Mistake—Restitution.*]—See *Allstadt* v. *Gortner*, 31 O. R. 495 (*ante* 1.)

Penalty — *Ontario Election Act — Summons for Corrupt Practices.*] — See *Halton Provincial Election, In re Cross*, 2 Elec. Cas. 158.

——— *Stamps — Pleading.*] — An action for a penalty for not affixing stamps to an instrument, under 27 & 28 Vict. c. 4, s. 5, must, by 31 Eliz. c. 5, be brought within a year. No right of action vests in the plaintiff until the action is so brought, and the defendant therefore may take advantage of this latter statute under a plea of not guilty. The defendant was held not precluded from such defence by having marked in the margin of his plea the statute 21 Jac. I. c. 4, only. *Mason q. t.* v. *Mossop*, 29 U. C. R. 500.

Supplemental Answer—*Setting up Statute.*]—Order made allowing a supplemental answer to be filed setting up the Statute of Limitations. *Seaton* v. *Fenwick*, 7 P. R. 146.

See DOWER, III. 5—INSURANCE, III. 9 (a), VI. 1—RAILWAY, XIX.—TRUSTS AND TRUSTEES, V. 5.

LIMITED PARTNERSHIP.

See PARTNERSHIP, VII.

LINE FENCES.

See FENCES, III.

LIQUIDATED DAMAGES.

See DAMAGES, IX.—PENALTIES AND PENAL ACTIONS, I. 1—SET-OFF, VII. 7.

LIQUIDATOR.

See COMPANY, X. 4.

LIQUOR LICENSE ACT.

See CONSTITUTIONAL LAW, II. 16—INTOXICATING LIQUORS.

LIS PENDENS.

Alimony Suit.]—A certificate of lis pendens should not be issued in a suit brought for alimony only. *White* v. *White*, 6 P. R. 208.

Appearance Gratis where Lis Pendens Registered.] — See *McTaggart* v. *Toothe*, 10 P. R. 261.

Class Suit — *Payment of Plaintiff's Claim.*]— In a class suit, in which a decree has been made, although the plaintiff's claim has been paid, the bill will not be dismissed nor a lis pendens vacated, where other persons may be entitled to the benefit of the decree, and to retain the lis pendens. *Armbery* v. *Thornton*, 6 P. R. 190.

Courts — *Power to Issue—Equity—Common Law.*]—See *Cochrane* v. *Franklin*, 10 C. L. J. 91.

Fictitious Suit — *Early Hearing.*] — Where a fictitious suit is brought for the purpose of registering a lis pendens, an application to remove the bill will be refused unless there is a direct admission of the nature of the suit by the plaintiff; but where the affidavits clearly shew this, an order will be made directing an early hearing. *Jameson* v. *Laing*, 7 P. R. 404.

Foreclosure Suit — *Subsequent Mortgagee — Service — Notice.*] — L. created a second mortgage after a bill had been filed to foreclose a prior incumbrance on the same land:—Held, that the mortgagee in such second mortgage took subject to the lis pendens, even though the service of the bill had then not been effected; and a bill filed by him to redeem the prior incumbrancer, after a final foreclosure in such suit, was dismissed with costs. *Robson* v. *Argue*, 25 Gr. 407.

Fraudulent Conveyance—*Action to Set aside.*]—Action by a creditor of M. to set aside a conveyance by M. to his wife, as fraudulent:—Held, a proper case in which to register a certificate of lis pendens, and that pending the action no order could be made to vacate it. *Foster* v. *Moore*, 11 P. R. 447.

Issue of, before Action Begun.]— Where a certificate of lis pendens purporting to be issued in this action was, by an error of an officer of the court, issued before the action was begun, an order was made in the action so declaring, and directing that it be set aside on that ground. *St. Louis* v. *O'Callaghan*, 13 P. R. 322.

Judgment — *Registration of—Action to Enforce—Parties—Abolition of Registration of Judgments.*]—In September, 1855, one G. entered into a contract (which was never registered) with one M., for the sale to him of a lot of land. In October, 1857, the plaintiffs recovered and registered a judgment against G., and thereby acquired priority over M., on the lot sold by him, and in March, 1861, filed a bill against G., to enforce their judgment against the lot contracted to be sold to M., as well as against other lands of G., to which bill the plaintiffs (having no notice of the contract) did not make M. a party, a certificate of lis pendens being however registered. In March, 1862, M. obtained from G., under the contract, a conveyance of the lot, which he registered in September, 1862, and the plaintiffs becoming aware thereof applied ex parte on the 10th June, 1864, under the orders of the 29th June, 1861, for, and obtained, an order to make M. a party in the master's office:—Held, that the suit was not pending as against M. prior to the date of the order to make him a party; that therefore there was no suit pending against him on the 18th May, 1861, (when the Act abolishing the registration of judgments, 24 Vict. c. 41, came into force), and in consequence, that the lien created by the registration of the plaintiffs' judgment against the lot, the subject of the contract, was gone, and that M. was not a necessary or proper party to the suit, and that the order to make him a party should be discharged. *Juson* v. *Gardiner*, 11 Gr. 23.

Litigious Rights—*Title to Lands—Usurper in Possession.*]—Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights. *Powell* v. *Watters*, 28 S. C. R. 133.

Nature of Claim—*Appropriate Remedy —Writ of Summons—Indorsement — Pleadings.*]—A lis pendens should not be vacated unless it appears from the indorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the court. Jameson v. Laing, 7 P. R. 404, approved of. When a plaintiff seeks to register a lis pendens he should be more precise in respect to the indorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Sheppard* v. *Kennedy*, 10 P. R. 242.

Order Discharging—*Application for.*]— Where a decree on further directions had been registered against lands, and afterwards the original decree was reversed on rehearing: —Held, that the order reversing the original decree destroyed the lien. The court cannot discharge the lis pendens on an application for that purpose—the mode of getting rid of it is by dismissal of the bill. *Graham* v. *Chalmers*, 2 Ch. Ch. 53.

——— *Necessity for—Decree.*]—Where a certificate of lis pendens is registered under the statute, and the bill afterwards dismissed, it is not necessary to obtain an order discharging the lis pendens from the registry, the registration of the decree dismissing the bill being sufficient. *Dexter* v. *Cosford*, 1 Ch. Ch. 22, 5 L. J. 67.

Refusal to Vacate — *Appeal.*]—No appeal lies, by virtue of s. 99 of the Judicature Act, R. S. O. 1897 c. 51, or otherwise, from an order of a master or Judge dismissing a motion made under s. 98 for an order vacating a certificate of lis pendens. *Hodge* v. *Hallamore*, 18 P. R. 447.

Registration of—*Requirements—Lots—Mandamus to Registrar—Costs.*]—The registrar was required to record a certificate of lis pendens affecting "lot No. 16 in the 9th concession of the township of Erin, and lots Nos. 14 and 15 in the 10th concession of the same township," which he refused to do, as the west halves of lots 14 and 15 had been laid out into village lots, according to a plan filed in his office. On application for a mandamus:—Held, that, so far as regarded the west halves, he was right, for by the Registry Act, 29 Vict. c. 24, s. 73, the certificate should shew the village lots affected. The point being new, and there being no difficulty in recording the certificate against lot 16, the rule

for a mandamus was discharged without costs. *In re Thompson and Webster*, 25 U. C. R. 257.

Sale of Land — *Deposit of Purchase Money—Lien.*]—Where the purchaser paid a deposit on effecting a purchase, which he afterwards rescinded in consequence of a good title not having been made out, and recovered judgment at law for the amount of the deposit, which he was unable to realize under execution:—Held, notwithstanding the provisions of the Administration of Justice Act, that the purchaser had a right to institute proceedings in the court of chancery to enforce his lien, his object being to obtain a lis pendens, which he could not obtain at law, in order to prevent the vendor disposing of his lands as he had of his goods. *Burns* v. *Griffin*, 24 Gr. 451.

Service of Bill — *Delay—Dismissal.*]—Where a bill had been filed and a lis pendens registered, but no office copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs. *Somerville* v. *Kerr*, 2 Ch. Ch. 154.

See PRACTICE — PRACTICE IN EQUITY BEFORE THE JUDICATURE ACT, III. 3.

LIVERY STABLES.

See LIEN, II. — MUNICIPAL CORPORATIONS, XXIX. 4—TROVER AND DETINUE.

LOAN COMPANY.

See BUILDING SOCIETY.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES, VIII.—MUNICIPAL CORPORATIONS, XVI.

LOCAL JUDGES.

See PRACTICE—PRACTICE SINCE THE JUDICATURE ACT, VIII. 4.

LOCAL MASTERS.

Jurisdiction — *Referring Actions to Drainage Referee.*]—A local master of the high court has jurisdiction, by virtue of rules 42 and 49—See also rule 6 (a)—to make an order, under s. 94 of the Municipal Drainage Act, R. S. O. 1897 c. 226, referring an action brought in his county to the referee under the drainage laws. *McKim* v. *Township of East Luther*, 19 P. R. 248.

Partnership—*Solicitors in Chancery.*]—Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in the court of chancery, although they may not actually share in the emoluments of the suit. *McLean* v. *Cross*, 3 Ch. Ch. 432.

Resignation—*Concurrent Appointments.*]—While an appeal from his report was pending a local master of the supreme court sent a letter of resignation to the attorney-general's department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local master" for the county in question. Subsequently the appeal was allowed and the report was referred back to "the master" for the county:—Held, that there could not be two local masters; that the action of the executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office. *In re Glen, Fleming* v. *Curry*, 27 A. R. 144.

Taxation of Costs—*Charge for.*]—Held, that the local masters who are paid by fees instead of salary, are entitled to charge one dollar per hour in money under chancery tariff of 23rd March, 1875, when taxing costs. *McGannon* v. *Clarke*, 9 P. R. 555.

See PRACTICE — PRACTICE SINCE THE JUDICATURE ACT, VIII. 4, 5.

LOCAL OPTION ACT.

See CONSTITUTIONAL LAW, II. 16—INTOXICATING LIQUORS, IV. 2.

LOCAL WORKS AND UNDERTAKINGS.

See CONSTITUTIONAL LAW, II. 18.

LOCATION TICKET.

See CROWN, II. 6.

LORD CAMPBELL'S ACT.

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LORD'S DAY ACT.

See CRIMINAL LAW, IX. 29—SUNDAY, II.

LOST DOCUMENTS.

See BILLS OF EXCHANGE, I. 3—DEED, VI.—EVIDENCE, I. 8 (b).

LOTTERY.

See CONSTITUTIONAL LAW, I., II. 9—CRIMINAL LAW, XI.—GAMING, III.

LUGGAGE.

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LUNATIC.

I. Commission or Declaration of Lunacy—Application for, 4061.

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1. *Committee*, 4066.
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IV. Guardian, Appointment of, 4070.

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I. Commission or Declaration of Lunacy —Application for.

Evidence—*Affidavits.*]—Before the court will declare a person a lunatic, it will in general require medical testimony to the fact. *Re Flemming*, 13 C. L. J. 167.

——— *Affidavits—Service of Notice.*]—An application to declare a person a lunatic without the expense of a commission must be supported by affidavits of more than one medical man. Semble, also, that notice of the application should be given to the lunatic; but that it will be dispensed with where service on the lunatic would be dangerous to him. The fitness of the proposed committee must be shewn on affidavit. *In re Patton*, 1 Ch. Ch. 192.

——— *Improvident Dealings — Leave to Impeach.*]—The father of P. and J. died during the infancy of J., leaving to them by his will 100 acres of land. After they attained majority, this land was, by deed, equally partitioned between them. J. was of weak intellect, without knowledge of the value of land or money, and unable to read or write. P. afterwards obtained from J. a conveyance of his 50 acres, and executed a bond in his favour, charging these 50 acres with the payment of £50 per annum during J.'s life. P. then mortgaged the 100 acres, and obtained from J. a release of the annuity bond, which was executed in presence of the solicitor of the mortgagees, without any good consideration therefor. On a petition filed to have J.'s lunacy declared, the evidence was taken in presence of the parties so interested in the land. J. was declared a lunatic, but, as no notice to the mortgagees or their solicitor of his imbecility when the mortgage was executed was proved, without prejudice to the mortgage, but allowing the committee of the lunatic to impeach it by bill. *In re McSherry*, 10 Gr. 390.

——— *Insufficiency of—What Order to be Made.*]—An application was made by petition to declare R. a lunatic, and the petitioner, failing to produce sufficient medical testimony, asked for an order dismissing the petition. The vice-chancellor declined to make such order, but made an order declaring that the court did not see fit to make any order on the application. *Re Randall*, 8 P. R. 202.

——— *Senile Imbecility.*] — A person whom it was sought to have declared a lunatic was shewn to be in a state of mind described as "senile imbecility:"—Held, that he might properly be declared a lunatic under C. S. U. C. c. 12, ss. 31, 32, and 33. *Re Kelly*, 6 P. R. 220.

Forum — *Chambers.*]—A Judge in chambers granted an application for a commission de lunatico inquirendo, the orders of June, 1853, giving to a Judge in chambers authority to act in such a matter. *Re Stuart*, 4 Gr. 44.

Jury — *Panel — Sheriff—Authority—Notice of Trial.*]—On an application in lunacy, the court ordered the sheriff to empanel a jury for the then next sittings of the court. The matter was not proceeded with until the sittings succeeding the next; and the matter then coming on:—Held, that the panel was not properly constituted; that the sheriff's authority to summon a jury was confined to the first sittings after the date of the order. Semble, an alleged lunatic should receive the same notice of a trial before the court as of an inquisition under the former practice. *In re McNulty*, 13 Gr. 463.

Object of Application — *Welfare of Lunatic.*]—Where a petition to have C. declared a lunatic was presented by one of his daughters, and it appeared that it was presented with a view to attack a disposition which C. had made of his estate in favour of another daughter, with whom he lived, for which purpose an action had already been begun in C.'s name by a son as next friend, and it also appeared to the Judge that there was no reason why C. should not remain in the custody and care of the daughter, the petition was dismissed, although C. was undoubtedly a lunatic. *Re Clark*, 14 P. R. 370.

Quashing Commission — *Costs.*]—The court, in a proper case, will, upon petition, quash a commission of lunacy, and the inquisition taken under it, without putting the party to the expense and delay of a traverse; but in such a case, where the alleged lunatic had afforded grounds for the application against him, the court, while quashing the inquisition, refused to charge the party applying for the commission with costs. *Re Milne*, 11 Gr. 153.

Renewal of Application.]—An application for a commission when renewed should be disposed of before the same Judge. *In re Milne*, 1 Ch. Ch. 194.

Service of Notice—*Access to Lunatic.*]—Before granting an order declaring a person a lunatic, he must be served with notice of the application, and any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him. *In re Miller*, 1 Ch. Ch. 215.

——— *Dispensing with.*]—As to the evidence required to dispense with such service as dangerous to the lunatic or useless. See *Re Newman*, 2 Ch. Ch. 390; *Re Mein*, 2 Ch. Ch. 429.

II. Contracts and Dealings with.

Acknowledgment of Debt—*Physical Weakness.*]—Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of a debt by a testator. *Emes* v. *Emes*, 11 Gr. 25.

Advance of Money — *Investment in Land—Insanity of Lender—Lien on Land—Family Arrangements.*]—A. received $1,200 belonging to his son-in-law, R., and invested it, with other money of A.'s own, in the purchase of a farm, which cost £3,200. R. with his family went into possession of the farm, and A., the father-in-law, by his will devised the farm to R.'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of $200 to a daughter of R., and of $600 to another person. It was assumed in the cause that R. was at the time of the purchase and thenceforward of unsound mind and unable to give a valid assent to the transaction: and the court held that on that assumption he was entitled to the $1,200 as against A.'s estate, and that the devise to his wife and son was no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the court directed inquiries whether R. was at the date of the transaction of mental capacity to assent to the purchase; and if so, whether he did assent thereto: also, inquiry as to occupation of the land by R. and family before the death of A., and the value of such occupation. *Goodfellow* v. *Robertson*, 18 Gr. 572.

Cognovit — *Execution—Fraud.*]—In this case a Judge refused to set aside the execution issued upon a cognovit, either upon the ground of insanity of the defendant, or of fraud on the part of the plaintiff. *Paterson* v. *Squires*, 1 C. L. Ch. 234.

Conveyance of Land—*Evidence—Family Arrangements.*]—Y., being the owner of valuable lands, became infirm in mind. He believed that he could control the elements, and asserted power in himself to recall from death, and in various other ways, for several years previous to his death, constantly shewed mental infirmity. While in this state his family, by an arrangement among them, entered into possession of the real estate, and severally worked it and enjoyed its profits. W. and P., Y.'s children, and M., his wife, obtained from him conveyances to them respectively of all his real estate, which were executed in presence of an attorney, and there was some evidence of a money consideration having been paid to Y. for them. It was not shewn conclusively that these conveyances were executed in a lucid interval, Y. having died intestate, on a bill by the heir of N., one of Y.'s children, these conveyances were set aside as fraudulent, with costs, and W., P., and M. were ordered to account for rents and profits. *Young* v. *Young*, 10 Gr. 365.

——— *Impeachment by Heir — Statute of Limitations.*]—In 1822 A., a maniac, conveyed land to B., who then entered into possession. A. died in 1829. C., his eldest son and heir, became of age in 1829. He died in 1829, and his brother and heir, D. (the lessor of the plaintiff), became of age in 1831, and brought his ejectment against B., on the ground that his father was non compos at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after our statute 4 Wm. IV. c. 1: —Held, that D., under these facts, was barred from recovery under the Statute of Limitations; and held, also, that B. could not be considered in possession as the servant or bailiff of the lunatic. *Doe d. Silverthorn* v. *Teal*, 7 U. C. R. 370.

——— *Knowledge of Grantee—Evidence—Notice.*]—To avoid a transaction on the ground of lunacy, it is not necessary to shew that the lunacy was connected with or led to it. But to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware of the seller's mental condition. *McDonald* v. *McDonald*, 14 Gr. 545.

A vendor was insane, but not on all subjects; and, apart from his delusions, a stranger might not perceive his insanity. In the negotiation for a sale of land, he said to the purchaser that he was bewitched, which, it was shewn, was one of his delusions:—Held, reversing the decree below, 14 Gr. 545, that this was not sufficient to affect the vendee with notice of the vendor's condition. *S. C.*, 16 Gr. 37, in appeal.

Before the court will compel a purchaser to accept a title, it must be shewn that the title is reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the court refused to enforce the contract. Where the lunacy of the previous owner of the estate was relied on as an objection to the title, and the vendor alleged that if such were the fact it was shewn that he had purchased fairly, and without notice of the lunacy, as a ground for enforcing the contract; still, as the fact that the vendor had purchased without such notice was one which from its nature was incapable of proof, and notice on some future occasion might be clearly shewn, the court allowed the objection, and dismissed the vendor's bill with costs. *Francis* v. *St. Germain*, 6 Gr. 636.

——— *Pleading.*]—Action for taking goods. Second plea, avowry as bailiffs of W. H. for rent due by one W. B., the goods being on the demised premises. Second replication thereto, that the said W. H. after the demise, by deed bearing date 30th October, 1869, granted to the plaintiff in fee the land mentioned in the plea, whereby the plaintiff became entitled to the rent from W. B.; and W. H., at the said time when, &c., had no interest in the lands. Third replication, that on the 7th May, 1870, the tenant by deed released to the plaintiff all his estate in the land, and the landlord, in consideration thereof, released the tenant from the rents and covenants. Third plea, avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication, that before the demise one W. H. was seised in fee of the land, and

by deed, dated 30th October, 1869, granted it to the plaintiff, who entered and took possession, and held it as owner in fee at the time of the distress. The defendants rejoined to each of the above replications, that at the time of making the alleged deed W. H. was of unsound mind, and incapable of executing and understanding the same, as the plaintiff then well knew:—Held, good, for that the defendants were entitled to set up such defence. *Hayward* v. *Thacker*, 31 U. C. R. 427.

——— *Release of Annuity Bond—Subsequent declaration of Lunacy.*]—See *In re McSherry*, 10 Gr. 390.

——— *Validity of Mortgage—Estoppel—Res Judicata — Pleading.*] — The plaintiff, on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st March, 1864, which was the plaintiff's only title to the land; that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction; that the plaintiff by the mortgage covenanted that he was seised in fee and had good right to convey; and that the eviction complained of was an action of ejectment brought by the heirs of L., on the ground that L. was of unsound mind when he executed the deed on the 31st March, 1864, which was proved at the trial, and the jury thereupon found for the heirs:—Held, that the plea was bad; for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the estoppel applicable to the deed extend to the mortgage; that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and, moreover, the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 U. C. R. 635.

Mortgage — *Evidence — Jury.*]—In this case a mortgage given in 1848, by a mortgagor who died in 1855, was impeached on the ground of insanity:—Held, that a rational act (the giving of the mortgage) being proved by testimony, not impeached, to have been done in a rational manner, and a security given for a valuable consideration, under no suspicion of unfairness or knowledge by the mortgagees of the alleged insanity, the transaction could not be upset by general evidence of insane delusions, expressions, and conduct ranging over a number of years, but none of it bearing on the time when the mortgage was made, or in any way approaching the impeached dealing; and the jury on such evidence having found the mortgage void, and rendered a verdict for the plaintiff, a nonsuit was ordered. *Campbell* v. *Hill*, 22 C. P. 526.

——— *Knowledge of Mortgagee.*] — The fact that a mortgagor at the time of executing the mortgage was insane, is no ground for setting it aside, if the mortgagees dealt with him and advanced their money on the mortgage in good faith, and without knowledge of his insanity:—Held, that there was in this case no evidence of such knowledge, and that a nonsuit, therefore, was properly entered. *Campbell* v. *Hill*, 32 C. P. 473, in appeal.

Promissory Note — *Absence of Consideration — Knowledge.*] — J., an infant, gave to M. for the purchase money of a buggy, a promissory note, indorsed by his father, who was of unsound mind, and unable to understand what he was doing. The father received no consideration, and M. was not aware of his condition:—Held, that the father's estate was not liable. *Re James*, 9 P. R. 88.

Work and Labour—*Insanity of Employer — Evidence — Knowledge.*]—The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him to do him some injury. He, however, superintended the repairs, and talked intelligently to the workmen employed about the vessel; but some months afterwards he became violent, and was confined in asylum for the insane:—Held, that the plaintiffs were entitled to recover for the work done. *Robertson* v. *Kelly*, 2 O. R. 163.

III. ESTATES OF.

1. *Committee.*

Accounts of—*Neglect to Collect Rents—Expenditure on Roads.*]—The committee, having neglected to collect rent of a tenant whom he found in possession of a portion of the estate, was charged with the amount thereof on passing his accounts. The committee expended more money in making surveys and roads—with a view to a sale of a portion of the estate—than the court had authorized, which excess was occasioned by the failure of a neighbouring proprietor, who had agreed to contribute towards such expenditure. On appeal from the master the court directed such excess to be allowed him on passing his accounts. The powers, duties, and liabilities of a committee of a lunatic's estate considered and acted on. *In re Shaw*, 15 Gr. 619.

English Committee—*Power to Convey.*] —The court is bound to take notice that the Imperial Acts 11 Geo. IV. and 1 Wm. IV. c. 60 enable lands in this Province, held in trust by a person of unsound mind, to be conveyed by a committee appointed by the high court of chancery in England. *Thompson* v. *Bennett*, 22 C. P. 393.

Fitness—*Affidavit.*]—See *In re Patton*, 1 Ch. Ch. 192.

Leave to Impeach Conveyance Made by Lunatic.]—See *In re McSherry*, 10 Gr. 390.

Scottish Curator — *Payment of Trust Funds to.*]—Funds were bequeathed to trustees, and one of the cestuis que trust, it was stated, had been declared a lunatic in Scotland, and a curator de bonis of the estate of the lunatic was appointed. The lunatic was not absolutely entitled to the fund, and the trustees applied to the court for liberty or instructions to remit the fund to the curator. The court, under the circumstances, refused

to make such direction, and ordered a reference "to the master to inquire and report (1) whether M. A. C. in the petition mentioned has been found and adjudged a lunatic according to the law of Scotland; (2) whether A. S. in the petition named has been appointed curator de bonis of the estate of the said M. A. C., and if so, whether he has given security for the proper application of any moneys of the said M. A. C., and the nature and amount of such security." *Re Charteris*, 25 Gr. 376.

Security—*Bondsman — Solicitor.*] — The rule that the solicitor for a party will not be accepted by the court as a bondsman for such party is still in force. The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee, and offering her two solicitors as sureties. *Re Gibson*, 13 P. R. 359.

——— *Recognizance.*] — The recognizance of the committee, or of a receiver, will not be deemed sufficient security under the statute. *Re Ward*, 2 Ch. Ch. 188.

——— *Validity of Prior Acts—Mortgage—Authority of Court.*]—Held, following Gunn v. Doble, 15 Gr. 655, and McLean v. Grant 20 Gr. 76, that a sale in 1854 by a mortgagee who had obtained a final order of foreclosure of real estate of a lunatic, valid on its face, could not be questioned by reason of a prior formal defect discovered a number of years afterwards. The committee of the lunatic filed a bill for redemption against the mortgagee, the representatives of the purchaser from him under a final order of foreclosure, and H., the committee who executed the mortgage, alleging that the mortgage was executed before H. had given security. The objection to the security was that the attestation clause of the recognizance filed by H. was not signed by any Judge of the court. It appeared, however, that the affidavits of justification were duly sworn, and each page of the mortgage was authenticated by the signature of the chancellor:—Held, that 9 Vict. c. 19, which provided for security being given, was intended to apply only to cases where the committee was appointed by the master, and not, as here, by the court, which has a discretionary power to authorize a committee to act before giving security. Held, also, that the security was only against the misapplication of the personalty, and was not directed against a mortgage executed under the authority of the court. Held, also, that the requirements of the statute as to security were only directory, and that a failure to comply therewith would not invalidate acts done by a person who had been actually appointed. *Shaw* v. *Crawford*, 4 A. R. 371.

See the next sub-head.

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2. *Distribution.*

Creditors—*Order for Sale of Lands—Conduct of.*]—Although the general rule of the court is, that no course will be taken that will prejudicially affect the interests or the comfort of a lunatic, even for the benefit of creditors; still the court will assist creditors where that can be done without prejudice to the lunatic. And where the court, by its orders, has induced creditors to prove their debts in the court of chancery and thus prevented them from proceeding at law:—Quere, whether the court is not bound to afford them relief, even to the prejudice of the lunatic's estate. In June, 1864, the committee of a lunatic's estate applied for and obtained an order for the sale of lands for the payment of debts reported due by the lunatic: but the committee took no action whatever under the order, and in 1868, after nearly four years, certain of the creditors applied for the conduct of the order directing the sale of the lands: and the court, under the circumstances, made the order. *In re Shaw*, 14 Gr. 524.

Death of Lunatic — *Administration Order.*]—The control of a court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy. Under such circumstances the committee took, under authority of the court, proceedings for the administration of the estate by applying for an administration order, which was granted, the proceedings being directed to be as inexpensive as possible. *Re Brillinger*, 3 Ch. Ch. 290.

——— *Special Statute—Sale of Land—Conversion into Personalty.*] — A special Act, passed in Upper Canada in 1827, authorized a commission to issue to inquire into the lunacy of one P. V.; and, if he should be found a lunatic, the Act directed a committee of his estate to be appointed, and authorized such committee to sell his goods and lands, and to invest the proceeds in bank stock or real securities; and enacted that whatever remained of such investments at the lunatic's death should be distributed among his legal representatives according to law:—Held, that such residue was personal estate, and was to be distributed among the next of kin. *Clarke* v. *Ruttan*, 11 Gr. 416.

One of several heirs of intestate being lunatic, an Act of Parliament was procured, authorizing the sale of intestate's lands, and the investment of the lunatic's share in government securities or mortgages, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and in a proceeding to distribute the share of the lunatic: —Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided among his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Gr. 254.

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3. *Maintenance.*

Costs of Opposing Lunacy Petition.] —A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessaries which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid

ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrill*, 10 P. R. 216.

Money in Court.]—On an application by the bursar of the Provincial lunatic asylum for moneys in court belonging to a lunatic party in a suit, in which his property had been sold:—Held, that such application was not authorized by the statute C. S. U. C. c. 71. *Mein* v. *Mein*, 3 Ch. Ch. 62.

Money in court to the credit of a lunatic though not so found was directed to be paid out in annual sums for maintenance. *Re Hinds, Hinds* v. *Hinds*, 11 P. R. 5.

Sections 48 and 49 of the Act respecting lunatic asylums and the custody of insane persons, R. S. O. 1887 c. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in court. Where the property of the lunatic is money in court, the inspector must apply for payment out under s. 61, and must shew clearly that the person to whom the money in court belongs is a lunatic, and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum; but it is not necessary, having regard to s. 1, s.-s. 2, that the person shall have been, or shall be, declared a lunatic. *Re McKenzie, Re Lind, Re Campbell*, 14 P. R. 421.

——— *Payment out — Life-tenant—Foreign Guardian.*]—During the infancy of the defendant $2,000 was paid into court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign court, the mother applied for payment out of the whole fund, having given in the foreign court specific security for the amount:—Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given. Held, as to the other half, that, being actually in the hands of the court, it was subject to the jurisdiction of the court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian. *Re Thompson, Thompson* v. *Thompson*, 19 P. R. 204.

Moneys on Deposit — *Garnishment—Payment into Court.*]—Moneys belonging to a lunatic, on deposit in a bank, which had been attached by a creditor, were, on the application of the committee, ordered to be paid into court for the maintenance of the lunatic in priority to the creditor's claim. *Re Verso*, 20 C. L. T. Occ. N. 309.

4. *Sale of Land.*

Discretion.]—The court will exercise a wide discretion as to the disposition of a lunatic's estate; and, when it appears to be necessary, will order its sale and disposition, and authorize the committee to collect rents, &c. *Re Keenan*, 2 Ch. Ch. 492.

Service of Notice.]—Where the heirs-at-law or next of kin of a lunatic are unknown, or reside at a distance, and service on them would be attended with great expense, the court may dispense with service of notice on them of a sale of the real estate of the lunatic. *Re McGrath*, 2 Ch. Ch. 435.

See sub-head 2, *ante; Woodry* v. *Woodry*, 7 C. L. T. Occ. N. 267, *post* VI.

5. *Other Cases.*

Dower of Lunatic—*Bar of.*]—See *In re Colthart*, 9 P. R. 356.

Reference—*Scope of.*]—When the estate of a person who has been found a lunatic is small, the court will combine in one reference to the master all the usual inquiries, although the several objects are in England the subjects of separate references. *Re Duggan*, 2 Gr. 622.

IV. Guardian, Appointment of.

Application for—*Evidence of Lunacy—Interest of Guardian.*]—On an application to appoint a guardian ad litem to a person alleged to be of unsound mind, not so found by inquisition, it is not sufficient evidence of the lunacy that deponents swear that the person is of unsound mind, or that they believe him to be so; such facts should be shewn as will enable the court to judge for itself. It must also be shewn that the proposed guardian has no interest conflicting with that of the lunatic. *McIntyre* v. *Kingsley*, 1 Ch. Ch. 281.

——— *Forum — Master in Chambers.*]—On an application under rule 69, O. J. Act, for an order appointing the official guardian the guardian of one of the defendants, a person of unsound mind, not so found:—Held, that the motion should be made before the master in chambers. *Crawford* v. *Crawford*, 9 P. R. 178.

——— *Lunatic not so Found.*]—In moving to have a guardian ad litem appointed to a person of unsound mind, it must be shewn that he has not been so found by inquisition. *Crawford* v. *Birdsall*, 1 Ch. Ch. 70.

——— *Necessity for Notice — Erroneous Order — Judgment — Forum—Chambers.*]—In a mortgage action for foreclosure a local master appointed the official guardian to represent a lunatic defendant as guardian ad litem without notice being served, as directed by rule 69, O. J. Act. The guardian made full inquiries, communicated with the relatives of the lunatic, and put in the usual formal defence on behalf of the lunatic; and a judgment of foreclosure was obtained in chambers against all the defendants, including infants and the lunatic defendant:—Held, that the order appointing the guardian was an erroneous one, for which there was no proper foundation, not a mere irregularity which could be waived by the subsequent steps taken to protect the lunatic's rights. Held, also, that the term "adult," in G. O. Chy. 645, does not include a lunatic or person of

unsound mind; and therefore that a judgment against a lunatic could not be obtained in chambers under G. O. Chy. 434. *Warnock* v. *Pricur*, 12 P. R. 264.

——— *Necessity for Notice—Judgment—Official Guardian.*]—Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant and obtaining an order of the court, by procedure analogous to that provided by con. rules 335 to 338. But where a person has been found by the court to be of unsound mind, the official guardian may be served without order, or notice to the lunatic. Section 32 of R. S. O. 1887 c. 44 must be limited to cases mentioned in the marginal note thereto, which correctly defines the scope of the enactment. *Wolff* v. *Ogilvy, Re Hagar*, 12 P. R. 645.

Power to Appoint.]—The power of the court to appoint a guardian for a lunatic is unaffected by 34 Vict. c. 18, s. 15 (O.) *McDonald* v. *Beard*, 13 C. L. J. 197.

V. Next Friend.

Affidavit on Production.] — Where a person of unsound mind sues by a next friend, the usual præcipe order that the plaintiff do produce is proper and is sufficiently obeyed by the affidavit of the next friend. *Traviss* v. *Bell*, 8 P. R. 550.

Costs — *Unnecessary Suit.*]—When a bill was filed in the name of a person of unsound mind, not so found by inquisition, by a next friend, the court, on the submission of defendant, made a decree declaring that the plaintiff was entitled to certain lands of which defendant had the legal estate, subject to defendant's lien for taxes, &c., which he had paid thereon; and the defendant not asking a sale, and it not appearing that a sale or other direction following the declaration was necessary in the interest of the plaintiff, the court made no order founded on such declaration; and it not appearing that the suit was necessary, or that the defendant was guilty of any blameable conduct, he was held entitled to costs, and the next friend was ordered to pay them without prejudice to any question as between him and the plaintiff's estate. *Young* v. *Heron*, 14 Gr. 580.

Removal of —*Stay of Proceedings—Married Woman—Inspector of Prisons.*]—An action was brought in the name of the plaintiff, a lunatic not so found, confined in a public asylum, by his wife as next friend, to set aside a conveyance of land made by him as improvident, &c.:—Held, that the action being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend: and, although a married woman cannot fill such an office, the fact that in this case she did so did not make her proceedings void; and the defendants' only remedy was to apply to remove her and to stay proceedings until a proper next friend should be appointed. Held, also, that the objection that the action should have been brought by the inspector of prisons and public charities could not prevail, for it was discretionary with him to institute proceedings or not. *Mastin* v. *Mastin*, 15 P. R. 177.

Security for Costs by Next Friend.] —See Costs.

See Re Clark, 14 P. R. 370.

VI. Miscellaneous.

Arrest of Escaped Lunatic — *Action —Malice.*] — Defendant, within one month after the plaintiff's escape from a lunatic asylum where he had been confined as a lunatic, with full knowledge of the plaintiff having recovered his sanity and really believing him to be sane, falsely represented to the medical superintendent of the asylum that the plaintiff was still insane, and had threatened to take one M.'s life, which was thereby in danger, and that the plaintiff's brothers had requested the defendant to procure his recapture; and the defendant thereupon obtained from the medical superintendent a warrant for his arrest, which he handed to a constable, and the plaintiff was arrested and reconveyed to the asylum, but after a medical examination the next day was discharged:—Held, that the plaintiff could recover in case for the malicious arrest, the jury having found that the defendant acted maliciously and without reasonable or probable cause; but that trespass would not lie, for the warrant having been bonâ fide issued by the medical superintendent, and being valid on the face of it, and authorized by 36 Vict. c. 31, s. 22 (O.), the defendant was protected by it. In this case the jury found that the defendant acted maliciously and without any reasonable or probable cause, but they gave a verdict for only one shilling. A new trial was granted for smallness of damages. *Dobbyn* v. *Decow*, 25 C. P. 18.

Assault—*Action for—Plea of Insanity.*] —A tort feasor cannot plead incapacity of mind in answer to an action for an assault. *Taggard* v. *Innes*, 12 C. P. 77.

——— *Intent to Ravish—Consent of Woman—Insanity.*]—In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented:—Held, that the conviction could not be sustained. In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, e. g., that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape. *Regina* v. *Connolly*, 26 U. C. R. 317.

Conveyance of Land to Trustee for Lunatic.]—The Crown granted land by letters patent to J. S. "in trust for his son I. S., a lunatic, his heirs and assigns for ever, to have and to hold the same land to him, the said J. S., his heirs and assigns for ever:"—Held, that this patent coming, as any other mode of assurance, under the operation of the Statute of Uses, 27 Hen. VIII.

c. 10, if it did not, from particular considerations applying to the lunatic only, vest the real estate in him, yet that it nevertheless created a use which, on the death of the lunatic, was executed in his heir, and that therefore a deed made by the heir after the death would be valid as against a deed executed by the grantee of the Crown. *Doe d. Snyder* v. *Masters*, 8 U. C. R. 55.

Execution against Lunatic — *Injunction.*]—The common law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ. *In re Grant*, 28 Gr. 457.

Intoxicating Liquors — *Sale to Insane Persons.*]—A section of a by-law prohibiting the sale of intoxicating liquors to idiots and insane persons:—Held, good. *In re Ross and United Counties of York and Peel*, 14 C. P. 171.

Mortgage — *Foreclosure—Invalidity.*]—See *Shaw v. Crawford*, 4 A. R. 371, *ante* III. (1).

——— *Sale or Foreclosure—Deposit.*]—A lunatic mortgagor in an action for foreclosure is entitled to have a sale without the usual deposit. *Woodry* v. *Woodry*, 7 C. L. T. Occ. N. 267.

Will — *Devise—Legacy—Subsequent Insanity of Testator.*]—See *Miller* v. *Miller*, 25 Gr. 224.

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I. MALICIOUS ARREST UNDER CIVIL PROCESS.

1. *Action, When it Lies.*

(a) *Form of Action.*

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——— *Irregularity — Directing Issue of Writ.*]—Where a person has been arrested, though irregularly, under colour and in consequence of a writ, he may sue in case as for an arrest made by the direction of the person who actually caused that writ to issue. *Thorne* v. *Mason*, 8 U. C. R. 236.

——— *Irregularity — Malice — Trespass — Person Arresting.*] — Though a writ of capias be set aside for irregularity, an action on the case will lie against the parties suing out the same maliciously. Trespass would be the proper form of action against the person making the arrest. *Cameron* v. *Playter*, 3 U. C. R. 138.

See Dobbyn v. *Decow*, 25 C. P. 18; *Donnelly* v. *Bawden*, 40 U. C. R. 611.

(b) *Order Setting aside Arrest or Discharging Defendant.*

Condition that no Action be Brought.]—Where an arrest is set aside on condition of bringing no action, that means no action which could not have been brought unless the writ had been set aside. Defendant therefore may sue the plaintiff for malicious arrest. *Graham* v. *Thompson*, 16 U. C. R. 259.

But where a person in custody under a capias had obtained an order for his discharge, upon such condition, and afterwards acted upon the order, an action for malicious arrest brought by him was stayed with costs. The last case held inapplicable to the present state of the law. *Hall* v. *Brown*, 3 P. R. 203.

Necessity for.]—It is not essential to the maintenance of an action for maliciously procuring a Judge's order to hold to bail, that the order for the arrest should be set aside, or that the plaintiff should procure himself to be discharged out of custody. Such an order, if obtained regularly and on sufficient material, cannot (save in very rare and exceptional cases) be rescinded or set aside on the merits. *Erickson* v. *Brand*, 14 A. R. 614.

In an action for damages for arrest under order made in a former action the plaintiff recovered a verdict for $1,000. Upon motion to set it aside, made before a divisional court composed of Armour, C.J., and Falconbridge, J.:—Held, per Armour, C.J., that so long as the order for arrest stood, an action for maliciously and without reasonable and probable cause arresting the plaintiff could not be maintained. Erickson v. Brand, 14 A. R. 614, distinguished. 2. Where a creditor, by affidavit, satisfies the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud; for he is removing his body, which is subject to the jurisdiction of the courts of Ontario, and liable to be taken in execution, beyond the jurisdiction of such courts. Toothe v. Frederick, 14 P. R. 287, commented on and not followed. Robertson v. Coulton, 9 P. R. 16, approved and followed. 3. The fact that the plaintiff, being a resident of Ontario, and having numerous creditors therein, including the defendant, left the Province without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded reasonable and probable cause for and justified his arrest. 4. Considering the action as one for imposing upon the Judge by some false statement in the affidavit to hold to bail, and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the Judge to consider in granting the order, and the burden is upon the plaintiff of shewing that the Judge was imposed upon. 5. The word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he was properly described as an absconding debtor. Falconbridge, J., adhering to the views expressed in Scane v. Coffey, 15 P. R. 112, was of opinion that the plaintiff had a cause of action, but thought there should be a new trial on the grounds of excessive damages and misdirection; and concurred pro formâ in the decision of Armour, C.J. Held, by the court of appeal, that where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States, after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable. Judgment below affirmed. *Coffey* v. *Scane*, 25 O. R. 22, 22 A. R. 269. See *Scane* v. *Coffey*, 15 P. R. 112.

See Griffith v. *Hall*, 26 U. C. R. 94, *post* 5 (a).

(c) *Principal and Agent.*

Action against Agent — *Pleading — Ca. Sa.*]—An agent of a creditor making an affidavit upon which the debtor is arrested on a ca. sa., is liable to an action for causing the writ to be sued out and to be indorsed and delivered to the sheriff, and the debtor to be arrested thereupon, though the jury expressly find that he only made the affidavit. *Davis* v. *Fortune*, 6 U. C. R. 281.

Where it was averred in the declaration that, by virtue of the affidavit of the defendant, he maliciously caused a ca. sa. to be sued out, when he had no probable cause for believing, &c., and that he further maliciously caused the writ to be indorsed and delivered to the sheriff, &c.:—Held, on motion in arrest of judgment, that these facts, if found by a

jury, constituted in themselves the agency of defendant for the plaintiff in the suit, which need not otherwise be more positively averred. *S. C., ib.* 597.

Action against Principal — *Agent's Affidavit—Knowledge of Principal.*]—An action for a malicious arrest will not lie against a principal on an arrest made on his agent's affidavit of his own apprehension that the debtor would leave the Province, the affidavit and arrest both being made without the principal's knowledge, privity, or procurement. *Smith* v. *Thompson*, 6 O. S. 325.

Joint Creditors — *Affidavit of One — Authority or Adoption.*] — Where a debt is due to A. and B., and A. makes an affidavit to arrest the debtor, B. is not liable to an action for a malicious arrest, unless it can be shewn that he authorized the malicious act, or was privy to it, or afterwards adopted or assented to it. *Cameron* v. *Playter*, 3 U. C. R. 138.

See McLarren v. *Blacklock*, 14 U. C. R. 24; *Lyden* v. *McGee*, 16 O. R. 105.

(d) *Other Cases.*

Actual Malice—*Necessity for Proof of.*]—After a bailable ca. re. placed in the sheriff's hands, defendant settled the suit in full; he was afterwards taken on the writ, and thereupon sued for malicious arrest:—Held, not maintainable without proof of actual malice. *McIntosh* v. *Stephens*, 9 U. C. R. 235.

Security for Claim, by Mortgage—*Arrest notwithstanding—Action for Arrest—Verdict for Plaintiff—New Trial Refused.*]—See *Blakely* v. *Patterson*, 15 U. C. R. 180.

2. *Arrest—What Constitutes.*

The arrest is not proved by shewing that the bailiff with the warrant went to plaintiff's house and told him at the door that he had a writ against him, but did not enter the house, nor touch him, and afterwards left him, on his promise to put in bail the next day, which he did. *Perrin* v. *Joyce*, 6 O. S. 300.

The deputy sheriff went to the debtor's house with a ca. sa. to arrest him, and being assured that a friend of the debtor, then from home, would go his bail, he returned home without the debtor. Afterwards he went again and told the debtor, without laying hands on him, that he must come to his (the deputy's) house, which he did, and remained there till discharged, but not under actual constraint:—Held, that there had been no legal arrest on the first visit of the deputy; that the merely insisting on the debtor going to the deputy's house on the second visit, did not of itself constitute an arrest; but that the debtor, in having gone there as desired, and remained there till discharged, though without constraint, had been duly arrested. *McIntosh* v. *Demeray*, 5 U. C. R. 343.

3. *Costs.*

Reduction of Amount for which Defendant Held to Bail.]—Defendant was arrested and held to bail for a debt alleged by plaintiff to be $704, but the plaintiff recovered only $489. As to $80 which the plaintiff failed to recover, it was held on the facts of the case that he had no reasonable ground for believing the defendant to be liable, and he abandoned it at the trial, but as to the other portion for which he failed he had reasonable ground:—Held, that the defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. 1877 c. 50, s. 343. *Porritt* v. *Fraser*, 8 P. R. 430.

4. *Evidence.*

Affidavit to Hold to Bail—*Proof of Copy.*]—An examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant. *Spafford* v. *Buchanan*, 3 O. S. 391.

Held, approving Spafford v. Buchanan, 3 O. S. 391, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the Crown office; and that the identity of defendant with deponent may be presumed primâ facie from the name. *Wilson* v. *Thorpe*, 18 U. C. R. 443.

———*Proof of Agency.*]—Where the action is against the agent of the plaintiff in the suit, it is not sufficient to produce an affidavit purporting to be made by him; it must be proved to have been made by him, and that he was the plaintiff's agent. *McLarren* v. *Blacklock*, 14 U. C. R. 24.

Exemplification of Judgment.]—In an action for a malicious arrest without any probable cause of action, it is not sufficient to establish a primâ facie case to shew an exemplification of the judgment in the former case, by which it appears that a verdict was rendered for the defendant in that action. *Sherwood* v. *O'Reilly*, 3 U. C. R. 4.

Verdict Indorsed on Record.]—The plaintiff offered in evidence the original record in the suit of the defendant against him, with the verdict of the jury in his, plaintiff's, favour indorsed thereon:—Held, inadmissible. *Daly* v. *Leamy*, 5 C. P. 375.

Writ of Arrest—*Admission—Pleading.*]—Upon the general issue, in an action for a malicious arrest, the writ is not admitted. *James* v. *Mills*, 4 U. C. R. 366.

——— *Notice to Produce—Mistake.*]—In an action for malicious arrest, a notice to produce a writ of ca. re. issued, &c., at the suit of A. against the defendant in this cause:—Held, sufficient, the mistake in using the word "defendant" for "plaintiff" being a mere clerical error, which could not mislead. *Wilson* v. *Gilmour*, 5 U. C. R. 212.

——— *Production of.*]—It is necessary to produce or prove the writ in order to connect defendant with the act. *Patterson* v. *Morrison*, 17 U. C. R. 130.

——— *Production of—Loss—Notice to Produce—Adoption of Arrest.*]—To connect a defendant, sued for malicious arrest, with

the writ, the writ itself should be produced, or, to let in secondary evidence, its loss must be shewn or notice to produce it, unless defendant has adopted the arrest, as by filing affidavits in justification. *Thorne* v. *Mason*, 8 U. C. R. 236.

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5. *Pleading.*

(a) *Declaration or Statement of Claim.*

Affidavit to Hold to Bail—*Falsity — Misleading Judge — Setting aside Order — Necessity for.*] — A declaration for malicious arrest alleged that at the time of making the affidavit, procuring the Judge's order, issuing the capias, and arresting the plaintiff, defendant had no reasonable or probable cause for believing, &c., yet he falsely and maliciously, and without any reasonable or probable cause, made oath that he verily believed, &c., and by means of such false allegations falsely and maliciously induced the Judge to grant the order, and caused the plaintiff's arrest:—Held, sufficient; that it was unnecessary to shew the order set aside, or to aver that the affidavit shewed facts and circumstances to satisfy the Judge—the real cause of action being that the defendant by his false and malicious statement set the law in motion. Defendant in his plea stated what allegations the affidavit contained (not averring their truth), and that they satisfied the Judge, who thereupon granted the order:—Held, clearly no defence. *Griffith* v. *Hall*, 26 U. C. R. 94.

——— *Setting out.*]—In trespass for an arrest under a ca. re against the plaintiff arresting, the declaration need not set out the affidavit to arrest. *Beamer* v. *Darling*, 4 U. C. R. 211.

Apprehension—"*Canada.*"]—A declaration that the defendant, not being apprehensive that the plaintiff would leave Canada, instead of Upper Canada, &c., swore that he was so apprehensive:—Held, bad, in arrest of judgment. *Thompson* v. *Garrison*, 6 O. S. 399; *McBean* v. *Campbell*, *ib.* 457.

——— *Reasonable and Probable Cause.*] —A declaration held good in arrest of judgment, stating that defendant made the arrest, "having no reasonable or probable cause to apprehend," instead of alleging "that he did not apprehend," that the plaintiff would leave the Province, &c. *Denham* v. *Ridout*, 6 O. S. 193.

Belief—*Reasonable Cause.*]—A declaration that defendant had not good reason to believe, instead of that he had not any reasonable cause for believing, and not believing, that the plaintiff was about to leave:—Held, sufficient. *Lyons* v. *Kelly*, 6 U. C. R. 278.

Ca. Sa.—*Amount of Judgment—Probable Cause.*]—Plaintiff charged defendant with maliciously causing the writ to be indorsed for a larger sum than warranted by the judgment, but he did not aver a want of probable cause therefor, nor lay any precise day on which the arrest was made, nor aver that defendant maliciously caused the plaintiff to be arrested:—Held, declaration bad. *Ackland* v. *Adams*, 7 U. C. R. 139.

——— *Judgment — Setting out.*]—In an action for a malicious arrest on a ca. sa., it is not necessary to set out for judgment in the declaration. *Crawford* v. *Stennett*, E. T. 2 Vict.

——— *Malicious Issue of.*]—In an action for a malicious arrest under a ca. sa., it is sufficient to aver that the defendant maliciously sued out a ca. sa., when he had no reason to believe that the plaintiff had made, &c. *McIntosh* v. *Demeray*, 5 U. C. R. 343.

Indorsement of Writ under Order.] —In an action for arrest under a Judge's order, an averment that the defendant maliciously obtained the order and indorsed the writ of ca. re. for bail, shews sufficiently that the writ was indorsed under the order. *Burnside* v. *Wilcox*, 5 O. S. 525.

Issue of Warrant in Division Court —*Judge's Order.*]—Held, that it is not necessary in an action against a clerk of a division court, which charges that he, "as such clerk, maliciously, &c., issued a warrant of commitment," to allege that it was so issued without the order of the Judge. *McBride* v. *Howard*, 12 L. J. 280.

Malice—*Inference—Reasonable and Probable Cause.*]—Y. issued a capias before judgment against V. and had him arrested. After the arrest V. tendered $90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than $90. In an action by V. against Y. for damages for wrongful arrest, in which no malice was alleged:—Held, on demurrer, that malice would not be inferred, because so far as appeared from the pleadings Y. had reasonable and probable cause for thinking that V. owed him more than $90, and as malice was not alleged, the demurrer must be allowed with costs. *Vandervoort* v. *Youker*, 13 O. R. 417.

Statutory Form.]—A declaration in the form prescribed by C. S. U. C. c. 22, sched. B., No. 27:—Held, sufficient. *Eakins* v. *Christopher*, 18 C. P. 532.

See Davis v. *Fortune*, 6 U. C. R. 281, *ante* 1 (c).

See cases under sub-head 7, *post*.

(b) *Pleas.*

Part of Cause of Action.]—To a declaration "for maliciously causing the plaintiff to be arrested," a plea that defendant did not make the affidavit stated in the declaration was held bad for professing to answer the whole cause of action, and answering only part. *Long* v. *Lee*, 4 U. C. R. 377.

Reasonable and Probable Cause—*General Issue.*]—Plea, that defendant had a reasonable and probable cause of action, &c.:—Held, bad, as amounting to the general issue. *Sanderson* v. *Downs*, 11 U. C. R. 99.

——— *Uncertainty—General Issue.*] — Plea, to a declaration for malicious arrest on a ca. sa., that defendant had reasonable and probable cause, for that, &c., setting out the facts on which he relied:—Held, bad, for uncertainty, and as amounting to the general

issue; and semble, bad in substance, the facts shewing no sufficient cause. *Jones* v. *Dunn*, 1 C. P. 204.

See Griffith v. *Hall*, 26 U. C. R. 94, *ante* (a).

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6. *Proof of Malice and Want of Reasonable and Probable Cause.*

(a) *Arrest under Ca. Re.*

Where in an action for a malicious arrest on a ca. re., the Judge at the trial was of opinion that want of probable cause had not been shewn by the evidence, and charged the jury strongly to that effect, but did not peremptorily direct them to find for the defendant, the court granted a new trial without costs. *Tyler* v. *Babington*, 4 U. C. R. 202.

In an action for malicious arrest defendant cannot succeed, in banc, in nonsuiting the plaintiff or in obtaining a new trial, on the ground that no probable cause was shewn, if he took no such objection either at the trial or in moving for his rule. *Joncs* v. *Duff*, 5 U. C. R. 143.

In an action for arrest under a ca. re., the plaintiff gave general evidence of his solvency, &c. No malice was proved on defendant's part, but defendant gave no evidence to shew why he had arrested. The jury having found nominal damages of 1s. for the plaintiff, the court refused a new trial. *Lyons* v. *Kelly*, 6 U. C. R. 278.

The mere fact that defendant was told by one or two persons that they thought he would be justified in arresting the plaintiff, otherwise he would lose his debt, is not enough to enable the Judge to rule absolutely at the trial in defendant's favour. *Thorne* v. *Mason*, 8 U. C. R. 236.

Defendant, living in York, received an anonymous letter, dated 6th May, 1850, posted at Adolphustown, the plaintiff's residence, informing him that the plaintiff had sold out and was going to leave the country in five or six weeks. Defendant, on the 24th June, 1850, without making any inquiries in the meantime, arrested the plaintiff on a ca. re: —Held, that there was a case for the jury; but the verdict being large, £100, and many circumstances tending to repel malice, a new trial was granted on payment of costs. *Ruttan* v. *Pringle*, 1 C. P. 244.

Defendant gave abundance of evidence to shew reasonable cause. The Judge left it to the jury to say whether they believed that defendant received the information stated to have been given, and whether he thought it to be true that the plaintiff was about to leave the Province:—Held, that the jury should have been told that the plaintiff had not proved a want of probable cause. *Smith* v. *McKay*, 10 U. C. R. 412.

Held, that upon the evidence in this case, it should have been ruled by the Judge that the case failed, for that probable cause was shewn to his satisfaction, of which he was the judge. *S. C., ib.* 613.

Held, that under the evidence the plaintiff clearly failed to shew want of reasonable and probable cause, and that a nonsuit should be entered. *Wanless* v. *Matheson*, 15 U. C. R. 278.

In an action for arrest on mesne process for £93, the plaintiff proved that before such arrest he had assigned all his effects, amounting to £30,000, in trust for his creditors generally, with a proviso that a dividend should be made for all, but that the sums accruing to such as had not come into the assignment should be paid to the plaintiff; that he was employed by the assignees at a salary in arranging the estate, and that defendant had knowledge of the assignment. He also proved his own general high character and standing, and that defendant had been cautioned by one witness against making the arrest. On cross-examination it appeared that the plaintiff's family and connexions resided out of Upper Canada; that his house had been advertised for sale a short time after the assignment; that his liabilities were about £40,000; and that the assignment had been made without previously calling a meeting of his creditors: —Held, that the plaintiff had shewn primâ facie a want of reasonable and probable cause, and should have been allowed to go to the jury. *Torrance* v. *Jarvis*, 13 U. C. R. 120.

Plaintiff declared against defendant, in the first count, for malicious arrest by a false affidavit that defendant had a cause of action against him for the seduction of his daughter; and in the second count for effecting the same object by falsely, &c., representing that he was about to quit Canada, with intent, &c. The plaintiff established a primâ facie case on both counts, in answer to which defendant proved that he was present when his daughter made an affidavit before a justice of the peace that she was pregnant by the plaintiff; that he had been informed of statements made by the plaintiff affording a very strong inference of improper intercourse; that he was told the plaintiff had said he had "signed away" his place; and that he, defendant, had received a letter from plaintiff's cousin, condemning the plaintiff for not marrying defendant's daughter, and telling defendant that it was his duty to look after him, as he was going to sell his place, and wanted to sell it to the writer:—Held, that these facts sufficiently shewed reasonable and probable cause; that, as they were uncontradicted, there was no question for the jury; and that a nonsuit therefore was proper. *Riddell* v. *Brown*, 24 U. C. R. 90.

Held, that, on the evidence, the Judge should, as a matter of law, have held there was no want of reasonable and probable cause, and that a nonsuit should have been entered. *Baker* v. *Jones*, 9 C. P. 365.

In his affidavit the reasons given by the deponent McK., one of the defendants, for his belief that the appellant was about to leave Canada, were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and defendant was himself informed, this day, by J. R., broker, of the said W. J. S.'s departure for Europe and other places:"—Held, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing

that the debtor was leaving with intent to defraud his creditors; and that the evidence shewed that the respondent had no reasonable and probable cause for issuing the writ of capias in question. *Shaw* v. *McKenzie*, 6 S. C. R. 181.

The defendant, in his application for the order to hold to bail, by his affidavit made out a primâ facie case, but certain facts and circumstances were omitted therefrom, which, it was contended, might, if stated, have satisfied the Judge granting the order that, although the plaintiff was about to depart from the Province, it was not with intent to defraud, &c. At the trial of an action for the arrest the plaintiff was nonsuited, the Judge holding that he had failed to shew a want of reasonable and probable cause:—Held, that the facts upon which the existence of reasonable and probable cause depended being in dispute, the Judge was not in a position to decide that question until the jury had found upon the facts. *Erickson* v. *Brand*, 14 A. R. 614.

See cases under sub-head 5 *ante*.

See Coffey v. *Scane*, 25 O. R. 22, 22 A. R. 269, *ante* 1 (b).

(b) *Arrest under Ca. Sa.*

In an action for a malicious arrest on a ca. sa., the defendant does not answer a primâ facie case of want of probable cause, by shewing that, although the plaintiff had been visibly in possession of considerable property, the sheriff had returned nulla bona. *Smith* v. *Chep*, 6 O. S. 213.

In an action for a malicious arrest on a ca. sa. the question to be submitted is not whether the assignment of the property, which caused defendant to arrest, really is fraudulent or not, but whether defendant had good reason to suspect it. *Gunn* v. *McDonald*, 6 U. C. R. 596.

Where it appeared that the defendant, before making the affidavit for a ca. sa., had consulted his attorney, who advised the arrest, the court granted a new trial to defendant on payment of costs. *Nourse* v. *Calcutt*, 6 C. P. 14.

See also *Crawford* v. *McLaren*, 9 C. P. 215; *Fellows* v. *Hutchinson*, 12 U. C. R. 633.

See cases under sub-head 5 (a) *ante*.

7. *Termination of Action.*

In a case for malicious arrest, the declaration, and not the writ, was held to be the commencement of the suit; and the suit in which the arrest was made was therefore held to be at an end by the lapse of a year before the declaration in this suit. *Cameron* v. *Fergusson*, 3 O. S. 318.

The determination of the suit is sufficiently averred by stating that "the plaintiff (the defendant in the original suit) recovered a certain sum for damages and costs" under the Provincial statute 2 Geo. IV. c. 5, allowing a verdict and judgment for defendant in set-off, "and that the defendant was in mercy," &c., without averring also, "that the defendant took nothing by his writ." *Wilcox* v. *Burnside*, 5 O. S. 525.

Where one of two counts was bad for not alleging the suit to be at an end, nor shewing how it ended, and plaintiff obtained a general verdict:—Held, on motion to arrest judgment, that such omission was not cured by verdict. *Manning* v. *Rossin*, 3 C. P. 89.

The first count charged that defendant, not having any reasonable or probable cause, but contriving, &c., (not saying more particularly in what respect there was such want). The second count was in substance similar. Neither count contained any allegation that the suit was at an end:—Held, that this latter objection was fatal; and judgment was arrested. *Bishop* v. *Martin*, 14 U. C. R. 416.

In an action for arrest under a Judge's order:—Held, not necessary to allege in the declaration that the action in which the arrest took place was at an end, or that the plaintiff had been discharged and the order set aside. *Eakins* v. *Christopher*, 18 C. P. 532.

II. Malicious Criminal Proceedings.

1. *Action, When it Lies.*

(a) *Against a Coroner.*

Warrant—*Arrest on Charge of Murder—Finding of Jury — Trespass—Malice—Nonsuit.*]—Plaintiff sued defendant in the first count in trespass, stating that, acting as coroner, he assaulted plaintiff, &c. The second count stated that defendant was acting as coroner, &c., and that, a jury being duly sworn, he held an inquisition on the body of one F., then lying dead, setting forth the finding of the jury—which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff, and through culpable negligence on his part in not having given sufficiently explicit directions—and charging that the defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c. At the trial, on its being objected that defendant, as coroner, was Judge of a court of record, and therefore that no action would lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted maliciously and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and super visum corporis, or that he had issued his warrant on the finding of the jury. On this plaintiff was nonsuited:—Held, that, as defendant was acting judicially, trespass would not lie against him; and that, though the nonsuit did not appear so erroneous as to warrant its being set aside, still, that if the plaintiff desired to present facts to the jury not suggested to them at the trial, the court would allow him to do so, on payment of costs. *Garner* v. *Coleman*, 19 C. P. 106.

(b) *Against a Corporation.*

Act of Agent—*False Imprisonment.*]—A corporation may be liable for false imprisonment under an order of its agent acting

within the scope of his authority. *Lyden* v. *McGee*, 16 O. R. 105.

Resolution — *Illegal Acts—Ratification.*]—A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts does not constitute a ratification thereof by the city corporation so as to make it liable in damages for such acts. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608, 22 A. R. 522.

(c) *Against Informant.*

Charge not Legally Sustainable—*Bona Fides—Defective Warrant—Trespass.*]—In July, 1878, on returning with the defendant from cashing a draft which the plaintiff had received from Scotland, the plaintiff boasted to defendant that he was going to get very much larger remittances in May, 1879, and 1880, but there was nothing to shew that the statement was made with a view of obtaining credit. Nearly the whole of the proceeds of the draft, after paying defendant an account then due for goods obtained, was deposited with the defendant, the plaintiff continuing to deal with him until not only the whole of the sum was absorbed, but a further indebtedness had been incurred. The defendant caused a warrant to be issued to arrest the plaintiff for obtaining goods under false pretences, though with the real object of obtaining a settlement of his account. After the plaintiff was arrested and brought before the magistrate he was allowed to go on his own recognizance to appear next day, but being unwell he could not appear, and the charge not being pressed by the defendant, and the magistrate not thinking there was sufficient evidence to commit, the matter was allowed to drop:—Held, that, though the evidence shewed that the charge was not legally sustainable, yet if the defendant acted bona fide, which was a matter for the jury, he would be justified in prosecuting. Held, also, that it sufficiently appeared that the prosecution had terminated. The warrant was issued in the united counties of Northumberland and Durham and was indorsed by a magistrate in the county of Peterborough, "This is to certify that I have indorsed this warrant, to be executed in the county of Peterborough," but there was no proof of the handwriting of the justice who issued the warrant, or recital of such proof, as required by 32 & 33 Vict. c. 30, s. 23 (D.) sched. K.:—Held, that the warrant was therefore defective and the arrest illegal, for which defendant was liable in trespass. Under the circumstances, a verdict having been entered for the defendant, a new trial was ordered. *Reid* v. *Maybee*, 31 C. P. 384.

Criminal Offence—*Charge at Hearing—Nonsuit — New Trial—Amendment—Trespass.*]—In an action for malicious prosecution, the information and warrant of commitment merely disclosed a civil trespass. The plaintiff was nonsuited at the trial. It appeared, however, that the defendants had not disclosed the whole facts to the magistrate, and that, at the hearing, on the plaintiff's solicitor objecting that no criminal offence was charged, one of the defendants said that in order to have the case investigated he would charge the plaintiff with stealing. The statement of claim alleged that the defendants had charged the plaintiff with felony. The court set aside the nonsuit, and granted a new trial, with leave to the plaintiff to amend the statement of claim according to the facts. Semble, that the facts stated above were evidence that the defendants were putting the criminal law in motion; and the information and warrant being invalid, they were liable as trespassers. Sed quære, as to this, and whether an action for malicious prosecution will lie for making a false and malicious statement to a magistrate, shewing nothing which conferred jurisdiction on him, but on which, nevertheless, he acts by issuing a warrant. *Macdonald* v. *Henwood*, 32 C. P. 433.

Information — *Jurisdiction—Warrant—Felony.*]—The first count averred that the defendant charged the plaintiff with having caused the death of S. by administering a poisonous drug and, upon such charge, procured a warrant for plaintiff's apprehension; and the charge in the information was to the same effect:—Held, bad, as disclosing no valid cause of action, for no felony was charged, and the administration of the drug might have been either accidental or as a medicine, so that there was nothing on which to found the magistrate's jurisdiction. *Stephens* v. *Stephens*, 24 C. P. 424.

See Campbell v. *McDonell*, 27 U. C. R. 343.

——— *Jurisdiction—Warrant — Interference — Trespass or Case.*]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of $90, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted:—Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest. Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

——— *Jurisdiction—Warrant — Interference—Trespass or Case—Damages.*]—A complainant who, in good faith, lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution. Smith v. Evans, 13 C. P. 60, and Stephens v. Stephens, 24 C. P. 424, referred to. Anderson v. Wilson, 25 O. R. 91, considered. His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest, or whether the conviction and imprisonment were the acts of the magistrate

alone. There was evidence upon which the jury might have reasonably found that the complainant, before laying the information, assisted in arresting the plaintiff. The case was left to the jury, as one of trespass as regarded that arrest, and malicious prosecution as to the subsequent proceedings, and they found a general verdict in the plaintiff's favour for $200 damages:—Held, that there must be a new trial. *Grimes* v. *Miller*, 23 A. R. 764.

——— *Trespass — Jurisdiction of Magistrate.*]—In an action for falsely and maliciously charging the plaintiff with obtaining money from the defendant by false pretences, and for arresting and prosecuting him therefor before the police magistrate for Belleville, appointed by the government of the Province of Ontario, who, it was alleged, had no jurisdiction to act, it being contended that such appointment properly lay with the Dominion government:—Held, that a person could not be considered a trespasser merely for laying an information before a police magistrate so appointed, charging another with a crime, and praying therein that a warrant might be issued for his arrest. *Richardson* v. *Ransom*, 10 O. R. 387.

——— *Use of Word "Feloniously"—Mistake of Magistrate—Case.*]—On laying an information against the plaintiff, the defendant only intended to charge him with having unlawfully carried away a saw, and stated facts to the magistrate which merely amounted to a charge of trespass, but in drawing the information the magistrate of his own accord used the word "feloniously," which word the defendant did not know the meaning of:—Held, that under these circumstances an action for malicious prosecution would not lie. Remarks as to the proper course to pursue in drawing an information. *Rogers* v. *Hassard*, 2 A. R. 507.

——— *Use of Words "As he Supposed"—Warrant—Advice of Magistrate—Interference.*]—The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed;"—Held, no variance. It was shewn that the information was laid by the defendant on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest, but it was proved that the information contained the substance of the statements made by the defendant, which justified the warrant:—Held, there being an absence of reasonable and probable cause, that the defendant was liable. *Colbert* v. *Hicks*, 5 A. R. 571.

Search Warrant—*Action in Case for Issuing.*]—An action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, commented on. *Young* v. *Nichol*, 9 O. R. 347.

(d) *Against Instigator.*

Incorrect Statement to Informant.]—Although generally a person who makes a false statement, knowing it to be such, to be acted upon by another, is liable for any injury thus caused; yet where a person, in laying an information before a police magistrate, had given an incorrect version of the statement made to him by the defendant, and caused the plaintiff's arrest, it was held that defendant was not liable. *Sparks* v. *Joseph*, 7 C. P. 69.

Person Directing Arrest—*Liability of — Warrant Issued without Jurisdiction — Trespass or Case.*]—The declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, procured one H. to appear before a magistrate, and charged plaintiff with obtaining money by false pretences, and upon such charge procured the magistrate to issue his warrant, and under it caused plaintiff to be arrested and brought before the magistrate, who having heard the charge dismissed it, and discharged him. At the trial it appeared that the offence was alleged to have been committed by the plaintiff in the county of Middlesex, but the charge was made and the warrant issued in the city of London, by a justice of the peace for the county only, not for the city:—Held, that as the magistrate, acting out of his jurisdiction, had no authority whatever, the action was misconceived: that it was as if the defendant had himself directed the arrest; and that trespass, therefore, not case, was the proper remedy; and a nonsuit was ordered. Held, also, that defendant was not precluded from objecting to the magistrate's jurisdiction, by having caused the application to him as such, there being nothing to shew that he did not really believe him to have authority. *Hunt* v. *McArthur*, 24 U. C. R. 254.

Real Prosecutor.]—Held, that the trial of the indictment being through a Queen's counsel, did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Proudfoot*, E. T. 3 Vict.

See Poitras v. *Le Beau*, 14 S. C. R. 742; *Sinclair* v. *Haynes*, 16 U. C. R. 247.

(e) *Against Justice of the Peace.*

Warrant—*No Conviction.*]—In an action against a justice of the peace for false imprisonment and for acting in his office maliciously and without reasonable and probable cause, an application was made before statement of claim to set aside the proceedings under s. 12 of R. S. O. 1887 c. 73, on the ground that the conviction of the plaintiff, made by the defendant, had not been quashed. It appeared, however, that the plaintiff was arrested and imprisoned under a warrant issued by the defendant, which in fact had no conviction to support it:—Held, not a case within s. 12. Per Robertson, J., that the plaintiff had a complete cause of action without setting aside the conviction. Per Meredith, J., that the application was premature. *Webb* v. *Spears*, 15 P. R. 232.

Warrant Issued without Information—*Reasonable Ground for Arrest.*]—A magistrate acts without jurisdiction, and so renders himself liable in trespass, where without any written information charging another with felony, he issues a warrant for his arrest therefor; and, while a reasonable

ground for the belief that such person had committed the felony, might justify the magistrate in arresting such person himself, it does not enable him to issue his warrant for his arrest by another. Ashley's Case, 6 Rep. 329, followed. *McGuinness* v. *Dafoe*, 27 O. R. 117, 23 A. R. 704.

——— *Subsequent Appearance of Justice as Prosecutor.*]—Defendant, a justice of the peace, on the 5th May, 1869, issued his warrant against plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant plaintiff was arrested and brought before him. At the sessions defendant appeared as prosecutor, when plaintiff was tried and acquitted:—Held, that a count for malicious prosecution could be added for this. *Appleton* v. *Lepper*, 20 C. P. 138.

(f) *Notice of Action.*

Constable—*Malice.*]—Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously. *Scott* v. *Reburn*, 25 O. R. 459.

——— *Malice—Reasonable and Probable Cause.*]—The object of the Act to protect justices of the peace and others from vexatious actions, R. S. O. 1887 c. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously; and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required. A breach of a city by-law for driving an omnibus without the license required thereby does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally and in the discharge of his official duty. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608. Affirmed, 22 A. R. 522.

——— *Pleading.*]—See *McKay* v. *Cummings*, 6 O. R. 400, *post* 4.

Justice of the Peace—*Trespass.*]—The notice of action in this case alleged that the defendant on the 8th September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th September maliciously, illegally, and wrongfully, and without any reasonable and probable cause, caused plaintiff to be brought before him, and to be committed for trial, and to be confined in the common gaol, alleging the subsequent indictment of the plaintiff, his trial on the charge, and his acquittal:—Held, a good notice of action in trespass. *McGuinness* v. *Dafoe*, 27 O. R. 117, 23 A. R. 704.

See also NOTICE OF ACTION.

(g) *Termination of Prosecution.*

Felony—*Instigator of Prosecution—Dismissal—Adjournment.*]—In an action for malicious prosecution for felony before magistrates, it is not necessary to prove that defendant laid an information on oath, where that is not averred in the declaration; it is enough to shew that he set the magistrates in motion. Nor is it indispensable that the party charged should have been arrested or imprisoned. In this case the plaintiff, on receiving the magistrates' summons, attended in obedience to it. The charge of felony made against him by defendant was dismissed; but the magistrates thought he had been guilty of misconduct in the same matter, and he was requested to attend on another day, to which they adjourned for the purpose of considering that point:—Held, that the determination of the proceedings with regard to the charge complained of was sufficiently shewn. *Sinclair* v. *Haynes*, 16 U. C. R. 247.

Penalty—*Instigator of Prosecution — Malice.*] — Where the plaintiff paid under protest a penalty imposed upon him by a justice of the peace in proceedings taken against him under the provisions of c. 22 of the Consolidated Statutes of Lower Canada, "An Act respecting good order in and near places of public worship," and afterwards brought an action for damages against the person who, as alleged, had maliciously instigated such proceedings, and at a trial before a jury there was no evidence of the favourable termination of the prosecution against him, the court, being equally divided as to the right to maintain the action, dismissed an appeal without costs. *Poitras* v. *LeBeau*, 14 S. C. R. 742.

See Reid v. *Maybee*, 31 C. P. 384.

See cases under sub-head 3 (a) *post*.

2. *Damages.*

See Clissold v. *Machell*, 25 U. C. R. 80, 26 U. C. R. 422; *Winfield* v. *Keen*, 1 O. R. 193; *Grimes* v. *Miller*, 23 A. R. 764; *Munroe* v. *Abbott*, 39 U. C. R. 78; *Wilson* v. *Tennant*, 25 O. R. 339; *Charlebois* v. *Surveyer*, 27 S. C. R. 556.

3. *Evidence.*

(a) *Acquittal, Proof of — Production of Record.*

If the record of the acquittal of the plaintiff is produced at nisi prius, the court cannot inquire into the circumstances under which it has been brought forward; but it must be received in evidence, although no order was ever granted for the delivery of a copy of the indictment to the plaintiff. *Lusty* v. *Magrath*, 6 O. S. 340.

Semble, that a person tried for felony and acquitted can only obtain a copy of the indictment and record of acquittal, to be used in an action for malicious prosecution, on the fiat of the attorney-general; and the granting or refusing such application cannot be reviewed by the court. The application here

was for a rule calling on the attorney-general to shew cause why judgment of acquittal should not be entered on the indictment:—Held, that the indictment not being a record of the court, or brought into it by certiorari, the court had no jurisdiction. *Regina* v. *Ivy*, 24 C. P. 78.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted, subject to objection, the original indictment, indorsed "no bill:"—Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced. *McCann* v. *Prenevcau*, 10 O. R. 573.

In an action for malicious prosecution, the plaintiff sought but was not permitted to prove his acquittal before the county Judge's criminal court of a charge of misdemeanour, by means of the production of the original record, signed by the county Judge, under the Speedy Trials Act, R. S. C. c. 175, and produced and verified by the clerk of the peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer:—Held, that the evidence should have been admitted in either of the above two forms, and judgment dismissing the action was set aside and a new trial ordered. *O'Hara* v. *Dougherty*, 25 O. R. 347.

In an action for malicious prosecution, the indictment, with an indorsement thereon of the acquittal of the plaintiff of the criminal charge on which he had been prosecuted, was produced by the clerk of the court, having been sent to him by the registrar of the Queen's bench division, to whom the indictment had been returned, and which he had been subpœnaed by the plaintiff to produce, the court being informed that the attorney-general had refused his fiat to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—Held, that the indictment so indorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, and no copy thereof, could be obtained without a fiat of the attorney-general. Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt* v. *Cane*, 26 O. R. 133.

Where in an action for malicious prosecution, in proof of the determination in the plaintiff's favour of the criminal proceedings in respect of which the action is brought, a record of acquittal, unobjectionable in form, is produced at the trial by the officer of the court in whose custody it is, though without a fiat of the attorney-general, it is properly receivable in evidence. *Bacchler* v. *Andrews*, 15 C. L. T. Occ. N. 55.

See Crandall v. *Crandall*, 30 C. P. 497; *Hamilton* v. *Broatch*, 17 O. R. 679; *Prentice* v. *Hamilton*, 2 O. S. 114.

(b) *Authority for Proceedings, Proof of.*

Indictment — *Exemplification — Heading.*]—In an action for maliciously and without probable cause procuring a warrant to issue and arresting the plaintiff:—Held, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *Aston* v. *Wright*, 13 C. P. 14.

Information — *Certified Copy—Original—Judgment of Acquittal — Exemplification.*]—In an action for false arrest and malicious prosecution arising out of a false information laid by defendant, a certified copy of the information having been put in and objected to at the trial, leave was given under con. rule 676, to put in the original afterwards, as also an exemplification of the judgment of acquittal, it appearing that the merits were not with the defendant. *Hamilton* v. *Broatch*, *Broderick* v. *Broatch*, 17 O. R. 679.

——— *Production of — Secondary Evidence.*]—In an action for maliciously making a charge before a magistrate, upon which plaintiff was arrested and afterwards discharged:—Held, that it was necessary to produce the information, or lay a foundation for secondary evidence; and that the plaintiff having done neither was properly nonsuited. *Nourse* v. *Foster*, 21 U. C. R. 47.

See Sinclair v. *Haynes*, 16 U. C. R. 247.

Order to Arrest—*Affidavit.*]—Held, that the order to arrest was well proved, under R. S. O. 1877 c. 62, s. 28, by the production of a copy certified as such under the hand of the clerk of the court; but that the affidavit on which the capias issued filed in that court was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the court, but not referred to or described in the certificate. *Timmins* v. *Wright*, 45 U. C. R. 246.

Warrant — *Information—Secondary Evidence—Record of Acquittal—Statute of Limitations — Point of Commencement.*] — The first count of a declaration alleged that one K., falsely and maliciously and without reasonable or probable cause, issued a warrant against plaintiff on a charge of fraud, &c., and that defendant, falsely and maliciously and without reasonable or probable cause, prosecuted the same, and caused the plaintiff to be arrested and imprisoned, alleging the trial and the acquittal of plaintiff and the termination of the proceedings. The second count alleged that defendant falsely and maliciously, &c., indicted the plaintiff on said charge, and caused him to be tried thereon, alleging as before his acquittal, &c.:—Held, that under the first count the warrant under which plaintiff was arrested should have been produced or evidence adduced of a search and its loss, to enable secondary evidence of its contents to be given; but as such secondary evidence was given at the trial without objection an objection taken for the first time in the rule nisi was too late. A similar objection taken in the rule nisi as to proof of the information, even if such proof were necessary, was for the same reason held to be too late. Held, that under the second count proof of such documents was not necessary. Held, also, that

the plaintiff was not bound by the day of acquittal as stated in the record thereof, being the commission day of the assizes, but might show the actual day on which it took place. Held, also, that the Statute of Limitations commenced to run from the date of acquittal, when the proceedings became terminated, before which the plaintiff had no right of action, and not from the date of arrest. Held, also, that the evidence was sufficient to connect defendant with the arrest and prosecution of the plaintiff, and to shew that he acted without reasonable and probable cause. *Crandall* v. *Crandall*, 30 C. P. 497.

(c) *Other Cases.*

Consulting Crown Attorney — *Magistrate.*]—In an action against the complainant for malicious prosecution, evidence was offered that the magistrate, against whom there was no charge, had, before acting, consulted the county attorney:—Held, that the evidence was properly rejected. *Scougall* v. *Stapleton*, 12 O. R. 206.

Discovery—*Examination for—Scope of—Conspiracy.*]—In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defendant averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes:—Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and all entries in the plaintiff's bill books and all other books relating to such transactions. *Colter* v. *McPherson*, 12 P. R. 659.

Motive.]—Held, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected. *McCann* v. *Prenveau*, 10 O. R. 573.

Statements of Third Persons — *Hearsay—Cause of Arrest.*] — In an action for malicious prosecution, on the opening of the defence the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but, on his proceeding to state what he had heard, the Judge ruled that this was inadmissible, and that the persons who had told him these facts should first be called. They were then called and examined, and afterwards the defendant gave his evidence as to what they had told him. The jury found a verdict for plaintiff with $500 damages:—Held, that the evidence was improperly rejected when offered. *Bernard* v. *Coutellier*, 45 U. C. R. 453.

Truth of Charge—*Reasonable and Probable Cause—Onus.*]—In an action for malicious prosecution the claim which was put in issue was that defendant did on a certain day charge plaintiff with having on two or three occasions committed wilful perjury. The Judge at the trial ruled that the defendant could not go into evidence to contradict plaintiff on his statement as to the perjury, or to establish the truth of the facts desired to be set up:—Held, that the ruling without qualification was too broad; for, though a defendant in an action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause. Quære, as to the onus being on the plaintiff to establish his innocence. *Watt* v. *Clark*, 18 O. R. 602.

4. *Malice.*

Inference — *Want of Reasonable and Probable Cause—Misdirection.*]—In an action for malicious prosecution the want of reasonable and probable cause does not necessarily establish that malice which is requisite to maintain the action. Therefore, where the jury were directed that if a person makes a charge against another for the purpose of his being arraigned upon it, without being justified in point of law, then he does it maliciously; that they need not trouble themselves with the question of malice except as it might be inferred from want of reasonable and probable cause; and that if the information had been laid without proper cause the result would be that it was laid maliciously; and the plaintiff obtained a verdict for $500:—Held, misdirection, for which a new trial should be granted. *Winfield* v. *Kean*, 1 O. R. 193.

Intent—*Evidence.*]—Defendant lost a bird and saw it in plaintiff's house, who refused to give it up. Defendant then went to a magistrate and stated that he had lost a bird, either accidentally or that it had been stolen, and that he suspected it to be at plaintiff's house. The magistrate issued a search warrant, on which the plaintiff was brought before him and discharged, it appearing that no larceny was committed:—Held, that there was no evidence of malicious intention, and a verdict for defendant was upheld. *Lucy* v. *Smith*, 8 U. C. R. 518.

Justice of the Peace—*Express Malice.*]—The defendant was a justice of the peace, and in the course of his duty as such acquired his knowledge of the circumstances on which he preferred the charge against defendant:—Held, that he was clearly not entitled as a magistrate, on that ground, to require that express malice should be proved against him. *Orr* v. *Spooner*, 19 U. C. R. 601.

See sub-head 6, *post*, and especially *St. Denis* v. *Shoultz*, 25 A. R. 131, *post* 6 (c).

5. *Pleading.*

Declaration—*Inconsistent Averments.*]—In a declaration for procuring plaintiff to

be indicted at the court of oyer and terminer, averments that defendant, on the 2nd June, went before a court holden on the 1st June, and that the plaintiff was acquitted at nisi prius on an indictment found by the court of oyer and terminer, were held bad. *Ashford* v. *Gohcen*, 7 U. C. R. 547.

——— *Proof — Variance.*] — In an action for malicious prosecution, the declaration stated a trial before the Hon. L. P. Sherwood and A. Macdonell, assigned by His Majesty's letters patent to them and others named therein directed, and the record put in evidence was of a trial before the Hon. L. P. Sherwood and others his fellow justices, assigned by letters patent directed to him and others, and any two of them, of whom he was to be one:—Held, no variance. *Prentice* v. *Hamilton*, 2 O. S. 114.

——— *Proof — Variance — Amendment.*] —Where in case for a malicious prosecution it was alleged in the declaration that the trial of the indictment took place before a court of oyer and terminer, and the indictment was at general gaol delivery:—Held, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Proudfoot*, E. T. 3 Vict.

——— *Proof — Variance — Information not Charging Crime.*] — The declaration for malicious prosecution alleged that defendant charged the plaintiff with having unlawfully and maliciously set on fire the defendant's premises. The information, produced at the trial, was that defendant's premises were set on fire, that he had reason to believe they were set on fire by the plaintiff; and prayed that she might be held to answer "the said charge." A verdict having been rendered for the plaintiff for $1,000:—Held, on the facts stated in the case, that there was evidence of want of reasonable and probable cause. 2. That the declaration, after verdict, though not sufficiently precise, might be held to import a crime. 3. That there was a variance between the declaration and evidence, the information not charging any crime. Quære, whether if amended to suit the information the count could be good. The court, considering the damages excessive, allowed the insertion of a count in trespass in lieu of that in case, if the plaintiff would consent to reduce the verdict to $300; and if not, granted a new trial on payment of costs, with leave to the plaintiff to amend. *Munroe* v. *Abbott*, 39 U. C. R. 78.

Statement of Claim — *Aggravation of Damages.*]—In an action for malicious prosecution, a part of the statement of claim setting out the observations of the Judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by defendants, was allowed to stand. *Morrow* v. *Cheyne*, 12 P. R. 487.

Statement of Defence — *Notice of Action—Honest Belief—Finding.*]—In an action for malicious arrest the jury found a general verdict for the plaintiff, with $200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The Judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute (R. S. O. 1877 c. 73) was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the court was of opinion, under the facts, that there was no evidence on which the special finding of the jury could be supported:—Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with $200 damages as assessed. If the statute has not been pleaded, honest belief is no defence, if there existed no reasonable ground for such belief. *McKay* v. *Cummings*, 6 O. R. 400.

——— *Matters Alleged in Mitigation of Damages.*]—In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavoured to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the bonâ fide belief that they were justified in thus aiding the arrest:—Held, that, although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Pursley* v. *Bennett*, 11 P. R. 64.

See Macdonald v. *Henwood*, 32 C. P. 433, *ante* 1 (e); *Patterson* v. *Scott*, 38 U. C. R. 642, *post* 6.

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6. *Reasonable and Probable Cause.*

(a) *Burden of Proof—Want of Reasonable and Probable Cause.*

It is not sufficient for the plaintiff to shew the prosecution and its abandonment, to go to the jury; he must also shew want of probable cause. *Lapointe* v. *Stennett*, T. T. 1 & 2 Vict.

Where A. went before a justice of the peace, and charged B. with having clandestinely removed and secreted a quantity of wool and books belonging to him, and the justice on such complaint issued his warrant directing the constable to search for the said books; and if found to bring them and the said B. before him, to be dealt with according to law:—Held, that the charge and nature of the complaint not being such as authorized the justice in issuing his warrant, B. could only recover against A. by proving that in making the complaint A. acted maliciously and without any reasonable or probable cause. *McNellis* v. *Gartshore*, 2 C. P. 464.

Want of reasonable and probable cause must be shewn by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof; and where it was shewn only that defendant laid the information on which the plaintiff was arrested, and that the magistrates, after hearing the parties, dismissed the charge:—Held, that a verdict was properly directed for defendant. *Barbour* v. *Gettings*, 26 U. C. R. 544.

Action for charging plaintiff before a justice of the peace with embezzlement. On the trial, the affidavit on which the information was laid, and the warrant and arrest thereunder, were proved; and that defendant had preferred a charge before the grand jury, and that they had ignored the bill:—Held, that the ignoring of the bill was some evidence of want of reasonable and probable cause, and a nonsuit was set aside. *McCreary* v. *Beetis*, 14 C. P. 95.

(b) *Functions of Court and Jury.*

Absence of Dispute as to Facts—*Question for Judge.*]—Where, in an action for malicious arrest, the facts are uncontradicted, the question of reasonable and probable cause must be decided exclusively by the Judge. The action at the trial was treated as one for malicious arrest, and in that view a nonsuit was entered. In term it was argued that the action was really one of trespass, and that the whole case should have been left to the jury as such, but the court held that it was too late to urge this. *Donnelly* v. *Bawden*, 40 U. C. R. 611.

Finding of Facts by Jury—*Assault—Justification.*]—Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was reasonable and probable cause for the prosecution; the plaintiff is entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong. A new trial granted on the ground of misdirection. Hinton v. Heather, 14 M. & W. 131, followed. Sutton v. Johnstone, 1 T. R. 493, distinguished. *Routhier* v. *McLaurin*, 18 O. R. 112.

——— *Conflicting Evidence.*] — If, in an action for malicious prosecution, there is any conflict of evidence as to the facts upon which reasonable and probable cause depends, the jury must be allowed to find the facts. The Judge cannot withdraw the case from them because, in his opinion, there was reasonable and probable cause for the prosecution. *Hamilton* v. *Cousineau*, 19 A. R. 203.

——— *Inference by Judge.*]—In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred, but the inference must be drawn by the Judge. Lister v. Perryman, L. R. 4 H. L. 521, followed. Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, 11 App. Cas. 247, considered. *Archibald* v. *McLaren*, 21 S. C. R. 588.

——— *Questions Submitted.*] — A robbery having been committed at the defendant's store, a bill of an account due by the plaintiff to the defendant, which it was alleged had been rendered some time previously, was found lying near by, which from its crumped appearance indicated that it had been carried about for some time in a person's pocket. From this the defendant said he suspected some one in the plaintiff's house, and he went to a magistrate and laid an information, upon which a search warrant was issued, and the plaintiff's house searched, but none of the stolen goods were found therein and no arrest was made. It appeared that the account which was found had never been sent to the plaintiff, but a similar one had, the defendant stating that when he caused the search warrant to be issued, he was under the belief that the account had been sent, having forgotten the fact that it had not been. In an action for malicious prosecution, the Judge entered a verdict for the defendant, holding that the plaintiff had failed to shew that the defendant acted without reasonable and probable cause:—Held, that there must be a new trial: that it should have been submitted to the jury to say: 1. whether the account was sent to the plaintiff: 2. whether it was found as alleged; 3. if not sent, whether the defendant believed it had been so sent; and 4. if defendant did so believe, whether the circumstances were such as to warrant a reasonable man of ordinary prudence in forming such belief; and it might be necessary also to submit to the jury the question whether it was a prudent and reasonable thing for the defendant to rely on his memory. *Young* v. *Nichol*, 9 O. R. 347.

——— *Question for Judge.*]—A tenant is not liable to prosecution under 11 Geo. II. c. 19 for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises. In an action for malicious prosecution, the jury having found the facts in dispute, the question of reasonable and probable cause is for the Judge. *Martin* v. *Hutchinson*, 21 O. R. 388.

Judge's Charge—*Reasonable and Probable Cause in Part.*]—In an action for malicious prosecution of a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles, and withdrew the case as to them from the jury, but held otherwise as to the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles, bore upon the question of damages only, and the jury found a verdict for the plaintiff:—Held, that there was no misdirection. Johnstone v. Sutton, 1 T. R. 547, considered and distinguished. Reed v. Taylor, 4 Taunt. 616, followed. *Wilson* v. *Tennant*, 25 O. R. 339.

See Winfield v. *Kean*, 1 O. R. 193 (*ante* 4); *Webber* v. *McLeod*, 16 O. R. 609.

See, also, cases under next sub-head.

(c) *What Constitutes Reasonable and Probable Cause.*

Belief—*Grounds of—Solicitor's Advice—Statement to Magistrate.*]—The plaintiff at Brantford having corresponded with the defendant at Hamilton as to purchasing ice, defendant on 7th September notified plaintiff by telegram that the ice would not be sent unless plaintiff telegraphed money to cover freight and ice, to which plaintiff answered that the money was paid to the express company, and to send a full car, which was done.

No money had, however, been paid to the express company. On 9th September defendant telegraphed plaintiff asking what he meant. The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to plaintiff on the following day. The plaintiff had, on 9th September, deposited $30 with a bank in Brantford to defendant's credit, supposing it would be transmitted to defendant, which was not done. On 1st October defendant wrote plaintiff that unless he sent the full amount of account defendant would have to take criminal proceedings. On 7th October the defendant, not having received a reply from the plaintiff, consulted his solicitor, who, defendant said, advised that plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, laid information before the police magistrate, who issued a warrant under which plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank was proved to be true, whereupon the magistrate stated that there was no ground for the arrest, and dismissed the case. In an action for malicious arrest, the jury found that the defendant believed the plaintiff had not deposited the money with the express company or with the bank, but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate:—Held, that there was a want of reasonable and probable cause; and the plaintiff was entitled to recover. *McGill* v. *Walton*, 15 O. R. 389.

——— *Grounds of—Reasonable Care—Malicious Injury to Property—Trifling Value.*]—The plaintiff, who was in occupation of a house on a farm of the defendant's, cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. The defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case. In an action for malicious prosecution, the jury found in answer to questions that the defendant had not reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property, and did not take care to inform himself as to the facts, and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100. A motion to set aside the verdict was dismissed. Held, that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of defendant to inform himself of the true state of the case was a sufficient justification for holding that there was a want of reasonable and probable cause. *Webber* v. *McLeod*, 16 O. R. 609.

——— *Grounds of—Reasonable Care—Prosecution for Arson — Bona Fides — Malice.*]—In an action for malicious prosecution brought against an insurance company by reason of an information charging the plaintiff with arson, and causing his arrest thereon, the jury found that the company's officers, who laid the charge, believed it to be true; but that such belief was not under the circumstances reasonable, and that they did not act on it in laying the charge and causing the arrest, but were actuated by other and improper motives:—Held, by the trial Judge, that the jury having found that the defendants' officers honestly believed in the truth of the charge laid, and the evidence warranting that finding, absence of reasonable and probable cause could not be held to have been shewn simply because further inquiries might have been made or further facts shewn: that the question of malice was of no importance; and that the defendants were entitled to judgment. On appeal, held, affirming the judgment, that the burden was on the plaintiff to shew that the defendants acted without reasonable and probable cause; and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited. *Malcolm* v. *Perth Mutual Fire Ins. Co.*, 29 O. R. 406, 717.

Opinion of Counsel—*Acting on—Bona Fides.*]—Case for preferring a charge of felony. The jury were directed to inquire whether defendant had laid a bonâ fide statement of the material facts of the case before counsel, and whether he acted bonâ fide on the opinion obtained, and that if so, that was reasonable and probable cause:—Held, right. *Fellowes* v. *Hutchinson*, 12 U. C. R. 633.

The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that the defendant did not give a full and true account of the case:—Held, that this ground failed. *Scougall* v. *Stapleton*, 12 O. R. 206.

Where a prosecutor has bonâ fide taken and acted upon the opinion of counsel in the proceedings taken by him, laying all the facts of the case fully and fairly before such counsel, this is itself evidence to prove reasonable and probable cause. *Martin* v. *Hutchinson*, 21 O. R. 388.

That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence. Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability: malice must exist, and the question of malice must be left to the jury. *St. Denis* v. *Shoultz*, 25 A. R. 131.

See McGill v. *Walton*, 15 O. R. 389, *supra*.

Prosecution for Forgery—*Evidence at Trial of Civil Action—Motive for Prosecution—Inquiry into Facts.*]—S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence at the trial of the suit was to the effect that he never intended to sign the note,

and if he had actually signed it with his father's name, it was because he believed it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods in the delivery book, but that the signature was denied and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceedings, S. laid information against the son for forgery. A police magistrate, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner:—Held, that the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages. *Charlebois* v. *Surveyer*, 27 S. C. R. 556.

Prosecution for Larceny—*Claim of Right to Chattels—Finding of Jury.*]—In an action for malicious prosecution, it appeared that the plaintiff's father sold a buggy to R. for $115, to be paid in two payments of $58 and $57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid, R. sold the buggy to defendant, a livery stable keeper. The plaintiff's father, on hearing of this, directed the plaintiff to go and take it from the defendant, which he did, informing those at the defendant's place that plaintiff could be seen at an hotel named. The defendant, on his return, went and saw the plaintiff, who told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but, notwithstanding, the defendant caused the plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The jury found for the plaintiff:—Held, on the evidence, that the verdict could not be interfered with. *Scougall* v. *Stapleton*, 12 O. R. 206.

Representation—*Bona Fides.*]—Where, in an action for malicious prosecution for arson, it was shewn that defendant received information through the office of the governor's secretary that certain persons confined in the penitentiary could give information on the subject of the burning, and he went there and received their statement that the plaintiff had committed arson:—Held, that if he acted bona fide on this representation, it formed a sufficient justification. *Oswald* v. *Mewburn*, 6 O. S. 471.

Suspicion — *Grounds for.*] — Case for malicious prosecution for arson:—Held, that under the evidence stated in the report defendant had reasonable ground for suspecting the plaintiff, and that a nonsuit was rightly directed. *Wilson* v. *Lee*, 11 U. C. R. 91.

In an action for malicious prosecution for stealing timber, it appeared that the defendant took one B., who had cut timber for him in 1862-3, to look at some timber lying near the plaintiff's barn, which B. told him he was positive was the same that he had cut for the defendant. B. found a newly made path from this timber to where he had cut for the defendant, and at this latter place he found that most of the timber had been carried off and the remainder knocked about:—Held, that there was reasonable and probable cause; that B.'s evidence being uncontradicted, and there being no proof of the defendant's absence of belief that the timber was his, there was nothing to go to the jury; and that the plaintiff therefore was properly nonsuited. One of the plaintiff's daughters swore that the timber at the barn had been cut elsewhere by the plaintiff, but there was nothing to shew that the defendant was aware before the plaintiff's trial that she knew anything of the matter:—Held, immaterial. *Joint* v. *Thompson*, 26 U. C. R. 519.

Declaration in trespass, for assaulting the plaintiff and giving him into custody. Plea, that the plaintiff was defendant's clerk, and as such was in the habit of receiving money for the defendant; that a large sum of defendant's money which had come into plaintiff's hands was feloniously stolen by some person; that the plaintiff, though requested by defendant, would not account for the same; whereupon the defendant, having good and probable cause of suspicion and suspecting the plaintiff to have been guilty of the felony, gave him in charge to a constable to take him before a magistrate:—Held, no defence, for that no reasonable or probable cause was shewn, either as regarded the action of defendant or of the constable. *Patterson* v. *Scott*, 38 U. C. R. 642.

Action of trespass for false imprisonment. The plaintiff was arrested, as alleged, by direction of the defendants' agent, the treasurer of the defendant association. On being brought before the police magistrate, the defendants did not appear to prosecute, when the police magistrate remanded plaintiff, and subsequently dismissed the charge, and discharged the plaintiff. The Judge charged the jury that it was not necessary to inquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty was no excuse. If G. had laid an information, it would have been different, but not having done so, the only question was whether he gave the plaintiff into custody:—Held, misdirection: for the defendant was justified in ordering the plaintiff's arrest if a felony was committed, and he had reasonable and probable cause to suspect that plaintiff committed the felony. Held, also, that the defendant could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings. *Lyden* v. *McGee*, 16 O. R. 105.

——— *Finding of Jury.*]—A spike having been found driven in between the rails on defendants' line of railway, plaintiff was arrested on suspicion of being the guilty party. The evidence against him was that he had been seen on the day the act was supposed to have been committed, lounging about the railway bridge and track early in the afternoon for two or three hours, and that his boots would make prints corresponding with the footmarks about the place. The plaintiff having been acquitted brought an action against the defendants for malicious prosecution, and the jury having given him $200 damages, the court, considering the insufficient nature of the evidence against him,

refused to interfere with the verdict. *Hagerty* v. *Great Western R. W. Co.*, 44 U. C. R. 319.

——— *Laying Second Charge.*]—The defendant, having lost a pig, and bonâ fide believing one subsequently found in the possession of one C. to be his, and that it had been stolen by the plaintiff and one D., caused proceedings to be instituted against them for stealing it. On the hearing of the charge the magistrate, instead of merely satisfying himself as to whether a primâ facie case was proved, entered fully into the question of the guilt or innocence of the prisoners, and received the evidence of one W. and his family to prove that W. had raised and sold the pig to them, and dismissed the charge. The defendant being afterwards informed by C. of a previous statement made by W., shewing his evidence to be false, and believing he was merely trying to screen the prisoners, and was equally guilty with them, consulted with the county attorney, and, acting upon his advice, instituted proceedings against the plaintiff, D., and W., upon which they were indicted, tried, and acquitted. The Judge, however, was of opinion, and so indorsed on the indictment, that the evidence justified and shewed reasonable and probable cause for the charge. In an action for malicious prosecution:—Held, that a nonsuit was properly entered, for that the facts shewed reasonable and probable cause, which was not disproved by laying the second charge, under the circumstances, after the dismissal of the first. *Rice* v. *Saunders*, 26 C. P. 27.

See Munroe v. *Abbott*, 39 U. C. R. 78; *Crandall* v. *Crandall*, 30 C. P. 497; *Reid* v. *Maybee*, 31 C. P. 384; *Fawcett* v. *Winters*, 12 P. R. 232; *Watt* v. *Clark*, 18 O. R. 602; *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608, 22 A. R. 522.

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7. *Other Cases.*

Joint Action—*Trespass—Case.*]—A general verdict on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court, being of the opinion that there was only one joint cause of action against the defendants, that is, the arrest, restricted the verdict to that count. Held, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew that no charge had been made against plaintiff; that the warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally. Semble, that if it had appeared that the defendant who issued the warrant was liable in case only, and malice of some special kind, personal to himself, in which his co-defendant was not and could not be a partaker, had been proved, a joint action would not be against both. 2. That one defendant might have been convicted in trespass, and the other in case. *Friel* v. *Fergusson*, 15 C. P. 584.

Justices of the Peace—*Several Defendants — Damages — Severance — Judgment.*]—In an action against two justices for one act of imprisonment, charged in one count as a trespass and in another as done maliciously, the jury found $800 against one defendant, and $400 against the other:—Semble, that the damages could not be thus severed. But held, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. Quære, as to the proper mode of entering the judgment. *Cissold* v. *Machell*, 25 U. C. R. 80, 26 U. C. R. 422.

Sheriff and Bailiff—*Execution—Seizure—Interference.*]—The plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer, who was also a county constable. He was committed for trial, and was tried but acquitted. In an action for false arrest and malicious prosecution:—Held, that the grain was properly under lawful seizure and in the custody of the law, and that, by R. S. C. c. 164, s. 50, any one taking it away without lawful authority was guilty of larceny, and that by R. S. C. c. 174, s. 25, any one found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs. *Beatty* v. *Rumble*, 21 O. R. 184.

A sheriff is identified in interest with his bailiff and liable for whatever the latter does under colour of the writ. The plaintiff, assisting a person acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by the defendant as sheriff's officer, and was arrested by the defendant:—Held, that the sheriff was liable for the act of his officer. Beatty v. Rumble, 21 O. R. 184, distinguished. The jury having assessed the damages against the officer at a nominal sum, the court, instead of a new trial, directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

Stay of Proceedings—*Malicious Prosecution—Former Action of Trespass—Costs.*]—The plaintiff in a previous action sued in trespass for assault and false imprisonment, but was nonsuited, on the ground that her remedy, if any, was by action for malicious prosecution. She accordingly sued in the latter form of action. The defendant then obtained a summons to stay all proceedings until the costs in the first action should be paid, on the ground that this suit was brought for the same cause of action. This summons having been made absolute, the plaintiff appealed. The appeal was allowed and the order staying proceedings set aside. Held, that trespass for assault and false imprisonment and case for malicious prosecution are clearly not the same cause of action. Semble, that the jurisdiction to stay proceedings in cases of this kind should be sparingly used. *Doolan* v. *Martin*, 6 P. R. 319.

Witness — *Warrant to compel Attendance — Arrest — Imprisonment—Search.*]—Where a police magistrate acting within his jurisdiction under R. S. C. c. 174, s. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice,

liable to damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest. Judgment in 24 O. R. 576 affirmed. In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict which must be given by them. The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered. Judgment in 24 O. R. 576 reversed. *Gordon* v. *Denison*, 22 A. R. 315.

III. OTHER MALICIOUS PROCEEDINGS.

1. *In Actions.*

(a) *Entering Appearance.*

Malice—*Want of Probable Cause—Pleading.*]—Plaintiff sued defendant for having caused an appearance to be entered for the defendants in an ejectment, brought by plaintiff against them, for land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge, or authority of the defendants, but not charging malice or want of reasonable or probable cause:—Held, on demurrer, that the declaration was bad on this ground. Semble, that defendant and his attorney would, on such a declaration, be liable to defendants in the ejectment suit; and that the defendants therein being worthless, he would also be liable to the plaintiff for the costs of that suit, on a summary application to the court made therein. *Fisher* v. *Holden*, 17 C. P. 395.

(b) *Issuing Attachment.*

Absconding Debtor—*False Affidavit—Reasonable Cause.*]—Declaration, that one O. caused an attachment to issue against the plaintiff as an absconding debtor, and that defendant, in order to enable him to obtain an order for such attachment, falsely, maliciously, and without reasonable or probable cause, made a false affidavit that he had good reason to believe and did believe that the plaintiff had departed from Upper Canada, with intent, &c. It was objected, in arrest of judgment, that there was no averment that the attachment had been set aside, nor that defendant had no reasonable cause for making the affidavit, or for his belief; but held, that the first averment was unnecessary, and that the other was sufficiently made, after verdict. *Fahey* v. *Kennedy*, 28 U. C. R. 301.

Debtor in Prison—*Knowledge of Creditor — Execution — Pleading — Absconding —Province.*]—In an action for maliciously suing out an attachment in the division court, it appeared that the defendant, when he made the affidavit, was aware that the plaintiff was then actually in prison. For the defence it was shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The court, however, refused a new trial on this ground, the verdict being small. In such a case it is proper to charge in the declaration that defendant had no reason to believe that the plaintiff was about to abscond from the Province of Canada, not the Upper Province only. *Owens* v. *Purcell*, 11 U. C. R. 390.

Malice—*Jury — Inference.*]—Held, that the jury might with propriety infer malice from the fact of the defendant having recovered a sum less than attached for, unless satisfactorily accounted for. *Palk* v. *Kenney*, 11 U. C. R. 350.

Removal of Goods — *Affidavit—Finding —Damages.*]—The first count was for maliciously making affidavit of debt, of the plaintiff's insolvency, and of his intention to remove and dispose of certain goods with intent to defraud defendants, and thereby procuring an attachment, and the plaintiff to be declared an insolvent—alleging that the attachment and proceedings were afterwards set aside. The second count was in trespass for seizing plaintiff's goods:—Held, as to the first count, that the affidavit of defendants' agent as to the removal of the goods not being corroborated by two witnesses, as required by the Act, was no objection, for by the form of action the plaintiff conceded the process to have been legal, and relied on its having been issued maliciously. On the second count, the jury were told that, if the attachment had been set aside, the plaintiff was entitled to a verdict; and the plaintiff objected that, as the setting aside had been proved, it should not have been left as if open to doubt. The jury having found for the defendants:—Held, that the charge was unobjectionable; and, as on the evidence nominal damages only would have been sufficient, the court refused to interfere. *Eaton* v. *Gore Bank*, 27 U. C. R. 490.

Ship — *Judgment—Appeal—Pleading.*]—Declaration for maliciously causing a steamer of the plaintiffs to be attached in the United States, alleging that the suit had been determined in favour of the plaintiffs. Plea, that defendant appealed from the decision, which appeal is still pending:—Held, on demurrer, plea good. *Griffith* v. *Ward*, 29 U. C. R. 31.

——— *Materials — Removal—Reasonable and Probable Cause—Claim for Rent—Finding.*]—Defendant having sued out an attachment from a division court, and seized under it certain materials employed in repairing plaintiff's vessel:—Held, that such attachment could not be warranted by any intention on the plaintiff's part to remove the property, the statute C. S. U. C. c. 19, s. 199, requiring an attempt to remove; and, there being no evidence of such an attempt, or of any reasonable ground for supposing it to have been made, that the defendant was liable for issuing the attachment without reasonable or probable cause. A count for maliciously attaching for $86, when the plaintiff owed defendant only $22:—Held, good, without shewing, as in the case of a distress for rent, that the goods were sold to satisfy more than $22. Defendant had claimed $74 for rent of shipyard, which had been disallowed by the division court. The evidence in support of the claim was, in substance, that after defendant had worked on a vessel being repaired there for plaintiff for some time, a difficulty arose between him and the plaintiff, in consequence of which he refused to go on, and the plaintiff

desired him to do nothing more. The vessel then remained in the yard for more than a month, until the plaintiff got her ready to launch, defendant having notified the plaintiff that he must pay rent in advance; but there was no evidence of any letting or agreement:—Held, that on these facts the jury were warranted in finding that the defendant had no reasonable ground for attaching for the rent. *Hood* v. *Cronkite*, 29 U. C. R. 98.

(c) *Issuing or Enforcing Executions.*

Judgment—*Satisfaction or Reduction—Malice—Want of Probable Cause.*]—In an action for enforcing a judgment in itself regular, but which has been satisfied, malice and want of probable cause must be alleged in the declaration. *Ault* v. *Armstrong*, 12 U. C. R. 385.

The declaration, after setting out a judgment recovered against the plaintiff in an action in which defendant was the then plaintiff's attorney, alleged that the plaintiff paid the same except a small sum, yet that defendant well knowing, but contriving, &c., issued a fi fa., and wrongfully and unjustly caused the same to be indorsed for the full amount of damages and costs, well knowing that only a small portion thereof remained unpaid, and caused the sheriff to seize the plaintiff's goods:—Held, that no cause of action was shewn, for it was not stated that defendant acted maliciously and without reasonable or probable cause, and these averments were not dispensed with by the allegation of his knowledge that the debt was nearly paid. Semble, that the declaration was defective also in not sufficiently shewing damage sustained, for it did not appear that the sheriff seized the goods to a larger amount than was really due. *Young* v. *Daniell*, 21 U. C. R. 443.

See, also, *Barber* v. *Daniell*, 12 C. P. 68.

Declaration, that defendants having recovered judgment and execution against plaintiff and others, plaintiff and said others paid and satisfied said judgment debt, except a small amount not exceeding about $20; yet defendants, well knowing, &c., and notwithstanding the small amount due, but contriving and intending to injure and aggrieve the plaintiff, thereafter, to wit, &c., wrongfully and unjustly, and by pretence that there was a large amount due, to wit, &c., caused the sheriff to take and seize certain goods of great value, to wit, &c., of plaintiff's, and to make thereout $200:—Held, on demurrer, bad, for not alleging that the act complained of was done maliciously, and without probable cause. *Ventris* v. *Brown*, 22 C. P. 345.

Declaration that defendant S. recovered a judgment in the Queen's bench against the now plaintiff, for 1s. damages, and that the master improperly allowed his costs at £39 3s. 1d., for which judgment was entered; that the costs were afterwards revised and allowed at £11 3s. 9d., for which S. was entitled to execution; yet the defendants, wrongfully and maliciously and without reasonable or probable cause, caused a fi. fa. to be enforced by the sheriff for £39 3s. 1d. Demurrer, because the declaration did not allege that the judgment was altered, &c., or that the amount was levied on an execution improperly sued out, &c.:—Held, that the declaration was sufficient. *Dewar* v. *Carrique*, 14 C. P. 137.

Release after Judgment—*Seizure after Release—Pleading.*] — Declaration, that defendant recovered a judgment against the plaintiff, and issued a fi. fa. thereon, and afterwards by an instrument under seal duly released the plaintiff therefrom, yet that defendant maliciously caused the sheriff to seize the plaintiff's goods under the writ, and would not direct him to stay, so that the plaintiff was obliged to pay a large sum of money to release them. Plea, on equitable grounds, that after the recovery of said judgment, and before the release, a fi. fa. was issued thereon; that in ignorance of the issuing of said writ, and believing that all the costs on said judgment did not exceed £6 5s., defendant consented to refer all matters between himself and the plaintiff to arbitration; that the arbitrators awarded that the plaintiff should pay defendant £202, and should also pay to him the said costs, which they believed amounted only to £6 5s., and they directed that sum to be paid, in ignorance of the fact that said costs, with the sheriff's fees, in truth amounted to £15; that it was the intention of the arbitrators that all the said costs should be paid by the plaintiff, but neither they nor the defendant became aware of the mistake until after the time for moving against the award had elapsed; that in similar ignorance of these facts mutual releases were directed by the arbitrators, and defendant executed and delivered the release in the declaration mentioned; that before the trespass complained of defendant discovered the mistake, and requested the plaintiff to pay the balance of said costs to the sheriff, which he promised but afterwards refused to do, and defendant thereupon, with the knowledge and privity of the plaintiff, who took no means to prevent the same, allowed the sheriff to obtain satisfaction of the said balance, as he lawfully might:—Held, on demurrer, plea bad, as shewing no defence. Held, also, that it sufficiently appeared from the declaration that the seizure took place after the release, and that the objection was, at all events, removed by the plea. *Duross* v. *Duross*, 19 U. C. R. 77.

Transcript from Division Court—*Mistake of Clerk—Seizure after Debt Paid—Non-liability of Creditor — Restoration of Goods—Damages.*]—The defendant having recovered a judgment against the plaintiff in the division court at Toronto, a transcript was ordered to be sent to another division court at Unionville, but by some mistake in the division court office it was not sent until after the debt had been paid, and the clerk of the Toronto court indorsed on it a direction to the clerk of the other court to issue execution and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought:—Held, that the plaintiff could not recover; that it was his duty to protect himself by seeing that the clerk of the division court was notified of payment of the debt; and there was therefore no malfeasance or omission on defendant's part. Held, also, that the defendant was not liable in trespass.

for he had not authorized the direction by the clerk to issue execution, which was no part of the clerk's duty: and semble, that neither could he have been responsible if his attorney had directed it, after the suit had been settled. Quære, under R. S. O. 1877 c. 47, s. 160, whether a person whose goods have been seized under division court process, can have any further relief than the restoration of his goods. Held, that the damages given were grossly excessive. *Tuckett* v. *Eaton*, 6 O. R. 486.

(d) *Issuing Injunction.*

Reasonable and Probable Cause—*Damages.*]—Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny, even generally, the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendants, who upon the merits have succeeded in getting the injunction dissolved, have no right of action for damages resulting from the issue of the injunction. *Montreal Street R. W. Co.* v. *Ritchie*, 16 S. C. R. 622.

(e) *Issuing Writ of Replevin.*

Opinion of Counsel—*Acting on—Bona Fides—Damages.*]—A writ of replevin having been issued by defendant against plaintiff, under which certain books of account were seized and given to defendant, the plaintiff some time afterwards brought an action for damages, contending that defendant had maliciously sued out the writ to injure him, claiming large damages. The jury found for the plaintiff £80:—Held, that a suitor taking legal advice upon a question of law, and acting thereon apparently bonâ fide, is not responsible; nor can an action for maliciously taking such proceeding be successfully prosecuted against him. *Crawford* v. *McLaren*, 9 C. P. 215.

(f) *Issuing Writ of Summons.*

Malice — *Special Damage.*] — Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer" issuing a writ of summons against the plaintiff in the name of a third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compromise and settle at great loss:—Held, on demurrer, that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged. Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 22 O. R. 712.

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2. *In Bankruptcy or Insolvency.*

Pleading—*Declaration—Necessary Averments.*]—In an action for maliciously suing out a commission of bankruptcy against the plaintiff, it should be distinctly averred that defendant acted without cause—the averment that he falsely and maliciously swore to the debt is not sufficient. The declaration should also state that the commission issued upon the affidavits set out, and that they were made before a competent authority; also, that the commission was superseded before action. *Locke* v. *Wilson*, 6 U. C. R. 600.

——— *Declaration — Termination of Proceedings — Reasonable Grounds.*] — Declaration, that plaintiff and another carried on business under the name of "McGill Bros.," were in good credit and solvent, and had not ceased to meet their commercial liabilities, as defendants well knew; that defendants, being creditors for over $500, maliciously intending to injure plaintiff, and destroy his business and credit, falsely and maliciously and without reasonable, &c., cause, made a demand in writing on said firm in the form "E" in the schedule to the Insolvent Act of 1864; that within five days thereafter defendants refused to abandon said proceedings, but, as a condition, insisted that plaintiff should retire from said firm, and that certain security for a composition on debts of said firm should be given, or defendants would proceed; that the trade and credit of the firm were much injured; and that in consequence of defendants' proceedings the plaintiff was put out of said firm, without receiving any share of the assets, &c.:—Held, on demurrer, bad, as shewing that the proceedings on the demand terminated against the plaintiff, not in his favour, and as disclosing a state of facts, in the submission of plaintiff to the demand, instead of controverting its reasonableness, which shewed that defendants had reasonable grounds for the proceedings complained of. *Magill* v. *Samuel*, 19 C. P. 443.

——— *Demand for Assignment—Malice—Action—Remedy—Costs.*]—Held, that an action will lie by a debtor against a creditor to recover damages for falsely and maliciously making a demand for an assignment, under s. 4 of the Insolvent Act of 1875 and amending Acts, and that his remedy is not confined to the imposition of treble costs under s. 5. To such action, the defendants' third plea, after setting up a variety of dealings between the parties shewing that the plaintiff had from time to time failed to meet his engagements with defendants, concluded, that the plaintiff being indebted to the defendants in the sum of $1,400, and being unable to pay the same or to meet his engagements, and the plaintiff being also, to the knowledge of the defendants, indebted in large sums to divers other persons, creditors of the plaintiff, the defendants bonâ fide believing the plaintiff to be insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and having reasonable and probable cause for so believing, and without malice, made a demand on the plaintiff:—Held, a good plea, although it was not expressly averred, in the words of s. 4, that

the plaintiff had ceased to meet his liabilities generally as they became due. Quære, whether that expression means his liabilities to the particular creditor, or to his creditors generally. *Nagle* v. *Timmins*, 31 C. P. 221.

See Eaton v. *Gore Bank*, 27 U. C. R. 470, *ante* 1 (a); *Mitchell* v. *McMurrich*, 22 O. R. 712, *ante* 1 (e).

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3. *In Other Cases.*

Crown—*Interference with Private Rights — Injunction — Representation to Public — Damages.*]—The first count alleged that the plaintiff was an hotel-keeper at Niagara Falls, and furnished guides and dresses to persons going under the Falls, and by consent of the Government had a stairway for visitors down the bank of the river; that the defendants also had a stairway for the same purpose; that the plaintiff's stairway had been burned down, and while he was rebuilding it the defendants, contriving to injure him, falsely and maliciously and without reasonable or probable cause, represented to the attorney-general that the land on which the plaintiff's stairway was built (which belonged to the Crown) was necessary for military purposes, and that the land on top of the bank was required for a highway, and had so been used for many years by license from the Crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road; and thereby the defendants induced the attorney-general to permit the use of his name in filing an information in chancery to restrain the plaintiff, and obtained an injunction to restrain him from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the Crown so to do, and lost the profits of his business, &c. The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshments and dresses to persons wishing to go under the Falls; that there was a certain public stairway for such persons down the bank; that the defendants, intending, &c., to injure the plaintiff, falsely and maliciously and without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons, who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants, and the plaintiff lost the profits of hiring his dresses and selling refreshments, &c.:—Held, on demurrer, both counts bad; for as to the first, no action would lie so long as the decree in equity remained in force, notwithstanding the subsequent license from the Crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action. *Davis* v. *Barnett*, 26 U. C. R. 109.

Inland Revenue Officers—*Seizure of Goods — Reasonable and Probable Cause.*]—Plaintiffs manufactured in Montreal some Old Tom gin, &c., which they sold and shipped to Guelph to J. & H., no permit accompanying it. The casks were branded as if manufactured in London, England; but the invoice received by the consignees from the plaintiffs, and handed to the officers, shewed that the goods came from the plaintiffs, and described the plaintiffs as distillers, &c. The defendants as officers of inland revenue seized and detained the goods for want of a permit, but subsequently, upon its being shewn at Ottawa that the goods were manufactured from spirits which had paid duty, they, by instructions, offered to release the goods on payment of costs of seizure:—Held, that, under the circumstances set out, the defendants had reasonable and probable cause for believing the goods were being unlawfully removed, and for seizing them. 2. That the seizure being so justified, and no permit obtained, the refusal to deliver up, except on payment of costs, could not make defendants liable. *Winning* v. *Gow*, 32 U. C. R. 528.

Lunatic — *Escape—Arrest of—Malice—Want of Cause—Trespass—Warrant.*]—Defendant, within one month after the plaintiff's escape from a lunatic asylum, where he had been confined as a lunatic, with full knowledge of the plaintiff having recovered his sanity, and really believing him to be sane, falsely represented to the medical superintendent of the asylum that the plaintiff was still insane, and had threatened to take one M.'s life, which was thereby in danger, and that the plaintiff's brothers had requested the defendant to procure his recapture; and the defendant thereupon obtained from the medical superintendent a warrant for his arrest, which he handed to a constable, and the plaintiff was arrested and reconveyed to the asylum, but after a medical examination the next day was discharged:—Held, that the plaintiff could recover in case for the malicious arrest, the jury having found that the defendant acted maliciously and without reasonable or probable cause; but that trespass would not lie, for the warrant having been bonâ fide issued by the medical superintendent, and being valid on the face of it and authorized by the statute 36 Vict. c. 31, s. 22 (O.), the defendant was protected by it. *Dobbyn* v. *Decow*, 25 C. P. 18.

Municipal Corporation — *Commissioners of Inquiry—Councillors Obstructing Commission—Refusal to Attend as Witnesses—Malice—Want of Reasonable Cause—Damages.*]—The plaintiffs, by their declaration—after alleging that the defendants were township councillors for East Nissouri during 1856, that a commission was issued under 12 Vict. c. 81, s. 181, to inquire into the financial affairs of the township, and the commissioners had thereby, and by force of the statute, all such powers as by law are vested in commissioners under 9 Vict. c. 38, and were by virtue of the said commission and of the said statute empowered to summon witnesses before them, and require them to give evidence, and produce such documents as the commissioners should deem requisite; and that the commissioners, in pursuance of their said powers, met, and summoned the defendants as witnesses to give evidence on oath and produce certain documents which the said commissioners deemed requisite—charged that defendants, contriving and maliciously intending to obstruct and delay the commissioners in the discharge of their duties, and in making the said inquiry, and to cause great damage to the paintiffs, by reason of the expenses

of said commissioners, and to obstruct and delay them in obtaining said evidence, and to prevent the production of said documents, wickedly and maliciously among themselves did conspire, contrive, confederate, and agree together to obstruct and delay the commissioners in making said inquiry, and to cause great expense to the plaintiffs by increasing the costs of said commission, and to obstruct and prevent them from obtaining said evidence, and to obstruct and delay the production of said documents, and prevent and hinder the said inquiry; and that defendants, maliciously contriving and intending as aforesaid, afterwards, and in pursuance of the said conspiracy, &c., refused and neglected to attend before the said commissioners as witnesses, and to give evidence to them, and to produce the said documents, although defendants might, and could, and ought to have attended and given such evidence, and produced said documents; and did procure one N., the clerk of the said municipality, and who as such clerk had the custody and possession of said documents, to part with the custody and possession thereof, and to conceal or remove himself, to avoid being summoned or attending as a witness before said commissioners, and to obstruct and delay the production of said documents before them, and did otherwise procure the said documents to be concealed and kept concealed from said commissioners—whereby the said inquiry was hindered and delayed, and the plaintiffs were in consequence made liable to pay £300 over and above what they would otherwise have been compelled to pay, if it had not been for said acts and conduct of defendants; that the necessary expenses of executing said commission, as provided by the statute, would not have exceeded £50, except for such unlawful conduct of defendants; but in consequence and by means thereof, and of the premises, said expenses amounted to £350, and the same were, after the execution of said commission, and before this suit, settled and allowed by the inspector-general, according to the statute, at £350, being £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs had paid to said commissioners before the commencement of this suit. Upon demurrer:—Held, that the declaration was good. That although a case of the first impression, a good ground of action was shewn, there being a wrongful act done by the defendants without any reasonable cause, and legal damage resulting to the plaintiffs. As to the various objections taken:—1. Held, that the damage was sufficiently stated, and was a legal damage, being directly occasioned by the act complained of. 2. Quære, whether the declaration could be taken to allege that power was given by the commission to summon witnesses, &c. If not, the commissioners would have no such power. 3. Held, that it was sufficiently averred that defendants acted maliciously and without reasonable or probable cause. 4. That the fact of the costs having been allowed by the inspector-general at £350, was no answer to the charge made against defendants. 5. That it was unnecessary to aver that defendants had been tendered their expenses as witnesses, there being no provision for such payment. 6. Or that the evidence or documents required were material. 7. That as upon the whole declaration good ground was shewn to sustain an action on the case, it could be no objection that a conspiracy was alleged, and that the facts stated would not support an action for conspiracy.

8. That defendants must be treated as being charged as individuals, not as acting in their capacity of councillors. *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 556.

——— *Mayor — Refusal to Execute Lease.*]—Case against the mayor of a municipal council, for that the council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the council while in session, and defendant being mayor, did instruct and order him as such mayor, for and on behalf of the council and in the name of the council, to make and execute the lease, of which he had notice, but which he maliciously refused to do, though thereunto requested:—Held, action not maintainable. *Fair* v. *Moore*, 3 C. P. 484.

Removal of Arbitrator — *Prescription —Termination of Proceedings—Damages— Quebec Law.*]—See *Mayor of Montreal* v. *Hall*, 12 S. C. R. 74.

MALICIOUSLY INJURING PROPERTY.

See CRIMINAL LAW, IX. 31.

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MANDAMUS.

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I. In General.

1. *Action for—When it Lies.*

Motion in Action—*Judgment.*]—Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under rule 321 of the Judicature Act. *Hislop* v. *Township of McGillivray*, 12 O. R. 749.

——— *Judicature Act.*]—Section 17, s.-s. 8, of the O. J. Act applies to motions for mandamus, &c., where an action is pending; but R. S. O. 1877 c. 52, s. 17, specially authorizes a summary application for a mandamus in chambers. Kincaid v. Kincaid, 12 P. R. 462, distinguished. *Re Brookfield and Brooke School Trustees*, 12 P. R. 485.

Prerogative Writ.]—The prerogative writ of mandamus is not obtainable by action, but only by motion. *City of Kingston* v. *Kingston Electric R. W. Co.*, 28 O. R. 399.

Semble, that a prerogative writ of mandamus cannot be granted in an action, but only on motion, but even if it can be granted in an action, it will not be granted to enforce private rights arising under an agreement. *S. C.*, 25 A. R. 462. See *post* II. 5 (b).

——— *Summary Application — Affidavits, Intituling of.*]—When a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office. But in this Province all the divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature; see rules 1084, 1090, 1091, 1092. And where a meritorious application was made, in an action, for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R. S. O. 1897 c. 232, it was directed that the affidavits should be re-sworn and intituled as in an application (not in an action) for the prerogative writ. *Toronto Public Library Board* v. *City of Toronto*, 19 P. R. 329.

Public Duty — *Railway Company — Fences.*]—The prerequisites to be observed to obtain a prerogative writ of mandamus are not essential where there is a right of action for a mandamus, namely, where under rule 1112 the plaintiff is personally interested in the fulfilment of a duty of a quasi public character, as in this case the omission of a railway company to properly fence their tracks. *Young* v. *Erie and Huron R. W. Co.*, 27 O. R. 530.

2. *Application for.*

(a) *Generally—When Granted.*

Ascertained Right.] — A mandamus never issues except to a limit or restore some person to an ascertained right. *In re Barnhart*, 5 O. S. 507.

Necessity and Effect.]—A writ of mandamus will not be granted when, if issued, it would be unavailing, or where there is no necessity for the relief. *Re Giles and Village of Wellington*, 30 O. R. 610.

See sub-heads 1 and 6.

(b) *Practice.*

Affidavits—*Intituling.*]—Semble, that affidavits in moving for a rule nisi for a mandamus may be intituled "In re complaint of —— v. ——," though it is more proper to intitule them only in the court. *In re Municipality of Augusta* v. *Municipal Council of Leeds and Grenville*, 1 P. R. 121. See, also, *Toronto Public Library Board* v. *City of Toronto*, 19 P. R. 329, *ante* 1.

Applicant—*Alien—Licensee.*]—It was objected that the applicant for a mandamus to the inspector of licenses to inspect and report on his premises, so as to enable him to apply for a license, did not shew that he was a natural born or naturalized subject, as required by the by-law: — Held, that such objection could not have prevailed, for he was shewn to have been duly licensed up to 1st May, 1876, and no exception had been made to him. *Re Blakely*, 40 U. C. R. 102.

——— *Interest.*] — An application by two members of a municipal council of a district for a mandamus to the warden to repay to the treasurer a sum he had received from the council as a salary for his services as warden, was refused, the parties applying having no particular interest in the matter. *Regina* v. *District Council of Gore*, 5 U. C. R. 357.

——— *Interest—Ratepayer.*]—On an application for a mandamus to compel a public body to raise and expend a large sum of money for general purposes, in this instance to build the gaol and court house:—Quære, whether the applicant as a ratepayer could claim a remedy by mandamus in such a case. *Regina* v. *Municipal Council of Bruce*, 11 C. P. 575.

——— *Misnomer — Amendment.*]—There having been a misnomer in the names of the applicants:—Held, that such misnomer, not having been objected to on the argument below, might be amended. *In re Stormont, etc., High School Board and Township of Winchester*, 45 U. C. R. 460.

Forum—*High Court—Chancery Division.*]—Under R. S. O. 1877 c. 40, s. 86, c. 49, s. 21, and c. 52, s. 4 et seq., the court of chancery could exercise the powers of a court of law in any proceeding, and the powers of the common law courts to grant mandamus upon motion not being by the latter Act restricted, the court of chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the chancery division of the high court of justice has the same jurisdiction. *Re Napanee Board of Education and Town of Napanee*, 29 Gr. 395.

——— *High Court—Chambers.*]—See *Re Brookfield and Brooke School Trustees*, 12 P. R. 485, *post* 3.

——— *Practice Court.*]—A rule nisi for a mandamus cannot be granted by the practice court. *In re Williams and Great Western R. W. Co.*, 26 U. C. R. 340.

——— *Practice Court—County Court.*]—Held, on the authority of In re Sams v. Corporation of Toronto, 9 U. C. R. 181, that a Judge sitting in practice court has no authority to issue a rule nisi for a mandamus in a cause pending in the county court. *Crysdale v. Moorman*, 17 C. P. 218.

How Directed—*Officers of Railway Company.*]—Upon an application to compel a railway company, by peremptory mandamus, to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "The mayor, aldermen, and commonalty of the city of Ottawa;" and by C. S. U. C. c. 54, the name of the corporation was changed to "The corporation of the city of Ottawa:"—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given. Held, also, that a mandamus should be directed to the company, not to the officers. *In re Goodwin v. Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

——— *Officers of Railway Company — Notice of Motion.*]—The notice of motion was addressed to the Midland Railway Company and the Grand Junction Railway Company and to the presidents and directors of each, and asked for relief against all or either:—Held, that s. 17 of R. S. O. 1877 c. 52 contemplates the calling upon any party who may be affected by the writ, if issued, to shew cause why it should not issue, and therefore the notice was not objectionable as being in the alternative. *Demorest v. Midland R. W. Co.*, 10 P. R. 731.

See Demorest v. Midland R. W. Co., 10 P. R. 82 (*post* 5).

——— *Treasurer of Municipality.*]—A mandamus nisi having been directed to "M. S., Treasurer of Belleville," and an attachment being moved for after he had ceased to be treasurer for not making a return to the same:—Held, that the proper direction would have been "To the Treasurer, &c.," generally, though the personal direction was not absolutely wrong; but that, as M. S. had ceased to hold the office, the attachment must be refused. *Burdett v. Sawyer*, 2 P. R. 398.

Issue of — *Requirements.*]—A mandamus nisi, issued upon a rule, must follow the rule, otherwise it may be quashed on motion before the return is filed. *Regina v. McLean*, 5 U. C. R. 473.

A mandamus does not require fourteen days between the teste and return, but under the C. L. P. Act, s. 282, may be returnable forthwith, and by s. 4 it may be signed and issued by the clerk of the process. *Burdett v. Sawyer*, 2 P. R. 398.

Parties to Application—*Person Sought to be Committed.*]—See *In re Delaney and McNabb*, 21 C. P. 563.

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3. *Costs.*

Affidavits—*Prolixity.*]—Where a mandamus to compel the corporation to levy an amount required for school purposes was refused, but the affidavits filed on shewing cause were unnecessarily long, the corporation were allowed only half their costs. *In re Fredericksburg School Trustees and Township of Fredericksburg*, 37 U. C. R. 534.

Clerk of the Peace — *Application by — Both Parties Wrong.*]—It was decided in Corporation of Lambton v. Poussett, 21 U. C. R. 472, that the clerk of the peace is not to look to the government for the expenses payable by him under C. S. U. C. c. 120, but to the county, who are to be reimbursed by the government. Where the clerk applied to the county auditors, instead of the sessions, and they refused, on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus calling upon the county to pay. *In re Poussett and County of Lambton*, 22 U. C. R. 80.

Quantum of Costs—*Court or Chambers.*]—Where a summary application for a mandamus was made to the court, costs of a chambers application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong. *Re Brookfield and Brooke School Trustees*, 12 P. R. 485.

See In re Dean v. Chamberlin, 8 P. R. 303.

Refusal of Demand—*Untenable Ground.*]—Where the demand had been refused upon an untenable ground, the respondents were made to pay the costs of the application for the writ, which was refused upon another ground. *Re Hutchison and St. Catharines School Trustees*, 31 U. C. R. 274.

Registrar of Deeds—*Application against —Dismissal—Costs.*]—A registrar of deeds was required to record a certificate of lis pendens affecting "lot number 16 in the 9th concession of the township of Erin, and lots numbers 14 and 15 in the 10th concession of the same township," which he refused to do, as the west halves of lots 14 and 15 had been laid

out into village lots according to a plan filed in his office. On application for a mandamus:—Held, that so far as regarded the west halves he was right, for by the Registry Act, 29 Vict. c. 24, s. 73, the certificate should shew the village lots affected. The point raised in this case being new, and there being no difficulty in recording the certificate against lot 16, the rule for a mandamus against the registrar was discharged without costs. *In re Thompson and Webster*, 25 U. C. R. 237.

——— *Objection not Taken until Hearing.*]—A rule nisi having issued for a mandamus to compel a registrar to register a discharge of two mortgages, the objection to including both mortgages in one certificate was first taken on the argument; and the court, under these circumstances, discharged the rule without costs. *In re Smith and Sheaston*, 31 U. C. R. 305.

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4. *Demand and Refusal.*

(a) *Sufficiency of Demand.*

A mandamus to a clerk of a municipality to furnish a copy of a by-law was refused, where it did not appear that the demand was accompanied by an offer of his fee. *In re Township Clerk of Euphrasia*, 12 U. C. R. 622.

On an application, at the instance of a resident ratepayer of Walkerton, for a mandamus commanding the provisional council to proceed with the erection and construction of a court house and gaol at Walkerton:—Held, that in such a case the court should be careful only to grant the writ on clear grounds. 2. That the applicant in this case had failed to establish a sufficient demand and refusal—that the court should have distinctly before it what was demanded, how the demand was made, and how answered. *Regina v. Municipal Council of Bruce*, 11 C. P. 575.

Held, that the demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company, were sufficient, the court being of opinion that service and demand upon the president were indispensable. *In re Goodwin v. Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

The demand made in this case upon the county council to repair the bridge previous to the application was sufficient. *In re Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

See In re Davidson and Miller, 24 U. C. R. 66 (*post* (b)); *Re Peck and County of Peterborough*, 34 U. C. R. 129 (*post* (b).)

(b) *Sufficiency of Refusal.*

The plaintiff's attorney wrote on the 20th December to the treasurer of the insurance company, demanding a portion of the claim, and on the 21st received an answer saying that the defendants' solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney; and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum:—Held, a sufficient refusal. *Hughes v. Mutual Fire Ins. Co. of District of Newcastle*, 13 U. C. R. 153; *S. C.*, 11 U. C. R. 241.

Where, on application for a mandamus to a township clerk to permit inspection of the assessment roll, a demand and refusal were sworn to, and the respondent denied the refusal, and alleged that he had always been willing to do what was required, the court granted the writ. *In re Otonabee School Trustees and Casement*, 17 U. C. R. 275.

Where any reason is given for the refusal complained of, it should be stated in the application for a mandamus. *Corporation of Vespra v. Beatty*, 17 U. C. R. 549.

Several demands to transfer stock having been made, and delays and evasive answers given without in direct terms refusing:—Held, that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer. *In re Goodwin v. Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

On application for a mandamus to compel a municipal corporation to provide money for school purposes, when it appeared that steps had been taken to provide the sum required, a mandamus nisi was nevertheless granted. *Re Toronto School Trustees and City of Toronto*, 23 U. C. R. 203.

On application for a mandamus to the chairman of the quarter sessions, to sign an order on the treasurer for payment of the sheriff's account, which had been audited and passed, the chairman stated, in his affidavit filed on shewing cause, that he declined to mark the account as audited and passed, and said that he would not sign a cheque therefor:—Held, that this removed all objection to the proof of a demand and refusal. *In re Davidson and Miller*, 24 U. C. R. 66.

Before the court will grant a mandamus to a municipal corporation to pass or submit a by-law to the electors granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shewn. P., a member of defendants' council, presented a petition for a by-law granting such a bonus, on the 20th June, and on the 21st the committee to which it was referred reported favourably, adding that they had a legal opinion going to shew that it was imperative on them to submit the by-law. The council refused to adopt this report, and on the same day P. moved that a by-law in accordance with the petition be then read a first time, which was lost, but it did not appear that the by-law was drawn up or presented to the council, and it was not before the court. On the 25th P. applied for a mandamus:—Held, not a sufficient demand and refusal; for the council were not bound to adopt the report, or assent to the legal opinion embodied in it, or to pass the motion for the first reading of a by-law not before them; and they were entitled to some time to consider the nature of the by-law they were required to pass and submit; and semble, they should have had reasonable notice of the intention to make this application. *Re Peck and County of Peterborough*, 34 U. C. R. 129.

See Regina v. Municipal Council of Bruce, 11 C. P. 575 (*ante* (a).)

5. *Enforcing by Attachment.*

A mandamus nisi having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule nisi for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted. The court, under these circumstances, discharged the rule nisi as against these two, on payment of costs of the application, and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule. *Regina* v. *Tyendinaga School Trustees*, 20 U. C. R. 528.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ. Such an attachment must be tested in term, on the same day as the rule on which it issues. The rule nisi called upon the trustees of a school section to shew cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B., and C., stating them to be trustees of said section, a rule absolute was granted, following it in form, and thereupon an attachment issued against A., B., and C.:—Held, bad, as not warranted by the rules. *Regina* v. *Tyendinaga School Trustees*, 3 P. R. 43.

The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi, directed to H., to deliver up to him the books and papers; that he went to the office with two constables in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority (it being only a mandamus nisi), but refusing to allow her or her solicitor to examine it; and they then took away the books, &c. Upon these affidavits the court granted a rule nisi for an attachment against M. but refused it against the constables, there being nothing to shew that they were aware of the fraud. *In re McLay*, 24 U. C. R. 54.

Attachment, not sequestration, is the proper remedy for disobeying a mandamus. A writ of mandamus was directed to the Midland Railway Company, and was served on the president. Attachment against the president for disobedience to the writ was refused, because it appeared that he could not by himself and without a majority of the board of directors perform the act required by the writ, and the other directors had not been served: but held, that the mandamus was properly directed to the company. *Demorest* v. *Midland R. W. Co.*, 10 P. R. 82.

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6. *Existence of Another Remedy.*

(a) *General Principles.*

Equitable Remedy—*Inadequacy of Legal Remedy.*]—Application for a mandamus to deliver to trustees certain debentures for a railway bonus:—Held, that the whole matter was one of contract, and the company, if entitled to the debentures, had another remedy, either at law or in equity, which would be more convenient and appropriate than a writ of mandamus. Held, on appeal, that the absence of an adequate legal remedy is a sufficient ground for granting a writ of mandamus, notwithstanding the existence of an equitable remedy; and since the Administration of Justice Act, 1873, the applicant for such a writ should succeed on disclosing a case which would entitle him to relief in equity. Semble, that this writ is not now invested with any prerogative character in this Province; and it would be a convenient rule, upon applications for it, to act upon principles similar to those which govern a court of equity in suits for specific performance. *In re Stratford and Huron R. W. Co. and County of Perth*, 38 U. C. R. 112.

Remarks as to the remedy by mandamus, and the effect of there being another remedy available in equity, though not at law. Semble, that it is the inadequacy and not the mere absence of all other legal remedies, coupled with the danger of a failure of justice without it, which must usually determine the propriety of granting or refusing the writ. *In re Hamilton and North Western R. W. Co. and County of Halton*, 39 U. C. R. 93.

Specific Legal Remedy.]—A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company, to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. *Hughes* v. *Mutual Ins. Co. of Newcastle*, 13 U. C. R. 153.

As a general rule a mandamus will not be granted unless the applicant has no other specific legal remedy. *Elzevir School Trustees* v. *Corporation of Elzevir*, 12 C. P. 548.

(b) *Particular Instances.*

County Court—*Failure to Proceed—Remedy by Appeal.*]—A mandamus to compel a county court to proceed with an action was refused, among other reasons, because the applicant had a remedy by appeal. *Meyers* v. *Baker*, 26 U. C. R. 16.

Court of Revision—*Trial of Complaint—Voters' List—Remedy by Appeal.*]—Held, that it was the duty of the court of revision under R. S. O. 1887, c. 193, s. 61, to try the complaint in regard to persons wrongfully omitted from the voters' list under the Manhood Suffrage Act; and that if no other complete, appropriate, and convenient remedy had existed, a mandamus to compel the court to perform its duty would have issued; but, as the legislature by s. 68 had given a specific remedy for this very breach of duty, by appeal to the county Judge, the applicant was not entitled to a mandamus. *In re Marter and Court of Revision of Town of Gravenhurst*, 18 O. R. 243.

Municipal Corporations—*Delivery of Debentures—Remedy by Action.*]—Upon an application for a mandamus to a township corporation to make and deliver to trustees

certain debentures for $25,000 authorized by two by-laws of the corporation granting aid to a railway company, it was argued that the company had lost all claim to $18,000, if not to the whole of the bonus, by non-commencement of their road. On the other hand, the company contended that, by certain agreements with the corporation, and by several statutes, extending the time for commencement, their right to the debentures was preserved:—Held, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was discharged with costs. *In re London, Huron, and Bruce R. W. Co. and Township of East Wawanosh*, 36 U. C. R. 93. See also *In re North Simcoe R. W. Co. and City of Toronto*, 36 U. C. R. 101.

——— *Payment of Salary—Remedy by Action.*]—An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council:—Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance. *Re Whitaker and Mason*, 18 O. R. 63.

Railway Company—*Appointment of Arbitrator—Remedy by Action—Bar.*]—Held, that the prosecutors were entitled to a mandamus under 29 Vict. c. 146 to a railway company to appoint an arbitrator to determine the compensation to be paid, though they might have submitted their case to a jury as well as to arbitration had they so chosen. Semble, that the court would not have interfered by mandamus had not the prosecutors' remedy by suit probably been barred by 16 Vict. c. 99, s. 10. *Regina* v. *Great Western R. W. Co.*, 14 C. P. 462.

Registrar of Deeds—*Restoration of Bonds—Remedy by Action.*]—The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi directed to H. to deliver up to him the books and papers; that he went to the office with two constables, in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority, but refusing to allow her or her solicitor to examine it, and that they then took away the books, &c.. Upon these affidavits the court granted a rule nisi for attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. A rule for an order to M. to restore the books, &c., thus obtained was refused, as H. might bring trespass, claiming a mandamus in the action; and where full redress can be had by an ordinary suit applications for summary remedies should not be encouraged. A writ of replevin had previously been refused. *In re McLay*, 24 U. C. R. 54,

Sheriff—*Delivery of Deed—Tax Sale—Remedy by Action.*]—Where lands were sold for taxes on the 1st March, 1830 and on the 1st March, 1831, the owner paid the purchase money and twenty per cent. besides, as required by the statute, to the deputy sheriff, who collected taxes for the treasurer then absent, and a short time afterwards the purchaser demanded a deed from the sheriff, who refused to give it—the court refused a mandamus to compel him, stating that the owner was in time, and if not, they would leave the purchaser to his action. *In re Sheriff of Newcastle District*, Dra. 503.

See In re Quin and Treasurer of Dundas, 23 U. C. R. 308; *Re McDonald and Mail Printing Co.*, 6 P. R. 309; *Grand Junction R. W. Co.* v. *County of Peterborough*, 8 S. C. R. 76; *Quillinan* v. *Canada Southern R. W. Co.*, 6 O. R. 567.

See cases under II. 4 (b) (c) (d), *post*.

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7. *Return to Writ of Mandamus.*

Demurrer to.]—In this country there could be no demurrer to a return. *Regina* v. *Wells*, 17 U. C. R. 545.

As to this see con. rule 1087.

Justices—*Record of Proceedings.*]—Upon a mandamus nisi to justices they should return the recorded proceedings had before them, and not collateral matter not embraced in the entries of the court. *Rex* v. *Justices of Home District*, T. T. 11 Geo. IV.

Member of Corporation—*Description—Authority—Nullity.*]—It was held no return to a mandamus to A., describing him by name as a member of a corporation named, that there was no such corporation—the description being unnecessary. The court will not, on a suggestion that the return to a mandamus was not actually made by the authority of the person to whom the writ is directed, as it purports to be made, treat it as a nullity; it must be expresly shewn that it was unauthorized. *Regina* v. *Balkwell*, 6 O. S. 267.

II. To Particular Corporations and Persons.

1. *To County, Surrogate, and Division Court Judges and Officers.*

To Allow Amendment.]—The discretion of a Judge in the division court to permit the plaintiff to amend his claim cannot be interfered with by mandamus. *Re White* v. *Galbraith*, 12 P. R. 513.

To Approve Security—*Appeal—Time.*]—A mandamus was refused to compel a county court Judge to approve of the security tendered for appeal after the four days given for such tender had expired. *Ford* v. *Crabb*, 8 U. C. R. 274.

To Deliver up Documents—*Removal from Office.*]—Mandamus granted to the clerk of a court of requests to give up the books and papers of the court, on being removed from office. *In re Lacroix*, 4 O. S. 339.

To Dispose of Garnishing Application—*Interest of Judge.*]—A garnishee summons having issued in a county court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed, from which it appeared that the Judge was interested with H., who was his brother-in-law, in his claim. The Judge then

declined to act further in the matter. A mandamus to compel him to dispose of the case was refused. *In re Judge of County Court of Elgin*, 20 U. C. R. 588.

To Enter up Judgment.]—See *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494.

To Grant Administration—*Discretion—Creditor.*]—The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. 1877 c. 46, ss. 32, 36, do not better the claim of a creditor. *Re O'Brien*, 3 O. R. 326.

——— *Establishment of Will.*]—A mandamus was directed to issue to compel the Judge of the surrogate court of the county of Wellington to grant administration with the will annexed of a certain testator to G. D., one of the next of kin (who had filed the necessary papers), notwithstanding that on an issue directed out of the surrogate court a jury had found against the will, it appearing that the applicant was no party to that issue, and that since the trial of it the high court had held in favour of the will. *Dickson* v. *Monteith*, 14 O. R. 719.

To Hear Appeal from Court of Revision.]—See *In re Allan*, 10 O. R. 110.

——— *Technical Objection—Form of Complaint.*]—C. was in possession of property when the assessors went round to assess; but he left, and M. took possession before the assessment slip was delivered. Immediately on receiving it M. asked the assessor to change the assessment, as C. had gone to live elsewhere; but the assessor refused. M. then appealed to the court of revision, which refused to interfere, and afterwards to the county Judge, by whom the complaint was dismissed on a technical objection taken to the form of the complaint. On application for a mandamus to the Judge to inquire and determine whether M.'s name was not improperly omitted from the electors' roll:—Held, that such objection should not prevail; and the mandamus was ordered. Held, also, that under the circumstances M.'s name should be entered on the list. *Re McCulloch*, 35 U. C. R. 449.

To Hear Argument — *Unmeritorious Objection—Costs.*]—Where a county court Judge improperly refuses to hear the argument of a rule nisi, mandamus is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted upon by defendant, he was ordered to pay the costs of the application for mandamus. *In re Dean* v. *Chamberlin*, 8 P. R. 303.

To Hear Quo Warranto Application.]—See *Regina ex rel. Grant* v. *Coleman*, 7 A. R. 619.

To Issue Execution—*Married Woman—Set-off—Husband's Debt.*]—L. and his wife, who had married in 1865, recovered judgment in the division court against B., for rent due to Mrs. L. of land which she had inherited from her father in 1852, and B. on the same day recovered a judgment against L. for a larger sum:—Held, that Mrs. L. being entitled under the Act to the rent as her own, and her husband joined in the action for conformity only, there could be no set-off against it of B.'s judgment against L. Such set-off having been directed in the division court, a mandamus was granted to the clerk to issue execution on the judgment recovered by Mrs. L. *In re Linden* v. *Buchanan*, 29 U. C. R. 1.

To Make Particular Inquiry—*Scrutiny of Votes—Canada Temperance Act.*]—The judgment reported in 9 O. R. 154, that a county court Judge will not be compelled by mandamus to inquire, on a scrutiny of ballot papers under ss. 61, 62, and 63 of the Canada Temperance Act of 1878, as to personation, bribery, or the status on the voters' list of the parties voting, was affirmed. Chapman v. Rand, 11 S. C. R. 312, followed. *Re Canada Temperance Act*, 12 A. R. 677.

To Order Payment out of Court.]—A. was defendant in the division court in a suit brought to try the right to a picture seized under execution, which he claimed. Judgment was given against him in his absence, and he obtained a new trial on payment into court of the amount for which the picture was seized, to abide the event of a trial. A verdict was afterwards given against him. On applying for the money, he found that it had been paid over to the execution creditors. He then inquired for the picture, but it had been seized and sold under other executions. A rule was moved for a mandamus to the Judge to make an order on the clerk to pay to A. the sum deposited; but the court held that they could not interfere. *In re Crookshank*, 9 U. C. R. 677.

To Proceed with Recount of Votes—*Parliamentary Election.*]—The court refused a mandamus to the junior Judge of the county of Wellington to proceed with the recount of votes under 41 Vict. c. 6, s. 14 (D.), as being a matter not within its jurisdiction, but belonging to parliament alone. *In re Centre Wellington Election*, 44 U. C. R. 132.

To Rescind Order—*Stay of Proceedings—Jurisdiction—Interference.*]—A Judge, by order, stayed the proceedings in a cause until the attorney or his client, a trustee, should give a proper indemnity to the plaintiff, who had executed a deed of trust making the client a trustee of his estate, against any costs of the action in case the plaintiff became nonsuited, &c. A mandamus to compel the Judge below to grant a summons or take other proceedings for rescinding the order was refused, as it would be interfering with the jurisdiction of a competent tribunal. *In re Judge of County Court of Elgin and Macartney*, 13 C. P. 75.

To Reverse Decision on Point of Practice.]—See *In re Woods* v. *Rennett*, 12 U. C. R. 167.

To Sign Judgment — *Default—Non-production of Note Sued on.*]—Where a defendant neglects to appear to a specially indorsed writ in an action on a promissory note, the plaintiff is entitled to sign judgment without the production of the note; and a mandamus was granted to the county court to sign such judgment. *In re Oliver* v. *Fryer*, 7 P. R. 325.

To Sign Order for Reward.]—Mandamus ordered to county court Judge to sign an order for payment of reward for apprehension of a horse thief. *In re Robinson*, 7 P. R. 239.

To Tax Full Costs — *Jurisdiction.*]—Mandamus does not lie to command a Judge of the county court to alter his adjudication upon matters within his jurisdiction. Where, in an action for wrongful dismissal brought in the county court, the plaintiff recovered a verdict for $50, and the Judge refused a certificate for full costs, a mandamus to the Judge and the clerk of the court to tax such costs was refused. *Coolican* v. *Hunter*, 7 P. R. 237.

To Try Action — *Judgment — Want of Jurisdiction.*]—A Judge of a county court having indorsed upon a rule nisi before him, "judgment refused for want of jurisdiction, rule absolute refused," upon which decision a judgment was entered:—Held, that while the judgment stood of record no mandamus to decide the case could be directed by the court, there being no cause pending before the Judge. *Williamson* v. *Bryans*, 12 C. P. 275.

——— *Jurisdiction.*]—The court will only grant a mandamus to the Judge of the county court where his jurisdiction is clear. *Trainor* v. *Holcombe*, 7 U. C. R. 548.

——— *Remedy by Appeal.*] — A mandamus to compel a county court to proceed with an action was refused, among other reasons, because the applicant had a remedy by appeal. *Meyers* v. *Baker*, *Hargreaves* v. *Meyers*, 26 U. C. R. 16.

——— *Stay of Proceedings—Right of Defendants to be Heard.*]—Action of trespass de bonis, &c., in a county court, in which defendants, after declaration, applied to the Judge, who stayed proceedings on it appearing that defendants had been sued for the same causes of action in the county court of another county, in which action the proceedings against them were held to be coram non judice; and whereof the costs, though taxed, had not been paid. On motion for mandamus to compel the Judge to try this case:—Held, that the defendant, being primarily interested, had a right to be before the court and heard. The mandamus was therefore refused. *In re Dollery* v. *Whaley*, 12 C. P. 552.

——— *To Correct Judgment.*]—A mandamus will lie to the Judge of a county court commanding him to hear and determine a matter. But not to correct his judgment when given. *In re Burns* v. *Butterfield*, 12 U. C. R. 140.

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2. *To Courts of Revision.*

Appeal — *Hearing—Defective Notice—Waiver—Appearance of Counsel.*]—An elector served the clerk of the municipality with notice that the names of several persons had been wrongfully inserted in the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the court of revision. On the 22nd May the court met, when it was objected for the persons named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters:—Held, that they were right, the six days' notice being imperatively required by the Act: and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it. Semble, that, if this were otherwise, the proper course would have been a mandamus to the mayor to summon the court of revision under s. 55 of C. S. U. C. c. 55. *Regina* v. *Court of Revision of Town of Cornwall*, 25 U. C. R. 286.

Counsel.]—Courts of revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act. A mandamus for such purpose was refused. *Re Rosbach and Carlyle*, 23 O. R. 37.

Petition—*Remission of Taxes—By-law.*] —The court of revision of a municipality is obliged to receive and decide upon a petition for remission of taxes, presented under s. 67 of 55 Vict. c. 48 (O.), notwithstanding that the municipality has not passed any by-law on the subject. A mandamus granted. *Re Norris*, 28 O. R. 636.

See In re Marter and Court of Revision of Town of Gravenhurst, 18 O. R. 243, *ante* 1. 6 (b); *In re Allan*, 10 O. R. 110, *ante* 1; *Re McCulloch*, 35 U. C. R. 449, *ante* 1.

See, also, cases under 4 (a).

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3. *To Justices of the Peace.*

Return — *Scope of.*] — Upon a mandamus nisi to justices, they should return the recorded proceedings had before them, and not collateral matter not embraced in the entries of the court. *Rex* v. *Justices of the Home District*, T. T. 11 Geo. IV.

To Admit Evidence—*Parliamentary Inquiry.*]—At the hearing of a criminal charge before a county Judge, sitting as police magistrate, evidence given before a special committee of the House of Commons, and taken down by stenographers, was tendered before the magistrate and refused by him:—Held, that the court had no power to grant a mandamus to the county Judge directing him to receive such evidence. Subsequent resolution of the House of Commons authorizing the evidence to be given. *Regina* v. *Connolly*, 22 O. R. 220.

To Admit Further Evidence.] — See *Regina* v. *Richardson*, 8 O. R. 651.

To Give Certificate of Dismissal—*Withdrawal of Charge.*]—The applicant, C., having appeared to an information charging him with an assault, and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words "falsely imprison." This being refused, H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a

certificate of dismissal of the first charge, or to proceed further thereon, but indorsed on the information, "case withdrawn by permission of the court, with the view of having a new information laid:" — Held, that the complainant could not, even with the magistrate's consent, withdraw the charge, the defendant being entitled to have it disposed of. Held, also, that an information may be amended, but if on oath it must be re-sworn; and that the amendment might have been made here. Semble, that the more correct course would have been to go on with the original case, and, under 32 & 33 Vict. c. 20, s. 46, to refrain from adjudicating. A mandamus to hear and determine the first charge, and, if dismissed, to grant a certificate of dismissal, was however refused, for the withdrawal was equivalent to a dismissal; and the magistrate might, under s. 46, refrain from adjudicating, and if it were dismissed without a hearing on the merits there could be no certificate. *In re Conklin*, 31 U. C. R. 160.

To Issue Distress Warrant — *Conviction—Objections to.*]—The court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him under the Temperance Act of 1864, where the by-law and conviction were open to grave objections, which had been taken on the trial before him. *Regina* v. *Ray*, 44 U. C. R. 17.

To Issue Execution—*Conviction—Information.*]—The court refused to grant a mandamus to compel two justices to issue execution upon a conviction under 6 Wm. IV. c. 4, s. 2, for selling spirituous liquors without license, the conviction having been grounded upon the written statement of the informer and the oath of one other witness; there being a doubt, under the statute, whether the information ought not also to be on oath. *Regina* v. *McConnell*, 6 O. S. 629.

To Issue Warrant—*Discretion—Application—Parties.*]—The issuing of a warrant of commitment, under 32 & 33 Vict. c. 31, s. 75, is discretionary, not compulsory upon a justice of the peace; and the court will therefore on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandamus, if this be the proper remedy, which in this case it was held not to be, but that the application should have been under C. S. U. C. c. 126, s. 8. *In re Delaney and McNabb*, 21 C. P. 563.

To Re-open Complaint — *Refusal to Hear Defence—Conviction.*]—The defendant was convicted in July, 1874, under the Public Health Act, 36 Vict. c. 43 (O.), of creating a nuisance; the magistrates refusing to hear witnesses for the defence, on the ground that the statute made no provision for such witnesses being called:—Held, that an application in May, 1875, for a mandamus to re-open the complaint, was not too late, and the writ was granted; the refusal to hear one side being the same as if the case had not been heard at all. *Re Holland*, 37 U. C. R. 214.

To Revoke Certificate—*Tavern License — By-law.*] — Mandamus refused to a magistrate, to revoke a certificate granted by him at an adjourned quarter sessions, authorizing the issue of a tavern license to A. B., for keeping a tavern in the township of Vaughan, the certificate having been granted in contravention of a by-law of the municipal council of Vaughan. *Regina ex rel. Gamble* v. *Burnside*, 8 U. C. R. 263.

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4. To Municipal Corporations and Officers.

(a) *Assessments.*

Account of Unpaid Taxes—*Collector — Other Remedies.*]—The treasurer of a town, by authority of the corporation, applied for a mandamus to the collector, commanding him to give an account in writing for each of seven years during which he had held office, of the taxes remaining due on his rolls, and the reason why he could not collect the same, by inserting in each case the words "non-resident," or "no property to distrain," and to make oath that the sums were unpaid. The court refused the writ, holding that, as there were other remedies provided, under ss. 167, 170, 173, and 177, of the Assessment Act, it must at least be shewn that they could not be used or be of any avail. *In re Quin and Treasurer of Town of Dundas*, 23 U. C. R. 308.

Alteration of Principle of Taxation.]—The court refused to interfere by mandamus to compel a municipal council to alter the assessment of the applicant's property as settled on appeal by a court of revision, or to express any opinion as to the principle to be adopted in the taxation of property. *In re Dickson and Village of Galt*, 10 U. C. R. 395.

Correction of Mistake in Roll—*Division of Lot.*]—One S., from 1858 to 1861, inclusive, occupied, as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots, and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot 24 had, during these four years, been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was asked to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, $228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere. *In re Secker and Paxton*, 22 U. C. R. 118.

——— *School Rates.*]—A rate having been imposed to build a new school house in the town of Amherstburg, certain persons who were not Roman Catholics, but Protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all such rates for common schools for 1861; and the clerk thereupon, in making up the collector's roll, omitted this rate opposite to their names:—Held, that the clerk had done wrong, and might be punished under C. S. U. C. c. 55, ss. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll. *In re Ridsdale and Brush*, 22 U. C. R. 122.

Equalization of — *By-law.*] — The court refused a mandamus commanding a county council to proceed as directed by the Assessment Act, C. S. U. C. c. 55, in equalizing the assessment, as it was not clear that they had not complied with it by their by-law. *Re Gibson and United Counties of Huron and Bruce*, 20 U. C. R. 111.

Exemption—*By-law.*]—A writ of mandamus will not be granted when if issued it would be unavailing, or where there is no necessity for the relief. When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in s-s. 2 of s. 8 of R. S. O. 1897 c. 224, a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of the farm lands should be exempt or partly exempt from taxation for such expenditure was refused. *Re Giles and Village of Wellington*, 30 O. R. 610.

See ante 2.

See Stephens v. *Township of Moore*, 25 A. R. 42.

(b) *Bridges and Roads, Building and Repair of.*

Building of Bridge—*Government Control of River—Discretion.*]—In 1856 a road company obtained leave to build a bridge (at a point on the O. river), from the public works department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and, if the government required, a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the department, and was removed by the county, under whose control the road had passed. Upon application for a mandamus to the corporation of the county to build a swing or other bridge at the point:—Held, that it was discretionary with the government to allow a bridge there or not, and that the county was neither authorized nor compelled to build it. The application was therefore refused. *Re Wescott and County of Peterborough*, 33 U. C. R. 280.

Rebuilding of Bridge — *Disputed Liability — Remedy by Indictment—Discretion.*]—A mandamus nisi having issued commanding a municipal corporation to repair and rebuild a bridge over the Grand river at Cayuga, it appeared on the return that the liability was disputed on several grounds, it being contended that the bridge did not belong to the defendants, that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place, and that it should be repaired by another municipality:—Held, that under these circumstances a mandamus would not lie, and that the applicants must proceed by indictment. And semble, that the latter is the proper remedy in all cases except where a charter has been obtained to construct a road, and the work has never been done. *Regina* v. *County of Haldimand*, 20 U. C. R. 574.

A mandamus to compel the county to build a bridge over the Grand river at Indiana was refused, for (1) the bridge having been built by a joint stock company, the public could not be bound to repair it: and at all events, the obligation being at least very doubtful, the parties should be left to their remedy by indictment; and (2), the place at which such bridge should be erected must be in the discretion of the council. *Re Kinnear and County of Haldimand*, 30 U. C. R. 398.

It was held that the corporation of the county of Haldimand were not liable to indictment for not repairing the bridge over the Grand river at the village of York, for it had been built by a joint stock company which had abandoned it, and had never been assumed by the county, nor had it become a public highway by dedication, tolls having been imposed on it. Quære, however, whether the council could not be compelled to establish a bridge across the river at some convenient place between Caledonia and Cayuga, there being none for that distance, about eleven miles. *Regina* v. *County of Haldimand*, 38 U. C. R. 396.

Held, upon the facts stated in the affidavits filed, that a mandamus would lie to compel the county to build the bridge, as suggested in the last case; and the writ was ordered. *Brooks* v. *County of Haldimand*, 41 U. C. R. 381.

Held, reversing the judgment in 41 U. C. R. 381, that, as there were other bridges over the river, the question whether a bridge should be erected at this particular spot was a matter within the discretion of the county council, with which the court should not interfere. *Brooks* v. *County of Haldimand*, 3 A. R. 73.

An appeal from a judgment dismissing an application under 46 Vict. c. 18, s. 535 (O.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the Judges of this court being divided in opinion, was dismissed. Per Hagarty, C.J.O., and Osler, J.A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it. Per Burton and Patterson, JJ.A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted. *In re Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

Repair of Bridge — *Remedy by Indictment.*]—Where a county council is liable to repair a bridge, the proper remedy is by indictment, not mandamus. *Re Jamieson and County of Lanark*, 38 U. C. R. 647.

Repair of Road — *Duty — Mandamus nisi.*]—Semble, that under the facts of this case there was clearly a duty incumbent

on the municipal council, under 12 Vict. c. 81, s. 37, to plank or gravel the road assumed by them, as they were desired. The court, however, granted only a mandamus nisi, in order that any question raised upon the return might be disposed of formally. *In re Municipality of Augusta and Municipal Council of Leeds and Grenville*, 12 U. C. R. 522.

——— *Railway Company — Duty.*] — Semble, that a mandamus, under the circumstances of this case, would not have been granted at the instance of the municipality to compel a company owning a railway intersecting highways to restore them to their former state, or in a sufficient manner not to impair their usefulness. *Regina* v. *Great Western R. W. Co.*, 21 U. C. R. 555.

——— *Road Company—Remedy by Indictment.*]—A motion for a mandamus requiring B. and S., the purchasers of a road from a company, to repair a portion of the said road, was refused on the authority of Regina v. Trustees of Oxford, &c., Turnpike Roads, 12 A. & E. 427, and the parties left to their remedy by indictment. *Regina* v. *Brown*, 13 C. P. 556.

(c) *Election of Members and Officers.*

Disputed Returns—*Remedy by Quo Warranto.*]—Where a mandamus was applied for to the warden of a district, to swear in a person who claimed to be duly elected a councillor, the court discharged the rule, it appearing that a councillor had been returned and sworn in for the township, which return had been contested, the proper remedy being by quo warranto. *In re Brenan*, 6 O. S. 330.

The court will not grant a mandamus to try an election of corporate officers, but will leave the parties contesting the validity of the election to their remedy by quo warranto. *Election Board of Police, Brockville*, 3 O. S. 175; *Regina* v. *Bank of Upper Canada*, 5 U. C. R. 338.

A mandamus may be granted to a municipal corporation to proceed in the trial of a contested election. *In re Denham and City of Toronto*, 3 O. S. 605.

Election of Reeve by Councillors—*Validity of Return of One Councillor.*]—At an election of township councillors, the person who acted as returning officer for one of the five wards was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, without taking the oath of office, proceeded to elect the reeve:—Held, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election. Held, also, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being, within the meaning of the Municipal Council Act, an "entry upon their duties." A mandamus applied for by the reeve thus elected to the clerk to certify his election, was therefore refused. *In re Hawk and Ballard*, 3 C. P. 241.

Election of Treasurer by Councillors—*Delivery of Books—Irregularity of Election—Remedy.*]—At a session in October, 1846, A. was elected by the district council treasurer of the district. When elected, A. was himself a district councillor; and then B. held the office of treasurer, having been long previously appointed by royal commission. B. refused to give A. the books, &c., of the office, upon the grounds that under the District Council Acts, 4 & 5 Vict. c. 10 and 9 Vict. c. 40, the election had been held at an improper time, and that the two offices of district councillor and treasurer were incompatible. Upon application for a mandamus to B. to deliver over the books, &c.:—Held, 1. that A. had been elected at the proper time and session; 2. that the two offices were incompatible; 3. that A. was ineligible for election, the council having no power to receive his registration as councillor: 4, that, notwithstanding A.'s irregular election, he, as treasurer de facto, under 9 Vict. c. 40, had a legal right to the books, &c., of his office; and that the mandamus might go, the legality of the election being questionable in another proceeding. *Regina* v. *Smith*, 4 U. C. R. 322.

Invalid Election—*Delivery of Papers.*]—A mandamus was ordered to the clerk of a township to deliver up the papers to the council first chosen, a second election having, under the circumstances, been held invalid. *In re Corporation of Asphodel and Sargeant*, 17 U. C. R. 393.

New Election—*Insolvency of Councillor—Remedy by Quo Warranto.*]—On application for a mandamus to the mayor of a town to issue his warrant for a new election in place of a member of the council whose seat it was alleged had become vacant by his insolvency:—Held, that the vacancy must first be established by quo warranto, and that mandamus was not the proper remedy. *Regina* v. *Mayor of Cornwall*, 25 U. C. R. 293.

Refusal to Admit Member after Judgment.]—Semble, that as soon as the judgment under a summons issued under 12 Vict. c. 81, ousting the defendant, has become final, the course for the relator to take will be to apply to the municipal corporation to admit him, and if they refuse, then to apply for a mandamus. *Regina ex rel. Gibbons* v. *McLellan*, 1 C. L. Ch. 125.

(d) *Payment of Money by Treasurer.*

Clerk of the Peace—*Charges—Legality of—Fund for Payment.*]—Where the treasurer of the district council refused to pay certain charges of the clerk of the peace, and returned to a mandamus nisi that such charges were not shewn to be connected with the administration of justice, or specifically provided for by law, so that they should be audited by the council; and further, that he had no funds out of which to pay, the return was allowed. *In re Clerk of the Peace* v. *Western District Municipal Council*, 1 U. C. R. 162.

Coroner—*Fees—Necessity for Inquest—Fund of Payment.*]—Under 20 Vict. c. 36, the coroner is made the judge of the necessity for investigation into the cause of a fire; and therefore to an application for a

mandamus to the treasurer to pay him his fees, it was no answer to shew that in the opinion of the reeve and others the inquiry was not called for. Held, also, that the want of funds in the treasurer's hands was no answer, the payment not having been refused on that ground. *In re Fergus and Cooley*, 18 U. C. R. 341.

District Treasurer.] — Quære, whether the court will award a mandamus to a treasurer of a district. *Rex* v. *Harris*, Tay. 10.

Medical Health Officer—*Services of—Board of Health—Judgment against.*]—Section 49 of the Public Health Act, R. S. O. 1887 c. 205, provides that "the treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act." A physician recovered judgment in a division court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic. It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed. Upon motion by the physician for a mandamus under s. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered:—Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the division court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus. *Re Darby and South Plantagenet Local Board of Health*, 19 O. R. 51.

Member of Assembly—*Wages—Assessment for—Application to Sessions.*]—Mandamus refused to a district treasurer to pay over to a member of the House of Assembly his wages, for which he had obtained the Speaker's warrant, under 1 Vict. c. 17, it not being shewn that the money had been raised by assessment, or that any application had been made to the magistrates in sessions to order the payment. *Cornwall* v. *Baby*, H. T. 5 Vict.

Sheriff — *Sessions — Remedy by Indictment.*]—A mandamus to pay the sheriff's account, audited by the justices in quarter sessions, was refused, and the sheriff left to his remedy against the treasurer by indictment. *In re Hamilton* v. *Harris*, 1 U. C. R. 513.

See In re Harbottle and Wilson, 30 U. C. R. 314 (*post* 6).

(e) *Rates, Levying of.*

Payment for Work—*Contract—By-law—Engineer.*]—The plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, which agreement contained this clause: "Notwithstanding anything hereinbefore contained to the contrary, this agreement . . is made subject to the final passing of the said by-law . . and in the event of the said by-law not being passed . . then this agreement shall be null and void . . ." The by-law was never finally passed, and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a quantum meruit:—Held, that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was not properly performed. *Quaintance* v. *Township of Howard*, 18 O. R. 95.

School Rates.]—A mandamus was applied for at the instance of the sessions for the county of Halifax, to compel the warden and council of the town of Dartmouth to assess, on the property of the town liable for assessment, the sum of $16,976 for its proportion of the county school rates for the years 1873-78, under s. 52 of the Educational Act, R. S. N. S. c. 38. The supreme court of Nova Scotia, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule nisi for a mandamus absolute, leaving these questions to be determined on the return of the writ. On appeal to the supreme court of Canada:—Held, that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion could not at present be questioned. *Town of Dartmouth* v. *The Queen*, 9 S. C. R. 509.

See *In re Stormont, etc., High School Board and Township of Winchester*, 45 U. C. R. 460; *Town of Dartmouth* v. *The Queen*, 14 S. C. R. 45; *In re Fredericksburg Public School Trustees and Township of Fredericksburg*, 37 U. C. R. 534 (*ante* I. 3.)

Sinking Fund—*Application of Debenture Holder—Current Year—Arrears—Future Years.*]—Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund:—Held, that they should be compelled by mandamus, on the application of a debenture holder, to raise the sinking fund for the current year, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. 1877 c. 180, s. 88. For that enactment must be taken in connection with 46 Vict. c. 18, s. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied. Held, however, that the mandamus could not include the levy of the rate for a sinking fund in future years, nor, semble, the levy of arrears. The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke* v. *Town of Palmerston*, 6 O. R. 616.

(f) *Road Allowances, Opening of.*

It is discretionary with and not obligatory upon a municipal council to open a road allow-

ance, and the fact that a by-law has been passed does not create such an obligation; and a mandamus was refused. *Re Wilson* v. *Wainfleet*, 10 P. R. 147.

The courts of Ontario have no jurisdiction to compel a municipality at the suit of a private individual to open an original road allowance and make it fit for public travel. *Hislop* v. *Township of McGillivray*, 17 S. C. R. 479. See *S. C.*, 12 O. R. 749, 15 A. R. 687.

Where, on an application to quash a by-law for closing up a road allowance, the evidence was contradictory as to whether the substituted way was fit for travel or not, the court suggested the issue of a mandamus, and the employment of some competent person to inspect and report, by which the true state of the road might be determined. *In re Thurston* v. *Township of Verulam*, 25 C. P. 593.

(g) *Other Cases.*

Court House—*Building of—Justices of the Peace.*]—The court refused a mandamus, at the instance of the justices of a district, to compel the district council to build a court house. *Justices of the District of Huron* v. *Huron District Council*, 5 U. C. R. 574.

See, also, *Regina* v. *Municipal Council of Bruce*, 11 C. P. 575.

Ditches and Watercourses Act—*Engineer.*]—An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. 1887 c. 220, s. 5, as amended by 52 Vict. c. 49, s. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act, requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend:—Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais* v. *Town of Trenton*, 24 O. R. 343.

Inspector of Licenses—*Certificate of Applicant.*]—The court refused a mandamus to compel the inspectors of licenses to examine a certain house fitted up by the applicant as a saloon, and to grant him the proper certificate, if he had complied with the by-law in that behalf. *In re Baxter* v. *Hesson*, 12 U. C. R. 139.

See Re Blakeley, 40 U. C. R. 102.

License Commissioners — *Issue of License.*]—A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued, by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in office. *Leeson* v. *License Commissioners of Dufferin*, 19 O. R. 67.

Railway Bonus By-law.] — Mandamus to finally pass a railway bonus by-law refused, where the assent of the electors had been procured by bribery. *Re Langdon and Township of Arthur*, 45 U. C. R. 47.

Relief of Destitute Person.]—C., a servant living in the township of London, was travelling to Komoka with a load of trees, and was injured on the way by the waggon upsetting. He was taken to the tavern of M., in the township of Lobo, where his leg was amputated, and he remained several months at M.'s expense, destitute and helpless:—Held, that the court by mandamus could not compel the corporation to provide for his relief, the power to do so being discretionary. *In re McDougall and Township of Lobo*, 21 U. C. R. 80.

Repair of Drain.] — The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening the drain, which was accordingly done. In 1881 they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear:—Held, that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O. 1877 c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. *White* v. *Township of Gosfield*, 2 O. R. 287.

Under s. 73 of the Drainage Act, 1894, [57 Vict. c. 56 (O.)] a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can shew that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property. *Stephens* v. *Township of Moore*, 25 A. R. 42.

See Regina v. *District Council of Gore*, 5 U. C. R. 357; *Regina* v. *Municipal Council of Bruce*, 11 C. P. 575; *In re Poussett and County of Lambton*, 22 U. C. R. 80.

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5. *To Public Companies.*

(a) *To Register Transfer of Shares.*

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff as a shareholder:—Held, that C. S. C. c. 70, as well as C. L. P. Act, ss. 255, 256, must be obeyed: and that, as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin* v. *Ottawa and Prescott R. W. Co.*, 22 U. C. R. 186.

Upon an application to compel a railway company by mandamus to register a transfer

of stock, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen, and commonalty of the city of Ottawa," and by C. S. U. C. c. 54, the name of the corporation was changed to "the corporation of the city of Ottawa:"—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given:—Held, also, that a demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company, were sufficient, the court being of opinion that service and demand upon the president were not indispensable. *In re Goodwin* v. *Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

On application for such a mandamus:—Held, that a demand and refusal after service of the attested copy of execution was essential, under C. S. U. C. c. 70. The execution debtor was the president of the company, and, on shewing cause, he asserted payment of the execution before the sale, &c.:—Held, that this could not justify the company in refusing to transfer, for they had no concern with the transactions between the execution plaintiff and defendant, or between defendant and the sheriff. Quære, as to the effect of a delay in serving the attested copy beyond the ten days after the sale prescribed by the Act. *In re Guillott and Sandwich and Windsor Gravel Road Co.*, 26 U. C. R. 246.

Application by the transferee of certain shares in a joint stock company for a mandamus to the directors to enter such transfer in the books of the company. The by-law of the company provided that "any shareholder may, by leave of the directors, but not otherwise, transfer his share, or shares, by making an entry of such transfer in a book." &c. The directors declined to grant the required leave, but gave no reason to the applicant for their refusal:—Held, that it was for the directors to exercise their discretion, and that they need not give any reasons; and having exercised this discretion without any evidence of caprice, the application could not succeed. *In re Macdonald and Mail Printing and Publishing Co.*, 6 P. R. 309.

(b) *Other Cases.*

Bank—*Inspection of Books.*]—The court will not, although they have the power, grant a mandamus for the inspection of the stock book or other books of a bank, unless on special grounds. *Bank of Upper Canada* v. *Baldwin*, Dra. 55.

Gas Company—*Statute—Duty—Remedy by Action.*]—A gas company incorporated under C. S. C. c. 65, having made a charge for a special illumination, which was disputed, refused to supply gas to the same premises for ordinary purposes until their claim had been paid:—Held, that this was not justified, but that a mandamus would not lie, as the statute imposed no duty; and that the only remedy was by action. *In re Commercial Bank of Canada and London Gas Co.*, 20 U. C. R. 233.

——— *Statute—Supply of Gas—Construction of Contract — Notice to Cancel.*]—See *Cadieux* v. *Montreal Gas Co.*, 28 S. C. R. 382.

Harbour Company—*Election of Directors—Quo Warranto.*]—Where an election of directors in a joint stock company was clearly illegal—the voters having each been allowed only one vote, whereas each share should have given a vote—but the persons chosen had for more than eight months discharged the duties, the court refused to interfere by mandamus for a new election. Quære, whether mandamus or quo warranto would be the proper remedy. *In re Moore and Port Bruce Harbour Co.*, 14 U. C. R. 365.

Mutual Insurance Company—*Payment of Claim.*—A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment by those who had been mutual insurers with the plaintiff, but no longer belonged to the company, their deposit notes having been cancelled. *Hughes* v. *Mutual Fire Ins. Co. of District of Newcastle*, 13 U. C. R. 153. See, also, *S. C.*, 11 U. C. R. 241.

Railway Company—*Duty to Fence.*]—See *Young* v. *Erie and Huron R. W. Co.*, 27 O. R. 530.

——— *Settlement of Compensation for Land Taken.*]—The owner of land taken for a railway is entitled to compensation, and the company must proceed to settle the amount thereof under R. S. O. 1877 c. 165, s. 20; if they do not, the proper course is to apply for a mandamus. On such application a formal title, in the absence of proof to the contrary, need not be proved; it is sufficient if the applicant swear that he is the owner of the land taken. *Demorest* v. *Midland R. W. Co. of Canada*, 10 P. R. 73.

Street Railway Company—*Contract—Enforcement of.*]—The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. c. 91 (O.):—Held, that it would not be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period. Held, by the court of appeal, that the court will not, in an action, direct the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind, the performance of which in specie is not deemed enforceable by the court. *City of Kingston* v. *Kingston, &c., R. W. Co.*, 28 O. R. 39, 25 A. R. 462.

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6. *To Public Officers.*

Board of Audit—*Fees of County Attorneys.*]—See *In re Fenton and Board of Audit for County of York*, 31 C. P. 31; *In re Stanton and Board of Audit of County of Elgin*, 3 O. R. 86.

Boundary Commissioners—*Appeal—Return.*]—A rule for a mandamus will be

granted against boundary line commissioners if they do not return the proceedings had before them within fourteen days after notice of appeal. *Delong* v. *Striker*, E. T. 3 Vict.

Canal Commissioners — *Appointment of Arbitrator.*]—A mandamus nisi was awarded to the commissioners of the St. Lawrence Canal to appoint an arbitrator to join in awarding upon an unsettled claim. *Re McNairn and Commissioners for St. Lawrence Canal*, 3 U. C. R. 153.

Coroner — *Witness Fees — County Treasurer.*]—Where a coroner under C. S. U. C. c. 125, summoned a second medical practitioner as a witness at an inquest and to perform a post-mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by s. 9, a mandamus to the coroner to make his order on the county treasurer for the fees of such witness, under s. 10, was refused. Semble, that on an application for such mandamus, the county treasurer, as well as the coroner, must be called upon. *In re Harbottle and Wilson*, 30 U. C. R. 314.

Police Board—*License Fees — Government.*]—A mandamus was granted, directing the board of police of Niagara to pay over to the inspector of licenses the sum of £240, received by the clerk of the board for tavern licenses for 1846 and 1847; the court deciding that, under s. 7 of 8 Vict. c. 62, and ss. 3 and 4 of 8 Vict. c. 72, the government, and not the town of Niagara, were entitled to receive the dues upon such licenses. *Regina* v. *Board of Police of Niagara*, 4 U. C. R. 141.

Provincial Secretary—*Increase of Capital Stock of Company.*]—Held, that mandamus to the Provincial secretary is the proper mode for enforcing the issue of a notice under 27 & 28 Vict. c. 23, s. 5, s.-s. 18 (C.), stating that a by-law increasing the capital stock of a company had been passed, and declaring the number and amount of shares of the new stock, &c. *Re Massey Manufacturing Co.*, 11 O. R. 444, 13 A. R. 446.

Registrar of Deeds.]—See *In re Thompson and Webster*, 25 U. C. R. 237; *In re Smith and Shenston*, 31 U. C. R. 305.

Revising Officer—*Objection to Name on List.*]—To compel a revising officer to hold a sittings and adjudicate upon a complaint to have a name struck off the voters' list. See *Re Simmons and Dalton*, 12 O. R. 505.

——— *Objection to Name on List—Notice—Grounds—Appeal.*]—A notice under s. 19 of the Electoral Franchise Act, R. S. C. c. 5, as amended by 52 Vict. c. 9, s. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection:—Held, sufficient. The revising officer (who was not a Judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the county Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:—Held, that no appeal was given by s. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the county Judge were coram non judice. A mandamus was granted. Held, on appeal, that the Queen's bench division having ordered a mandamus to issue, directing a revising officer to consider the objections to the qualification of certain persons whose names appeared on the preliminary voters' lists, and the revising officer having obeyed the mandamus, the court of appeal should not consider the question of the right to grant the mandamus. A notice of application to have a name removed from the voters' lists, giving as the ground of objection only the statement "not qualified," is sufficient. *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101.

School Trustees—*Admission of Pupils.*]—See *Dunn* v. *Board of Education of Windsor*, 6 O. R. 125; *In re Minister of Education, McIntyre* v. *Blanchard Public School Trustees*, 11 O. R. 439.

School Trustees—*Election.*]—See *Chaplin* v. *Public School Board of Town of Woodstock*, 16 O. R. 728.

Sheriff—*To Bring Prisoner before County Judge.*]—Where a prisoner is brought before a county court Judge under s. 766 of the Criminal Code, and elects to be tried by a jury, and is thereupon remanded under s. 767 to await such trial, although his election is made under a mistake or qualified by using the words "at present," there is no duty upon the sheriff to notify the Judge a second time under s. 766, or to bring the prisoner again before him to enable the prisoner to re-elect to be tried by the Judge. *Regina* v. *Ballard*, 28 O. R. 489.

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7. *To Sessions.*

Acquittal—*Evidence — Conviction — Reversal.*]—Where a person had been convicted before justices and fined, and on an appeal to the quarter sessions the justices there admitted more evidence than had been heard on the conviction, and the accused party was acquitted, but, on receiving the opinion of the attorney-general that the additional evidence should not have been admitted, the justices in sessions confirmed the conviction, and ordered it to be recorded, but took no notice of the acquittal—the court granted a mandamus, commanding them to enter an acquittal. *Rex* v. *Justices of Bathurst*, 4 O. S. 340.

Appeal — *Rehearing.*] — The court of Queen's bench has no power to grant a mandamus to compel the sessions to rehear an appeal. *Regina* v. *Grainger*, 46 U. C. R. 382.

Clerk of the Peace—*Audit of Accounts—Items.*] — Where the quarter sessions have audited the accounts of a clerk of the peace, this court will not interfere by mandamus to compel the allowance of particular items. *Re Dartnell and Court of General Sessions for Prescott and Russell*, 26 U. C. R. 430.

——— *Certificate — Costs.*] — The court, having granted a prohibition against proceeding further with an appeal from a conviction, refused a mandamus to the clerk of the peace to certify the non-payment of costs, under C. S. U. C. c. 103, s. 67. *In re Coleman*, 23 U. C. R. 615.

Disputed Boundary — *Appointment of Agent to Settle—Discretion.*]—Where there is

a disputed boundary between two districts, and one of the districts appoints an agent for settling the boundary, under 1 Vict. c. 19, s. 3, the court will not, on the refusal of the justices of the quarter sessions of the other district to appoint an agent on their behalf, direct a mandamus to them to do so, as the Act leaves it discretionary with them to proceed or not. *In re Boundary Line between Eastern and Johnstown Districts*, M. T. 6 Vict.

Evidence — *Amended Conviction—Reception of—Discretion.*]—A minute of conviction signed by the justice, but not sealed, was returned to the sessions upon the entering of an appeal therefrom by the defendant. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The chairman reserved judgment, and during the adjournment the justice returned and filed a conviction under seal. The chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard:—Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment: for the reception of the conviction in evidence at that period was in the chairman's discretion, which could not be reviewed. *In re Ryer and Plows*, 46 U. C. R. 206.

Jurisdiction — *Excess — Conviction — Amendment.*]—Under the facts stated in this case, a mandamus was ordered to issue, directing the order of the quarter sessions quashing a conviction to be set aside, as in excess of jurisdiction, and the conviction to be amended and affirmed. *McKenna* v. *Powell*, 20 C. P. 394.

Jury—*Perverse Verdict — Enforcement — New Trial.*]—Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that court has no authority to grant a new trial. Quære, whether, when such verdict has been rendered against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed. *Yearke* v. *Bingleman*, 28 U. C. R. 551.

Order as to Costs on Quashing Conviction—*Right of Subsequent Sessions to Make.*]—See *In re Rush and Village of Bobcaygeon*, 44 U. C. R. 199.

Payment of Account — *Excessive Amount.*]—A mandamus will not be granted to order the justices in sessions to direct the treasurer of a district to pay the balance of an account for printing for the district, which has been rejected by them as excessive. *Staunton* v. *Justices of Home District*, E. T. 3 Vict.

Payment of Parliamentary Wages.]—A mandamus was refused to justices of a district in quarter sessions, to order parliamentary wages to be paid to the representative of a town, under 43 Geo. III. c. 9. *Rex* v. *Justices of Niagara*, Tay. 394.

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8. *To Other Corporations and Persons.*

College of Physicians and Surgeons.] — Mandamus to restore name of medical practitioner which had been improperly removed from the register. *Regina* v. *College of Physicians and Surgeons, Re McConnell*, 44 U. C. R. 146.

To register a practitioner registered in England. See *Regina* v. *College of Physicians and Surgeons, Re Mallory*, 44 U. C. R. 564.

Crown.] — Mandamus will never, under any circumstances, be granted where direct relief is sought against the Crown. *McQueen* v. *The Queen*, 16 S. C. R. 1.

Witness to Deed.]—A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry. *Regina* v. *O'Meara*, 15 U. C. R. 201.

III. Miscellaneous Cases.

Appeal — *Supreme Court of Canada.*]—The appeal in cases of mandamus under s. 23 of the Supreme and Exchequer Court Act is restricted by the application of s. 11 to decisions of "the highest court of final resort" in the Province, and an appeal will not lie from any court of the Province of Quebec but the court of Queen's bench. *Danjou* v. *Marquis*, 3 S. C. R. 251.

See Town of Dartmouth v. *The Queen*, 9 S. C. R. 590.

See Constitutional Law, I. — Intoxicating Liquors—Municipal Corporations, XII. 10 — Schools, Colleges, and Universities, IV. 4 (d), (e)—Sessions, III. 5.

MANITOBA SCHOOLS.

See Constitutional Law, III.

MANSLAUGHTER.

See Criminal Law, IX. 36.

MANUFACTORIES.

Bonus by way of aid to—*See* Municipal Corporations, VI.

Exemption from Taxation — *See* Municipal Corporations, VI.

Act to Provide against Frauds in the Supplying Milk to Cheese or Butter Manufactories.]—See *Regina* v. *Wason*, 17 A. R. 221; *Regina* v. *Dowling*, 17 O. R. 698.

MARINE INSURANCE.

See Insurance, VI.

MARITIME COURT.

Appeal—*Disputed Facts—Nautical Questions.*] — Where a disputed fact involving

nautical questions is raised by an appeal from the judgment of the maritime court of Ontario, as in the case of a collision, the supreme court will not reverse the decree of the Judge of the court below merely upon a balance of testimony. *The "Picton," McCuaig* v. *Keith*, 4 S. C. R. 648.

——— *Notice of—Time—Rules of Court.*]—Rule 269 of the rules of the maritime court of Ontario requires notice of appeal from a decision of that court to the supreme court of Canada to be given within fifteen days from the pronouncing of such decision. A judgment of the maritime court was handed by the surrogate to the registrar, but not in open court, on 31st August, and was not drawn up and entered by the registrar for some time after:—Held, that notice of appeal within fifteen days from the entry of such judgment was sufficient under the rule. Quære, is such rule 629 intra vires the maritime court? *The "St. Magnus," Robertson* v. *Wigle*, 15 S. C. R. 214.

Constitutional Law — *Act Establishing Court.*]—Held, that 40 Vict. c. 21, establishing a court of maritime jurisdiction for the Province of Ontario, is intra vires of the Dominion Parliament. *The "Picton," McCuaig* v. *Keith*, 4 S. C. R. 648.

Jurisdiction — *Claims Accruing before Act.*]—The court has no jurisdiction in respect of claims that accrued before the proclamation bringing into force the maritime court of Ontario. *The "Kate Moffatt,"* 15 C. L. J. 284.

——— *Damage to Land — Proximate Cause.*]—The maritime court has jurisdiction to entertain an action to recover damages for injury to real estate caused by the negligent navigation of a steam vessel, when the injury complained of is the natural and proximate consequence of the fault of the ship. *The "Walter S. Frost,"* 5 C. L. T. 471.

Jurisdiction in Rem.]—The owner of the dredge "Nithsdale" was indebted to the petitioner for services performed on board the said dredge, and this cause was instituted against the dredge to recover the amount due. The owner of the dredge set up as a defence that a dredge was not a ship or vessel within the Maritime Jurisdiction Act of 1877, and that the maritime court of Ontario had no jurisdiction in rem.:—Held, that the maritime court had no jurisdiction. *The "Nithsdale,"* 15 C. L. J. 268.

——— *Personal Injury Resulting in Death.*]—The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them (The "Garland.") Petition against the "Garland"—libelled under the Maritime Court Act at the port of Windsor—on behalf of the appellant claiming $2,000 damages suffered by her owing to the death of her son and servant caused by the negligence of the officers in charge of the said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against the "Garland" within the jurisdiction of the court:—Held, that the maritime court of Ontario has no jurisdiction apart from R. S. O. 1877 c. 128 (re-enacting in that Province Lord Campbell's Act, 9 & 10 Vict. c. 93), in an action for personal injury resulting in death, and therefore the appellant had no locus standi, not having brought her action as the personal representative of the child; that vice-admiralty courts in British possessions and the maritime court of Ontario, have whatever jurisdiction the high court of admiralty has over "any claim for damages done by any ship, whether to person or to property." *The "Garland," Monaghan* v. *Horn*, 7 S. C. R. 409.

See EXCHEQUER COURT—SHIP.

MARITIME LAW.

See EXCHEQUER COURT, I.—SHIP.

MARKET.

See MUNICIPAL CORPORATIONS, XXIX. 6.

MARKET OVERT.

Stolen Goods—*Auction—Retaking—Trespass.*]—When a horse was stolen from the plaintiff and bought by defendant at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and defendant immediately retook it:—Held, that the plaintiff had a right to retake it, no property having passed to defendant by the sale; and that, although it was in his possession only for a moment, yet the property revested in him, and he could maintain trespass against the defendant for the retaking. *Bowman* v. *Yielding*, M. T. 3 Vict.

MARRIAGE.

See CONSTITUTIONAL LAW, I. — CRIMINAL LAW, IX. 4, 33 — DOWER, I. 3 (a) — FOREIGN LAW—HUSBAND AND WIFE, IX. —INFANT—SCIRE FACIAS AND REVIVOR.

MARRIAGE SETTLEMENT.

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MARRIED WOMAN.

See HUSBAND AND WIFE—INSURANCE, V. 3 —JUDGMENT DEBTOR, II.—WILL, I. 2.

MARSHALLING SECURITIES.

See MORTGAGE, XV. 1.

And see, also, especially, the following cases; *Boucher* v. *Smith*, 9 Gr. 347 (Mortgage); *Joseph* v. *Heaton*, 5 Gr. 636, and *S. C., sub nom. Topping* v. *Joseph*, 1 E. & A. 292 (Principal and Surety); *Quay* v. *Sculthorpe*, 16 Gr. 449 (Principal and Surety); *Anderson* v. *Kilborn*, 16 Gr. 449 (Will); *Becher* v. *Hoare*, 8 O. R. 328 (Will); *Clarke* v. *Bogart*, 27 Gr. 450 (Registry Laws); *Rutherford* v. *Rutherford*, 17 P. R. 228 (Parties).

MASTER.

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MASTER AND SERVANT.

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I. APPRENTICE.

Action against Father—*Covenant—Absence—Leave and License — Pleading.*]—The plaintiff, in covenant against the father, alleged as a breach that the apprentice unlawfully absented himself on a certain day, and from thence hitherto continued absent from the service of the plaintiff. Plea, as to the absenting, that the apprentice did depart and absent himself by plaintiff's leave and license; —Held, sufficient, without pleading a license to continue absent, as the plea only professed to answer the absenting. Held, also, that the plea need not shew that the license was by deed or in writing. *Black* v. *Stevenson*, 3 U. C. R. 160.

——— *Covenant — Enticing.*] — Where a father and his son, a minor, entered into articles, and the son by his father's orders refused to complete his apprenticeship:—Held, that covenant against the father on the articles, and not case for enticing away, was the proper remedy. *Dillingham* v. *Wilson*, 6 O. S. 85.

Action against Master's Heir — *Covenant.*] — The plaintiff declared against the heir of W., upon W.'s covenant to teach and board and lodge the plaintiff a specified period, and that in case of W.'s death his heirs, executors, and administrators should perform the covenant:—Held, bad, for (1) by the form of the covenant the heir was not bound; and (2) upon such a contract, being one of apprenticeship, he could not be made liable. *Frazer* v. *Wright*, 16 U. C. R. 514.

Action by Father of Apprentice—*Non-joinder of Son — Construction of Indenture.*]—By deed between A. B. and C. D., father and son, of the one part, and E. F. and G. H., partners, coach builders, of the other part, the son, with the consent of his father, bound himself apprentice to the coach builders. The instrument contained this clause: "And lastly, for the true and faithful performance, &c., the said A. B., C. D., and E. F. and G. H., do bind themselves unto each other in the sum of," &c.:—Held, in debt by the father alone, against E. F., the surviving partner, that all defendant's covenants were with the son and not the plaintiff. 2. That the words "unto each other" did not mean separately and individually, but that each party respectively, i. e., E. F. and G. H. jointly to A. B. and C. D. jointly, became jointly bound to the other; and that there was therefore a non-joinder of plaintiffs. Quære, the sufficiency of the declaration as given in the report. *Connell* v. *Owen*, 3 C. P. 249.

Articles of Apprenticeship—*Unreasonable Provision — Non-liability.*]—Articles of apprenticeship which require the apprentice during the term of four years of three hundred and ten working days of ten hours each, to give and devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for the time being, or as special exigencies of the business may require, are unreasonable and cannot be enforced against the infant apprentice, nor against a surety for him. *MacGregor* v. *Sully*, 31 O. R. 535.

Contract Void or Voidable — *14 & 15 Vict. c. 11.*]—Contracts of apprenticeship for

less than seven years, entered into before 14 & 15 Vict. c. 11, are not void, but voidable *Webster* v. *McBride*, 5 C. P. 109.

——— *5 Eliz. c. 4.*]—An indenture of apprenticeship is not void, but voidable, when contrary to 5 Eliz. c. 4; and that is not in force in this Province. *Fish* v. *Doyle*, Dra. 328; *Billingham* v. *Wilson*, 6 O. S. 85.

Conviction — *Two Justices — Arrest—Summons—5 Eliz. c. 4—20 Geo. II. c. 17.*]—5 Eliz. c. 4 is not in force in Upper Canada, but 20 Geo. II. c. 19 is; and under ss. 3 and 4 jurisdiction is given to two or more justices, and cannot be exercised by one; and the party cannot be arrested on the complaint—he must be summoned. *Shea* v. *Choat*, 2 U. C. R. 211.

——— *14 & 15 Vict. c. 11—Absence—Execution of Indenture by Minor alone—Term of Imprisonment.*]—The defendant, a justice of the peace, convicted an apprentice of having absented himself without leave, and adjudged that he should give sufficient security to make satisfaction to his master, according to 14 & 15 Vict. c. 11, and in default to be imprisoned for two months. The conviction was quashed: 1, because the articles of apprenticeship were not within the Act, the apprentice being a minor, and the articles not executed by any one on his behalf; and 2, because it could not be sustained under the sixth clause of the Act for two months' imprisonment, or under the seventh, because the satisfaction to be given was not ascertained. *In re Regina* v. *Robertson*, 11 U. C. R. 621.

——— *38 Vict. c. 19—Absence—Currency of Indenture.*]—Section 20 of the Apprentices and Minors' Act, 38 Vict. c. 19 (O.), applies only to the case of an apprentice who, having absented himself as mentioned in s. 19, refuses to serve a further term after the expiration of his apprenticeship equal to the period of such absence; and a complaint under it therefore can only be made after such expiration, and a refusal to comply with s. 19. A conviction under s. 20, during the currency of the apprenticeship, was therefore quashed. *Regina* v. *Walker*, 41 U. C. R. 568.

Execution of Indenture — *Evidence of—Seal—Signature—Absence of.*] — In covenant against two defendants the indenture sued upon was produced from the custody of defendants, with whom the apprentice had served until his dismissal. It had four seals, and was signed by the plaintiff, his son the apprentice, and one of the defendants:—Held, that there was evidence of execution by both defendants. *Judge* v. *Thomson*, 29 U. C. R. 525.

Intoxicating Liquors—*Sale of, to Apprentices—By-law Prohibiting.*]—See *Re Barclay and Municipality of Darlington*, 12 U. C. R. 86; *In re Brodie and Town of Bowmanville*, 38 U. C. R. 580; *In re Arkell and Corporation of St. Thomas*, 38 U. C. R. 594.

Justice of the Peace — *Jurisdiction—Wages.*]—Under the Master and Servant Act, C. S. U. C. c. 75, a magistrate has no jurisdiction to award the payment of wages to an apprentice. *In re Perrin and Neil*, 9 L. J. 218.

Partnership — *Covenant — Liability of Surviving Partner.*]—A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice until the end of the term for which he was apprenticed. *Connell* v. *Owen*, 4 C. P. 115.

——— *Dissolution — Effect on Apprenticeship—Pleading.*]—Action for damages by reason of defendant's son, the plaintiffs' apprentice, absenting himself. Plea, that before breach the plaintiffs dissolved partnership:—Held, bad, for not shewing an apprenticeship to plaintiffs as partners, and that a dissolution would render the service impossible. *Modeland* v. *Maguire*, 12 C. P. 407.

——— *Execution of Indenture by one Partner.*]—Upon an application under 29 & 30 Vict. c. 45, for the discharge of a prisoner committed under the Apprentices and Minors Act for disobedience to his masters, on the ground, inter alia, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm:—Held, that it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his co-partners had not been present and assented to the execution. *Regina* v. *McNancy*, 5 P. R. 438, 7 C. L. J. 325.

See SOLICITOR.

II. CONTRACT OF HIRING.

1. *Between Relatives.*

(a) *Parent and Child.*

Specific Contract—*Necessity for.*]—Unless a specific contract of hiring be proved, the court will discountenance an action by a son or daughter against a parent for services performed while living in the parent's house. *Sprague* v. *Nickerson*, 1 U. C. R. 284.

A son working at home upon his father's place would not be entitled to recover for work and labour in the absence of an agreement to that effect. *Campbell* v. *McKerricher*, 6 O. R. 85.

——— *Proof of.*]—The plaintiff sued his father's executor on a promissory note made to him in 1850, by his father, payable seven years after date. According to his own account, the consideration for this note was work done by him for his father from the time he came of age, in 1816, for two years, under an agreement, but the note was handed by the testator to plaintiff's brother for him, and the plaintiff first became aware of its existence in 1858. The father died in 1856, and the plaintiff took his share of the personal property, without saying anything of this claim, which was not referred to in the father's will, made in 1847, though the plaintiff was mentioned in it. He had never asked for payment for his services, and other sons had worked for the father after they came of age without charge. The jury having found for defendant, the court, under the very singular circumstances of the case, refused to interfere, although the making of the note, and the consideration for it as stated by the testator when he made it, were clearly proved. *Wismer* v. *Wismer*, 23 U. C. R. 519.

In an action by a son against his father for wages, the only evidence tending to establish

the relation of employer and employed, beyond the fact of the plaintiff having worked, was that of a witness who swore that six or seven years ago the father had asked him what wages he was getting, and said that the plaintiff wanted $12.50, and that he would give him $12:—Held, sufficient to go to the jury. *Henricks* v. *Henricks*, 27 U. C. R. 447.

Whether Binding on Parent.]—Quære, whether, if an infant hire himself for wages to his parent, the contract is binding on the latter. *Perlet* v. *Perlet*, 15 U. C. R. 165.

(b) *Other Relationships.*

Implied Contract—*Circumstances—Evidence.*]—The plaintiff sued her brother for wages during several years that she had lived with him on his farm, keeping house for him while he was unmarried:—Held, that from this alone the law would not, under the circumstances, imply a promise to pay; and, there being no other evidence of any hiring or promise, that there was nothing to go to the jury. *Redmond* v. *Redmond*, 27 U. C. R. 220.

The mere fact that one brother performs for several years work for another, will not raise the presumption of a promise to pay. Where, therefore, the evidence before the master was, that the claimant had worked in the mill of the testator (his brother) from the year 1861 till 1874, without any express agreement for wages, but the testator had promised to be faithful to the claimant, and the master refused to admit the claim, this ruling was, on appeal, affirmed by the court. *Re Ritchie, Sewery* v. *Ritchie*, 23 Gr. 66.

Where brothers, or sisters, or other near relatives, live together as a family, no promise arises by implication to pay for the services rendered or benefits which, as between strangers, would afford evidence of such a promise; and therefore in an action between relatives so living together for board, wages, or the like, an express promise must be proved by the party making the claim. Redmond v. Redmond, 27 U. C. R. 220, followed and approved of. *Her* v. *Her*, 9 O. R. 551.

——— *Promise of Provision by Will.*]—The plaintiff, when a few months old, was taken by the defendant, his uncle, a farmer, and he continued to live with him and work on the farm, though without any contract of hiring, until he was twenty-six years old, when they quarrelled and the plaintiff was turned off. When the plaintiff was sixteen defendant told him if he behaved well he should have what was left at the deaths of defendant and his wife, and he subsequently made a will in plaintiff's favour, which when they quarrelled after the wife's death the defendant destroyed. The plaintiff then sued defendant for the value of his services during the three years succeeding his attaining his majority. It appearing that during the last three years he had worked the farm on shares with defendant, and received his share, and that during such period no claim was ever made for the three years in question:—Held, that the relationship of master and servant never existed between the parties, so as to entitle the plaintiff to recover. *Morris* v. *Hoyle*, 28 C. P. 598.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule; the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, while they form part of the household. *Walker* v. *Boughner*, 18 O. R. 448.

2. *Companies and Corporations.*

Loan Company — *Executory Contract—Seal.*]—A resolution passed by defendants, that the plaintiff be engaged for the society's office as a clerk, "at three months, on trial, at a salary of $800 per annum:"—Held, looking at the statutes incorporating defendants, C. S. U. C. c. 53, 37 Vict. c. 50 (D.), the duration and character of plaintiff's employment, and the circumstances of his appointment, that the contract, so far as executory, must be under the defendants' corporate seal. *Hughes* v. *Canada Permanent Loan and Savings Society*, 39 U. C. R. 221.

Municipal Corporation — *Seal.*] — Semble, that a municipal corporation may contract to hire a clerk or servant to render service in the ordinary business of the corporation, without using their corporate seal, and such servant may sue on the contract. *Raines* v. *Credit Harbour Co.*, 1 U. C. R. 174.

Railway Company — *President — Oral Contract.*]—Semble, that a contract of hiring as master of a ship, made orally with the president of the defendant company might be binding. *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464.

Trading Corporation — *Implied Contract.*]—The increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has modified the law as to contracts of trading corporations, so as to correspondingly increase their liability on implied contracts. Finlay v. Bristol and Exeter R. W. Co., 7 Ex. 409, considered. *Bain* v. *Anderson*, 27 O. R. 369. See *S. C.*, 24 A. R. 296, 28 S. C. R. 481.

3. *Statute of Frauds.*

Oral Contract — *Not to be Performed within a Year.*] — In an action on an oral agreement made in November, for the hiring

of plaintiff by defendant for a year from the 1st December then next:—Held, that there could be no recovery for wrongful dismissal, the agreement being one not to be performed within a year; and that there being an express agreement in fact, no other agreement for a monthly hiring could be implied. *Harper* v. *Davies*, 45 U. C. R. 442.

A contract of hiring for a year or more, defeasible within the year, is within s. 4 of the Statute of Frauds. The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of $500 a year, for one year, and thereafter at such salary as might be agreed upon: the plaintiff to enter upon his duties and his salary to commence on the 3rd March then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon:—Held, clearly within the statute. *Booth* v. *Pettie*, 6 A. R. 680.

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4. *Termination.*

Acquiescence in Dismissal.] — The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding "and I am now leaving their employment;" —Held, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages. *Burnet* v. *Hope*, 9 O. R. 10.

Death—*Partnership.*]—A contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet* v. *Hope*, 9 O. R. 10.

Destruction of Ship — *Engagement as Master.*] — Where the plaintiff was engaged by the defendants for "the season," i. e., from early in May till some time in November, as master to manage the steamer "Idyl-Wyld" for $1,000, and he continued so employed until September, when the steamer was burnt:—Held, that the plaintiff was not entitled to more than the proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the vessel, and performance was excused by its destruction without the default of the defendants. *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464.

Marriage — *Subsequent Conduct.*] — In 1863 the plaintiff, whose husband had left her, was hired by the defendant as his housekeeper at $10 a month. He, however, never paid her anything as wages, but gave her $30 a month for housekeeping expenses, &c. In 1875 the plaintiff, who for some time previous had been cohabiting with the defendant, went through the form of marriage with him and lived with him as his wife until 1877, having the full benefit of his earnings and position of his wife, when they quarrelled and separated. It appeared that the husband was alive, of which defendant was ignorant, and of which the wife stated she also was, but that she might have ascertained the truth if she had so desired. The plaintiff having sued the defendant for wages for the six years previous to the commencement of the action: —Held, that she could not recover, for that the marriage and subsequent conduct of the parties put an end to any previously existing relationship of master and servant. *Wilkinson* v. *Lawson*, 28 C. P. 603.

See Roche v. *Walsh*, 27 C. P. 555; *Bain* v. *Anderson*, 27 O. R. 369, 24 A. R. 296, 28 S. C. R. 481.

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5. *Wages or Remuneration.*

Evidence of Contract to Pay Wages.] —In an action for wages of the plaintiff's son as defendant's servant, it was proved that defendant had said he would give the son what was going: that the son went to him at twelve years of age, and worked for him four years, and that on his leaving defendant told him to send his father and he would settle with him:—Held, that this was clearly evidence to go to the jury of an agreement between plaintiff and defendant. *Pickering* v. *Ellis*, 28 U. C. R. 187.

Forfeiture of Wages—*Abandoning Employment.*]—When a person hired by the year departs without consent during the year, he forfeits his wages; and it is important that this law should be enforced. Where the plaintiff had taken such a course, and afterwards sued for his wages, and a verdict was given in his favour for £25, the court granted a new trial without costs, though it appeared that defendant had offered him that sum to settle. *Blake* v. *Shaw*, 10 U. C. R. 180.

Implied Contract to Pay Wages—*Expectation of Marriage.*]—Where services were rendered by the plaintiff to the defendant, in expectation that the defendant would marry her, but there was no contract of hiring, and the plaintiff expressly said that she was not to receive and did not expect wages or pay: —Held, that, on defendant's refusal to marry the plaintiff, no action would lie as upon an implied promise to pay the value of such services in money. *Robinson* v. *Shistel*, 23 C. P. 114.

——— *Forisfamiliation.*] — The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relative, to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing, and to give her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family would naturally do:—Held, that the plaintiff had no implied right to remuneration for services rendered after she had attained the age of eighteen, and that in the absence of an express agreement for payment of wages she could not recover. *Peckham* v. *Depotty*, 17 A. R. 273.

Minor's Wages — *Parent's Right.*] — When a minor enters into a contract for hiring, the wages he earns belong to him and

not to his parent. *Delesdernier* v. *Burton*, 12 Gr. 569.

Municipal Corporation—*Appointment of Officer—Salary not Fixed.*]—Where a by-law of a municipality appointed a health officer but did not fix his salary:—Held, that the law would fix his salary at a reasonable sum, regard being had to the services performed. *Bogart* v. *Township of Seymour*, 10 O. R. 322.

Weekly Hiring—*Finding of Jury.*]—The plaintiff was employed by defendant as foreman in a printing office, and sued for wages due him, proving on the trial that defendant was in the habit of settling the amount thereof weekly. The jury on this evidence found that the hiring was a weekly one, and the court refused to disturb the verdict. *Rettinger* v. *Macdougall*, 9 C. P. 485.

See Shanly v. *Grand Junction R. W. Co.*, 4 O. R. 156; *Ellis* v. *Midland R. W. Co.*, 7 A. R. 464; *Watson* v. *Miller*, 23 U. C. R. 217; *Quin* v. *School Trustees*, 7 U. C. R. 130. See also *ante*, 1.

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6. *Yearly Hiring—What Constitutes.*

Engagement by Season—*Termination—Notice.*]—The plaintiff was engaged by one, on behalf of all the owners of a steamer, to sail her by the season. This engagement was oral, and with the understanding that it was not determinable without some notice. He sailed her during the years 1855 and 1856 under this arrangement, during which time the owner who had made the arrangement sold out, and during 1857 the vessel was not run. The plaintiff contended that he was entitled to his salary for 1857, under the agreement:—Held, that the evidence shewed no agreement for that year. *Dick* v. *Heron*, 8 C. P. 67.

Engagement for One Year—*Continuance of Employment.*]—Where a bookkeeper is engaged for the term of one year, and his employment is continued after the expiration of that time, there is no presumption that it is to continue for another year absolutely. *Harnwell* v. *Parry Sound Lumber Co.*, 24 A. R. 110.

——— *Continuance of Employment—Temporary Arrangement.*]—Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case. A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain, his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages, claiming that his retention for the month was a re-engagement for another year on the same terms:—Held, affirming the judgment in 24 A. R. 296, which reversed that in 27 O. R. 369, that, as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reductions of expenses and salaries, that he had been informed that the contracts with the employees had not been assumed by the purchaser, and that upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed. *Bain* v. *Anderson*, 28 S. C. R. 481.

Engagement for Quarter—*Yearly Salary.*]—A resolution passed by the defendants that the plaintiff be engaged as a clerk "at three months, on trial, at a salary of $800 per annum:"—Held, not to support a count alleging his employment for a year. *Hughes* v. *Canada Permanent L. and S. Society*, 39 U. C. R. 221.

General Hiring.]—When the hiring is general, it is presumed by law to be by the year. *Rettinger* v. *Macdougall*, 9 C. P. 485.

See Watson v. *Miller*, 23 U. C. R. 217, *post*, 7; *Fortier* v. *Royal Canadian Ins. Co.*, 29 C. P. 353, *post*, 7; *McGuffin* v. *Cayley*, 2 U. C. R. 308, *post*, III. 5.

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7. *Other Cases.*

Breach of Contract—*Action against Servant — Pleading — Misconduct.*] — *See O'Neill* v. *Leight*, 2 U. C. R. 204.

Construction of Contract — *Appointment — Security — Condition.*] — The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general board for the due performance of his duties; that he did not furnish such security; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the board, and that the board unreasonably, capriciously, and improperly refused to be satisfied therewith:—Held, replication bad; for the furnishing security satisfactory to the board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting bonâ fide under an honest sense of dissatisfaction. *Macmath* v. *Confederation Life Association*, 36 U. C. R. 459.

——— *Commencement of Salary.*]—On the 27th November, 1873, the plaintiff, who resided at Toronto, wrote to the president of the defendant company at Montreal suggesting their entering into the marine business, and offering his services as manager; and on receiving a favourable reply asking what salary he would require, on the 16th December he wrote stating that he would accept a named sum, and was willing to enter into an engagement for three or five years. On the 19th December the defendants replied stating that they agreed to pay the salary named, "the engagement to be for a period of not less than three years," to which the plaintiff replied

accepting the salary and appointment. The correspondence shewed that the plaintiff's duty was to be at Montreal, at which place he was to reside, and that the business usually commenced early in the year, at which time the plaintiff suggested their commencing it, stating that he would then be prepared to begin, and would be down soon after New Year's:—Held, that the proper construction of the correspondence was, that the contract was for three years, and to commence from the beginning of the following year, namely, 1st January, 1874; and that the fact of the plaintiff being paid for a month's services rendered in Toronto at the request of defendants' manager prior to that date, on the basis of the salary agreed upon, could not have the effect of making the contract commence from the first of such prior month, especially when it might reasonably be inferred from the evidence that such services were performed, not under the contract, but with a view of getting it. *Fortier* v. *Royal Canadian Ins. Co.*, 29 C. P. 353.

——— *Conveyance of Land — Services—Condition.*]—Where the plaintiff covenanted that his son should serve the defendant for seven years, in consideration whereof the defendant covenanted at the expiration of the time to convey two hundred acres of land to the son, his heirs and assigns:—Held, that the service for seven years was a condition precedent to the right to the conveyance of the land. *Goodall* v. *Elmsley*, E. T. 4 Vict.

——— *Obligation of Master—Continuance of Employment.*]—By an agreement signed by both parties, plaintiff agreed and bound himself to defendant to act as his bookkeeper, &c., for five years, for a specified sum in each year, and to pay $10 per month for board, to be deducted from his salary, and also to pay his washing and other personal expenses. It was added: "This agreement to commence from 1st February, 1876, and end 1st February, 1880:"—Held, that there was no obligation, either express or implied, on the defendant to continue his business or retain the plaintiff in his employment during the five years. *Roche* v. *Walsh*, 27 C. P. 555.

——— *Payment of Year's Salary in One Event—Voluntary Abandonment.*]—The declaration alleged that defendants, being associated as a gas company, agreed to employ the plaintiff as their manager at a monthly salary, and if anything should occur to prevent the completion of their project, to pay him a year's salary from that time; but should they close their operations by sale of their chartered rights, then it should be in his option to divide equally with them the profits. The plaintiff then averred that he entered into their service, received his salary for nine months and a half, and was willing to remain; that defendants had discontinued and sold their chartered rights, and that thereupon a year's salary became due to him. Defendants (among other pleas) pleaded that long before such sale the plaintiff voluntarily left their service, and was not then nor thereafter in their employment. The jury having found in their favour on this plea:—Held, on motion for judgment non obstante, that defendants must succeed, for the plaintiff was not entitled to the year's salary except in the event of losing his employment by the discontinuance of their operations, it being intended as a compensation for such loss by their act, not by his own. *Watson* v. *Miller*, 23 U. C. R. 217.

Execution of Contract — *Signature by Servant only — Penalty — Liquidated Damages.*]—Where an agreement contains the names of the two contracting parties, the subject matter of the contract, and the promise, it is binding on the party signing it, although not signed by the other party. In this case the defendant entered into a written agreement, whereby, in consideration of a certain salary and allowances to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and if he should leave within that period to pay them $400 as liquidated damages. The agreement was signed by the defendant but not by the bank:—Held, that defendant was bound by it, and having left without excuse he was liable for the $400, which was recovered as liquidated damages, and not as a penalty. *Bank of British North America* v. *Simpson*, 24 C. P. 354.

School Trustees — *Agreement with Teacher—Board.*]—Semble, that school trustees have no power under the School Act, 9 Vict. c. 20, to make an agreement for providing the teacher with board and lodging. *Quin* v. *School Trustees*, 7 U. C. R. 130.

III. Dismissal of Servant.

1. *Justification of.*

Assignment of Grounds—*Necessity for Establishing—Notice of Termination—Agreement to Refer.*]—Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided; and in case of failure of the plaintiff to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines, or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final. To an action by the plaintiff for wrongful dismissal, defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified:—Held, 1. that defendant was bound to establish the ground mentioned in his notice for terminating his agreement; and 2. that the agreement to refer, being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action. *Griggs* v. *Billington*, 27 U. C. R. 529.

——— *Proof of other Grounds — Yearly Hiring—Dismissal for Cause.*]—Where a person in the service of another under a yearly hiring is dismissed for cause by his employer during the currency of any one year, he is not entitled to any remuneration for the portion of the year that he has served; but if he has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service; and, although the employer on dismissing his employee may have

assigned one ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal. *Tibbs* v. *Wilkes*, 23 Gr. 439.

If good cause for dismissal exists it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient. *McIntyre* v. *Hockin*, 16 A. R. 498.

Breach of Agreement—*Insurance Agent —Rival Employer.*]—To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal. *Eastmure* v. *Canada Accident Assurance Co.*, 22 A. R. 408, 25 S. C. R. 691.

——— *Non-disclosure of Trade Secret — Reference to Assess Damages.*] — The plaintiff agreed with the defendant to serve him as manager of a tannery for six years, the agreement reciting that he was to manage the works, while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret process of tanning, which defendant was not to use after the agreement, except in connection with the plaintiff, and to manufacture the leather according to such process. The defendant discharged the plaintiff after about seven months, alleging, among other things, that he was not a practical tanner, and that he was not using the secret process, and had not disclosed it to the defendant:—Held, reversing the judgment reported in 27 Gr. 86, that the plaintiff was a practical tanner within the meaning of the agreement; and that the manufacture of leather was being carried on according to a secret process, and that as no time was limited for disclosing such process, the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for its non-disclosure. A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal. *Blake* v. *Kirkpatrick*, 6 A. R. 212.

Disobedience of Orders—*Agreement— Arbitrary Right—Share of Profits.*]—By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on such machine and assign the same to McR., who, in consideration thereof, agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation. By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against his employer. M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders:—Held, reversing the judgments in 17 A. R. 39 and 16 O. R. 495, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty, without notice and without specifying any particular act calling for such dismissal. Held, also, that such dismissal did not deprive M. of his claim for a share of the profits of the business. *McRae* v. *Marshall*, 19 S. C. R. 10.

——— *Master of Ship — Shareholder in Owners' Company—Damages—New Trial.*]—Action to recover damages for breach of contract. The plaintiff was master of the "George Shattuck," trading between Halifax and St. Pierre and other points in the Dominion. She was owned by the defendant company, the plaintiff being one of the largest shareholders of the company. The plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company:—Held, that, even if the dismissal had been wrongful, the damages ($2,000) were excessive, and the case should go back for a new trial on this ground. 2. That the fact of the master being a shareholder in the corporation owning the vessel had no bearing on the case, and that it was proper to grant a new trial to have the question whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a Judge, if the case should be tried without a jury. *Guildford* v. *Anglo-French S. S. Co.*, 9 S. C. R. 303.

Misconduct—*Condonation — Condition — Future Good Conduct — Jury.*] — When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment, and afterwards, at any distant time, turn him away for that fault, without anything new; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs, the old offence may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury, if, in the opinion of the Judge, there is any evidence of it to be laid before them. In an action for damages for wrongful dismissal tried with a jury, it is for the Judge to say whether the alleged acts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction. *McIntyre* v. *Hockin*, 16 A. R. 498.

——— *Editor of Newspaper — Change of Policy.*]—A. B. and C. B., who had published a newspaper as partners or joint owners, entered into a new agreement by which A. B. assumed payment of all the debts of the business, and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he

wished to sell out, to give C. B. the preference. The agreement provided that: "3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur Bélanger lui allone quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu' au montant de cette somme, et le dit Arthur Bélanger no pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger." The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "rédacteur et directeur" of the newspaper, and for damages:—Held, that C. B. by the agreement had become the employee of A. B., the owner of the paper; that he had no right to change the political colour of the paper without the owner's consent; and that he was rightly dismissed for so doing *Bélanger* v. *Bélanger*, 24 S. C. R. 678.

——— *Manager of Commercial Agency—Speculation.*]—The defendants carried on the business of a commercial agency, of which the plaintiff was general manager, having oversight over the employees, and command of a large amount of money passing through his hands. By the terms of his engagement plaintiff was to be paid a salary of $5,000, and was to devote his whole time, influence, and talents to the successful prosecution of the business, the failure of either party to keep the agreement rendering it void. The plaintiff having engaged in speculating in margins in the stock and grain exchange, through brokers and "bucket shops," had sunk all his private means, and had become indebted to a large extent beyond his ability to pay. It appeared also that he had engaged in such speculations with various merchants, whose ratings he had not altered, although, in his judgment, transactions of that nature materially affected the credit of those engaging in them. Having been requested by the defendants to give up speculating, he refused to do so, stating that if his so doing was a condition of his remaining he would dissolve the connection—whereupon he was dismissed:—Held, that his dismissal was justifiable. *Priestman* v. *Bradstreet*, 15 O. R. 558.

——— *Servant of Railway Company—Drinking on Duty.*]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees; and, although only a recipient of the intoxicating liquor, such conduct constitutes a participation in a criminal offence under s. 293 of the Railway Act, 51 Vict. c. 29 (D.), which prohibits anyone selling, giving, or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *Central Ontario R. W. Co.*, 28 O. R. 241.

See post, 3.

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2. *Notice.*

Contract for Defined Term—*Continuance of Employment—Right to Dismiss.*]—Where a bookkeeper is engaged for the term of one year, and his employment is continued after the expiration of that time there is no presumption that it is to continue for another year absolutely. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage to the contrary, three months' notice is reasonable. *Harnwell* v. *Parry Sound Lumber Co.*, 24 A. R. 110.

General Hiring — *Hiring for a Year — Termination.*]—The plaintiff, having been for many years superintendent of a factory at a salary, was still under engagement for the current year when the factory and business were purchased by a joint stock company, the employment of the plaintiff continuing without further express agreement until after the expiration of the year, when he was dismissed on refusing to submit to a reduction of salary:—Held, at the trial, that, whether the plaintiff's hiring at the time of his dismissal was for a year or not, and whether it was terminable by written notice or not, both of which were questions of fact and not of law, no reasonable notice had been given in this case, and he was entitled to damages. A general hiring is not necessarily to be considered a hiring for a year. This decision was reversed on appeal, the majority of the court holding that, upon the evidence, there was no definite engagement of the plaintiff, but merely a temporary arrangement pending the reorganization of the business. *Bain* v. *Anderson*, 27 O. R. 369, 24 A. R. 296. Affirmed, 28 S. C. R. 481.

See Griggs v. *Billington*, 27 U. C. R. 526; *McRae* v. *Marshall*, 19 S. C. R. 10; *Guildford* v. *Anglo-French S. S. Co.*, 9 S. C. R. 303, *ante*, 1.

See post, 4.

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3. *Pleading.*

Declaration — *Period of Hiring — Averment—Sufficiency.*]—A declaration setting out a contract to pay a certain sum per year for services as long as a person should remain in such service, and a readiness and willingness to continue, will not entitle a party to recover for a wrongful dismissal, unless the declaration plainly and directly allege that the defendant did agree to retain the plaintiff in his service for the period within which he is stated to have been dismissed. *Raines* v. *Credit Harbour Co.*, 1 U. C. R. 174.

——— *School Trustees — Agreement—Corporate Seal—Want of Averment as to.*]—In an action by a teacher against the school trustees appointed by the Act 9 Vict. c. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year, at a certain salary, &c.; and also upon a parol agreement, for wrongfully, and without cause turning the plaintiff away, and preventing him thereby from earning his salary:—Held, that the declaration in both cases was bad in not averring the agreement to have been made with the defendants by their corporate seal. *Quin* v. *School Trustees*, 7 U. C. R. 130.

Plea — *Justification — Dismissal by Third Person.*]—In an action for wrongfully dismissing the plaintiff, a school teacher, a plea

averring the dismissal of the plaintiff by a third party authorized by law to do so is bad, being an argumentative denial of the wrong complained of. *Campbell* v. *Black*, 4 U. C. R. 488.

——— *Justification — Misconduct — Particulars.*]—In an action for wrongful dismissal, where the defence is misconduct generally, it is proper to direct particulars shewing the nature and character of the instances relied on by the employer; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely; and leave should be given to supplement with further particulars if discovered before trial. *Crabbe* v. *Hickson*, 14 P. R. 42.

——— *Justification — Misconduct — Sufficiency.*]—Action upon an agreement in writing between plaintiff and defendant, by which the plaintiff was engaged as editor of a newspaper for one year at a salary payable quarterly. Defendant pleaded that the plaintiff conducted himself in such an improper, offensive, and disobedient manner towards him, that he dismissed the plaintiff as he lawfully might:—Held, a good plea. *Hunter* v. *Foote*, 12 C. P. 175.

——— *Justification—Suspicion of Misconduct—Necessity for Averment of Facts.*]—The second count was for wrongful dismissal of the plaintiff, who had been hired by defendant as a merchant's clerk for a year. Plea, that defendant had large sums of money stolen from him by some persons; that the plaintiff being then in defendant's employment, and having as such clerk had said money in his possession, did not nor would account for the same, whereby defendant had reason to and did suspect that plaintiff had feloniously embezzled the money, and by reason thereof defendant dismissed him:—Held, bad, for no facts were stated to justify defendant's alleged suspicion. *Patterson* v. *Scott*, 38 U. C. R. 642.

See Williams v. *Herrick*, 5 U. C. R. 613, *ante* (Landlord and Tenant); *O'Neill* v. *Light*, 2 U. C. R. 204, *ante* II. 7; *McGuffin* v. *Cayley*, 2 U. C. R. 308, *post* 5.

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4. *Removal of Municipal Officers.*

County Council — *Right to Dismiss — Salary—Right to.*]—Held, that a new county council of a municipality may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary. *Hickey* v. *County of Renfrew*, 20 C. P. 429.

Salary — *Right to—Office Held during Pleasure—Assumpsit—Seal—Demand.*]— The plaintiff had been appointed by the corporation of the city of Toronto, many years before action, weigh-master and clerk of the fish market. He had been voted each year by the common council a sum of money for his services during the then current year. The municipal year began on the 23rd January. For the year 1847, the plaintiff had been voted £90 for his salary. On the 30th June, 1848, the corporation having determined to farm out the plaintiff's office, he was dismissed without notice, and without any allowance being made for his services between January and June, 1848. The plaintiff brought an action of assumpsit against the corporation to recover a year's salary at the same rate as had been voted him the previous year. The corporation resisted the action upon the general grounds: 1. That assumpsit for services rendered as upon an executed contract, not under the corporate seal, would not lie. 2. That the plaintiff held his office at sufferance, both as respected tenure and allowance. 3. That, before action brought, the corporation should have been requested to vote an allowance:—Held, that assumpsit would well lie; and that though the plaintiff, holding his office during pleasure, by the Act of incorporation, could not recover the whole year's salary for 1848, still he was entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847, and that no previous demand upon the corporation to vote an allowance need be proved. *Dempsey* v. *City of Toronto*, 6 U. C. R. 1.

Tenure of Office—*Indefinite Engagement —Notice — Salary — Proportion of.*]—The charter of the city of Montreal, 1889, 52 Vict. c. 79, s. 79 (Q.), gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "à sa discrétion," while the English version has the words "at its pleasure:"—Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the city council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis* v. *City of Montreal*, 27 S. C. R. 539.

——— *Notice—Cause.*]—Municipal officers appointed by the council hold office during the pleasure of the council, and may be removed without notice and without cause. *Wilson* v. *York*, 46 U. C. R. 289.

Validity of Appointment — *By-law—Dismissal during Year.*]—The property of the Grand River Navigation Company having passed to the defendants, a municipal corporation, the plaintiff was appointed manager thereof under their common seal, at an annual salary, from 1st January, 1865, an appointment to which he had been previously recommended in a report of a committee of council, and by a resolution the mayor was authorized to execute the necessary bonds between plaintiff and defendants:—Held, a valid appointment, and not necessary to have been made by by-law. The defendants having dismissed the plaintiff in September, 1867:—Held, that such dismissal, before the end of the year, was wrongful, defendants having recognized plaintiff as their officer during the second year. *Broughton* v. *Corporation of Brantford*, 19 C. P. 434.

5. Other Cases.

Costs—*County Court Action—Amount of Verdict.*]—Where, in an action for wrongful dismissal brought in a county court, the plaintiff recovered a verdict for $50, and the Judge refused a certificate for full costs, a mandamus to the Judge and the clerk of the court to tax such costs was refused. *Coolican v. Hunter*, 7 P. R. 237.

School Trustees — *Right to Dismiss Teacher.*]—The right of public school trustees to dismiss for good cause a teacher engaged by them, necessarily exists from the relation of the parties. By 49 Vict. c. 49, ss. 165, 168 (O.), a proceeding is provided by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as dismissal; but such enactment does not deprive the employers of the inherent right to dismiss. *Raymond v. Cardinal School Trustees*, 14 A. R. 562.

What Constitutes a Dismissal.]—The plaintiff renewed his engagement for a year with the defendant company at Hamilton to serve them in the capacity of bookkeeper. Before the expiry of the time agreed for, P., one of the managers of that branch of the company, removed the books from the possession of the plaintiff, placing another in charge thereof and telling the plaintiff that he did not any longer require his services, but that if W., another officer of the company, had anything for him to do outside he would be very glad, adding, "But I have no further service for you in the office, in fact I do not want you in the office." The plaintiff refused to recognize the right of P. to thus remove him, and it was arranged between the plaintiff, W., and P., that the plaintiff should remain occupying his time with other work until it was ascertained from the head office if P. had the authority he asserted: and on obtaining information in the affirmative, plaintiff left:—Held, that the action of the defendants was a dismissal of the plaintiff. *Lash v. Meriden Britannia Co.*, 8 A. R. 680.

Yearly Hiring — *Action Begun during Year—Common Counts.*]—A clerk or servant engaged on a yearly hiring cannot, on being wrongfully dismissed, recover his year's wages in an action on the common counts commenced before the expiration of the year; and this although the hiring was for one year at a certain sum per month. *McGuffin v. Cayley*, 2 U. C. R. 398.

See Burnet v. Hope, 9 O. R. 10, *ante* II. 4.

IV. Jurisdiction of Justices.

See C. S. U. C. c. 75, (R. S. O. 1897 c. 157); 29 Vict. c. 33 (C.); 36 Vict. cc. 24, 25, 26, (R. S. O. 1897 c. 159).

Associate Justices—*Right to Take Part in Hearing—Summons Issued by One Justice—No Exclusive Right.*]—S., a justice of the peace, upon an information laid before him, issued a summons for non-payment of wages under C. S. U. C. c. 75, s. 12, returnable before himself or such other justices as might then be present. On the return two other justices were present, who, without any objection from S., heard the complaint with him. At the conclusion of the case, these two thought the complaint should be dismissed, while S. was in favour of the claimant, and, against the protest of the other two, made an order requiring the defendants to pay the claim and costs, and in default that a distress should issue; the two other justices made an order dismissing the complaint. Subsequently a formal conviction was drawn up, and signed and sealed by S., the whole proceedings being set out as before him alone, and afterwards a distress warrant was issued by him. The minutes of the evidence taken down by the magistrates' clerk were headed as in a cause before the three justices:—Held, that the conviction was clearly bad, and must be quashed, S. having no exclusive right to deal with the case merely because he had issued the summons. *Regina v. Milne*, 25 C. P. 94.

Certiorari — *Conviction—Confirmation at Sessions.*]—Where it is shewn to a Judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Act, the Judge will order the issue of a writ of certiorari for the removal of the conviction, notwithstanding the confirmation of the conviction by the court of sessions, to whom an appeal was made against the legality of the conviction. *In re Sullivan*, 8 L. J. 276.

Conviction—*Facts Necessary to Give Jurisdiction.*]—The alleged conviction in question in this case (being an action against a justice for false imprisonment and malicious arrest) was made under the supposed authority of C. S. U. C. c. 75, but nothing appeared on the proceedings to shew the relation of master and servant, or any offence punishable under the Act, and it therefore shewed no jurisdiction in defendant. *McDonald v. Stuckey*, 31 U. C. R. 577.

——— *Requisites of.*]—Held, that a conviction under C. S. U. C. c. 75, s. 12, must shew that the person against whom the complaint is lodged was a servant at the time of the conviction or order; that the complaint was "upon oath;" and in what manner the wages are due. *Helps v. Eno*, 9 L. J. 302.

Nature of Hiring—*Effect on Jurisdiction—Conviction — Appeal to Sessions — Certiorari.*]—A. engaged B. and his hired man C. to build a house for him, and agreed to pay B. his ordinary wages, and $1 per diem for C. A. making default was convicted before a magistrate under the Act, and ordered to pay B. $15.50 for C.'s services. A. appealed, and the conviction was quashed. B. then obtained a summons to shew cause why a certiorari should not issue to return the order quashing conviction, &c., into the Queen's bench:—Held, that the applicant had a right to the certiorari; but semble, that the proceedings to reinstate the conviction were unnecessary; that the agreement referred to did not come within the second branch of C. S. U. C. c. 75, s. 3; and semble, that the terms used in the first branch of that section refer to agreements where master, journeyman, and labourer belong to the same calling, and one engages the other to work for him in its exercise. *In re Doyle*, 4 P. R. 32.

——— *Effect on Jurisdiction—Perjury at Hearing.*]—Defendant engaged to work with one T. on the 9th April, 1890, at $8 per month; the bargain being that he was to work for half a month, and as long as he

was found to suit, or until the fall ploughing was done. He left on the 21st November, having told T., about three weeks previously, that he would like to go then, to which T. assented. Defendant complained of T. before a magistrate for not paying his wages, and was indicted for perjury committed on that occasion, and found guilty:—Held, that the hiring was such as to give the magistrate jurisdiction under C. S. U. C. c. 75; and the conviction was affirmed. *Regina* v. *Walker*, 21 U. C. R. 34.

Order for Payment—*Return—Sessions.*]—An order for the payment of money, made by a justice under the Act, is not a conviction which it is necessary to return to the quarter sessions. *Rannev q. t.* v. *Jones*, 21 U. C. R. 370.

School Trustees and Teacher.]—The Act 10 & 11 Vict. c. 23 does not apply to the case of school trustees and school teacher. *In re Joice*, 19 U. C. R. 197.

Termination of Hiring—*Lapse of Time—Effect of—Notice of Action.*]—A magistrate having entertained a case under the Master and Servant Act, C. S. U. C. c. 75, as amended by 29 Vict. c. 33 (C.), and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute:—Held, that the jury were warranted in finding that he did not bonâ fide believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action. *Cummins* v. *Moore*, 37 U. C. R. 130.

V. Liability of Master for Acts of Servant.

1. *Generally.*

Arrest for Non-payment of Taxes—*Act of Collector — Respondeat Superior.*]—See *McSorley* v. *Mayor, &c., of the City of St. John*, 6 S. C. R. 531.

Carrying Passenger on Goods Train—*Responsibility of Railway Company.*]—The defendants agreed with a contractor for the construction of their railway, to furnish a construction train to be used in carrying materials for ballasting and laying the track of a portion of their road, then under process of construction: the defendants to provide the conductor, engine-driver, and fireman; the contractor furnishing the brakesmen. On the 31st October, 1872, after work was over for the day, and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor, but without the authority of the defendants, got on the train. Through the negligence of the person in charge of the train, an accident happened, and the plaintiff was injured:—Held, that the defendants were not liable, for their contract was to carry materials only, not passengers, and the conductor in permitting the plaintiff to get upon the train, was not acting as defendants' agent. *Graham* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 541. See, also, *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451.

Detaining Luggage—*Passenger on Boat—Conviction for Assault — Imprisonment.*]—The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day, by a steamer of the defendants, which ticket had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser demanding the plaintiff's fare, and the latter refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff was injured:—Held, that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. It appeared that the purser had been summoned by the plaintiff before a magistrate for the assault, and a fine imposed, which he paid:—Held, that this, under 32 & 33 Vict. c. 20, s. 45 (D.), though a release to the purser, did not constitute any bar to the present action against the company. Held, also, that the alleged imprisonment of the plaintiff by the purser in his office for non-payment of his fare, not being an act which the defendants themselves could legally have done, they were not liable for it. *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 528.

Impounding Cattle.]—A master is liable for the acts of his farm servant in impounding cattle in his absence, the servant acting within the general scope of his authority. *Spafford* v. *Hubble*, E. T. 7 Wm. IV.

Neglect in Leaving Elevator Shaft Open—*Boy in Charge of Elevator—Damages.*]—On the 13th April, 1883, C., an architect, who had his office on the third flat of a building in the city of Montreal, in which the landlord had placed an elevator for the use of the tenants, desiring to go to his office, went toward the door admitting to the elevator and seeing it open entered, but the elevator not being there, he fell into the cellar and was seriously injured. In an action brought by C. against R., the landlord, claiming damages for the injury suffered, it was proved at the trial that the boy, an employee of R., in charge of the elevator, at the time of the accident had left the elevator with the door open to go to his lunch, leaving no substitute in charge. It was shewn also that C. had suffered seriously from a fracture to his skull, had been obliged to follow for many months an expensive medical treatment, and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial Judge awarded C. $5,000 damages, which was reduced by the Queen's bench to $3,000, on the ground that C. was not entitled to vindictive damages. On appeal to the supreme court of Canada:—Held, that R. was liable for the fault, negligence, and carelessness of his employee, and that the amount awarded was not unreasonable. Held, also, that the sum of $5,000 was not an unreasonable amount, and could not be said to include vindictive damages, but, as no cross-appeal had been taken, the judgment of the trial Judge could not

be restored. *Stephens* v. *Chaussé*, 15 S. C. R. 379.

Negligence—*Liability of Crown.*]—See *Regina* v. *McFarlane*, 7 S. C. R. 216.

Negligent Act of Servant—*Railway Company—Scope of Duty.*]—The plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains, and was thus taking two crow-bars from Port Hope to a point on the line where his men were at work. As the train passed the spot, C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggage man having nothing to do with him, nor any right to meddle with his tools, nor did he ask him to put the bar out:—Held, that defendants were not responsible for the injury, for the baggage man was not acting as their servant or in pursuance of his employment. *Cunningham* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 350.

——— *Street Railway Company— Scope of Employment.*]—A master is not liable for the wrongful act of a servant, though intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority, and is one which the master himself could not legally do. The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger. *Coll* v. *Toronto R. W. Co.*, 25 A. R. 55.

Negligent Driving—*Deviation from Employment — Resumption.*] — A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so ran over and injured a child:—Held, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store and made a fresh start. *Merritt* v. *Hepenstal*, 25 S. C. R. 150.

——— *Hired Vehicle—Servant of Another.*]—A plate glass company hired by the day the general servant and horse and waggon of another company for use in its business, and while so hired the servant in carrying a load of glass knocked a man down and seriously injured him:—Held, reversing the judgment in 26 A. R. 63, that the plate glass company was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the plate glass company. *Consolidated Plate Glass Co.* v. *Caston*, 29 S. C. R. 624.

——— *Parent and Child—Business of Child.*]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf. The father of a lad of twenty, living at home, was held not liable, therefore, for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horse and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. *File* v. *Unger*, 27 A. R. 468.

——— *Wrongful Possession of Horse and Vehicle.*] — In an action for damages for injury caused by negligent driving, it appeared that a servant of defendants on his way for a wrench, for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of defendants wrongfully took possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran plaintiff down, causing the injury complained of:—Held, that defendants were not liable. *Stretton* v. *City of Toronto*, 13 O. R. 139.

Repairing Highway—*Felling Trees—Injury to Traveller — Municipal Corporation.*]—Upon a road, not a regular road allowance, but formed of land given by the owners thereof for their general convenience, statute labour had been performed for some time under the regular pathmaster, and the public funds expended:—Held, that the road must be considered to be under the charge of the municipality, so as to render them liable for its state of repair. The liability to keep in repair extends to overhanging trees liable to fall upon the road and cause damage to passers by. Where, therefore, the defendants' servants, in getting materials on land adjoining the road for its repair, felled a tree, which in falling lodged against another tree near the road, and being left there afterwards fell, and killed the plaintiff's wife while she was passing along the road:—Held, that the defendants were liable. Semble, that the defendants' servants as well as the defendants were liable, but in the event of the latter being held liable, they would have a remedy over against the former. *Gilchrist* v. *Township of Carden*, 26 C. P. 1.

——— *Material Left on Road—Contractor — Respondeat Superior.*] — A township council appointed by resolution two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants, to draw drain tiles, which were required for the work, to the place in question. The work was done by the day, and, while it was being done, the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured—Held, per Burton, J. A., Osler, J.A., dissenting, that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maxim respondeat superior applied. Held per Macleennan, J.A., Osler, J.A., dissenting, that leaving the tiles at the side of the highway was not negligence and did not constitute a nuisance, and that no action lay. In the

result the judgment below was reversed. *McDonald* v. *Dickenson*, 24 A. R. 31.

Seizure of Goods—*Hire Receipt — Assault on Person in Possession—Scope of Servant's Duty — Joint Tort-feasors — Action.*]—Under a hire receipt of an organ sold by defendant R. to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same, without resorting to any legal process. Default having been made of certain instalments due under the hire receipt, defendant R. sent his bookkeeper, the other defendant, and two assistants, with instructions to get the organ. The bookkeeper, taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door and entered the hall, but on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued, and the plaintiff's wife was injured:—Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority. Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrong-doers. Murphy v. City of Ottawa, 3 O. R. 334, distinguished. *Ferguson* v. *Roblin*, 17 O. R. 167.

Selling Liquor without License.]—See INTOXICATING LIQUORS, IV. 4.

Setting out Fire—*Pleading—Allegation as to Servant.*]—Where the declaration alleges that at the time when the negligent or wrongful act was committed A. was the defendant's servant, and that A. did the act, the fact of A. being such servant is a material allegation, which is not put in issue under not guilty. In this case the declaration alleged that the plaintiff and defendant at the time when, &c., were possessed of adjoining land, and that G., being defendant's servant, negligently set out a fire, which extended to plaintiff's land:—Held, that the word "being" referred to the time of the alleged negligence. *Henderson* v. *Chapman*, 3 P. R. 331.

Statutory Duties—*Medical Health Officer—Municipal Corporations.*] — Held, that the medical health officer of a municipal corporation, appointed under R. S. O. 1887 c. 205, s. 37, is not a servant of the corporation so as to make the corporation liable for his acts done in pursuance of his statutory duties. *Forsyth* v. *Cannift*, 20 O. R. 478.

Trespass by Servants—*Nature and Extent of Interference.*] — The plaintiff had workmen working at a steam mill. The defendant, being interested in getting saw logs cut up, removed plaintiff's fireman and placed another man in his stead, and added several of his own workmen to those employed by the plaintiff. Owing to some mismanagement the boiler burst—Held, that there was evidence for the jury that the defendant was a trespasser; that whether he was responsible as such for the injury done to the boiler depended on the nature and extent of his interference, and how far he was implicated in the acts which caused the explosion. *Eligh* v. *Winters*, 5 C. P. 491.

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2. *Independent Contractor.*

Construction of Highway—*Personal Liability of Contractor.*] — The defendant, having been employed by a road company to place stones for them on the road, accidentally caused the death of the plaintiff's servant and horse. On an application for a nonsuit, it was held that the defendant was, under 16 Vict. c. 190, s. 49, personally liable for the damage done. *Lennox* v. *Harrison*, 7 C. P. 496.

Construction of House—*Injury to adjoining House—Act within Scope of Duty.*]—The plaintiff owned a dwelling house for twenty years, and defendant, intending to erect a house on her land adjoining, employed an architect who drew the plans, whereby trenches to lay the foundations in were to be dug adjoining the plaintiff's foundation wall, and the depth of the trenches was shewn. This work was let out to a contractor, and through his negligence in digging the trenches, &c., the wall of the plaintiff's house fell:—Held, that the defendant was liable, for the damage arose, not in a matter collateral to, but in the performance of the very act which the contractor was employed to perform. Butler v. Hunter, 7 H. & N. 826, and Bower v. Peate, 1 Q. B. D. 321, commented upon. *Wheelhouse* v. *Darch*, 28 C. P. 269.

Construction of Municipal Works—*Liability of Corporation—Remedy over against Contractor.*]—Before a building which was being erected by competent contractors for the municipal corporation of a city had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person in the street below. The trap door was a necessary part of the contract, which required all work to be done in a good and workmanlike manner, and imposed responsibility on the contractors for all accidents which might have been prevented by them. Damages were recovered against the corporation on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings, and the corporation, on the same evidence, sought to recover over from the contractors, brought in as third party defendants, on the terms that the findings in the action should be binding on them only as to the amount of damages, and that the question of their liability should be afterwards tried:—Held, that, under the circumstances, the corporation could not recover over against the contractors. *McCann* v. *City of Toronto*, 28 O. R. 650.

——— *Superintendence of Corporation Engineer.*]—See *Murphy* v. *City of Ottawa*, 13 O. R. 334.

Construction of Railway—*Acts not Required by Contract.*]—A railway company is not responsible for damages occasioned by the negligence of sub-contractors in making the road, where such damage was occasioned by said sub-contractors doing acts which they were not required by their contract to do. *Woodhill* v. *Great Western R. W. Co.*, 4 C. P. 449.

Setting out Fire—*Evidence of Agency—Ratification.*]—To sustain an action against the employer for damages occasioned in the performance of a contract, it must be shewn that the contractor is the authorized agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own. In this case the defendants were held not liable for damage done by fire in clearing up an allowance for road. *Carroll* v. *Corporation of Plympton*, 9 C. P. 345.

——*Nature of Employment — Workman.*]—One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land, and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:—Held, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment and subject to his directions; and that defendant was responsible. Quære, whether if M. had been such contractor the defendant would have been liable. *Johnston* v. *Hastie*, 30 U. C. R. 232.

——*Railway Contractors—Interference of Engineer—Evidence.*]—The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing, and clearing the track of trees, &c., to be done to the satisfaction of the defendants' engineer, were let to M. and G., who sublet it to other persons. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage:—Held, that the contractors, not the defendants, were primâ facie responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence did not shew such an interference by the engineer as would make defendants liable. *Gillson* v. *North Grey R. W. Co.*, 33 U. C. R. 128. Affirmed in appeal, 34 U. C. R. 475.

Teamster — *Municipal Corporation—Control.*]—The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place. Judgment in 29 O. R. 273 reversed. *Saunders* v. *City of Toronto*, 26 A. R. 285.

See Walker v. *McMillan*, 6 S. C. R. 241; *Cunningham* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 350, *ante* 1; *Graham* v. *Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 541, *ante* 1; *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451; *McDonald* v. *Dickinson*, 24 A. R. 31, *ante* 1.

VI. Liability of Master for Injury to Servant.

1. *At Common Law.*

(a) *For Acts of Fellow Servants.*

Common Employment — *Quebec Law.*]—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen* v. *Filion*, 24 S. C. R. 482; *The Queen* v. *Grenier*, 30 S. C. R. 42; *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285.

Constructive Negligence of Master—*Foreman.*]—Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow servant, though it may be of a higher grade. *Rudd* v. *Bell*, 13 O. R. 47.

Contributory Negligence — *Defective Appliances—Neglect of Servants to Remedy—Railway Company.*]—Plaintiff as administratrix sued defendants for the death of her husband, caused by a railway accident. It appeared that deceased, with three others and a foreman, were employed with a hand-car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching at speed a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it waving a flag. Two of the men stepped aside when it came up, but deceased and the other man ran in front of it along the track, until it drove the hand-car against and killed them both:—Held, clearly a case of contributory negligence on the part of deceased; and a nonsuit was ordered. One of the brakesmen on the train swore that the brakes were defective, and that the train could not therefore be stopped in obedience to the proper signal, which was up. It appeared, however, that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by the defendants could have done in a few minutes; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped; that it came up at a speed shewing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station, and that at the next station, on the same grade, and with the same brakes, it was stopped without difficulty:—Held, that these facts conclusively shewed the negligence not to have been that of the defendants, but of their servants engaged in a common employment with deceased, and for which, therefore, defendants were not responsible. *Plant* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 78.

Delegation of Duty by Master—*Selection of Servants—Reasonable Care—Competency of Delegate.*]—Held, that a master may,

among other duties, delegate to another the duty of selecting fellow workmen or servants, and that in such a case the master's obligation is limited to the exercise of a reasonable care in selecting a competent person for such purpose. In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question:—Held, that the defendants were not liable. *Wilson* v. *Hume*, 30 C. P. 542.

Exoneration from Liability—*Contract—Crown.*]—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. Griffiths v. Earl Dudley, 9 Q. B. D. 357, followed. In s. 50 of the Government Railway Act, R. S. C. 1886 c. 38, providing that "Her Majesty shall not be relieved from liability by any notice, condition, or declaration in the event of any damage arising from any negligence, omission, or default of any officer, employee, or servant of the minister," the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. Grand Trunk R. W. Co v. Vogel, 11 S. C. R. 612, disapproved. An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the government contributed annually $6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant:—Held, reversing the judgment in 6 Ex. C. R. 276, that the rule of the association was an answer to an action by his widow under Art. 1056, C. C., to recover compensation for his death. *The Queen* v. *Grenier*, 30 S. C. R. 42.

Gas Company — *Procuring Services of Plumber's Journeyman—Evidence—Jury.*]—A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work, and while engaged thereon H. was injured by the negligence of the servants of the company. In an action for damages for such injury:—Held, that by the evidence at the trial negligence against the company was sufficiently proved. Held, further, that whether or not there was a common employment between H. and the servant of the company was a question of fact, and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate court would not interfere. *St. John Gas Light Co.* v. *Hatfield*, 23 S. C. R. 164.

Municipal Corporation — *Repair of Bridge—Reeve Acting as Foreman of Works—Whether Fellow Servant of Workman.*]—The plaintiff, being engaged in the service of the defendants in repairing a bridge, was injured by the fall of the hammer of a pile-driver, caused, as was found, by the negligence of one M. The work was being performed in R.'s section, R. being a councillor, and M., who was the reeve of the municipality, was employed at day wages by R. as foreman:—Held, that M., though reeve, was not acting in that capacity, but as a hired fellow servant with the plaintiff; that there was nothing to so identify the defendants with him in the work, as their chief officer, as to take the case out of the ordinary rule governing the relation of fellow servants; and that the plaintiff therefore could not recover. *Drew* v. *Township of East Whitby*, 46 U. C. R. 107.

Negligence in Excavating—*Liability.*]—Plaintiff, as an employee of defendants, was sent by the foreman of the works to excavate earth from a bank below, while others were loosening it from above. While so engaged a quantity of earth fell down upon him, and broke his leg:—Held, that defendants were not liable, and a nonsuit was ordered. *O'Sullivan* v. *Victoria R. W. Co.*, 44 U. C. R. 128.

Negligence of Servant Attributable to Master — *Under what Circumstances—Pleading.*]—Declaration, that the defendant, an hotel keeper, and not a contractor or builder, was engaged in erecting a building, being an addition to an hotel, and employed one G. as architect of said building to furnish the plans, select the materials, employ men to erect the building, and generally to superintend the erection thereof for the defendant, and represent the defendant therein; that G., in pursuance of his duty and authority, employed one M. as sub-foreman in the erection of the building, and the plaintiff as a workman under him; that G. directed M. to remove some lumber to the upper floor, which the plaintiff, with other workmen under the defendant, was ordered by M. to do; and the plaintiff, in pursuance of his employment, was lawfully on the upper floor, the said floor having been constructed by the defendant and G. in the pursuance of his duty and employment as aforesaid, when, by the insufficiency of the beams supporting said floor—which insufficiency was known to the defendant, though unknown to the plaintiff—and the negligence of G. and the defendant in the construction of said floor and building, the said floor gave way, and thereby plaintiff was injured:—Held, on demurrer, that the declaration shewed a good cause of action against defendant, for it must be taken to mean that the defendant had the building under his own care and supervision, so that what G. did was the act of the defendant only, and not the act of G. as a fellow workman with the plaintiff. Remarks as to the use of ambiguous language in pleading. *Macdonald* v. *Dick*, 34 U. C. R. 623.

Negligence of Servant Attributable to Master—*Interference by Director—Competency of Superintendent.*]—In an action for damages by the administratrix of M., an employee of the defendant company, who was killed by an explosion of defendants' powder mills, caused by a portion of the machinery being out of repair, it was shewn that W., a director of the company, had some time before the explosion, when the works were idle, given directions to C., the superintendent and head of the works, to have the defective portions of the machinery repaired before recommencing operations, but C. neglected to attend to it, and the repairs were not made. It was not shewn that W. in any way assumed to direct the practical working of the mills, or that he had any special knowledge or ability to do so,

and there was no suggestion that C. was an incompetent or improper person to employ:—Held, reversing the judgment in 12 O. R. 58, that the intervention of W. had not taken the case out of the general rule of law that the defendants were not responsible for an accident due to the negligence of a fellow servant, which C. was. *Matthews* v. *Hamilton Powder Co.*, 14 A. R. 260.

Negligent Employment of Incompetent Person — *Railway Company.*]—Action against a railway company for the death of one D., an engine driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of the Stratford station, so as to prevent D.'s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff:—Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person; that for R.'s neglect, he being D.'s fellow servant, the plaintiff clearly could not recover; and a nonsuit was ordered. *Deverill* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 517.

Quarry Company — *Works — Director Acting as Foreman—Defective Appliances.*]—One of the directors of a quarry company was appointed foreman of the works, with full powers of management, subject to the directors' control, and to such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of the foreman's negligence while acting under his instructions, brought an action at common law against the company:—Held, so far as the action rested upon the liability of the company through the foreman, that there was no liability, as he was merely a fellow servant of the plaintiff. Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations. *Fairweather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604.

Railway Company—*Person Employed in Construction—Travelling by Train—"To be Safely Carried."*]—The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:—Held, that if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May* v. *Ontario and Quebec R. W. Co.*, 10 O. R. 70.

Railway Contractor—*Person Employed by—Railway Company.*]—Declaration, that I. S. (husband of the plaintiff) was a servant and workman employed by certain contractors with defendants in ballasting defendants' railway, and in performing such work certain cars and engines under the guidance and management of defendants' servants were used for the transport of materials and the conveyance of workmen employed by the contractors, said workmen not being servants of the defendants, to and from their residence and their work, for reward to the defendants; and that I. S., in his lifetime, being such workman, became a passenger on a car drawn on said railway by a locomotive under the defendants' management, to be carried from his place of work home, and as such workman and passenger then was lawfully on said car, yet the defendants so negligently managed the train, &c., that I. S. was thereby injured, and died. Semble, that the deceased could not have been considered a fellow servant with those employed by the defendants. *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451.

See, also, *Torpy* v. *Grand Trunk R. W. Co.*, 20 U. C. R. 446.

Tramway—*Neglect of Fellow Servant to Replace Rail—Patent Defect.*]—The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employees were permitted to be carried on the cars used. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction. The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, and it was shewn that B. neglected to replace the rail, though he was aware of its being displaced:—Held, that the accident having been caused by the negligence of a fellow servant, the defendants were not liable. Quære, apart from this, whether the plaintiff could have recovered, he being aware that the road was without ballast, the defects in construction being patent, and such tramways being known not to be substantially built or of a permanent character. *McFarlane* v. *Gilmour*, 5 O. R. 362.

See Canadian Coloured Cotton Mills Co. v. *Talbot*, 27 S. C. R. 198, *post* 4; *Carnahan* v. *Robert Simpson Co.*, 32 O. R. 328, *post* 2.

(b) *Owing to Dangerous Machinery or Dangerous Processes.*

Absence of Direct Evidence as to Cause of Accident.]—*See Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595; *Tooke*

v. *Bergeron*, 27 S. C. R. 567; *Cowans* v. *Marshall*, 28 S. C. R. 161; *Canada Paint Co.* v. *Trainor*, 28 S. C. R. 352; *Dominion Cartridge Co.* v. *Cairns*, 28 S. C. R. 361; *Canadian Coloured Cotton Mills Co.* v. *Kervin*, 29 S. C. R. 478; *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285; *Wilson* v. *Boulter*, 26 A. R. 184.

Defect—*Knowledge of Master—Nonsuit.*]—Across the hatchway of defendant's vessel there was a string beam fastened by a cleat for the support of the hatch, and the men in descending the hatch to trim or load the vessel used to swing down it, holding on either by the beam or the combings of the hatch. The plaintiff, engaged as a hand on board, while descending the hatch, rested his whole weight on the beam, and the cleat happening to be loose or out, he was thrown down and injured. There was no proof of knowledge either by defendant or the master of the vessel of any defect, or any defective construction or unsoundness of material, nor was it shewn when or how the cleat came out:—Held, that there was no evidence of negligence in defendant so as to render him liable, and a nonsuit was upheld. *Jarvis* v. *May*, 26 C. P. 523.

Defective System—*Notice to Master of.*]—A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery, or a defective system of using the same, by reason of his failure to give notice to the employer of such defect. *Webster* v. *Foley*, 21 S. C. R. 580.

Employment of Child—*Warning—Evidence—Jury.*]—The plaintiff, a boy of twelve, in the employment of the defendant, was left with two other boys to attend to a flax scutching machine. He had never attended to the machinery before, and he said he had received no instructions. The two boys were sent away, and the plaintiff, in attempting to replace a roller, which frequently came out of its place, had his arm crushed in some cog-wheels which were not covered. These wheels were on the opposite side of the machine from where the plaintiff was required to work, and the roller could readily have been replaced without going near them. The plaintiff further said that he put the roller on as he had seen the boys do it, and that he had not been warned not to go near the cog-wheels. The defendant's evidence, on the other hand, shewed that the plaintiff had been distinctly warned; that the other boys had not placed the roller on as plaintiff did; and that the plaintiff had been shewn how to put it in. It also appeared that the machine had been in use several years without an accident, although boys had constantly been employed about it:—Held, that there was evidence to go to the jury, if the plaintiff's statements were true; and a nonsuit was set aside. *Vicary* v. *Keith*, 34 U. C. R. 212.

Servant's Knowledge of Danger.]—In an action by a servant for an injury sustained, in consequence of the guard being out of place in working a circular saw which he had to attend:—Held, that it was not sufficient to shew that the master knew the saw was not guarded; but it must also appear that the servant was ignorant of that fact, and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off, as it was his duty to have done, he could not, therefore, make the master responsible to him for the consequences of his own neglect of duty. *Miller* v. *Reid*, 10 O. R. 419.

The plaintiff, having had years of experience in running iron work machines and having been previously employed by the defendants in their wood working manufactory, hired a second time and was injured in working a jointer which he was told other men had been injured at. In an action against the employers:—Held, that plaintiff knew from his own inspection and experience, that the machine was dangerous, that it needed caution and firmness in operating; that the risks were open to his observation; and that his opportunities and means of judging of the danger were at least as good as those of his employers; and a motion to set aside a nonsuit was dismissed. *Rudd* v. *Bell*, 13 O. R. 47.

The defendants were the owners of a tannery for use in which a hoist had been built for them by a contractor, and one of them was, with the plaintiff, one of the defendants' servants, aiding the contractor in putting the hoist in place and testing it. Owing to a defect in the mechanism, of which the plaintiff and defendants were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall, but their absence had nothing to do with the occurrence of the accident:—Held, that the defendants were not liable. *Ross* v. *Cross*, 17 A. R. 29.

In an action by a servant against a master to recover damages for injuries sustained by the plaintiff, owing to an accident which occurred by reason of a defect in the machine which he was working, the defect being the giving way of a string which worked a brake automatically, thus saving the necessity of an attendant to work the brake by hand, it appeared that the plaintiff knew of the defect and of the likelihood of an accident, he having frequently replaced the string when worn, and that he worked and continued to work the machine without help from any other person, and without any complaint:—Held, that the plaintiff was volens and could not recover at common law. *Poll* v. *Hewitt*, 23 O. R. 619.

——— *Want of Warning.*]—The plaintiff, while employed in removing the cut pieces from a pair of metal-cutting shears worked by steam power, was struck by a flying piece of metal and severely injured. The machine was perfect of its kind, and it was not shewn that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut:—Held, that there should have been some system of giving warning when steel was about to be cut, and that, this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law. *Choate* v. *Ontario Rolling Mill Co.*, 27 A. R. 155.

See Plant v. *Grand Trunk R. W. Co.*, 27 U. C. R. 78, *ante* (a); *McFarlene* v. *Gilmour*, 5 O. R. 302, *ante* (a); *Matthews* v. *Hamilton Powder Co.*, 14 A. R. 260, *ante* (a); *Faircrather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604, *ante* (a); *Murphy* v. *City of Ottawa*, 13 O. R. 334, *post* (c); *Canada Southern R. W. Co.* v. *Jackson*, 17 S. C. R. 316; *Canadian Coloured Cotton Mills Co.* v. *Talbot*, 27 S. C. R. 198, *post* 4; *Roberts* v. *Hawkins*, 29 S. C. R. 218; *Burland* v. *Lee*, 28 S. C. R. 348; *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 580; *Citizens Light and Power Co.* v. *Lepitre*, 29 S. C. R. 1.

(c) *Other Cases.*

Assault—*Moderate Correction—Pleading.*]—Where in trespass for an assault and battery, for wounding and kicking, and for tearing the plaintiff's clothes, the defendant justified as for a moderate correction of the plaintiff as his servant—the plea was held bad on demurrer, as it afforded no answer to the wounding and tearing the clothes of the plaintiff. *Mitchell* v. *Defries*, 2 U. C. R. 430.

Crown—*Negligence of Servants or Officers—Liability for.*]—See CROWN.

Municipal Corporation—*Contractor—Action by Workman—Joint Action—Judgment against One—Election—Knowledge of Danger—Interference by Corporation.*]—The corporation of the city of Ottawa contracted with the defendant Doyle to lay down sewer pipes on certain streets in the city of Ottawa, and by their engineer and inspector the corporation exercised superintendence over the work as it progressed. Doyle employed one McCallum to engage workmen and oversee the work; McCallum engaged Murphy, the husband of the plaintiff. During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls thereof, thereby causing the death of Murphy:—Held, that under the evidence the corporation were not liable; that no recovery ought to have been had against either of the defendants, as there was no evidence from which it could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, of which he had quite as much knowledge and means of knowledge as his master, and with the knowledge of which he voluntarily engaged in it; but, as defendant Doyle had not moved against the verdict found against him, it was allowed to stand. Held, also, that the corporation by their inspector had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within Stephens v. Commissioners of Police of Thurso, 3 Court of Session Cases, 4th series, 535. Held, also, that the action being founded on the relationship of master and servant, both defendants could not be held liable, and that the plaintiff, by retaining her judgment against Doyle, had elected to treat the wrongful act or omission as his, and had therefore no recourse against the corporation. *Murphy* v. *City of Ottawa*, 13 O. R. 334.

See Williams v. *Bartling*, 29 S. C. R. 548.

2. *Factories Act.*

[*See* R. S. O. 1897 c. 256.]

Child Labour—*Injury to Child—Cause of Action.*]—The employment of a child under fourteen years of age in a factory at work other than of the kinds specified in s. 5 of the Factories Act, R. S. O. 1897 c. 256, as proper for children, though it subjects the employer to a penalty, does not give rise to an action for damages, unless there be evidence to connect the violation of the Factories Act with the accident. *Roberts* v. *Taylor*, 31 O. R. 10.

Mechanical Device—*Approval by Inspector—Onus.*]—By s. 15, s.-s. 4, of the Factories Act, R. S. O. 1877 c. 208, "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident." The negligence charged was the manner in which the heads of the bolts were held and the nature of the safety catch used upon the cage of an elevator. There was no evidence to shew whether this particular safety catch had been approved by the inspector:—Held, that the onus was upon the plaintiff to prove that the catch had not been approved, and, if it had neither been approved nor disapproved, the question still was whether the catch used was of such a character and pattern as to make the use of it unreasonable. *Black* v. *Ontario Wheel Co.*, 19 O. R. 578.

——— *Approval by Inspector—Cause of Action.*]—By s. 20, s.-s. 1 (d), of the Ontario Factories Act, R. S. O. 1897 c. 256, in every factory all elevator cabs are to be provided with some suitable mechanical device to be approved by the inspector, whereby the cab will be securely held in the event of accident:—Held, that the defendants' departmental store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator in the store, by the fall of which the plaintiff was injured, were suitable was upon the defendants; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved; it was sufficient that the kind of device used had been approved. Held, also, that, in order to render the employers liable to a civil action, it was incumbent on the plaintiff to make out the causal connection between the omission to provide the statutory safeguards and the injury complained of; and that she had not done. *Carnahan* v. *Robert Simpson Co.*, 32 O. R. 328.

Quebec Factories Act—*Civil Responsibility—Statutable Duty, Breach of—Police Regulations.*] — The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendants' engine and machinery. In an action by the widow for damages, the evidence was altogether circumstantial, and left the manner in which the accident occurred a matter of conjecture:—Held, that, in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise, and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence, or neglect of the person sought to be charged with responsibility, and, such proof

being entirely wanting, the action must be dismissed. The provisions of the Quebec Factories Act are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the civil code. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595.

3. *Liability of Employers (B. C.) Act.*

Defect in Way — *Set of Cogs — New Trial.*]—Action by a workman in the defendants' mill for damages for injuries received while passing over a set of cogs, left uncovered, upon which he slipped, and his leg was dragged in by the cogs before they could be stopped. The jury found that there were other passage ways besides the cogs for the plaintiff to use in fulfilling his duties, but that none of them was sufficient, and the way used was more expeditious; that the non-covering of the cogs made the "way" defective; and that the plaintiff was not unduly negligent. The trial Judge, however, dismissed the action, upon the ground that the plaintiff voluntarily incurred the risk. His decision was reversed by the supreme court of British Columbia, and a verdict ordered to be entered for the plaintiff, with damages as assessed by the jury. The supreme court of Canada allowed an appeal by the defendants, and ordered a new trial, being of opinion that it was not sufficiently established that the plaintiff had of necessity (reasonable and practical necessity) to pass over a set of cogs which, being uncovered, were in a dangerous and defective state, as alleged in the statement of claim. *British Columbia Mills Co.* v. *Scott*, 24 S. C. R. 702.

4. *Workmen's Compensation for Injuries Act.*

[*See* R. S. O. 1897 c. 160.]

(a) *Action, Notice of.*

Notice of Objection—*Pleading.*] — The provisions of s. 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it. *Cavanagh* v. *Park*, 23 A. R. 715.

To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice of the objection must be given in accordance with the provisions of s. 14. Cavanagh v. Park, 23 A. R. 715, applied. *Wilson* v. *Owen Sound Portland Cement Co.*, 27 A. R. 328.

Signature—*Necessity for.*]—A notice of action under the Workmen's Compensation for Injuries Act does not require to be signed or to be on behalf of any one. *Mason* v. *Bertram*, 18 O. R. 1.

Sufficiency of.]—Solicitors for the plaintiff before action wrote as follows to the defendants:—"We have been consulted by Mr. J. Cox concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf:"—Held, that this was sufficient notice of action to satisfy the requirements of 49 Vict. c. 28, s. 7, and s. 10 (O.). Stone v. Hyde, 9 Q. B. D. 76, followed. *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 399.

See, also, NOTICE OF ACTION.

(b) *Cause of Accident not Apparent.*

Bursting of Boiler—*Absence of Evidence—Inference.*]—B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R. B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report of one of the defendants' officials it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under the Workmen's Compensation for Injuries Act, 49 Vict. c. 28, s. 3, s-s. 5 (O.):—Held, that the defendants were not liable. *Brunell* v. *Canadian Pacific R. W. Co.*, 15 O. R. 375.

Conjecture — *Evidence.*] — Action under the Workmen's Compensation for Injuries Act, against a railway company, by the deceased's administratrix, for damages sustained through deceased's death, while engaged, as alleged, in coupling the defendants' cars, caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture:—Held, that the action was not maintainable. The plaintiff was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. Hicks v. Newport, &c., R. W. Co., 4 B. & S. 403 *n.*, distinguished. *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299.

Explosion—*Evidence of Experts.*]—Where a workman was killed by the explosion of a

tank in which refuse was being boiled into soap, and there was no direct evidence as to the cause of the explosion, evidence of experts who had examined the tank, stating that the screws fastening the tank cover were defective, and that the explosion was probably due to this cause, was held sufficient to justify the submission of the case to the jury. *Badcock* v. *Freeman*, 21 A. R. 633.

See Badgerow v. *Grand Trunk R. W. Co.*, 19 O. R. 191, *post* (d).

(c) *Machinery.*

Defect—*Factories Act.*]—By s. 15 of the Factories Act, R. S. O. 1887 c. 208, it is provided that all belting, shafting, gearing, flywheels, drums, and other moving parts of the machinery shall be guarded:—Held, that the word "moving" is used in its transitive sense, and signifies "propelling," and that no duty is imposed by the section upon owners of sawmills to guard the saws which are propelled by the moving parts of the machinery. By s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1887 c. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work:—Held, that the want of a guard to a saw was not a defect within the meaning of this provision. Such a defect must be an inherent defect, a deficiency in something essential to the proper use of the machine. And where a workman in a sawmill was injured by being thrown against an unguarded saw, and it was shewn that a guard would have prevented the injury:—Held, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes. An appeal by the plaintiff from this judgment, 19 O. R. 76, was dismissed, the court holding that, on the evidence, no negligence on the part of the defendants was shewn. The court also held that, as the injury in question did not occur in connection with the user of the saw, it was unnecessary to consider whether the absence of a guard was a "defect" or not within the meaning of the Workmen's Compensation for Injuries Act; and also that, as there was no evidence as to the number of persons employed on the premises in question, it was not necessary to consider the points raised as to the construction of the Factories Act. *Hamilton* v. *Groesbeck*, 18 A. R. 437.

The plaintiff, a lad of seventeen, worked at a stamp-machine in the defendants' factory, his duty being to keep it clean. Being refused proper material for this purpose, he used pieces of bagging. Attempting to clean it while in motion, the bagging got caught in the cogwheel, and he was injured:—Held, that the defendants, knowing that the plaintiff was working with improper appliances in a dangerous place, was guilty of negligence in not making provision for his safety, by supplying him with proper material, and in not having the machinery stopped while the cleaning was going on, and the plaintiff was entitled to retain the verdict found in his favour at the trial. As the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories Act, the failure to furnish one was per se evidence of negligence on the part of the defendants. *Thompson* v. *Wright*, 22 O. R. 127.

A drilling machine manufactured by a well-known maker, and similar to those generally in use, was put up for the defendants in their factory. The plaintiff, a workman acting under the orders of the defendants' foreman, for the purpose of oiling the shafting on the arm in which the drill worked, tried to push a portion of it up and down the arm, and in order to do so, knowing that the machine was in motion, pressed his body against the revolving drill, which was not in motion when the order was given to him, and his clothes catching on an unguarded set-screw on the spindle, he was seriously injured. No other accident had occurred on the machine, which was quite new and in good order, and which, according to the evidence, was sometimes made with the set-screw sunk in the spindle. In an action for damages the jury found that the accident was caused by the defendants' negligence, and without any negligence on the part of the plaintiff. On appeal, a divisional court was equally divided. Held, by the court of appeal, that the absence of a guard to a projecting screw in a revolving spindle, part of a radial drill, which was used to fasten the drilling tool into the spindle, is a violation of the provisions of the Factories Act, R. S. O. 1887 c. 208, s. 15, the spindle being a "moving part of the machinery," within the meaning of that Act, and it is also a "defect in the condition of the machinery," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. 1887 c. 141, s. 3, as amended by 52 Vict. c. 23, s. 3 (O.), and in either view damages may be recovered from an accident caused by its absence. Held, by the supreme court of Canada, affirming the decision of the court of appeal, that the jury were warranted in finding that there was negligence in not having the screw guarded; that, as the foreman knew that the plaintiff had no experience as to the ordinary mode of doing what he was told, he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care. *O'Connor* v. *Hamilton Bridge Co.*, 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598.

——— *Factories Act—Contributory Negligence.*]—The plaintiff was employed by a subcontractor to do work upon lumber after it had left the defendants' saw-mill, and before it was shipped. To get some water to drink, the plaintiff went through the saw-mill (in which he had no business in connection with his work), and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some planks, he fell into an unguarded hole, in which a saw was working, and was injured:—Held, that under these circumstances he had no claim against the defendants, either under the Ontario Factories Act, R. S. O. 1887 c. 208, or the Workmen's Compensation for Injuries Act, ib. c. 141. Although the plaintiff might be a person in the employment of the defendants within the meaning of the Ontario Factories Act as amended, yet the duties prescribed by that Act can be enforced only by penalty; no civil liability is imposed on the

owner of the factory, if, apart from the statute, he would not have been liable at common law, except that the Act may be used for evidential purposes in regard to the place of the accident being dangerous and requiring protection (as e. g. per Ferguson, J., s. 15 shews the hole in the case to have been.) But here the defendants would not be so liable, on account of the contributory negligence of the plaintiff. *Finlay* v. *Miscampbell*, 29 O. R. 29.

——— *Knowledge—Appreciation of Risk.*]—To disentitle a workman to recover damages for a defect in a machine, under the Workmen's Compensation for Injuries Act, he must not only have a knowledge of the danger he incurs, but also a thorough comprehension or appreciation of the risk he runs. The plaintiff, when formerly in the employment of the defendants, had knowledge of a defect in a machine in their factory, and after leaving had returned to such employment, and had again worked at the machine, knowing that the defect, of which the defendants were aware, had not been remedied. The jury having found that he did not fully appreciate the risk he ran:—Held, that he was entitled to recover. *Haight* v. *Wortman and Ward Manufacturing Co.*, 24 O. R. 618.

——— *Knowledge—Evidence for Jury.*]—T. was employed as a weaver in a cotton mill, and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom-fixer," whose duty it was to keep them in proper repair. The evidence shewed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and, as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom-fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. In an action at common law and under the Workmen's Compensation Act 1892, T. obtained a verdict, which was affirmed by the court of appeal:—Held, that the "loom-fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the plaintiff was entitled to recover under the Act of 1892, but not at common law. *Canadian Coloured Cotton Mills Co.* v. *Talbot*, 27 S. C. R. 198.

——— *Unfitness for Purpose.*]—A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160. Owing to changes in legislation, Hamilton v. Groesbeck, 19 O. R. 76, declared to be no longer an authority. *Wilson* v. *Owen Sound Portland Cement Co.*, 27 A. R. 328.

——— *Volenti non Fit Injuria.*] — The plaintiff was employed in the laundry department of the defendants' factory, and while she was standing on a bench to open a window for the purpose of letting steam and hot air escape, her hair was caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of the window, and she was severely injured:—Held, that she could not be said to have been doing an act so entirely unconnected with her employment and duties as to be regarded as a mere volunteer and as such outside the protection of the Act, and that there was a "defect in the arrangement" of the machinery within the meaning of the Workmen's Compensation for Injuries Amendment Act, 52 Vict. c. 23, s. 3 (O.), that is, an element of danger arising from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose to which it is to be applied and used. The effect of s. 7 of that Act and what is meant by voluntarily incurring risk of injury considered. *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117.

——— *Volenti Non Fit Injuria—Factories Act.*]—In the defendants' dye-house, over the tanks containing the dye, was certain machinery consisting of a series of rollers for wringing the dye out of the warp as it came from the tanks, having cogwheels at the ends thereof where they connected with the frame of the machine. There were spaces between the tanks where planks were placed for the workmen to pass along, which were always in a slippery condition. The plaintiff, a workman employed by the defendants, who was aware of the absence of a guard, but did not consider it a defect, while returning along one of these planks from the discharge of his duty in disentangling a warp, slipped, and by reason, as was found by the jury, of the defendants' negligence in not guarding the wheels, in trying to save himself, caught his hand therein and was injured:—Held, that the cogwheels constituted part of the machinery, and, being dangerous, should have been guarded under s. 15, s.-s. 1, of the Factories Act, R. S. O. 1887 c. 208; and that the non-guarding constituted a "defect in the condition of the machinery" under the Workmen's Compensation for Injuries Act, R. S. O. 1887 c. 141. McCloherty v. Gale Manufacturing Co., 19 A. R. 117, commented on. Held, also, following Baddeley v. Earl Granville, 19 Q. B. D. 423, that the maxim volenti non fit injuria does not apply where an accident is caused by the breach of a statutory duty. *Rodgers* v. *Hamilton Cotton Co.*, 23 O. R. 425.

——— *Want of Reasonable Care—Evidence.*]—In an action by a workman against his employers to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants' factory, the negligence charged was in the manner in which the heads of the bolts were held, and in the nature of the safety catch used upon the cage. There was no evidence to shew that the defendants were aware or should have been aware that the bolts were improperly held. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shewn that the alleged defect might readily have been discovered:—Held, that the defendants were not liable upon this head. Murphy v. Phillips, 25 L. T. N. S. 477, distinguished. The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used:—Held, that the defendants were not liable upon this head, unless there was a want of reasonable care on their

part in using the appliance which they used; and it was no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years previously by others, or even that it was at present in use, and that a witness thought it might have prevented the accident; and as no negligence was shewn, the defendants were not liable either at common law or under the Workmen's Compensation for Injuries Act. *Black* v. *Ontario Wheel Co.*, 19 O. R. 578.

——— *Warning — Contributory Negligence.*]—The lower blade of a pair of steam shears was attached by a bolt to an iron block, called the bed-plate, some eight inches thick, upon which the iron to be cut was put, and along the face thereof, where the workman stood, was a guard three inches high, under which the iron was placed and pushed forward to the shears, the only danger being when the iron became too short to allow the guard to be any protection. The bolt was too long, projecting out about four and a-half inches, which it was urged was a defect in the machine, making it dangerous, and the cause of the accident to the plaintiff, but the evidence failed to shew that it was insufficient for the purpose for which it was used, or likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked several times at it prior to the accident without injury or fear of any, the accident being caused by the piece of iron he was holding becoming too short to hold outside of the guard, and in attempting to hold it down with another piece his fingers got jammed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given plaintiff except a warning not to let his fingers get too close to the shears:—Held, that the defendants were not liable for the accident, there being no evidence that the bolt was insufficient for the purpose for which it was used to bolt the under side of the shears to the bed-plate, or that from its length it was likely to injure a person working at the machine. Quære, whether there was evidence of contributory negligence on the plaintiff's part. *Bridges* v. *Ontario Rolling Mills Co.*, 19 O. R. 731.

Infant — *Employment of—Danger—Factories Act.*]—The plaintiff, a boy under twelve years of age, was hired to work a hoist for the defendants in their factory. The elevator was worked by ropes on the outside of the cab or frame, which was handled by the person standing within, through a square opening cut in the framework. The plaintiff was instructed for a few hours by a bigger boy how to raise and lower the hoist, and was cautioned not to put his head out of the opening when the hoist was going. On the occasion in question the elevator stopped when going up, and the plaintiff put his head out of the opening to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in an action which he brought against the defendants for negligence:—Held, that the nonsuit should be set aside and a new trial ordered with costs to the plaintiff in any event. The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories Act; and, for this reason, the employer has to exercise more than ordinary precautions for the well-being and safeguarding of minors who have been put into factory work contrary to the prohibition of the legislature. *O'Brien* v. *Sanford*, 22 O. R. 136.

Obedience to Orders—*Improper Orders.*]—The defendants, an iron works company, used in their business a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty, was injured. The plaintiff, though apprehensive of danger, was not aware of the nature or extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workmen's Compensation for Injuries Act for the damage sustained by the plaintiff:—Held, that defendants were liable. *Madden* v. *Hamilton Iron Forging Co.*, 18 O. R. 55.

——— *Negligence of Person in Charge.*]—Held, that the evidence in this case, in which the plaintiff, while at work in the sweat-box of a sewer pipe company and engaged in placing the clay in the press, was, according to his witnesses, injured by reason of S., who was in charge of the press, causing the plunger to come down before the plaintiff had given the word, and while his hand was in the press, primâ facie brought it within s. 3, s-s. 3, of 49 Vict. c. 28 (O.), and the nonsuit must be set aside and a new trial had. If, while in obedience to orders, injury arises through the negligence of one giving the orders, it is sufficient under this sub-section, and it is not necessary that an order negligent per se should have been given, nor is any specific order necessary, general prior orders being sufficient. *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300.

Omission of Statutory Duty—*Cause of Accident.*]—K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery, which caused the death of K., contrary to the provisions of the Workmen's Compensation Act:—Held, that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident. *Canadian Coloured Cotton Mills Co.* v. *Kervin*, 29 S. C. R. 478.

Warning — *Change of Work.*]—Semble, that, as the defendants' foreman had been in the habit of warning the workmen when steel was to be cut, and had neglected to do so on the occasion when the plaintiff was injured, there was liability under the Workmen's Compensation for Injuries Act. *Choate* v. *Ontario Rolling Mill Co.*, 27 A. R. 155.

See British Columbia Mills Co. v. *Scott*, 24 S. C. R. 702, *ante* 3.

(d) *Plant, Defects in.*

Brake on Railway Car — *Contributory Negligence.*]—Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendants' railway on which deceased was employed as a brakesman:—Held, that there could be no recovery, for the evidence failed to shew how the accident happened, the contention that it was the defective brake being mere conjecture; and, even had it been the cause, it would have been no ground of liability, for under the defendants' rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor; and if he made the examination he apparently discovered no defect, as he made no report, a latent defect being no evidence of negligence; and if he omitted to make such examination, &c., then the accident would be attributable to his own negligence. *Badgerow* v. *Grand Trunk R. W. Co.*, 19 O. R. 191.

Buffers on Street Railway Cars.]—Having car buffers of different heights, so that in coupling the buffers overlap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30, s. 3 (O.) *Bond* v. *Toronto R. W. Co.*, 22 A. R. 78. Affirmed: *Toronto R. W. Co.* v. *Bond*, 24 S. C. R. 715.

Escape Pipe—*Safety Valve—Damages—Infant.*]—The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam which was forced through the boiler, there being an intake pipe and an escape pipe which had to be adjusted by hand and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion, and the defendants contended that it was due to a latent defect in the boiler:—Held, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable. Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing, and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him. *Wilson* v. *Boulter*, 26 A. R. 184.

Master's Knowledge.]—Where the workman is aware that the employer knows of the defect that ultimately causes the injury, he is not bound under s.-s. 3 of s. 6 of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. c. 30 (O.), to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shewn for the omission, this being a question of fact for the jury. Where both the employer and the workman know of the defect, and it is the workman's own duty to see that the defect is remedied, but orders given by him with that object are not carried out, he cannot recover. *Truman* v. *Rudolph*, 22 A. R. 250.

Notice of—*Guarding Dangerous Place—Volenti non Fit Injuria.*]—In the defendants' dyehouse a number of vats were used for boiling cotton. In the course of his employment as a dyer in the defendants' factory, in which he had been employed at the same work for about three years, it was necessary for the plaintiff to stand on the top of one of these vats, the cover provided for which consisted of several boards, whose average size was five feet six inches by ten inches, the vat being five feet. About 3rd December, 1886, the plaintiff complained to the defendants' foreman that these boards were insufficient in number to cover the vat completely, but the defendants did not remedy the defect; and on the 6th of the same month, while he was at work standing on them, one of the boards slipped sideways, precipitating plaintiff into the boiling liquid. Defendants thereafter remedied the defect. A similar accident had occurred in the factory two years before:—Held, setting aside a nonsuit, in an action brought by plaintiff for damages, that there was sufficient evidence of negligence on defendants' part, in not having had the vat "securely guarded," in compliance with the Ontario Factories Act, 1884 (47 Vict. c. 39, s. 15, s.-s. 1), to have justified a jury in finding for plaintiff. *Dean* v. *Ontario Cotton Mills Co.*, 14 O. R. 119.

(e) *Ways, Defects in.*

Contributory Negligence.]—The plaintiff, in going to that part of the defendants' building where his work was, had to pass through a long room, the passage being nearly straight until within ten or twelve feet of a hoist, where it turned to the left. He was quite familiar with the passage, which was well lighted, but on the occasion in question, while looking at a man at work repairing the hoist, instead of turning toward his workroom, he walked straight into the hole and fell to the cellar below, thus causing injury. As a rule there was a bar protecting the entrance to the hoist, but on the occasion in question this bar had been removed on account of the repairs:—Held, that the action must be dismissed upon the ground of contributory negligence on the part of the plaintiff. Held, by the court of appeal, that there was no defect in the condition of the "way," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. 1887 c. 141, for which the defendants were responsible. Held, by the supreme court of Canada, affirming the decision of the court of appeal, that there was no evidence of negligence of the defendants to which the accident could be attributed, and W. was properly nonsuited at the trial. *Headford* v. *McClary Manufacturing Co.*, 23 O. R. 335, 21 A. R. 164, 24 S. C. R. 291.

Negligence in not Discovering—*Finding of Jury.*]—A plank forming part of the scaffold being used in the erection of a house had been securely placed in position under instructions of the contractors' general superintendent. Late one afternoon two workmen of their own accord removed the stay on which one end of the plank had rested, and replaced it about a foot higher in an insecure fashion. Early the following morning, to carry out instructions of the foreman, the plank was replaced on the stay by fellow workmen, in the

presence of the plaintiff, and when the plaintiff was mounting on it the stay gave way, and he fell and was injured. The jury found that the foreman did not direct the removal of the stay; that the replacing of it caused it to be defective; that the defect was not discovered through the negligence of the foreman:—Held, reversing the judgment in 31 O. R. 521, that there was evidence to support the finding, and that it could not be interfered with or disregarded. *Kelly v. Davidson*, 32 O. R. 8, 27 A. R. 657.

Public Street.]—A public street in a defective condition, used by an employer in connection with his business, is not a "way used in the business of the employer," within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30, s. 3 (O.). The defendants' factory was built immediately on the line of a public street, which was fourteen feet wide at the place, and on the other side there was a steep declivity without a fence. One of their workmen was on a load of straw on a waggon, unloading it into the defendants' premises through an aperture facing the street, when he lost his balance, fell off and down the declivity, and was killed:—Held, that the defendants were not liable. *Stride v. Diamond Glass Co.*, 26 O. R. 270.

Superintendence — *Gangway.*] — The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall, the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured:—Held, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened. Held, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act, or constructed by a person having, in regard to it, superintendence intrusted to him. *Ferguson v. Galt Public School Board*, 27 A. R. 480.

——— *Plank.*] — The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, supplied by the owners of the building, about eleven feet long by eight inches wide and three inches thick, which the evidence shewed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank:—Held, that the plank was a "way" within the meaning of s-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way, for which the defendant was responsible. *Caldwell v. Mills*, 24 O. R. 462.

(f) *Other Cases.*

Dominion Railway Company — *Act Applicable to.*]—See *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316.

Omission of Statutory Duty—*Dominion Railway Act—Damages—Limitation of Amount—Action.*]—Section 289 of the Dominion Railway Act, 51 Vict. c. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained" is intra vires, and the limitation of the amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section. Where a statutory direction imposed upon an employer has not been observed, it is no defence that its non-observance is due to the negligence of a fellow-servant of the person injured. The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R. S. O. 1897 c. 166, without waiting six months. The court, thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accepted a reduced amount. *Curran v. Grand Trunk R. W. Co.*, 25 A. R. 407.

Packing of Railway Frogs.]—Sub-section 3 of s. 262 of the Railway Act, 51 Vict. c. 29 (D.), provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing rail and any railway frog, and between any guard rail and track rail, shall be filled with packing, and this sub-section ends with a proviso that the railway committee may allow "such filling" to be left out during the winter months:—Held, that this proviso applied to both sub-sections, and that permission having been given by the railway committee to frogs being left unpacked during the period in question, the defendants were not liable for an accident resulting from that cause. The provisions of s.-ss. 2 and 3 of s. 5 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (O.), as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion. *Washington v. Grand Trunk R. W. Co.*, 24 A. R. 183. Reversed, 28 S. C. R. 184, [1899] A. C. 275.

Parent and Child—*Death of Child—Expectation of Benefit.*] — The plaintiff's son, who had just come of age, was killed by an accident in the defendant's machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmer's sons usually do,

without wages, and it was intended that he should study medicine, at an expense to his father of about $1,000, the course lasting three or four years, and in the vacations, while so engaged in acquiring his intended profession, it was expected that he would work at home as usual. In an action by his father as administrator to recover damages for the death of his son:—Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered. *Mason* v. *Bertram*, 18 O. R. 1.

"Servant in Husbandry" — *Knowledge of Danger—Jury—New Trial.*]—In an action under the Workmen's Compensation Act and at common law for damages for injuries sustained by the plaintiff while engaged in digging a drain upon defendant's farm, it did not appear that the plaintiff engaged with the defendant to do any particular work, but that he was first put by the defendant at mason work and then at digging the drain:—Held, that it was a question for the jury whether the hiring of the plaintiff was as a servant in husbandry within the meaning of 56 Vict. c. 26 (O.), and whether the work he was engaged in was in the usual course of his employment as such, and also whether the danger was known to the defendant and unknown to the plaintiff, or the converse. The jury were asked certain questions, one being whether the hiring was as a servant in husbandry, but they were told that they might give a general verdict, and they gave one for the plaintiff, answering none of the questions. The trial Judge in his charge gave them no instruction on this point and no direction as to what the law was:—Held, that they were not competent to find a general verdict, and there should be a new trial. *Reid* v. *Barnes*, 25 O. R. 223.

Superintendence — *Negligence of Person to whose Orders Workmen bound to Conform—Custom of Business.*]—The plaintiff was injured in using a derrick in connection with the construction by the defendants of a building. It appeared that the custom or manner of conducting the work was that the oldest man working on the derrick was understood to be in charge of it, and A., being such oldest man and having been ordered by the foreman of the stone branch so to lift a stone which had by the foreman's orders been prepared in a particular way for lifting with "dogs," directed the plaintiff to assist in lifting the stone with the "dogs," instead of having it wrapped in chains as would have been proper, and the stone fell and injured the plaintiff:—Held, by a divisional court, that A. was a person in the service of the employer to whose orders the plaintiff "was bound to conform and did conform" within the meaning of 55 Vict. c. 30, s. 3, s.s. 3 (O.). Held, by the court of appeal, that no implied right of superintendence within the meaning of s. 2 (1) of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. c. 30 (O.), arises merely from length of service or skill, and the employer is not liable where one workman, presuming on greater length of service or skill, directs his fellow workman to do certain work in an unsafe manner, and injury results. Judgment of the court below reversed. *Garland* v. *City of Toronto*, 23 A. R. 238, 27 O. R. 154.

——— *Person Having—Elevator.*]—The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator. Apart from a question as to the defective condition or arrangement of the safety appliances in connection with the elevator, the cause of the fall was the failure of the person in charge to properly manage the elevator and to use the brake for the purpose of controlling, and which, but for that failure, would have controlled, its movements:—Held, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow servant, nor under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, for the fellow servant was not a person having any superintendence intrusted to him, within ss. 2 (1) and 3 (2). *Carnahan* v. *Robert Simpson Co.*, 32 O. R. 328.

——— *Person in Charge or Control—Motorman.*]—The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. *Snell* v. *Toronto R. W. Co.*, 27 A. R. 151.

——— *Person to whose Orders Workmen Bound to Conform.*]—See *Ferguson* v. *Galt Public School Board*, 27 A. R. 480.

VII. Miscellaneous Cases.

Company—*Winding-up* — *Managing Director—Servant.*]—See *Re Bolt and Iron Co.*, 14 O. R. 211, 16 A. R. 397.

Enticing away Servant.] — Plaintiff sued defendants for enticing and procuring certain of his servants to desert his service, and the evidence at the trial established that the parties were in plaintiff's service, and were, with the exception of one of them, induced by defendants' manager to leave:—Held, following Lumley v. Gye, 28 U. C. R. 216, that the plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of services, but that the jury were justified in giving ample compensation for all damages resulting from the wrongful act. Plaintiff, while objecting to one of the servants going, said he did not know that he would trouble him if he did leave:—Held, that this did not, in law, amount to a permission to leave his service. *Hewitt* v. *Ontario Copper Lightning Rod Co.*, 44 U. C. R. 287. See also *Dillingham* v. *Wilson*, 6 O. S. 85.

Injunction—*Effect on Servant of Person Enjoined.*]—A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ. And after leaving his master's service he continues bound by an injunction issued while he was a servant, against the master and his servants to restrain waste. *Brown* v. *Sage*, 12 Gr. 25.

See, also, *Gilchrist* v. *Corporation of Carden*, 26 C. P. 1.

Intimidation of Servants—*Injunction—Trade Union—Resolution.*]—The plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not in their writ state in what character they sued; but by their affidavits filed professed to represent their association, and joined the defendants as representing the operative association. Some of the defendants, by threats, intimidation, and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business:—Held, that this entitled the master to an injunction restraining these defendants from so interfering with his servants. It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiffs' association, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon the plaintiffs' association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiffs' association that in default the workmen would strike. The resolution was not rescinded, and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence:—Held, that the defendants, by shewing the fact of the resolution of the plaintiffs association, which the plaintiffs had not divulged on their motion ex parte for an injunction, which they now moved to continue, were entitled to have the injunction dissolved. Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution. *Hynes* v. *Fisher*, 4 O. R. 60.

Labourers—*Deserting Service.*]—A person hiring himself to work with his own team of oxen, is not within the British statutes for punishing labourers deserting their service. *Whelen* v. *Stevens*, Tay. 439.

Municipal Corporation—*Officer — Servant.*]—A medical health officer is not a servant of a municipal corporation within the meaning of R. S. O. 1877 c. 47, s. 125. *Macfie* v. *Hutchison*, 12 P. R. 167.

See, also, *Forsyth* v. *Canniff*, 20 O. R. 478.

Secret Profits in Service—*Costs—Jus Tertii.*]—Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal. The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position as adviser to influence the purchase by the meat company of a new plant from the defendants, who promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company:—Held, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants. The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs. *Jones* v. *Linde British Refrigeration Co.*, 32 O. R. 391.

Share in Profits — *Right to Investigate Accounts.—R. S. O. 1877 c. 133, s. 3.*]—See *Rogers* v. *Ullman*, 27 Gr. 137.

Wages—*Action for—Plea—Discharge in Insolvency.*]—To an action by a commercial traveller for wages defendants pleaded a discharge in insolvency, and the plaintiff replied that the claim was privileged:—Held, reversing the judgment below, 45 U. C. R. 188, that privileged claims are not within the class of debts mentioned in s. 63 of the Insolvent Act, 1875, to which a discharge does not apply without the consent of the creditor. *Fryer* v. *Shields*, 6 A. R. 57.

Wages not Due—*Common Counts—Particulars — Amendment.*]—Plaintiff delivered particulars under the common counts, the last two items of which were for salary from March, 1875, to March, 1876, and from March, 1876, to March, 1877, respectively. A summons was taken out to amend the particulars, the ground taken being that under the common counts a claim could not be made for wages not yet due:—Held, that the particulars were incorrect, and that defendants were entitled to have them amended. *Worden* v. *Date Patent Steel Co.*, 6 P. R. 276.

See INTOXICATING LIQUORS, IV. 4—RAILWAY, XVIII.—SEDUCTION, I. 5 (a).

MASTER OF SHIP.

See SHIP, IX.

MATERIAL MEN.

See LIEN, V. 4.

MAYOR.

See MUNICIPAL CORPORATIONS, XIX. 8—NOTICE OF ACTION, I.

MAXIMS.

"Actio Personalis Moritur cum Persona."]—See *White* v. *Parker*, 16 S. C. R. 699; *Mason* v. *Town of Peterborough*, 20 A. R. 683.

"Caveat Emptor."]—See *Borthwick* v. *Young*, 12 A. R. 671; *Moores* v. *Gooderham & Worts (Limited)*, 14 O. R. 451.

"Cessante Ratione Cessat Lex."]—See *In re High School Board of U. C. of Stormont, Dundas, and Glengarry and Township of Winchester*, 45 U. C. R. 460.

"Crown can Do no Wrong."]—Applies to alleged tortious acts of the officers of

a public department of Ontario. *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563.

"Cujus est Solum ejus est usque ad Coelum."]—See *Potts* v. *Bovine*, 16 O. R. 152, 16 A. R. 191.

"De Minimis non Curat Lex."]—See *Claxton* v. *Shibley*, 9 O. R. 451, 10 O. R. 295; *Steeth* v. *Hurlbert*, 25 S. C. R. at p. 632.

"Falsa Demonstratio non Nocet."]—See *Guardian Assurance Co.* v. *Connely*, 20 S. C. R. 208.

"He who Comes for Equity must Do Equity."]—See *Clemow* v. *Booth*, 27 Gr. 15; *Archer* v. *Severn*, 14 A. R. 723; *Jones* v. *Dale*, 16 O. R. 717.

"He Who Seeks Equity must Do Equity."]—See *Allen* v. *Furness*, 20 A. R. 34.

"Ignorantia Juris Neminem Excusat."]—Where a widow who had married again filed a bill alleging that she had accepted the provisions and bequests given to her by will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her:—Held, that the rule "Ignorantia juris neminem excusat" applied, and the bill was dismissed with costs. *Gillam* v. *Gillam*, 29 Gr. 376.

"Injuria non Excusat Injuriam."]—See *Ratté* v. *Booth*, 11 O. R. 491.

"Interest Reipublicae ut sit Finis Litium."]—See *The Queen* v. *St. Louis*, 5 Ex. C. R. 354.

"Locus Regit Actum."] — See *Ross* v. *Ross*, 25 S. C. R. 307.

"Nemo bis Vexari Debet pro una et eadem Causa."] — See *The Queen* v. *St. Louis*, 5 Ex. C. R. 354; *Auer Incandescent Light Manufacturing Co.* v. *Dreschel*, 5 Ex. C. R. 384.

"Omnia Praesumuntur contra Spoliatorem."]—See *St. Louis* v. *The Queen*, 25 S. C. R. 649.

"Omnia Praesumuntur Rite esse Acta."]—See *The Queen* v. *The "Minnie,"* 4 Ex. C. R. 151; *Palmatier* v. *McKibbon*, 21 A. R. 441.

"Qui Prior est Tempore, Potior est in Jure."]—See *The Queen* v. *The "City of Windsor,"* 5 Ex. C. R. 231.

"Quicquid Plantatur Solo, Solo Cedit."] — See *Stevens, Turner, and Burns Foundry and General Manufacturing Co.* v. *Barfoot*, 9 O. R. 632, 13 A. R. 366.

"Res ipsa Loquitur."]—See *Roberts* v. *Mitchell*, 21 A. R. 433; *Sangster* v. *T. Eaton Co., ib.* 624.

"Res Magis Valeat quam Pereat."] —See *Barthel* v. *Scotten*, 24 S. C. R. 367.

"Respondeat Superior."] — Applied in an action against a municipal corporation for act of collector. *McSorley* v. *Mayor, &c., of City of St. John*, 6 S. C. R. 531.

"Verba Fortius Accipiuntur contra Proferentem."] — See *Barthel* v. *Scotten*, 24 S. C. R. 367; *Compagnie pour L'Eclairage au Gaz de St. Hyacinthe* v. *C. des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 S. C. R. 168.

"Volenti non Fit Injuria."]—See *Dean* v. *Ontario Cotton Mills Co.*, 14 O. R. 119; *LeMay* v. *Canadian Pacific R. W. Co.*, 18 O. R. 314, 17 A. R. 293; *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117; *Rodgers* v. *Hamilton Cotton Co.*, 23 O. R. 425; *Poll* v. *Hewitt, ib.* 619; *Hurdman* v. *Canada Atlantic R. W. Co.*, 25 O. R. 209, 22 A. R. 292, 25 S. C. R. 205; *Price* v. *Roy*, 29 S. C. R. 494.

See also specific titles

MEASURE OF DAMAGES.

See DAMAGES, X.

MECHANICS' LIENS.

See LIEN, V.

MEDICINE AND SURGERY.

I. AUTHORITY TO PRACTISE—LICENSE AND REGISTRATION, 4200.

II. CONVICTIONS FOR UNLAWFULLY PRACTISING,

1. *What Constitutes Unlawful Practising*, 4201.

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V. MISCELLANEOUS CASES, 4207.

I. AUTHORITY TO PRACTISE — LICENSE AND REGISTRATION.

License in Lower Canada.]—A medical practitioner duly licensed in either section of the Province may practise in the other without a fresh license:—Held, therefore, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws respecting the profession there. *Shaver* v. *Linton*, 22 U. C. R. 177.

Registration in England—*Mandamus.*]—A medical practitioner, registered in England under the Imperial Medical Act, is entitled, without examination, to practise in Ontario, on payment of the proper fees; and that though his registration in England has been after July, 1870; and a mandamus will therefore be granted to the proper authorities here

to admit him to registration on payment of such fees. *The Queen* v. *College of Physicians and Surgeons of Ontario, Re Mallory*, 44 U. C. R. 564.

——— *Necessity for Registration in Ontario — Slander.*] — A medical practitioner registered in Great Britain, to entitle him to practise in this Province, must be registered under R. S. O. 1877 c. 142, s. 21. In this case the plaintiff, a practitioner registered in Great Britain, but not in this Province, claiming to be entitled to practise here, brought an action against the defendant for slandering him in his profession by stating that he was a quack, &c.:—Held, that the action was not maintainable. *Skirving* v. *Ross*, 31 C. P. 423.

Removal from Register—*Conviction for Felony Previous to—Registration—False Representation—Notice to Person Charged—Mandamus—Restoration.*]—One C. was convicted in 1869 of manslaughter, and sentenced to five years' imprisonment in the penitentiary. Before its expiration his sentence was remitted, and in 1874, after the full period of sentence had expired, he applied to defendants for registration, and was duly admitted and placed on the register as a bachelor of medicine. At the time of his application for registration the secretary was not aware of his conviction, and the applicant was not asked any questions. Subsequently, in 1875, on ascertaining the fact, by direction of the defendants, and without notice to C., the secretary erased his name from the register:—Held, that C. had clearly been guilty of no false or fraudulent representation within 37 Vict. c. 30, s. 39 (O.) 2. That the case was not within s. 34 of that Act, which referred to a conviction for felony of a person already registered. 3. That in any case he could not be legally removed from the register without notice and an opportunity of being heard. Quære, as to the true meaning of s. 34, and remarks as to the hardship which it might work. A mandamus was, therefore, granted to restore his name to the register. *The Queen* v. *College of Physicians and Surgeons of Ontario, Re McConnell*, 44 U. C. R. 146.

Representation as to Registration—*Use of Addition "M.D."*]—Where defendant, in partnership with two registered practitioners, resided in an establishment over the door of which was a fanlight containing the names of the registered practitioners, with the addition "M.D., M.C.P. & S., Ont." and the name of the defendant with only the addition "M. D.":—Held, that the use of the simple letters "M.D.," in contradistinction to the full titles of the partners of defendant appearing on the same fanlight, was not the use of a title "calculated to lead people to infer" registration, and the defendant therefore could not be convicted under s. 42 of the Ontario Medical Act, R. S. O. 1877 c. 142. *Regina* v. *Tefft*, 45 U. C. R. 144.

See Regina v. *Sparham*, 8 O. R. 570, *post* II. 2; *Regina* v. *Howarth*, 24 O. R. 561, *post* II. 1; *Re Washington*, 23 O. R. 299, *post* V.

II. CONVICTIONS FOR UNLAWFULLY PRACTISING.

1. *What Constitutes Unlawful Practising.*

Prescribing — *Apothecary — Pharmacy Act—Authority to Practise.*]—A person went into a druggist's shop, stating he was sick, and describing his complaint, which the druggist said he believed to be diarrhœa, and after advising him as to diet, gave him a bottle of medicine, for which he charged 50 cents. The druggist stated that he had several kinds of diarrhœa mixture, and had sometimes to inquire as to symptoms in order to decide what mixture to give:—Held, that this was practising medicine for gain within s. 45 of the Medical Act, R. S. O. 1887 c. 148. Held, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. 1887 c. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practice of medicine. The meaning of "apothecary" considered. *Regina* v. *Howarth*, 24 O. R. 561.

——— *Vendor of Patent Medicines—Sale of—Uncertainty — Particular Acts — Amendment of Conviction—Costs.*]—Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a certiorari, the court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction. Regina v. Wallace, 4 O. R. 127, followed. But where a conviction for an offence over which the magistrate had jurisdiction is bad on its face, the court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction. A conviction under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 45, for practising medicine for hire:—Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising. Re Donelly 20 C. P. 165, Regina v. Spain, 18 O. R. 385, and Regina v. Somers, 24 O. R. 244, followed. And the court refused to amend and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man indicated, and selling him some of it. Costs against the informant refused. Regina v. Somers, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

But see the next case.

——— *Vendor of Patent Medicines—Treatment—Payment.*]—The defendant was convicted under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 45, for practising medicine for hire. The evidence shewed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that, upon the advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon:—Held, that there was evidence to support the conviction. Regina v. Coulson, 24 O. R. 246, distinguished. Regina v. Howarth, ib. 561, followed. *Regina* v. *Coulson*, 27 O. R. 59.

Treatment—*Remuneration.*]—The defendant, who was agent for a dealer in musical instruments, undertook to cure one P. of cancer by friction and application of a certain oil, receiving as remuneration $3 a visit, which he stated was for the medicine, being its actual cost. He admitted having practised in Germany, and that he imported the specific in

question by the gross. It also appeared that he prescribed other medicine for the patient besides the oil:—Held, that this was practising medicine, and that the defendant was rightly convicted of doing so for gain or hope of reward without registration under the Medical Act. *Regina* v. *Hall*, 8 O. R. 407.

The defendant attended a couple of sick persons for which he received payment, but he neither prescribed nor administered any medicine, nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient:—Held, that this was not a practising of medicine, contrary to the provisions of R. S. O. 1887 c. 148, s. 45, and a conviction therefor was consequently quashed, with costs against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction. Regina v. Hall, 8 O. R. 407, distinguished. *Regina* v. *Stewart*, 17 O. R. 4.

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2. *Other Cases.*

Practising without Registration—*Conviction to Specify Particular Acts.*]—See *Regina* v. *Coulson*, 24 O. R. 246, *ante* 1.

——— *Imprisonment—Charges of Conveying to Gaol.*]—Held, that a justice of the peace, on a conviction under ss. 44 and 46 of c. 142, R. S. O. 1877, intituled an Act respecting the profession of medicine and surgery, had no jurisdiction, on default by the defendant of payment of fine and costs, to direct his confinement for the space of one month, unless, in addition to the payment of the fine and costs, he be paid the charges of conveying him to gaol. *Regina* v. *Wright*, 14 O. R. 668.

——— *Improper Removal of Name from Register—Power to Award Distress.*]—A conviction under the Ontario Medical Act, R. S. O. 1877 c. 142, s. 40, for practising without being registered, was quashed, because, in default of payment of the fine imposed, distress was also awarded; and, held, that s. 57 of 32 & 33 Vict. c. 31 (D.) did not apply, as by s. 46 of the Medical Act provision was made for enforcing payment. Held, also, that s. 40 applied to any person whose name had been erased from the register, though he might have practised after having been first registered. Semble, that on a prosecution under the Act the defendant may shew that as a matter of law his name was on the register, though by accident or design improperly removed or erased therefrom. *Regina* v. *Sparham*, 8 O. R. 570.

——— *Omission of "for hire," &c.—Invalidity of Conviction — Requisites of.*]—A conviction for practising medicine without license or being registered as a medical practitioner, under R. S. O. 1877 c. 142, s. 40, omitted to add "for hire, gain, or hope of reward," and it did not appear that the defendant had appeared and pleaded, and that the merits had been tried, and that the defendant had not appealed, or that the conviction had been affirmed on appeal; so that 32 & 33 Vict. c. 31, s. 73, was not applicable:—Held, that the conviction must be quashed. A conviction should, if possible, state the facts necessary to bring it within that section, and it should not be drawn up until the four days for giving notice of appeal have elapsed. *Regina* v. *Hessel*, 44 U. C. R. 51.

Pretending to be a Physician—*Misdemeanour — Reserved Case — Sessions, Powers of.*]—The appellant, having been convicted before justices of having pretended to be a physician, contrary to 29 Vict. c. 34, appealed to the quarter sessions and was found guilty:—Held, that the sessions had no power to reserve a case for the opinion of the court under C. S. U. C. c. 112, the appellant not being a person "convicted of treason, felony, or misdemeanour." Semble, that if 29 Vict. c. 34 had in terms declared the act charged unlawful, it would have been an indictable misdemeanour. *Pomeroy* v. *Wilson*, 26 U. C. R. 45.

See Swann v. *Walker*, 23 U. C. R. 434, *post* V.; *Regina* v. *Tefft*, 45 U. C. R. 144, *ante* 1.

III. Negligence or Malpractice.

Evidence—*Libel of Surgeon — Unskilful Treatment—Proof of Other Causes.*]—In an action for libel of a surgeon respecting unskilful treatment by him of a fractured thigh, the question was raised, whether the failure to cure was not owing to the rough treatment of the patient by his master; and the plaintiff desired to prove that the patient had been heard to complain of such usage:—Semble, that such evidence was admissible. *Smith* v. *McIntosh*, 14 U. C. R. 592.

——— *Treatment—Bad Surgery—Reply—Admissibility.*]—A medical man called by the defendant stated that, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial that the treatment was bad surgery:—Held, inadmissible. *VanMere* v. *Farewell*, 12 O. R. 285.

——— *Treatment—Discovery of New Evidence—Corroboration—New Trial.*]—Action against defendant, a medical man, for negligence in the setting of plaintiff's thigh bone, which had been fractured. The professional evidence generally went to shew improper treatment; that the proper treatment in such a case would greatly depend upon the condition of the patient, and particularly upon the condition of the knee, which, it came out on cross-examination of plaintiff's witnesses, had also been injured more or less. The jury having found for the plaintiff, the court refused a new trial on affidavits of the discovery of further corroborative evidence shewing that plaintiff's knee had been seriously injured. *Fawcett* v. *Mothersell*, 14 C. P. 104.

Husband and Wife—*Neglect to Attend Wife—Action by Husband alone—Contract—Breach—Pleading—Amendment—Personal Injury to Wife.*]—The plaintiff sued defendant for neglecting, as a medical man, to attend upon his wife during child-birth, alleging the contract in one count to be to attend at 3 p.m. on the 12th April, and in another count to attend when notified:—Held, that upon the evidence, stated in the case, a contract and breach of it were shewn, which, with proper amendments, as pointed out in the case, would support the declaration; but that the plaintiff in this action could not recover for the personal injury and suffering of the wife. *Hunter* v. *Ogden*, 31 U. C. R. 132.

——— *Unskilful Treatment of Wife—Action by Husband alone—Pleading.*]—Case, by the husband alone, for negligent and unskilful treatment of his wife in child-birth. The first count was bad for merely stating negligence, without averring any damage accruing therefrom. The second count alleged that by reason of the defendant's improper treatment of the plaintiff's wife her life was endangered, and she was much injured—being a ground of action for which the husband could not sue alone. The third count combined different causes of action, some for which the husband could sue alone, and others for which the wife should be joined:—Held, that the proper course was to arrest the judgment and not to award a venire de novo. *Smith* v. *Carder*, 11 U. C. R. 77.

Limitation of Actions—*Infant.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated:—Held, that the action was barred under the Ontario Medical Act, R. S. O. 1887 c. 148, s. 40. Infancy does not prevent the running of the statute. *Miller* v. *Ryerson*, 22 O. R. 369.

Negligence—*Evidence of—Conjecture—Direction to Jury—Right to Address Jury.*]—In an action by husband and wife for negligence of defendants, surgeons, in treatment of the wife, the evidence was of a weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not, while the evidence offered on behalf of defendants was of the most favourable character to them:—Held, that on the plaintiffs' counsel declining to take a nonsuit, the Judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Veach*, *Anderson* v. *Walker*, *Thackeray* v. *Askin*, 22 C. P. 164.

——— *Weight of Evidence—Case for Jury—Nonsuit.*]—Where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury. In an action against a surgeon for malpractice in amputating an arm above, instead of below, the elbow, several medical men of repute approved of defendant's course. The jury having, nevertheless, found for the plaintiff, a new trial was granted without costs. *Jackson* v. *Hyde*, 28 U. C. R. 294

In an action against a surgeon for malpractice, one of the medical men called for the plaintiff stated, though not in terms condemning defendant's treatment or alleging negligence therein, that he would have pursued a different course; but the weight of evidence showed clearly that the course of treatment pursued by the defendant was such as would have been adopted by medical men of competent skill and good standing in the profession:—Held, that there was no evidence of negligence to submit to the jury, and a nonsuit was entered. *Fields* v. *Rutherford*, 29 C. P. 133.

Negligence—*Conflict of Evidence as to Treatment — Finding of Jury.*]—Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage to a fracture of the forearm; and, if this was good surgery, then there was neglect and want of proper care, in applying the bandage too tightly, and in not placing the arm in proper position, whereby the arm became paralyzed and permanently useless. The defendant admitted the use of the primary bandage, and justified its use as proper, and denied that there had been any neglect, &c. The jury found for the defendant:—Held, that on the evidence the verdict could not be interfered with. *Van-Mere* v. *Farewell*, 12 O. R. 285.

——— *Necessity to Shew Injury thereby—Findings of Jury.*]—In an action against a medical practitioner for malpractice the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby. In this case, which was for negligence and want of skill in the treatment of the plaintiff in her confinement, the jury found that the defendant was guilty of such negligence, in that he was remiss in giving instructions to the nurse, and in not seeing that his instructions were properly carried out:—Held, that the inconsistency in the finding would not entitle the defendant to judgment dismissing the action, but at most to a new trial if there was evidence to go to the jury thereon. Held, however, that there was no evidence from which it could reasonably be inferred that the injury complained of by the plaintiff was attributable to either want of skill or care or negligence by defendant; and judgment was therefore directed to be entered dismissing the action. *McQuay* v. *Eastwood*, 12 O. R. 402.

Verdict—*Jury—Expression of Opinion.*]—In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following: "We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention:"—Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan* v. *Pigeon*, 10 O. R. 632.

IV. Pharmacy Acts.

Departmental Store—*Drug Department—Uncertificated Proprietor.*]—The defendant, being owner of a departmental store, opened a drug department therein, and placed it under the sole control of a duly qualified and registered chemist, who sold the drugs in the defendant's name, receiving as remuneration a weekly salary and also a percentage of profits, the defendant himself not being a duly qualified and registered chemist:—Held, that the defendant was liable to be convicted under s. 24 of the Pharmacy Act, R. S. O. 1887 c. 151, for keeping an open shop for retailing, dispensing, and compounding poisons, &c., contrary to its provisions. *Regina* v. *Simpson*, 27 O. R. 603.

Licentiate—*Registration—Partnership.*]—Held, that s. 8 of 48 Vict. c. 36 (Q.), which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising,

are entitled to be registered as licentiates of pharmacy, applied to the respondent, who had, during more than five years before the coming into force of the Act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he (respondent) was entitled under s. 8 to be registered as a licentiate of pharmacy. *Association Pharmaceutique de la Province de Québec* v. *Brunet*, 14 S. C. R. 738.

See Regina v. *Howarth*, 24 O. R. 561, *ante* I. 1.

V. Miscellaneous Cases.

Coroner—*Post-mortem Examination—Direction to Surgeons—Jury—County Crown Attorney—Consent—Statutes.*]—The wife of the plaintiff having died suddenly, the defendants, three practising physicians and surgeons, acting under an oral direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants. There was no consent in writing of the county Crown attorney:—Held, that the coroner, having authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem. Held, also, that no rule of law forbade the making of the post-mortem before the impanelling of the jury; that was a matter of procedure in the discretion of the coroner. Held, also, that the meaning of s. 12 (2) of R. S. O. 1897 c. 97 was that the coroner should not, without the consent of the Crown attorney, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained. *Davidson* v. *Garrett*, 30 O. R. 653.

Evidence — *Medical Witnesses — Text-Books.*]—It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, and then to read such books to the jury; but they may be asked whether such books have influenced their opinion. *Brown* v. *Sheppard*, 13 U. C. R. 178.

Examination of Person by Surgeon—*Action for Bodily Injuries.*]—See Evidence, VII. 2 (f).

Fees at Inquests.]—A medical witness, in obedience to the coroner's summons, attended during two inquests held on fifty-two persons killed by a railway accident, and occupying several days; no post-mortem examinations were made:—Held, that under 13 & 14 Vict. c. 56, s. 7, he could be allowed only 25s. for each day's attendance (not for each body), together with his mileage in travelling. *In re Askin and Charteris*, 13 U. C. R. 498.

Where a coroner, under C. S. U. C. c. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a post-mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by s. 9, a mandamus to the coroner, to make his order on the county treasurer for the fees of such witness, under s. 10, was refused. Semble, that on application for such mandamus the county treasurer, as well as the coroner, must be called upon. *In re Harbottle and Wilson*, 30 U. C. R. 314.

Goodwill of Business—*Asset of Estate—Administration Account—Sale.*]—The goodwill of a professional business, as a surgeon's, may be sold by the personal representative, and the contract enforced, where the price has been agreed upon, or any other means of fixing its value provided. It is therefore an asset of the estate, to be accounted for in the ordinary course of administration. Semble, however, that the personal representative could not be compelled to find a sale for it. *Christie* v. *Clarke*, 16 C. P. 544. See *S. C.*, 27 U. C. R. 21.

——— *Partnership — Physician and Apothecary—Illegality—Contract of Sale.*]—The plaintiffs, S. and W., S. being a licensed medical practitioner and W. an apothecary, purchased the goodwill of defendant's practice as a medical man, at L., defendant agreeing not to practise within eight miles of that place. In an action on this agreement:—Held, that there was nothing illegal in the plaintiffs entering into partnership; that no intention could be inferred that W. should practise physic contrary to the statute; and that the fact of his not being licensed could therefore form no defence. *Swann* v. *Walker*, 23 U. C. R. 434.

——— *Sale of—Agreement not to Practise—Damages—Injunction.*]—By an agreement under seal the defendant sold to the plaintiff a house and the goodwill of his medical practice for $2,100, and the defendant "(bound) himself in the sum of $400, to be paid to the (plaintiff) in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village:"—Held, that there was an implied agreement by the vendor not to resume practice; that the sum of $400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both. Judgment in 31 O. R. 91 varied. *Snider* v. *McKelvey*, 27 A. R. 339.

Misconduct — *Advertising — Discipline—Procedure.*]—Upon an appeal by a registered medical practitioner, under R. S. O. 1887 c. 148, s. 37, the Ontario Medical Act, as amended by 54 Vict. c. 26, s. 5, from an order of the council of the College of Physicians and Surgeons of Ontario, directing that his name should be erased from the register, it appeared that he had advertised extensively in newspapers and by handbills, setting forth and lauding in extravagant language his qualifications for treating catarrh, shewing that that

disease led to consumption, stating the symptoms of it, and giving testimonials from persons said to have been cured by him:—Held, that mere advertising was not in itself disgraceful conduct in a professional respect; but that the advertisements published by the appellant were studied efforts to impose upon the credulity of the public for gain, and were disgraceful in a professional respect within the meaning of s. 34 of the Act. It appeared also that the appellant had represented to two persons, who were in fact in the last stages of consumption, that they were suffering from catarrhal bronchitis, and that he had the power to cure them, and that he had taken money from them upon the strength of such representations:—Held, that this was conduct disgraceful in the common judgment of mankind, and much more so in a professional respect. Held, however, that publishing broadcast the symptoms of the disease known as catarrh was not in itself disgraceful conduct in a professional respect. The council referred the complaint against the appellant for inquiry and report to their discipline committee, who took evidence, and reported it with their conclusions thereon to the council:—Held, that the report of the committee could not be set aside or treated as a nullity because they took unnecessary evidence or because they drew conclusions from the facts ascertained by them. Proper procedure under the Act pointed out. *Re Washington*, 23 O. R. 299.

Settlement—*Advice of Attendant Physician—Mala Fides.*] — The relationship of a medical man to his patient is one of trust and confidence, and any settlement made through him, in consequence of advice given mala fide, will be set aside. *Rowe* v. *Grand Trunk R. W. Co.*, 16 C. P. 500.

See CONSTITUTIONAL LAW, I.

MEETINGS.

See COMPANY, III. 4—MUNICIPAL CORPORATIONS, XVII.—PARLIAMENT, I. 2 (c), (d), (e), 3 (k), (n).

MEMBERS OF MUNICIPAL COUNCILS.

See MUNICIPAL CORPORATIONS, XVIII.

MEMORIALS.

See EVIDENCE, I. 8 (c)—REGISTRY LAWS.

MENACES AND THREATS.

See CRIMINAL LAW, IX. 34.

MENTAL INCAPACITY.

Physical Weakness—*Acknowledgment of Debt—Validity.*] — Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt. Under the facts of this case, it was held that there was not sufficient evidence of mental incapacity to render invalid an acknowledgment of a debt signed by the testator. *Emes* v. *Emes*, 11 Gr. 325.

See FRAUD AND MISREPRESENTATION — LUNATIC—WILL.

MERCANTILE AGENCY.

Libel—*Confidential Report — Privilege — Reasonable Care.*]—In an action of libel brought by a trader against the conductors of a mercantile agency, it appeared that the libellous matter was sent to a few subscribers on their personal application. The information on which the statement complained of was founded, in reality related to another trader of the same surname as the plaintiff:—Held, by Boyd, C., that the publishing of the information was a matter of qualified privilege, but that the want of reasonable care in collecting the information was evidence of malice which destroyed the privilege. Todd v. Dun, 15 A. R. 85, followed. Cossette v. Dun, 18 S. C. R. 222, discussed. Held, by the court of appeal, reversing the above, that a mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness. Cossette v. Dun, 18 S. C. R. 222, considered. *Robinson* v. *Dun*, 28 O. R. 21, 24 A. R. 287.

Representation as to Solvency of Trader—*Necessity for Writing—Evidence. Reception of—Contract to Furnish Information—Damages.*]—The defendants, who carried on the business of a trade protection society, in consideration of a yearly subscription undertook to procure and furnish the plaintiff, a merchant in Toronto, to the best of their ability, with information of the mercantile standing and credit of the plaintiff's customers among the merchants, traders, and manufacturers throughout the United States and Canada (in the communities wherein they respectively resided), for the purpose of aiding the plaintiff in determining the propriety of giving credit. On the 10th June, 1875, the plaintiff sent his clerk to the defendants to ascertain the mercantile standing and credit of one W., residing and doing business in Toronto, who had applied to him to purchase goods on credit. The defendants' clerk read out of a book to the plaintiff's clerk—that W. had stock about $10,000, and $5,000 or $6,000 in his business, and claimed to be worth $7,000; that his character and habits were good; that he was doing a fair trade; and that his credit was good locally. The plaintiff, relying on this report, which had reference (to the knowledge of plaintiff) to the information which the defendants had collected on the 29th April previously, without making any further inquiries, sold to W., about twelve days afterwards, $500 worth of goods on credit. W. was really insolvent at the time that the report was made, and on the 8th July following, absconded without paying the plaintiff. The jury found that the defendants did not furnish the information to the

best of their ability, and that the plaintiff did not act imprudently in not making further inquiries:—Held, reversing the judgment in 39 U. C. R. 551, that the defendants were not liable for the loss which the plaintiff had sustained, for that the action was brought upon or by reason of the representation, which was not in writing and signed by them under C. S. U. C. c. 44, s. 10, and was therefore not receivable in evidence; and the fact that the representation was made in pursuance of a contract did not prevent the application of the statute. Held, also, that under the circumstances the plaintiff was only entitled to nominal damages for the breach of the contract to procure and furnish the information. *McLean* v. *Dun*, 1 A. R. 153.

See DEFAMATION, XII. 3 (a).

MERCANTILE LAW AMENDMENT ACT.

See PARTNERSHIP.

MERCHANTS SHIPPING ACT.

See SHIP, XVII.

MERGER.

I. OF CONTRACT FOR SALE OF LAND, 4211.

II. OF ESTATES, 4212.

III. OF SIMPLE CONTRACT DEBTS BY SPECIALTIES, 4214.

IV. MISCELLANEOUS CASES, 4215.

I. OF CONTRACT FOR SALE OF LAND.

Conveyance to Third Person—*Release—Accord and Satisfaction.*]—Plaintiff declared on defendant's agreement to sell him certain lands, and convey the same to him in fee simple free from all incumbrances—alleging in one count that he had not so conveyed, and in another that although defendant by deed pretended to convey the land to one H., at the plaintiff's request, free from incumbrances, yet defendant had allowed part of it to be sold for taxes. Defendant pleaded that the incumbrances were created by a former owner, of which defendant had no notice, and which he was not legally bound to pay, and that afterwards he, at plaintiff's request, conveyed the land to H. by a deed with qualified covenants, which the plaintiff accepted, whereby defendant was released from said agreement:—Held, no defence, for there was no merger, because the deed was not to the plaintiff, no release was shewn, and no accord and satisfaction. Quære, as to the effect of the deed if it had been given to the plaintiff. *McLennan* v. *Cheguin*, 37 U. C. R. 301.

Parol Contract—*Subsequent Bond.*]—In 1858 a parol contract was entered into for the sale of one acre of land, the consideration for which was paid, and the purchaser was let into possession of the property, which he occupied, improved, and built upon. Afterwards, and in the same year, the vendor executed by way of security a life lease to another person of fifty acres, including the acre sold. In 1860 a bond was executed by the vendor to the wife of the purchaser for the conveyance of the acre to her. The purchaser of the acre having filed a bill for specific performance of the parol contract, the court refused relief on that ground, the parol contract having become merged in the written contract or bond. *McCrumm* v. *Crawford*, 9 Gr. 337.

Subsequent Conveyance—*Provisions of Original Contract—Action to Enforce.*]—The defendant, an assignee for creditors, agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated 24th March, the houses were to be completed by 30th May, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, i. e., by 24th May, but as a matter of fact they were executed and exchanged about 9th May. The plaintiff subsequently, in the present action, claimed damages for non-completion of and defects in the finishing of the houses. The deed from the defendant contained no covenants covering the matters complained of:—Held, nevertheless, that the plaintiff was entitled to recover on the original contract. A contract to perform work or to do things for the other contracting party on a sale of lands, at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance:—Held, also, that the loss of rents which might have been obtained for the houses, if completed at the proper time, was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

II. OF ESTATES.

Equitable Right to Charge—*Subsequent Acquisition of Fee.*]—In taking the accounts under the judgment reported 27 O. R. 511, and 24 A. R. 543, it was held that the defendant had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by him to prior incumbrancers before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9, and 10 of R. S. O. 1897 c. 121, and there being no evidence of intention to preserve the right to the equitable charge. *Armstrong* v. *Lye*, 27 A. R. 287.

Leasehold Estate—*Acquisition of Reversion.*]—The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. Emmett v. Quinn, 7 A. R. 306, distinguished. Judgment in 24 A. R. 599 affirmed. *Mackenzie* v. *Building and Loan Association*, 28 S. C. R. 407. (Leave to appeal was refused by the Privy Council).

Life Estate in Remainder—*Statute of Limitations.*]—Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainderman till the death of the tenant for life. *Sladden* v. *Smith*, 7 C. P. 74.

Reversion in Legal Estate.]—S., having mortgaged certain land in fee, afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words, "bargain, sell, and release," to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action, by certificate duly registered, and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage:—Held, that S. had a legal reversion by estoppel as against the tenant, which passed to the plaintiff by the first conveyance from S. Held, also, that the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J., and that the plaintiff being still bound by the lease, defendant was so as well. *Cameron* v. *Todd*, 22 U. C. R. 390.

Tenancy by the Curtesy in Reversion.]—Held, that the husband of a deceased wife cannot be tenant by the curtesy, except of lands of which his wife was seised of such an estate as that her issue by him would inherit, as heir to her; and that, as between the reversioner and tenant by curtesy, a conveyance from the tenant by the curtesy operates as a surrender of the life estate, and that the freehold in law vests in the assignee before entry; and the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died. *Wigle* v. *Merrick*, 8 C. P. 307.

Term in Life Estate—*Fi. Fa.—Sale.*]—*—Immediate Possession.*]—A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and voidable as to them, is nevertheless as between the lessor and lessee a merger of the lease, or more properly a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession. *Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449.

Term in Life Estate—*Fi. Fa.—Sale.*]—Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be completed and ended:"—Held, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the fi. fa. against goods. *Dalye* v. *Robertson*, 19 U. C. R. 411.

III. Of Simple Contract Debts by Specialties.

Agreement for Advances—*Subsequent Mortgage.*] — Held, that under the facts proved in this case, the mortgage by plaintiff to defendants of his mill to secure advances on his flour, to be sold by defendants as commission merchants, was not to be treated as superseding the parol agreement for such advances, or as shewing a different agreement from that evidenced by the letters. *Hyde* v. *Gooderham*, 6 C. P. 21.

Cause of Action in Judgment.] — Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant. Under execution issued upon the judgment, the goods sold were seized, and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent:—Held, upon the evidence, that fraudulent collusion between the husband and wife to defeat the plaintiffs' claim was not established; and, in the absence of fraud or mistake, the court would not grant the plaintiffs the extraordinary relief of vacating the judgment against the defendant in order to allow them to proceed against the wife. Held, also, that, so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged. *Toronto Dental Manufacturing Co.* v. *McLaren*, 14 P. R. 89.

Collateral Security—*No Merger.*] — Held, that the mortgage in this case, being expressed to have been given as further security, and providing that it should stand as security for any renewal of the bills sued on, was collateral only, and did not effect a merger. Held, also, that the remedy on the specialty and simple contract not being co-extensive or between the same parties, the doctrine of merger did not apply. *Gore Bank* v. *McWhirter*, 18 C. P. 293.

Joint Debtors—*Mortgage from One.*]—Where there is a simple contract debt due by A. and B., partners, and the plaintiff takes a mortgage from A., giving time, the simple contract debt is thereby extinguished as regards B. *Loomis* v. *Ballard*, 7 U. C. R. 366.

Quære, whether the taking of a specialty security from one of two joint debtors on a simple contract will operate as a merger, and whether Loomis v. Ballard, 7 U. C. R. 366, can be followed since Sharpe v. Gibbs, 16 C. B. N. S. 527, and Booler v. Mayor, 19 C. B. N. S. 76. *Currie* v. *Hodgins*, 42 U. C. R. 601.

Mortgage for Amount Less than Debt.]—The acceptance of a conveyance by way of mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage, is a satisfaction of the simple contract debt for the larger amount. *Allen* v. *Alexander*, 11 C. P. 541.

See Commercial Bank v. *Muirhead*, 12 U. C. R. 39.

See, also, Collateral Security.

IV. Miscellaneous Cases.

Annuity—*Acceptance of Conveyance — Intervening Mortgage — Interest of Annuitant.*]—The owner of certain land devised it to his two sons, charged with an annuity to his widow, and also with certain legacies. After his death in March, 1879, the son's devisees mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it. They then raised money from the plaintiff in November, 1879, by a mortgage which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage, and, therefore, gaining priority. In this mortgage to the plaintiff the widow joined, barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage, and there was a considerable surplus, and the question was whether the widow as dowress and annuitant had priority over C.:—Held, that the fact that the widow had accepted a conveyance of a moiety of the land from one of the sons did not cause her annuity to merge in whole or in part, the mortgage to C. intervening; and it not being to her interest to hold that a merger had taken place. The question of interest governs merger in the absence of express intention. *Maciennan* v. *Gray*, 16 O. R. 321.

See S. C., 16 A. R. 224; *S. C., sub nom. Gray* v. *Coughlin*, 18 S. C. R. 553.

Church—*Trustees—Corporate Capacity — Merger of Individual Capacity — Parties to Action.*]—The plaintiffs sued as "The Trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and would rebuild it so as better to answer the purposes of said deed, defendant promised to pay them $160 to assist them in so doing:—Held, that the plaintiffs being entitled to sue in their corporate or quasi-corporate capacity their individuality was merged therein, and the objection that the defendant, being a trustee, was also one of the plaintiffs could not arise. *Trustees of Toronto Berkeley Street Church* v. *Stevens*, 37 U. C. R. 9.

Easements.]—See *Attrill* v. *Platt*, 10 S. C. R. 425.

Legacy — *Merger of Interest in Estate.*]—A testator devised all his estate real and personal to his wife for life, and after her death the real estate was to be equally divided between one of his sons and one of his daughters; the daughter to have all his personal estate also; in the event of the death of either without heirs, his or her share was to be divided between the other children of the testator. Several pecuniary bequests were made, which were to be paid by the son and daughter, by instalments, commencing one year after they should "have come into possession hereby given." The daughter married and died during the life of the widow, leaving the husband tenant by the curtesy, but no child her surviving. The widow subsequently died, and thereupon the tenant by the curtesy recovered possession of his deceased wife's share, in ejectment. More than a year after the death of the widow, a daughter of the testator, one of the legatees named in his will, filed a bill for the payment of the arrears of her legacy:—Held, in the events that had happened, that there was no merger of any portion of her legacy by reason of her interest in the deceased daughter's share. *Robson* v. *Jardine*, 22 Gr. 429.

See Bills of Exchange, VII. 4—Mortgage, VII. 5.

MESNE PROFITS.

See Ejectment, II.

Right to Mesne Profits in Action of Dower.]—See *Ryan* v. *Fish*, 4 O. R. 335.

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MINES AND MINERALS.

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I. Agreements.

Assignment of Interest—*Stipulation as to Profits—Proceeds of Sale.*]—The plaintiff, having discovered mines upon certain lands, agreed with D. and T. that they should furnish the funds to work the mines, and, after securing the title, convey an undivided third to him. He afterwards agreed to assign his interest in this agreement to defendant, in consideration of $100, and one-half of whatever profit might be derived from the share agreed to be given to him by D. and T.; and the defendant agreed to account for and pay over to him one-half of whatever profits or returns might be derived from the said share assigned to defendant, as agreed to be given to the plaintiff by D. and T.; and further, it was agreed that the plaintiff should not have to pay or advance any moneys or labour in the working of said mines. The defendant having sold one-half of his interest to one G. for $1,125:—Held, that this money was not profits or returns derived from defendant's

share, for which he was bound to account to the plaintiff under his agreement. *Loucks* v. *Wallbridge*, 31 U. C. R. 32.

Construction — *Lease or License — Foreigners—Foreign Debt.*]—Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction:—Held, that the agreement was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and that the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order:—Held, also, affirming the decision in 17 P. R. 300, that the court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here. Credits Gerundeuse v. VanWeede, 12 Q. B. D. 171, distinguished. *Re Benfield and Stevens*, 17 P. R. 339.

——— *Mineral Rights—Right to Possession.*]—By an agreement made on the 13th January, 1897, in consideration of $1, the owner of certain lands agreed "to lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery, and conveniences for mining, quarrying, and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises and to build necessary railroad thereon." "Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897." "Unless said (plaintiff) utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void:"—Held, that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords. *Haren* v. *Hughes*, 27 A. R. 1.

Formation of Company to Work Mine — *Breach — Damages — Performance of Plaintiffs' Part of Contract—Title—Mineral Rights in Highway—Conveyance from Municipality—Proviso as to Public Travel.*]—The plaintiffs and defendant entered into a joint adventure to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the title to the mineral rights in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under s. 442 of the Municipal Act of 1873, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with defendant's consent, made to one R. B. G., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. Defendant obtained an Act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued defendant for not forming the company or carrying on mining operations, and having obtained a verdict for $400:—Held, that the verdict must be reduced to nominal damages. Held, also, that the conveyance by the municipality of the mineral rights, under s. 442, was sufficient, and that s. 441, for stopping up of a road allowance, did not apply. Held, also, that, although the conveyance of the mineral rights was to R. B. J., defendant could not urge that he could not be compelled to convey, owing to the absence of any writing; and that the plaintiffs, having control of the title, were in a position to aver and prove their readiness to perform the agreement. *Johns* v. *Beck*, 24 C. P. 219.

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

Specific Performance—*Conveyance of Part of Land—Consideration.*]—Defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same; agreeing to give the plaintiff one-fourth of the land for his trouble, on his paying one-fourth of the consideration, and to reconvey to the owner of such title another one-fourth part. The title having been bought up, the defendants did reconvey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff:—Held, that the agreement was such as the court of chancery would decree specific performance of. *Bogart* v. *Patterson*, 14 Gr. 624.

——— *Mutual Mistake — Reservation of Minerals.*] — The defendants executed an agreement to sell certain lands to the plaintiff, who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land, while the agreement was for an unconditional sale. In an

action for specific performance of the agreement the defendants contended that in their conveyances the word "land" was always used as meaning land minus the minerals:—Held, reversing the judgment in 6 B. C. Reps. 228, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake, and he was entitled to a decree for specific performance. (Leave granted for an appeal to the Privy Council.) *Hobbs* v. *Esquimalt and Nanaimo R. W. Co.*, 29 S. C. R. 450.

Transfer of Proceeds of Sale—*Statute of Frauds.*]—An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it should be sold, is not a contract for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

See McDonald v. *Upper Canada Mining Co.*, 15 Gr. 179, 551, *post* III.; *Williams* v. *Jenkins*, 18 Gr. 536. See, also, cases under IV., V.

II. Crown.

Dominion Lands—*Reservation of Mines and Minerals.*]—Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. *Canadian Coal and Colonization Co.* v. *The Queen*, 3 Ex. C. R. 157. Affirmed: *The Queen* v. *Canadian, &c., Co.*, 24 S. C. R. 713.

Precious Metals — *Canadian Pacific Railway Lands — Dominion or Provincial Government.*]—Rights of Dominion and Provincial governments in precious metals upon lands conveyed by the government of British Columbia to further the construction of the Canadian Pacific Railway, upon that Province being admitted into Confederation. See *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 S. C. R. 345, 14 App. Cas. 295.

——— *47 Vict. c. 14, s. 3—54 Vict. c. 26—Construction—Free Miner's Certificate.*]—By s. 3 of the British Columbia Act 47 Vict. c. 14, land was granted to the Dominion government, the appellant company's predecessor in title, "including all mines, minerals, and substances whatsoever thereupon, therein, and thereunder:"—Held, in an action for wrongful ejectment by the holder of a free miner's certificate, under the British Columbia Placer Mining Act, 1891 (54 Vict. c. 26), applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the Provincial Legislature to administer the precious metals in the lands assigned. *Esquimalt and Nanaimo R. W. Co.* v. *Bainbridge*, [1896] A. C. 561.

III. Mining Company.

Bills of Exchange—*Right to Draw and Accept.*]—A mining company incorporated under C. S. C. c. 63, s. 57, has not, as a necessary incident, the right to draw, accept, or indorse bills of exchange for the purposes of their business; and the power of "selling or otherwise disposing of their ores as the company may see fit," in their articles of association, will not give such right by implication. *Gilbert* v. *McAnnany*, 28 U. C. R. 384.

Compensation — *Power of Company to Make—Explorer—Share in Mine — Corporate Seal—Profits.*]—An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a company's incorporation Act, and as was conducive to the attainment of those objects, having been duly carried out:—Held, that the arrangement could not afterwards be declared to have been beyond the powers of the company or their directors, so as to entitle the company to keep for their own use without compensation to the plaintiff the whole benefit which the arrangement had afforded the company. M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The communication having proved valuable to the company:—Held, that M. was entitled to compensation in the manner usual in such cases. The usual mode was proved to be, by receiving a share or partnership interest in the mine, on the patent being procured:—Held, that this mode was not ultra vires of the company or the directors. The agreement was not under the corporate seal. The company received $5,500 for their claim to the property by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors, to obtain secretly a grant of the property to himself personally:—Held, that the plaintiff was entitled to share this sum, and that the want of seal was no defence. *McDonald* v. *Upper Canada Mining Co.*, 15 Gr. 179.

Wages—"*Labourers, Servants, and Apprentices*"—*Mining Companies Act — Directors.*]—The plaintiff, the manager of a mining company, paid out of his own moneys the amount due for wages by the company to certain labourers, and having obtained assignments of their claims, recovered a judgment against the company for the amount, together with a sum of money owed to him by the company for services. After an execution against the company had been returned unsatisfied, he brought this action on behalf of himself and the labourers against two of the directors under s. 8 of R. S. O. 1897 c. 197, the Ontario Mining Companies Incorporation Act, to make them personally liable for the amount due on the execution:—Held, that the action brought against the company was not such a one as is contemplated under the section. The manager of a mining company is not a "labourer, servant, or apprentice," within the meaning of s. 8. *Herman* v. *Wilson*, 32 O. R. 60.

See Johns v. *Beck*, 24 C. P. 219, *ante* I.; *Burn* v. *Strong*, 14 Gr. 651, *post* V.; *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285, *post* VI.

IV. Mining Leases.

Covenant for Payment of Rent—*Proviso for Determining Lease—Independent Contracts.*]—In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said lands and mine, payable quarterly on the first days of March, June, September, and December in each year." The lease contained, also, the following covenants by the lessee: "The parties of the second part for themselves, their executors, &c., covenant and agree to and with the party of the first part, her heirs, &c., that they will dig up and mine and carry away in each and every year during the said term a quantity of not less than two thousand tons of such stone or iron ore for the first year, and a quantity of not less than five thousand tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid." "And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof." There was a provision that the lessor should be at liberty to terminate the lease in case of non-payment of rent for a certain period, and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper and reasonable effort in paying quantities, then the lessee should be at liberty to determine the lease:—Held, affirming the judgment in 14 A. R. 460, sub nom. Walbridge v. Gaujot, that this lease contained an absolute covenant by the lessee to pay the rent in any event, and not having terminated the lease under the above proviso he was not relieved from such payment in consequence of ore not being found in paying quantities. *Palmer* v. *Wallbridge*, 15 S. C. R. 450.

Entry on Lands—*Permission of Owner—Unproclaimed Districts—Validity of Lease—Areas — License — Irregularity.*] — Held, that where a mining lease is obtained over private lands in Nova Scotia, the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the Mining Act. Mining leases may be granted in all districts whether proclaimed or unproclaimed. A mining lease is not invalid because it includes a greater number of areas than is provided by the statute, such provision being only directory to the commissioner. The issue of a lease cures any irregularities in the application for a license, or in the license itself, in the absence of fraud of the licensee. *Fielding* v. *Mott*, 14 S. C. R. 254.

Municipal Corporations — *Highway—Natural Gas.*] — Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. 1887 c. 184, s. 565, which gives power to the corporation of any county or township to sell or lease mineral rights under highways. A lease under that section should be of the right to take the minerals, and not of the highway itself. The lease in this case was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals." The quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected:—Held, that the practical difference was so small as not to constitute a ground for quashing the by-law. The council, before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing of the same:—Held, that, under the circumstances, this could not be deemed to be evidence that it was not passed in the public interest. The plaintiffs, by first sinking a well on the land near that of the defendants, did not thereby acquire the right to restrain the defendants from sinking wells upon their own lands for the purpose of reaching the portion of the reservoir which lies under them. *Ontario Natural Gas Co.* v. *Smart, In re Ontario Natural Gas Co. and Township of Gosfield South*, 19 O. R. 591, 18 A. R. 626.

See, also, *Johns* v. *Beck*, 24 C. P. 219, *ante* 1.

Oil Lands—*Agreement to Convey—Construction—Injunction—Specific Performance—Purchasers—Parties in Master's Office.*]—The court, in adapting itself to the exigencies of mankind as they arise, will deal with new subjects so as best to effectuate the intentions of the parties, and will not allow rules and principles, applicable to the different state of circumstances, to interfere with the exercise of its jurisdiction when it can be usefully exercised; and where money has been expended upon the faith of an agreement, which otherwise the court might not have enforced, it will not entertain objections to the form of the contract when it can execute it, and in doing so will construe the agreement liberally. The owner of land demised fifty acres for fourteen years at a nominal rent, for the purpose of borjng for oil, and at the same time agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road, and "also sufficient land for the working of such well or wells," the lessee agreeing to pay "$100 for the first well he might work for oil, and $50 per acre for the land necessary for working such oil well on said roadway," and "the sum of $50 for any oil well he shall work after the first one, and $25 per acre for any land necessary for working said well or wells and the roadway:"—Held, that, under the agreement, the purchaser was not entitled to space for a refinery, but it appearing that the sinking of another well within such acre would tend to injure the well already sunk, and that an acre was not too large for the purposes contemplated, an injunction was refused to the owner; and the purchaser by his answer having asked cross-relief by way of specific performance of the agreement, a decree was made accordingly. The master having required a list of all persons who had opened and worked wells upon the property with a view to making them parties in his office; and taking an account of what they owed respectively, in order that they might be bound thereby, and

that the defendant might thus acquire a lien on their portions of the land for the sums so to be paid by defendant:—Held, on appeal, that such other purchasers were not proper parties; nor could the defendant thus acquire any lien upon their property, or, in the absence of a request, any claim against the parties for repayment of the amounts advanced on their accounts, there being no legal liability on his part to make such payment. Quære, if he could thus acquire such lien or claim, whether they would in that case have been proper parties. *Ledyard* v. *McLean*, 10 Gr. 139.

——— *Agreement for Lease—Reservation.*]—The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop. The intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. At the hearing the bill was dismissed with costs. *Morris* v. *Kemp*, 13 Gr. 487.

——— *Condition as to Commencement of Work—Time—Failure to Perform—Waiver.*]—Two leases were executed between the same parties, and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty. It was a condition of the leases that the lessee should commence digging for oil on or before the 1st June, 1861, which he failed to do. On the 16th September, 1863, the lessor accepted from the lessee $50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was indorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared he considered valid. On the 30th November, 1864, another memorandum was indorsed on the same lease, and signed by the lessor, agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was, until after this time, beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part, the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the court of chancery decreed that there was waiver of the condition to commence work by a particular time; and that the ten-acre lease was binding on the patentee, and restrained him from bringing ejectment; and the decree was affirmed on appeal. *Flower* v. *Duncan*, 13 Gr. 242.

——— *Covenant to Sink Well—Option to Purchase—Time—Independent Contracts.*]—The owner of vacant land leased part of it for nine months at a nominal rent. The lessee covenanted to sink on the land, during the term, a test well to the depth of 1,000 feet, for the purpose of obtaining oil; and it was provided that at any time during the term the lessees should have the option of purchasing, and the lessor should convey to them, on their request, any five acres of the demised land at $12 a lot; and that at the end of the term the lessees should have the option of purchasing the residue at the same price. The lessees did set about making the well, but the machinery broke after they had reached a depth of 530 feet, and they were in consequence unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete; and the work had enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice before the end of the term that they would take the five acres:—Held, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the non-completion of the well to the stipulated depth, without prejudice to any action by the lessor on the covenant. *Hunt* v. *Spencer*, 13 Gr. 225.

——— *Lease or License.*]—Defendant leased to M. a lot of land for 25 years, for the purpose of boring for oil, salt, or minerals, with right of ingress and egress in a certain designated manner. M. was to pay an advance of $35 on oil, and one-eighth part, every three months, of all oil obtained, and was to be allowed two years for testing the oil-bearing character of the land, when, if oil was not found in paying quantities, the lease was to be null and void, and plaintiffs were to return the $35 advanced. Defendant was to have the free use of the premises for agricultural purposes, except such portions as should be required for the oil operations:—Quære, whether the instrument in question amounted to a lease, or was a mere license to bore for oil, salt, or minerals. *Burnside* v. *Marcus*, 17 C. P. 430.

——— *Right of Tenant to Bore for Oil.*]—See *Lancey* v. *Johnston*, 29 Gr. 67.

See Hope v. *Ferris*, 30 C. P. 520.

Provision for Royalty—*Non-exercise of—Purchaser for Value.*]—A mining lease for 99 years contained provisions enabling the lessor to demand at his option a royalty upon the proceeds of the mine, or $4,000 in lieu of such royalty. The lessor had not exercised such option:—Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Gr. 541.

Provisions of Indenture—*Lease or License.*]—In an indenture describing the parties as lessor and lessees respectively, the granting part was as follows: "Doth give, grant, demise, and lease unto the said (lessees) the exclusive right, liberty, and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, labourers, and teams, to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises, and of making all necessary roads, &c, also the right, liberty, and privilege to erect on the said premises the buildings, machinery, and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores." There was a covenant by the grantees not to do unnecessary damage and a provision for taking away the erections made and for the use of timber on the premises and such use of the surface as might be needed. The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a cer-

tain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and covenant by the lessor for quiet enjoyment. The lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne c. 14, s. 1, and the trial Judge gave judgment in favour of the defendants, on the ground that the instrument was a license merely and not a lease. This judgment was reversed by a divisional court (7 O. R. 471), and an appeal to the court of appeal, owing to an equal division of the Judges, was dismissed with costs (14 A. R. 738). On appeal to the supreme court that court was also equally divided. *Lynch* v. *Seymour*, 15 S. C. R. 341.

Rental Agreement—*Payment of Rent—Forfeiture.*]—By R. S. N. S., 5th ser., c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by s.-s. (c) the owner of any leased area may, by duplicate agreement in writing with the commissioner of mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by s. 8 said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated 10th June, 1889, for twenty-one years from 21st May, 1889. On 1st June, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On 22nd May, 1894, the commissioner declared the lease forfeited for nonpayment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on 9th June, 1894, and an action was afterwards taken by the attorney-general, on relation of E., to set aside said license as having been illegally and improvidently granted:—Held, that the phrase "nearest recurring anniversary of the date of the lease" in s.-s. (c) of s. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on 10th June, no rent for 1894 was due on 22nd May of that year, at which date the lease was declared forfeited, and E.'s tender on 9th June was in time. Attorney-General v. Sheraton, 28 N. S. Rep. 492, approved and followed. Held, further, that, though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. *Temple* v. *Attorney-General for Nova Scotia*, 27 S. C. R. 355.

Tenants in Common—*Lease by One—Injunction — Account.*]—One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Gr. 614.

See McArthur v. *Brown*, 17 S. C. R. 61.

V. Partnership.

Abandonment of Location—*Continuance of Partnership—Presumption—Enforcing Rights—Delay—Acts of Partner—Benefit of Co-partners — Statute of Frauds — Entry and Work.*]—A partnership was formed between three persons, A., B., and C., to dig for gold on the property of one Allan; two of them, A. and B., were to do the work, and the third, C., to pay the expenses; all three were to share in the profits. The place so named was afterwards abandoned by mutual consent, and the two working partners, A. and B., removed, at the instance of the third, C., to a lot in another township (Elzevir), where they resumed work, C. paying expenses as before:—Held, that, in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally named. The plaintiff had occasion to leave the work on the 2nd March, and did not return. He filed a bill to enforce his partnership rights on the 30th July:—Held, that, as there was no stipulation respecting the time he was to work, and he was not requested to resume work, and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit. C. in his own name bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a company by whom that lot was purchased:—Held, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C. in this transaction. There was no writing signed by C. acknowledging the agency and trust:—Held, that A. and B. having entered and worked on the lot, the Statute of Frauds did not apply. *Burn* v. *Strong*, 14 Gr. 651.

Evidence to Establish—*Transfer of Interest—Agreement.*]—Held, that in a suit for a share of the profits of a gold mine, where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine; and the suit was dismissed. *Stuart* v. *Mott*, 14 S. C. R. 734.

VI. Miscellaneous.

Coal Mines Regulation Act, B. C.—*Ultra Vires—Employment of Chinamen.*]—See *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A. C. 580.

Expropriation—*Proof of Value.*]—In a case of expropriation the claimant is not obliged to prove by costly tests or experiments

the mineral contents of the land. Brown v. Commissioner for Railways, 15 App. Cas. 200, referred to. Where, however, such tests or experiments have not been resorted to, the court or jury must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

——— *Right of Railway Company.*]—See *Jenkins v. Central Ontario R. W. Co.*, 4 O. R. 593.

Mining Claim—*Invalid Location—Foreign Territory.*]—If the initial post of a mining claim is in the United States territory, the claim is utterly void. *Madden* v. *Connell*, 30 S. C. R. 109.

——— *Registered Description — Error — Certificate of Improvements.*]—If the description of a mining claim as recorded is so erroneous as to mislead persons locating other claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims. *Coplen* v. *Callahan*, 30 S. C. R. 555.

Negligence—*Injury to Servant—Use of Dangerous Materials.*]—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285.

Purchaser for Value without Notice—*Consideration.*]—An unpatented and undeveloped mining property, the value of which was purely speculative, and the government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being $100, and he, for the express, but not actual, consideration of $750, conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who, after holding it for a year, conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of $25:—Held, that the release of the debt was a sufficient consideration for the deed. Held, also, that, taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not, by reason of the consideration expressed in the deeds to and from the plaintiff, put upon inquiry so as to affect him with constructive notice of the plaintiff's rights. *Moore* v. *Kane*, 24 O. R. 541.

Sale of Phosphate Mining Rights—*Option to Purchase other Minerals—Transfer of Rights.*]—M., by deed, sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind, he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mine for five years, and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals, and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B., the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator, and for damages:—Held, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica as to which B. claimed the option. *Baker* v. *McLelland*, 24 S. C. R. 416.

See Stuart v. *Baldwin*, 41 U. C. R. 446.

See CONSTITUTIONAL LAW, II. 17—WAY, IV. 8.

MINISTERS OF THE CROWN.

See PARLIAMENT, II.

MISBEHAVIOUR IN OFFICE.

See CRIMINAL LAW, IX. 35.

MISDIRECTION.

See NEW TRIAL, V. 1.

MISJOINDER.

See PARTIES, I. 2 (a), (b), (e).

MISNOMER.

I. IN BAILABLE PROCEEDINGS, 4228.

II. IN PLEADINGS, 4229.

III. IN OTHER INSTRUMENTS AND PROCEEDINGS, 4230.

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I. IN BAILABLE PROCEEDINGS.

Arrest — *Wrong Christian Name.*]—An arrest was set aside, where the defendant, whose name was "Patrick," was called "Peter" in the affidavit and writ. *Botsford* v. *Stewart*, E. T. 11 Geo. IV.

——— *Wrong Christian Name — Representation.*] — One of several defendants, Stephen Nathaniel Campbell, was arrested on a writ of capias, in which he was called Samuel N. Campbell. As to the misnomer, the plaintiff shewed that the defendant had represented his first name to be Samuel, but did not shew that he had said this was his only name, or that any inquiries had been made to learn what his second name was:—Held, that the arrest was bad. *Pegg* v. *Campbell*, 1 P. R. 328.

——— *Wrong Surname — Representation.*]—The plaintiff, Campbell, who lived at Montreal, was arrested at Kingston upon a warrant reciting that R. B. Boman had been charged, &c., for that he, the said — Campbell, did, &c., and commanding the arrest of the said R. B. Boman. The information was against R. B. Boman, the name of Campbell having been struck out. It was found that the plaintiff was known as Campbell, but carried on business as R. B. Boman & Co.:—Held, that the information and warrant could afford no justification, for they were against Boman, not the plaintiff, and though the plaintiff had entered his name as "R. B. Boman" in the hotel where he was staying, there was nothing to shew that he ever represented that to be his name, and he was known to the hotel keeper and bar keeper as Campbell. *Campbell* v. *McDonell*, 27 U. C. R. 343.

Bail Piece—*Irregularity.*] — Where there are two plaintiffs with the same surname, the non-repetition of the surname after the Christian name of each in a bail piece is only an irregularity, and will not warrant the plaintiffs in taking an assignment of the bail bond. *Meighan* v. *Brown*, Dra. 167.

II. In Pleadings.

Bill of Complaint—*Company—Demurrer.*]—Where an incorporated company files a bill using a name other than that mentioned in the Act of incorporation, the bill is liable to a demurrer for want of equity. *Cornish Silver Mining Co.* v. *Bull*, 21 Gr. 592.

Declaration—*Mistake in Name of Plaintiff—Amendment.*]—A defendant cannot sign judgment of non pros. for not declaring, where the plaintiffs have in fact declared, but a mistake has been made in the name of one of them, the proper course being to move to amend the declaration as to the name under 7 Wm. IV. c. 3, or to set it aside for irregularity. *Hart* v. *Boyle*, 6 O. S. 168.

It is no ground of nonsuit that the plaintiff has declared by a name different from her real name; it can only be taken advantage of by an application to amend the declaration. *Murphy* v. *Bunt*, 2 U. C. R. 284.

——— *Mistake in Name and Court—Motion to Set aside—Affidavits—Intituling.*]—Writ of summons in common pleas, T. H. B. Purdy v. Rowlands. Declaration by mistake in Queen's bench J. T. H. Purdy v. Rowlands. Motion to set aside declaration for irregularity is properly made on affidavits intituled as in the latter cause. *Purdy* v. *Rowlands*, 4 P. R. 308.

Plea — *Mistake in Name of Plaintiff — Judgment—Setting aside.*]—The plaintiff declared by the name of Hutchison. Defendant in his plea spelt the plaintiff's name Hutchinson. The plaintiff treated the plea as a nullity, and signed judgment, and took out execution. Proceeding were stayed to the next term so that defendant might apply to set the judgment aside, which he was held entitled to do. *Hutchison* v. *Hart*, 1 C. L. Ch. 223.

See Township of Beverley v. *Barlow*, 10 C. P. 178, *post* IV.

III. In Other Instruments and Proceedings.

Affidavit of Disbursements—*Name of Witness.*]—A misnomer of a witness David instead of Daniel, in an affidavit of disbursements, was held to be immaterial on a motion to revise a taxation, the defendants having disbursed the amount. *Ham* v. *Lasher*, 24 U. C. R. 357.

Affidavits in Cause — *Variance.*] — Where in the style of the cause the plaintiff was called "Davids Cass," but in the title of affidavits in support of a rule nisi in the same case "Davis H. Cass," and "Davis Hawley Cass:"—Held, a fatal variance. *Beauchamp* v. *Cass*, 1 P. R. 291.

Amendment of Unimportant Mistake.]—The court will allow an amendment where an unimportant mistake has been made in a name, which has misled no one, and the right person has been served. The court does not favour objections of this nature, and refused an enlargement, where, but for such mistake, the proceedings were regular and ample notice had been given. *Re Fraser, Fraser* v. *Fraser*, 2 Ch. Ch. 457.

Award.]—Held, that a mistake in the initial letters of the name of one of the parties is not fatal to an award. *Charles* v. *Hickson*, T. T. 3 & 4 Vict.

Where a verdict was taken for the plaintiff, subject to a reference, and the arbitrator awarded for defendant, but everywhere styled the plaintiff "John," instead of "Patrick," the court set the award aside and granted a new trial. *McManmon* v. *McElderry*, H. T. 6 Vict.

Bond.]—An obligor who is called by the wrong name in a bond, but executes it by his right name, must be sued by the name in the bond. *Ketchum* v. *Brady*, M. T. 3 Vict.

See Township of Beverley v. *Barlow*, 10 C. P. 178, *post*, IV.

Cognovit — *Irregularity — Judgment—Setting aside.*]—Held, that the styling of a cognovit thus—"Thomas Paterson, plaintiff, v. Philemn Squires and Willian Squires, defendants," leaving out the letter o, and omitting part of the letter m, was not an irregularity (there being no doubt as to the identity of the parties), upon which a judgment and execution entered and issued upon the cognovit could be set aside. *Paterson* v. *Squires*, 1 C. L. Ch. 234.

See Parker v. *Roberts*, 3 U. C. R. 114, *post* IV.

Commission to Take Evidence—*Name of Commissioner.*]—A commission was addressed to S. B. Henry, and G., of Philadelphia, jointly and severally. G. took no part in executing it, but all was done by one S. B. Huey, and an affidavit of the plaintiff's counsel at Philadelphia, taken before G., explained that Huey was the name forwarded by him to the plaintiff's attorney here, but through some clerical error it was directed to Henry; that he knew no such person as S. B. Henry in Philadelphia, but that the Huey before whom the depositions were taken was the person intended. This objection was not taken to the commission at the trial, though others were, and the evidence of witnesses on both sides taken under it was read:—Held, that, nevertheless, the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity. *Lodge* v. *Thompson*, 26 U. C. R. 588.

——— *Name of Defendant.*]—Held, that a mistake in the intituling of the cause in the commission (the defendant having been styled William instead of Samuel) was fatal to it, and that the taking of the evidence under it was a void proceeding. *Graham* v. *Stewart*, 15 C. P. 169.

——— *Name of Witness.*]—Upon a commission the name of one witness was stated to be William Lansing Flynn, and in the return of the commissioners they stated that they had reduced to writing the answers of William L. Flynn:—Held, not to vitiate the commission. *Comstock* v. *Tyrrell*, 12 C. P. 173.

Deed — *Description of Company.*]—The deed to the defendant company described it by its original name of the P. H. L. and B. R. Co., when in fact its name had been changed:—Held, a sufficient descriptio personæ to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. W. Co.* v. *Midland R. W. Co.*, 7 A. R. 681.

——— *Variance.*] — The patent for land issued to Michael Corrigan, and the name was so spelt in the deed from him under which the plaintiff claimed, but was signed Michael Corgan:—Held, no variance. *Prince* v. *McLean*, 17 U. C. R. 463.

Idem Sonans.]—Jacques and Jakes are not necessarily idem sonans so that the substitution of the one for the other is sufficient. *Jaques* v. *Nicholls*, T. T. 3 & 4 Vict.

Owen and Orrin are not idem sonans. *Terry* v. *Mathews*, T. T. 3 & 4 Vict.

Wrong spelling of a party's name is not a sufficient ground for refusing an order when it is idem sonans. "Rae" instead of "Wray" held idem sonans. *Vance* v. *Wray*, 3 L. J. 69.

Judgment — *Registration.*]—A judgment was recovered against Charles Westley Lount, which was the correct name of the defendant. The registration was of a judgment against Charles Wesley Lount:—Held, sufficient. *Proudfoot* v. *Lount*, 9 Gr. 70.

A confession of judgment was executed in the name of Matthew Rodger; the certificate of registration was of a judgment against Matthew Rodgers:—Held, that the mistake vitiated the registration. *McDonald* v. *Rodger*, 9 Gr. 75.

Mandamus — *Application for — School Trustees — Description of.*]—In an application for a mandamus to compel a municipal corporation to provide $286.74 for a board of school trustees, they were described in the proceedings as "The Trustees of the Port Rowan High School:"—Held, description of trustees sufficient, for although "The Trustees of the Port Rowan County High School" would appear to be the more correct one, yet 34 Vict. c. 33 (O.) did not in express terms require it, and the township corporation had by their action shewn that they fully understood the body with whom they were dealing. *In re Port Rowan High School Trustees and Township of Walsingham*, 9 C. L. J. 188.

——— *Names of Applicants.*]—There having been a misnomer in the names of the applicants for a mandamus:—Held, that such misnomer not having been objected to on the argument below might be amended. *In re Stormont, &c., High School Board and Township of Winchester*, 15 U. C. R. 460.

See Nichol School Trustees v. *Maitland*, 26 A. R. 506.

Notice of Trial—*Name of Defendant.*]—In a notice of trial the Christian name of defendant was wrong in the style of cause:—Held, that the notice must be set aside. *Carnegie* v. *Rutherford*, 9 C. L. J. 212.

Promissory Note—*Mistake in Name of Company.*]—Quære, as to the effect of the defendants being described in the note in question in this case as the "Watertown Insurance Company," while the real name was "The Agricultural Insurance Company of Watertown, N. Y." *Scars* v. *Agricultural Ins. Co.*, 32 C. P. 585.

Quo Warranto Summons—*Warden of County—Description of—Amendment.*]—The proper designation of a warden in a quo warranto summons is "warden of the corporation of the county of ——;" but "the warden of the county of ——" is not improper, as there is no particular name or designation in the Municipal Act of 1886. The words "the warden of the county council of the county of Simcoe" might, if deemed necessary, be amended by striking out the words "of the county council" after the word "warden," and before the words "of the county of Simcoe" in the writs to be issued in pursuance of the judgment in a quo warranto matter. *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

Rating of Electors—*Mistake in Christian Names—Idem Sonans.*]—The franchise ought not to be lost to any one really entitled to vote, if it can be sustained in a reasonable view of the requirements of the statute. The rating of electors, under s. 75 of C. S. U. C. c. 54, is sufficient if in the surnames of the electors, although the Christian names be erroneous. Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified. So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to

vote, he having taken the same oath, and being otherwise duly qualified. "Thomas Sanderson" was held to be idem sonans with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating. *Regina ex rel. Chambers* v. *Allison*, 1 C. L. J. 244.

Rule on Attorney—*Name of Applicant.*]—A rule nisi having been obtained on an attorney to pay over to Charles Edward Hatherley a sum of money, a technical objection was taken that the complainant's name was not Charles Edward, but Charles Edmund:—Held, that the objection must prevail. *In re Latham*, 1 P. R. 91.

Rule on Corporation — *Name of Applicant — Costs.*] — In the copy of the rule nisi first served on a corporation, the applicant's name was by mistake written James instead of Joseph Thompson. The road in question also passed through the land of one James Thompson, with whom an arbitration had taken place, and the corporation, supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The court, in making it absolute, with costs, directed the costs incurred by the corporation in consequence of the error to be deducted. *In re Thompson and United Townships of Bedford, Olden, Oso, and Palmerston*, 21 U. C. R. 545.

Rule to Set aside Proceedings — *Intituling of.*]—See *Grant* v. *Taylor*, 2 U. C. R. 407.

Subscription for Shares—*Railway.*]—The naming af a railway "railroad" at the heading of a page of a stock book was held not to vitiate the subscription. *Smith* v. *Spencer*, 12 C. P. 277.

Writ of Fi. Fa.—*Transposing of Names.*]—In a writ of fi. fa., and the indorsements thereon, the plaintiffs were styled defendants and vice versâ, the words being transposed throughout, and the Christian names of the defendant were also transposed:—Held, that the writ and indorsements were clearly irregular. *Davidson* v. *Grange*, 5 P. R. 258.

IV. Waiver of Objections.

Where the plaintiffs are styled in proceedings upon a cognovit as they are named in the cognovit itself, the defendant, having recognized the plaintiffs' names in his cognovit, cannot object that the Christian and surnames of the plaintiffs have not been used in the proceedings. *Parker* v. *Roberts*, 3 U. C. R. 114.

When a party, by his own conduct and admissions, has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer; and held, that in this case the defendant was precluded from raising the objection. *Browne* v. *Smith*, 1 P. R. 347.

The plaintiffs declared on a bond to "The Beverley Municipal Council" (there being no such corporation in existence). The defendants did not deny the making of the bond, but pleaded over. On demurrer to the plea, and objections to the declaration:—Held, that by not pleading non est factum defendants were debarred from taking the objection to the form of the bond as pleaded. *Township of Beverley* v. *Barlow*, 10 C. P. 178.

See O'Donohoe v. *Donovan*, 41 U. C. R. 591.

MISREPRESENTATION.

See Fraud and Misrepresentation—Insurance, III., V. 7.

MISTAKE.

I. In Deeds and Other Writings,
1. *Generally*, 4234.
2. *Description of Land*, 4236.
II. In Proceedings in Actions, 4238.
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I. In Deeds and Other Writings.

1. *Generally.*

Account—*Rectifying Mistake in.*]—See *Taylor* v. *Magrath*, 10 O. R. 669.

Agreement for Sale of Land — *Omission—Vendor to Pay off Incumbrance.*]—See *Parkinson* v. *Clendinning*, 29 C. P. 13.

By-law—*Error in Computation.*]—Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially when it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections. *Re Secord and County of Lincoln*, 24 U. C. R. 142.

Chattel Mortgage — *Affidavit of Bona Fides.*]—See *Boldrick* v. *Ryan*, 17 A. R. 253.

——— *Re-filing—Description of Premises.*]—An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the re-filing. A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances. *Walker* v. *Niles*, 18 Gr. 210.

Confirmation Deed—*Effect of Making to One of Several Persons Interested—Decree Declaring Trust.*]—A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed by the purchaser was a conveyance by the husband only, with a bar of dower by the wife. The error was not discovered until after the property had been disposed of in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties

and the grantor (the husband being dead) the court decreed the grantee in the second deed to be a trustee for all the parties interested; and this decree, on appeal, was affirmed with costs. *Grace* v. *MacDermott*, 13 Gr. 247.

Date—*Error in Deed of Transfer.*]—See *Pilon* v. *Brunet*, 5 S. C. R. 318.

——— *Error in Mortgage—Registration.*]—A mortgage and memorial were executed on the 26th February, 1855, but by a clerical error the date in the mortgage was written as 1851. The memorial stated the date of the mortgage as 1855:—Held that the error did not vitiate the registration. *Harty* v. *Appleby*, 19 Gr. 205.

——— *Error in Recital of Agreement.*]—K. having agreed with the plaintiffs for the purchase of some lumber, the defendants consented to guarantee his punctual payment for the same; but inadvertently the first agreement, in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties as bearing date the 22nd December, 1851, whereas it was dated on the 8th January, 1852:—Semble, that on such an issue, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth* v. *Townley*, 10 U. C. R. 579.

Insurance Policy—*Cancellation after Loss—Mutual Mistake.*]—Where to an action on a policy of insurance on plaintiff's vessel, the defendants pleaded that before the loss the parties cancelled the policy, while the evidence shewed that the cancellation took place after the loss:—Held, that the plea was disproved, and that the plaintiff was entitled to recover. Knowledge on the part of the defendants, and ignorance in the plaintiff of the loss having occurred, at the time of such cancellation, would render it inoperative; and even if the defendants were equally ignorant with the plaintiff, the cancellation would still be void as made under a common mistake of fact. *Brown* v. *British America Assurance Co.*, 25 C. P. 514.

——— *Omission to Affix Seal.*] — See *Wright* v. *Sun Mutual Ins. Co.*, 29 C. P. 221.

Lease—*Assignment—Mistake as to Position of Property—No Frontage on Street—Equitable Defence to Action for Rent.*]—See *Talbot* v. *Rossin*, 23 U. C. R. 170.

——— *Cancellation of—Taking out Several Sheets and Replacing them by others—Effect of—Intention of Parties.*]—See *Bell* v. *McKindsey*, 32 U. C. R. 162, 3 E. & A. 9.

——— *Covenant—Mutual Mistake—Pleading.*]—To an action of covenant on a lease, defendant pleaded in substance, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended, and supposed, when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, plea bad. *Shier* v. *Shier*, 22 C. P. 147.

——— *Omission—Proviso for Arbitration as to Terms of Renewal Lease.*]—See *Dawson* v. *Graham*, 41 U. C. R. 532.

Mortgage—*Covenant—Error in Computation of Amount Due.*]—See *Stark* v. *Shepherd*, 29 Gr. 316.

——— *Mistake of Mortgagor as to Amount of Debt Secured.*]—The jury found that the defendant when he gave the mortgage supposed the debt, as security for part of which his mortgage was given, to be only $60,000:—Held, upon the evidence, that the finding of the jury that defendant supposed the debt to be $60,000 was wholly immaterial, as the mere fact that he thought it was only that amount could not, under the circumstances, relieve him from liability upon the mortgage either wholly or partially. *Merchants Bank* v. *Bostwick*, 3 A. R. 24.

Parol Evidence to Vary Writing.]—The court will receive parol evidence to rectify a written instrument, notwithstanding that the language used was that intended by the parties, where the legal effect of such language is different from what was their intention and agreement. *Merritt* v. *Ives*, 2 O. S. 25.

Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged. *McDonald* v. *Rose*, 17 Gr. 657.

Patent of Invention—*Mistake in Specification and Description.*]—See *Withrow* v. *Malcolm*, 6 O. R. 12.

Proviso in Deed for Making Void on Non-payment at the Day Named—*Insertion by Mistake.*]—See *Boland* v. *McCarroll*, 38 U. C. R. 487.

Sale of Securities—*Error in Schedule.*]—See *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

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2. *Description of Land.*

Injunction against Legal Owner—*Equitable Title.*]—In 1834 a contract was made for the purchase of the easterly fifty acres of a lot of land, but through mistake the deed covered the whole north half, thus conveying the legal title to the north-easterly and north-westerly quarters, but the purchaser went into possession of the portion actually intended to be conveyed, and shortly afterwards the vendee of the westerly portion went into possession of and occupied it without any disturbance of his title or assertion of right by the party to whom the conveyance had been made by mistake (although all parties knew of the error that had occurred), until the year 1857, when the assignee of the person holding the legal title instituted proceedings in ejectment, and recovered judgment; the evidence of adverse possession not being sufficient to outweigh the legal effect of the deed which had been so erroneously executed. This court restrained the owner of the legal title from proceeding to recover possession, and ordered him to convey the legal title to the plaintiff, who was equitably entitled thereto, and to pay the

costs of the suit, holding that the Dormant Equities Act did not apply to bar the plaintiff. *Armer* v. *McKenna*, 9 Gr. 226.

Land Conveyed to Two Purchasers—*Error in Description—Action to Compel Conveyance—Parties—Original Vendor.*]—Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective descriptions the conveyance to A. comprised B.'s land, and did not comprise A.'s own, nor did the conveyance to B. comprise A.'s land, but each took and kept the land actually intended for him:—Held, that, to a bill filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party. *Rowsell* v. *Hayden*, 2 Gr. 557.

Land Conveyed Twice by Same Grantor—*Priority of Registration — Cloud on Title—Bond to Remove—Action on—Plea of Mistake.*]—C. conveyed certain land to the defendant, and the deed was registered. Afterwards C., by mistake, included this with other land in a conveyance to one K., which was also registered. Defendant subsequently sold the land to the plaintiff, and the deed to K. having been treated as a cloud on the title, defendant and C. executed a bond to the plaintiff, reciting the above facts, and conditioned to procure within two months a conveyance from the representatives of K. (who had died) of all K.'s interest in the land, or, in case of their being unable through disability to execute such conveyance, then to take the necessary proceedings within two months to remove such cloud; and within that period to make and complete for the plaintiff a good and clear paper title, free from all incumbrances. The plaintiff sued defendant on this bond, alleging as breaches that defendant did not obtain such a conveyance, take such proceedings as would remove the cloud, or make and complete a good and clear paper title. To this the defendant pleaded that the conveyance to K. was by mistake, and the plaintiff purchased from W. with notice thereof, and on the understanding that proceedings would be taken to foreclose the mortgage: that C.'s executor had foreclosed; and that the executor was ready and willing to convey to plaintiff all K.'s interest in the property; that there was no cloud upon the title, and no title claimed by K., her conveyance being subsequent to defendant's and its registration:—Held, plea bad; for the condition of the bond being for the removal of K.'s deed, the plaintiff was entitled to have it performed, although the plaintiff might without it have a good title. *Matthews* v. *Walker*, 26 C. P. 67.

Land not Owned by Grantor—*Equitable Plea.*]—Part of the land included in a conveyance was inserted by mistake, the vendor not being or pretending to be the owner of it. To an action on the covenants for title an equitable plea alleging these facts was held good. *Belyea* v. *Muir*, 5 P. R. 273.

Land not Owned by Mortgagor—*Subsequent Sale of Land Intended to be Mortgaged—Account.*] — Where a mortgage was, through error, created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title, the court ordered him to account for the proceeds of the sale, not exceeding the amount secured by the mortgage, with interest and costs. *Lundy* v. *McKamis*, 11 Gr. 578.

Notice of Mistake — *Proof of.*] — W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only; A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that before the sale to the plaintiff W. had sold all he purchased to A.:—Held, that this was sufficient proof of that actual notice which is requisite in this class of cases. *Wigie* v. *Setterington*, 19 Gr. 512.

Statute of Frauds—*Contract for Sale—Letter—Whole Lot instead of Half.*]—Quære, where the agent of a person resident out of this Province sold by parol half a lot of land of the principal, and afterwards wrote to him a letter detailing the terms of the contract, but mentioning the whole instead of the half of the lot, and the mistake was clearly proved, whether this would be a sufficient note in writing to satisfy the provisions of the statute. *Jennings* v. *Robertson*, 3 Gr. 513.

II. In Proceedings in Actions.

Cognovit — *Original and Copy — Discrepancy.*] — Immaterial discrepancies between the sworn copy filed and the original cognovit constituted no ground for setting aside the judgment entered on such cognovit and subsequent proceedings. *Irvin* v. *Ham*, 9 L. J. 80.

Costs—*Motion to Correct Error.*]—When in equity any error occurs in drawing up any of the papers in a cause, and it is necessary to have the mistake rectified, the party applying for that purpose must pay the costs of the motion. *Emmons* v. *Crooks*, 1 Gr. 558.

Courts — *Intituling Papers in Wrong Court.*]—See *Re Kingston Election*, 39 U. C. R. 139; *S. C.*, 41 U. C. R. 310.

——— *Queen's Bench or Common Pleas—Motion for New Trial.*]—An application for a new trial made in the Queen's bench was referred to the common pleas, as the record had been returned there, and the case, which had been tried before the chief justice of the common pleas, was not to be found in his note book of trials from the Queen's bench. A rule nisi was then obtained in proper time in the common pleas, and enlarged until the next term, and in the meantime it was discovered that the record had been by mistake indorsed in the common pleas. Under these circumstances the application was entertained in the Queen's bench on the return of the rule. *Bens* v. *Stover*, 12 U. C. R. 623.

Decree—*Mistake as to Priorities—Application to Correct — Assignee of Trustee — Equities.*]—Where a decree by mistake gave a trustee priority, in respect of a debt due to

him by the estate, over claims of certain persons who were entitled to priority over the trustee:—Held, on an application to correct the error, that an assignment for value, executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all the equities to which the trustee himself was subject. *Wood* v. *Brett*, 14 Gr. 72.

——— *Default — Mistake of Solicitor — Effect of Dispute Note — Setting aside Decree—Forum.*]—An application was made to vacate a præcipe decree taken in the master's office, and to allow instead of a disputing note an answer to be filed setting up the Statute of Limitations:—Held, that the motion was properly made in chambers, and should be granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it. *Cattanach* v. *Urquhart*, 9 C. L. J. 212.

See Wright v. *Morgan*, 24 Gr. 457.

Execution—*Error in Names—Plaintiff for Defendant—Irregularity.*]—In a fi. fa. and the indorsements thereon the plaintiffs were styled defendants, and vice versâ, the words being transposed throughout, and the Christian names of the defendant were also transposed:—Held, clearly irregular. *Davidson* v. *Grange*, 5 P. R. 258.

——— *Stay of—Receipt for Debt—Alias.*]—Where, with a view of giving the defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt as the only proper mode of staying the execution, which receipt the sheriff had stated in the return of the writ of fi. fa., the court ordered an alias to issue. *Hinnerley* v. *Gould*, Tay. 143.

Master's Report—*Error in Date—Correction.*]—In taking account of mortgage money and interest, the master computed interest up to the 19th March, but by some error in preparing his report the money was appointed to be paid on the 19th January. Upon the application of the plaintiff ex parte, this error was ordered to be corrected. *White* v. *Courtney*, 1 Ch. Ch. 11.

Notice — *Motion to Correct Error.*]—An application to correct a clerical error in a decree or order must, as a general rule, be made on notice. *Radcuhurst* v. *Reynolds*, 11 Gr. 521.

Notice to Produce — *Clerical Error — "Defendant" for "Plaintiff."*]—In an action for a malicious arrest the plaintiff's attorney served the defendant's attorney with a notice "to produce the writ of ca. re. issued, &c., at the suit of A. against the defendant in this cause;" — Held, sufficient, the mistake in using the word "defendant" for "plaintiff" being a mere clerical error, which could not mislead. *Wilson* v. *Gilmour*, 5 U. C. R. 212.

Partition — *Rule Confirming — Non-issue of — Subsequent Application.*] — In 1855 the widow and children of one of two joint owners of land petitioned for a partition under 2 Wm. IV. c. 35, the other owner being respondent. In the same year a partition was made under a writ directed to the sheriff; the return and plan were filed, and a rule to record and confirm it was moved for, but by some mistake this rule never issued, and there was no official entry of its having been either granted or refused. In 1860 the respondent died. The partition thus made had always been acquiesced in, the parties supposing that it had been confirmed:—Held, that the court could not now, even by consent, examine and confirm such partition, for it would in effect be giving judgment against a party (the respondent) several years dead, and the proceeding would be void. *Park* v. *Park*, 24 U. C. R. 459.

Payment into Court—*Credit of Wrong Cause.*]—See *Johnston* v. *Johnston*, 9 P. R. 259.

Payment out of Court — *Discharge of Mortgage — Mistake as to — Restoration of Money.*]—A sum of money having been paid into court under the decree, an application was made by the plaintiff to have it paid out, which the court declined to order without an unconditional execution of a discharge of a mortgage which the plaintiff had undertaken to have discharged. A deed sealed by the mortgagees, but which had never been delivered, was then, through some misunderstanding, submitted to the court as duly executed and delivered, and on the faith of this representation the money was paid out accordingly. On the facts being subsequently discovered by the defendant, and brought before the court on petition, the court ordered the restoration of the money. *Robson* v. *Wride*, 13 Gr. 419.

Pleading—*Clerical Error—"Plaintiff" for "Defendant."*]—See *Hayward* v. *Harper*, 4 U. C. R. 489; *O'Donnell* v. *Hugill*, 11 U. C. R. 441.

——— *Defence at Law—Failure in—Relief in Equity.*]—Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or to come to the court of chancery, and by mistake pleaded them at law as a legal defence only, upon which he necessarily failed:—Held, that this did not form any bar to relief, on the same grounds, in the court of chancery. *Arnold* v. *Allinor*, 16 Gr. 213.

Undertaking — *Non-compliance with — Solicitor's Slip.*]—Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin* v. *Devlin*, 3 Ch. Ch. 491.

III. Miscellaneous Cases.

Audit of Account — *Misapprehension of Judgment of Court—Effect of.*]—See *Reynolds* v. *County of Ontario*, 30 C. P. 14.

Carrier's Delivery at Wrong Destination.]—See *Monteith* v. *Merchants' Despatch and Transportation Co.*, 1 O. R. 47, 9 A. R. 282.

Crown Patent — *Error and Improvidence in Issue of.*]—See *Fonseca* v. *Attorney-General for Canada*, 17 S. C. R. 612.

Deputy Returning Officer—*Return of.*]—See *Cameron* v. *Clucas*, 9 P. R. 405.

Insurance Policy—*Proofs of Loss—Condition—Non-compliance—Time.*]—See *Robins v. Victoria Mutual Fire Ins. Co.*, 6 A. R. 427.

——— *Proofs of Loss not in Accordance with Conditions — Waiver of Objection.*] — In an action on a policy of insurance the proofs of loss were not in accordance with the conditions of the policy, in that the magistrate's certificate stated that the magistrate was "contiguous" instead of "most contiguous" to the place of the loss, and also omitted to state that the insured had sustained loss on the property insured to the amount claimed by him; but it appeared that the certificate was in accordance with a printed form furnished by the company's agent to the insured for him to fill up as well as with the policy at first delivered to the insured, and in his possession when the fire took place, but subsequently, and after the loss had occurred, on the ground of a misdescription of the property insured, exchanged for the policy sued on; and the defendants, though aware of the plaintiff having complied with the first policy and of the mistake as to the subsequent one, never informed him, so that he might correct it, but lay by until the trial, when they attempted to take advantage of it: — Held, that, under these circumstances, the defendants could not avail themselves of the mistake. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

Interest—*Overpayment of—Recovery back—Account.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands, through the executor, in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of such instalment on the amount of such payment, to be computed from the time of his decease; and, by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—Held, that the overpayments were made under a mistake of fact and might be recovered or set off; but that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained. Corham v. Kingston, 17 O. R. 432, and United States v. Sanborn, 135 U. S. 271, specially referred to. *Barber v. Clark*, 20 O. R. 522. Affirmed, 18 A. R. 455.

Mortgage—*Interest — Overpayment of — Recovery back—Redemption.*] — A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. All the receipts given stated that the payments made were on account of interest. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal:—Held, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action. Rogers v. Ingham, 3 Ch. D. 351, followed. *Stewart* v. *Ferguson*, 31 O. R. 112.

Municipal Election — *Qualification of Alderman.*]—When a person elected alderman of a city made a declaration of office inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the quo warranto summons against him, qualified in respect of other property, his election was upheld. *Regina ex rel. Hartrey* v. *Dickey*, 1 C. L. J. 190.

Offer—*Effect of—Mistake as to—Release.*] —A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have. *Cousineau* v. *City of London Fire Ins. Co.*, 12 P. R. 512.

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

Partition—*Voluntary Division of Estate—Land Allotted by Mistake—Compensation—Valuation—Contribution.*]—A testator devised to his son a certain named lot; the residue of his estate, after certain other specific devises, he directed to be divided between his two brothers and sister, amongst whom, after the death of the testator, the property was divided, in which division by mistake the lot devised to the son was included, which was allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake which had been committed, applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible; and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate at its present value, one-third of which, with interest from the date of the first division, to be contributed ratably by the other residuary devisees or their representatives, or, if desired

by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Gr. 94.

Registrar's Abstract — *Omission of Mortgage — Notice to Purchaser — Payments Made after Notice.*]—A registrar of deeds gave an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage:—Held, that a purchaser who had notice of the omitted mortgage could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar, who, on finding his mistake, had bought up the outstanding mortgage, was held entitled to foreclose the same. *Brega* v. *Dickey*, 16 Gr. 494.

Subrogation — *Mortgagee — Payment of Prior Incumbrances — Intervening Execution.*] —The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search:—Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge; and that he was not disentitled to relief because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced by the want of care. *Brown* v. *McLean*, 18 O. R. 533.

——— *Purchaser — Payment of Incumbrances — Intervening Lien.*] — The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly afterwards the defendant completed his purchase, and, having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but, as he did not make a further search, he did not discover the plaintiff's lien:—Held, that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien. The Registry Act does not preclude inquiry as to whether there was knowledge in fact; and the court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake. Brown v. McLean, 18 O. R. 533, specially considered. *Abell* v. *Morrison*, 19 O. R. 669.

Taxes — *Voluntary Payment — Recovery back.*] — Where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. Judgment in Q. R. 8 Q. B. 246 affirmed. *Canadian Pacific R. W. Co.* v. *City of Quebec, Grand Trunk R. W. Co.* v. *City of Quebec*, 30 S. C. R. 73.

——— *Voluntary Payment—Recovery back —Sale for Arrears.*]—Land belonging to a trust estate having been sold for taxes, during the year allowed for redemption the trustees who had been newly appointed paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem, as the arrears exceeded the value of the land:—Held, that they were not entitled to recover back the money as paid under a mistake of fact. *Trusts Corporation of Ontario* v. *City of Toronto*, 30 O. R. 209.

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I. GENERALLY.

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"Due J. G., or bearer, $462 in Canada bills, payable fourteen days after date," &c.:—Held,

not a note; for such bills (issued under 29 & 30 Vict. c. 10), though currency, are not specie or money. *Gray* v. *Worden*, 29 U. C. R. 535.

——— *Agreement to Sell American Currency or Greenbacks—Trover and Detinue for—Property Passing—Payment by Promissory Note.*]—See *Walsh* v. *Brown*, 18 C. P. 60.

——— *Rate of Exchange.*]—An instrument dated at New York, signed and indorsed by the defendant, promising to pay to the order of himself $1040.23 at a bank in Toronto, with the current rate of exchange on New York:—Held, sufficient evidence prima facie of an account stated, for that the transaction would be assumed as immediate between plaintiff and defendant without proof to the contrary, and though not a promissory note according to Fahnestock v. Palmer, 9 C. P. 172, it was a written acknowledgment of indebtedness in the sum named. The plaintiff was held entitled to the full sum of $1040.23, not merely to so much as would purchase a draft on New York for that sum, which when the note fell due would have cost only $754. *Grant* v. *Young*, 23 U. C. R. 387; *Wood* v. *Young*, 14 C. P. 250.

——— *Specific Sum—Express Promise.*]—A plaintiff may recover on an express promise to pay a specific sum, though such promise were made on the occasion of presenting the account due to the defendant, no admission of which account could, according to 2 Geo. IV. c. 13, be received in evidence, the account rendered being in New York currency, and the books from which the account was taken being also kept in that currency. *Crooks* v. *Law*, 5 O. S. 306.

Current Funds.]—Quære, whether an instrument purporting to be a bill of exchange, payable in New York, "with current funds," if it mean other than lawful money of the United States, is a bill of exchange. *Stephens* v. *Berry*, 15 C. P. 548.

——— *Pleading.*]—Held, that a note made in this Province, payable in current funds of the United States of America, was not a promissory note. The plaintiff having declared upon such note, defendants pleaded, setting it out in hæc verba, and alleging that it was made in this Province: that the current funds mentioned were paper notes issued by the United States government, and current there as money, but that the dollar named in them was not equal to the dollar of our money, nor of any fixed value; and that, except by indorsement of said notes by defendants, there was no contract between them and the plaintiff:—Held, that the plea was good, and not objectionable as varying the written contract by parol. *Bettis* v. *Welter*, 30 U. C. R. 23.

Damages—*Breach of Contract to Advance Money.*]—See *Hyde* v. *Goodcrham*, 6 C. P. 21.

Evidence—*Foreign Law—Expert.*]—The president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country as to what is money there. *Third National Bank of Chicago* v. *Cosby*, 43 U. C. R. 58.

Municipal Corporation—*Duty of Treasurer.*]—County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money. *Peers* v. *Oxford*, 17 Gr. 472.

Theft—*Following Stolen Money—Purchase of Property—Injunction.*]—If the court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it. Accordingly, where money was stolen the owner was held entitled to a leasehold, furniture, and other chattels, purchased with the stolen moneys, and an injunction was granted to restrain parting therewith until the hearing. Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property in this country, the court granted an injunction to restrain the selling or incumbering thereof. *Merchants' Express Co.* v. *Morton*, 15 Gr. 274.

——— *Specific Money—Agent—Liability.*]—Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money, while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. Remarks as to such defence and the facts required to sustain it. *Bickle* v. *Mathewson*, 26 U. C. R. 137.

II. Money Had and Received.

1. *Failure of Consideration or Title.*

Auctioneer—*Money Paid for Goods—Warranty of Title.*]—An auctioneer at an attempted sale of goods warranted them, saying they were his own, and he would stand between the purchaser and loss. Having sold the property by auction a few days subsequently to a bidder on the former occasion, and the goods having been claimed and taken by a third party under a chattel mortgage which covered them, the auctioneer, upon an action for money had and received, was held responsible to the purchaser. *Somers* v. *O'Donohue*, 9 C. P. 208.

Bank—*Discount of Bill—Non-acceptance—Assignment for Creditors—Following Proceeds of Bill.*]—A. & H., a firm doing business in Hamilton, had a draft for $1,200 accepted by B. at Montreal for their accommodation, falling due on the 27th April. H., in order to obtain funds to meet it, on the 26th April procured a draft on B. for $600 to be discounted by the plaintiffs, telling them that it would be accepted, and the proceeds of it were placed to the general credit of the firm This draft was sent to B. for acceptance, and H. on the same day wrote to him enclosing the firm's cheque for $1,200 on the Bank of Montreal, to take up the $1,200 draft, and requesting him to accept that for $600. On the 27th B. duly paid the draft for $1,200. On the 28th A. and H. had a difference, and A., hearing from H. that the firm was in difficulties, and that he intended using their funds in paying B. and another person, thereupon on the 29th drew out on the cheque of the firm their balance in plaintiffs' bank, consisting of the proceeds of the draft for $600, of which A. knew

nothing, and of other moneys, and handed it to their solicitor, for the benefit of their creditors generally. Between the 25th and 29th both the debtor and creditor side of the firm's account had been dealt with, and the balance increased in their favour. H., on the 29th, on hearing what A. had done, wrote to B. that in consequence the cheque sent to him could not be paid, and B. then refused to accept the draft. On the 2nd May the firm became insolvent, and an assignee was appointed, to whom the solicitor handed over the moneys deposited with him. The plaintiffs, however, claimed the amount of the $600 draft, contending that it was only discounted on the faith of its being accepted, and that, as one of the partners had caused its non-acceptance by his letter to the drawee, there was a failure of consideration, and that they were therefore entitled to follow the money in the assignee's hands:—Held, that they were not so entitled; that the case was the ordinary one of the discount of a draft on the belief that it would be accepted; and that the money formed part of the firm's general assets and passed to the assignee. *Canadian Bank of Commerce* v. *Davidson*, 25 C. P. 537.

Executor—*Payment to Legatee—Invalid Will.*]—The plaintiff, as executor of one W., having paid money to defendant, as a legatee, and the will with the probate having been afterwards set aside by a decree, the plaintiff was held entitled to recover back the money. *Haldan* v. *Beatty*, 40 U. C. R. 110.

Foreign Corporation — *Discount of Notes.*]—A foreign corporation—to wit, a bank—cannot maintain an action upon notes discounted and received by them in the course of conducting banking business in this Province, although they may maintain an action for money had and received to their use against the person for whom such note was discounted, and to whom money was advanced upon it. *Bank of Montreal* v. *Bethune*, 4 O. S. 341.

See Howe Machine Co. v. *Walker*, 35 U. C. R. 37.

Joint Stock Adventure.] — A person contributing to a joint stock adventure which does not go into effect, may recover back his money in an action for money had and received. *Gilpin* v. *Greene*, 7 U. C. R. 586.

Municipal Debenture — *Purchase of—Void By-law.*]—Action to recover the amount of a debenture, one of a series issued by the defendants pursuant to their by-law passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain:—Held, following Alexander v. Township of Howard, 14 O. R. 22, and Re Clark and Township of Howard, 16 A. R. 72, that the by-law was void, the defendants having no power to pass it for such a purpose. The debenture was silent as to the purpose for which it was issued, but referred to the by-law, which disclosed such purpose. There was no representation by the defendants that it was good:—Held, that, although the plaintiffs were innocent holders and had paid the full value of the debenture, they could not recover upon it, because the defendants had no power to make the contract professedly made by it. Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642, distinguished. Marsh v. Fulton County, 10 Wall. 676, especially referred to. Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover for money received by the defendants. *Confederation Life Association* v. *Township of Howard*, 25 O. R. 197.

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

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

See Owston v. *Grand Trunk R. W. Co.*, 28 Gr. 431, *post* 6.

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2. *Fraud and False Representations.*

Fraud and False Representations.]—A., a Crown lands agent, being asked by the plaintiff whether there were any lands for sale by government in the township of M., told him that there were not, but that B. had certain lots there, to which he would sell his right, and the plaintiff, being introduced by A. to B., paid the latter £50 for his goodwill, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as Crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence, or as money had and received. *McMaster* v. *Geddes*, 19 U. C. R. 216.

See Canada Farmers' Mutual Ins. Co. v. *Watson*, 25 C. P. 1, *post* 5.

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3. *Illegal Contracts.*

Excessive Interest.]—Held, that s. 2 of 16 Vict. c. 80, which provides that no party to any contract or payment, shall be liable to any loss or forfeiture for usury, did not bar the right to recover in an action of assumpsit for money paid in excess of legal interest. *Stimson* v. *Kerby*, 7 Gr. 510.

Reeve of Township—*Payment for Services.*]—In an action for money had and received, brought by the municipality of a township in 1857, against the defendant, who had been reeve in 1856, it appeared that at a meeting of the council in that year, the defendant being in the chair, it was resolved: 1. That the treasurer should pay the defendant the sum of £129, "for moneys advanced, attending commission, salary as councillor for 1856, for defending chancery suit, &c." 2. That the defendant should be authorized to sign an order on the treasurer to pay certain witnesses called by the council their expenses attending the commission, and paying other township officers, &c., not already paid by orders on the treasury. 3. That the reeve should give an order on the treasurer for £10 10s., in favour of N., for services as township clerk. It was proved that the treasurer paid the £129 to defendant; that the commission mentioned was held under 12 Vict. c. 81, s. 181, to examine into the financial affairs of the township; that the suit referred to had been brought by one C. respecting the affairs of the township; but the clerk swore that no documents had come into his possession shewing for what the moneys paid to the defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorize any of these payments:—Held, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence. With regard to the different items mentioned in the resolutions:—Held, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal. As to the charge of "attending commission," that it was primâ facie illegal, and the defendant should have shewn his right to it. That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. As to the money paid for defending the suit, that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend. As to the second resolution, that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers. As to the third resolution, that as there was no evidence of illegality in the payment nothing could be recovered. *Municipality of East Nissouri* v. *Horseman*, 16 U. C. R. 576.

Sunday.]—Where A. had received money on an agreement to deliver timber to B. which he afterwards refused to deliver, and was sued by B. to recover the money back, it is no defence to shew that the agreement was made on a Sunday, and therefore void under 8 Vict. c. 45. *Vail* v. *Duggan*, 7 U. C. R. 508.

Wager.] — Plaintiff and A. bet upon a horse race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified not to do so:—Held, that the plaintiff might recover back the amount from defendant as money had and received. *Anderson* v. *Galbraith*, 16 U. C. R. 57; *Sheldon* v. *Law*, 3 O. S. 85; *Battersby* v. *Odell*, 23 U. C. R. 482.

See GAMING.

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4. Illegal Fees or Tolls.

Clerk of the Peace—*Fees and Disbursements—Audit.*]—In this case the question was whether certain fees, classified in schedules in a special case submitted, could legally be claimed, and how far the county, having paid them during several years upon accounts duly audited and passed, could recover back such as the clerk of the peace was not entitled to. Besides deciding as to the different charges the following general principles were laid down:—Where the clerk of the peace, at the request of the justices or municipality, or of the county auditors, renders services which he is not bound to render, and for which no fee is allowed, though he might be unable to sue for his charges, yet when they have been duly audited and paid under no misunderstanding the municipality cannot recover them back; and the same rule is applicable to disbursements, as for stationery, office furniture, &c. Where the fees are within C. S. U. C. c. 119, s. 8, and have been received by the clerk contrary to its express provisions, they may be recovered back as money illegally received, though his accounts containing them have been audited and passed. *County of Lambton* v. *Poussett*, 21 U. C. R. 472.

——— *Striking Jury.*]—Fees illegally exacted by a clerk of the peace for services in striking a special jury, can be recovered back as money had and received. *Hooker* v. *Gurnett*, 16 U. C. R. 180.

Harbour Dues—*Agreement for Fixed Sum—Overplus.*]—Where the plaintiff agreed with a harbour company for the admission into their harbour of certain property of the plaintiff for a fixed sum, less than the toll which they might have claimed under their charter, but they afterwards refused to allow the property to be removed without the payment of their usual harbour dues:—Held, that the plaintiff might recover back the overplus. *Marsh* v. *Port Hope Harbour Co.*, 6 O. S. 100.

Road Tolls—*Compulsion.*] — Semble, that money paid as tolls under compulsion, in order to enjoy a road, may be recovered. *Little* v. *Dundas and Waterloo Macadamized Road Co.*, 2 C. P. 399.

Sheriff—*Summoning Jury—Overcharge.*] —An overcharge by the sheriff for summoning jurors may be recovered back by the county in an action for money had and received. *County of Haldimand* v. *Martin*, 19 U. C. R. 178.

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5. Mistake of Facts.

Forgotten Facts — *Insurance Premium.*] —A party may recover back money paid in forgetfulness of certain facts, which had without doubt been known to him. Held, that upon the facts in this case the assured could not recover back from the underwriters the amount they had paid on their premium note.

Perry v. *Newcastle Fire Ins. Co.*, 8 U. C. R. 363.

Knowledge of Facts—*Partnership—Imputed Knowledge.*]—Defendant sold to plaintiff and M. some lumber, the quantity of which was estimated according to a measurement made by M. and defendant's son. Two notes were given for part of the purchase money, the first of which was paid by plaintiff and M., and the second by plaintiff after he and M. had dissolved partnership. It appeared that before this note was paid, and before the dissolution, M. had gone over the measurement again with defendant's son, and found a deficiency of 474; for which the plaintiff sued defendant as money had and received:—Held, that he could not recover, for the payment was made after the deficiency was known to M. while the partnership continued, and therefore known to plaintiff. *Snarr* v. *Small*, 13 U. C. R. 125.

Laches—*Inquiry.*]—A person seeking to recover money paid under mistake of fact is not now bound to shew that he has been guilty of no laches; the only limitation is, that he must not waive all inquiry. *Law Society of Upper Canada* v. *City of Toronto*, 25 U. C. R. 199.

Misrepresentation of Facts—*Fire Insurance—Affidavit as to Ownership.*]—The defendant insured his dwelling house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire, defendant swore to the same facts in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by the defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid to him under false pretences, and for perjury; and defendant, to avoid the arrest and prosecution, gave the plaintiffs a note for the $700:—Held, that the plaintiffs could not recover on the note, for, in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration appeared but that of avoiding the arrest and prosecution. Held, also, that for the same reason the plaintiffs could not recover on the common counts, as for money paid under a mistake or misrepresentation of fact; but a new trial was granted to enable plaintiffs to shew the facts more fully. *Canada Farmers' Mutual Ins. Co.* v. *Watson*, 25 C. P. 1.

Payment for Goods not Ordered or Accepted—*Bill of Sale.*]—Defendant sold by a bill of sale to the plaintiff his goodwill, lease, and certain druggist's stock thereafter to be selected, to the amount of $5,700. One P. selected the stock from the stock list for the plaintiff, who paid the $5,700, and by some oversight a lot of lamp cleaners, of the value of $173, were charged and paid for as part of the $5,700, which, as the jury found, neither P. nor the plaintiff had ever chosen or accepted. Defendant having refused on application to take away these lamp cleaners or repay the $173:—Held, that, notwithstanding the bill of sale, the plaintiff was entitled to recover back the $173 as money paid under a mistake of fact, and without consideration. *Mingaye* v. *White*, 34 U. C. R. 82.

Payment for Goods not Received—*Laches — Demand.*] — The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs, in ignorance of the non-receipt of the third consignment, accepted and paid the defendant's draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the amount paid, which the defendant refused:—Held, that, although the plaintiffs had had the means within reach during all this time of ascertaining the true position of matters, there was no duty cast on them in relation to the defendant which made their delay in discovering the mistake laches on their part, and that they were entitled to recover back the amount paid as money paid under a mistake of fact. Semble, a demand of repayment or notice to payee of the mistake was necessary before action. *Clark* v. *Eckroyd*, 12 A. R. 425.

Payment to Wrong Person.]—Payment of note to defendant, under the belief that it had been assigned to him, with a mortgage for one of the instalments of which the note was given, whereas it had been transferred to a third party, to whom plaintiff was afterwards compelled to pay it. Plaintiff held entitled to recover back. *Chesney* v. *St. John*, 4 A. R. 150.

——— *Assignee for Creditors—Status of.*]—M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him, with other property, to the plaintiff, for the benefit of his creditors. He at the same time made over his interest in the contract to defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords, as well as for what he had himself supplied:—Held, that the plaintiff might recover this sum as money had and received. Held, also, that defendant could not object that the assignment to plaintiff was not properly filed. *Scott* v. *Kelly*, 17 U. C. R. 306.

Payment under Order of Court—*Subsequent Rescission—Partnership.*] — Defendant, having a judgment against M. and others, obtained an order on C. and others, garnishees, to pay over, after deducting any contra claim they might have. The defendant received on this order $171, by cheque of the plaintiff's firm, the plaintiff alone being the assignee of C.'s estate. It was afterwards discovered that the order had been for too much, and it was therefore rescinded, except as to the proper sum, which the garnishees' admitted set-off more than covered, so that nothing in fact should have been paid:—Held, that the plaintiff might recover the $171 from defendant as money had and received. Held, also, that the fact of the payment having been made by the cheque of plaintiff's firm, could not prevent the plaintiff alone from recovering, as the money was proved to have been the money of C.'s estate, in which the plaintiff's partners had no interest. *Sessions* v. *Strachan*, 23 U. C. R. 492.

6. *Mistake of Law.*

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

Assessment — *Illegality—Irregularity.*]—In an action against the corporation of a city to recover money alleged to have been paid by the plaintiff under the mistaken belief that an assessment was valid:—Held, affirming the judgment in 2 Dorion 221, that the plaintiff had failed to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might, in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted. 2. That the city council in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal. *Bain* v. *City of Montreal*, 8 S. C. R. 252.

Knowledge of Facts—*Common Mistake of Law.*] — On the death of the testator's widow, two sons and a surviving daughter entered into possession, collected rents, sold parts thereof, dividing the proceeds in equal shares among themselves, and partitioned part of the unsold balance thereof by deed, dated 31st January, 1885, and in all respects dealt with the lands and the proceeds thereof as if they were all equally interested therein. In May, 1886, the plaintiff, the eldest son, was advised that he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the will and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land:—Held, that the moneys paid over more than six years before action, could not be recovered: and, following Rogers v. Ingram, 3 Ch. D. 351, that as to the moneys paid over within six years, an action for money had and received would not lie for moneys paid by one party to another under a mistake of law common to both, when both had a full knowledge of all the facts. *Baldwin* v. *Kingstone*, 16 O. R. 341, 18 A. R. 63 and Appx.

——— *Ignorance of Legal Result.*]—When a person has paid money with a full knowledge of facts, he cannot recover it back on the ground that he paid it in ignorance of the law resulting from those facts. *Perry* v. *Newcastle Fire Ins. Co.*, 8 U. C. R. 363.

Marine Insurance—*Money Paid by Insurers — Mistaken Liability — Special Agreement.*]—The mortgagees of a vessel had insured her with plaintiffs. She was stranded at a place not within the policy, and the plaintiffs, who had received a protest from the captain, assuming that they were liable, sent their agent to get her off. The agent met defendant at the place, and, in his own words, "employed him as he would have employed a perfect stranger" to perform the service, advancing to him $300 on account. The defendant it appeared was in fact an owner of or had an interest in the vessel, but when acquired or to what extent was not shewn. The plaintiffs, having discovered that they were not liable, demanded back the money, which defendant refused to pay, alleging that he had used it; and they then sued:—Held, that the jury were warranted in finding for defendant, for if the money was not paid upon the policy, but advanced upon a distinct agreement, the mistake as to their liability would not enable them to recover. *Montreal Assurance Co.* v. *McCormick*, 25 U. C. R. 440.

Payment to Executors—*Tenant for Life —Claim of Remainderman.*]—An "action for money had and received will lie whenever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman:—Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors . . . of money to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs, it became money had and received by the executors to the use of the plaintiffs." *Owston* v. *Grand Trunk R. W. Co.*, 28 Gr. 431.

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7. *Pleading and Evidence.*

Evidence — *Consideration* — "*Value Received.*]—The words "value received" in—"I promise to pay A. or bearer £25 value received, to be paid in merchantable wheat at market price"—import a debt due, and are primâ facie evidence of a consideration: and such an instrument may be shewn under the count for money had and received, and account stated. *Waddel* v. *McCabe*, 3 O. S. 502; *S. C.*, 4 O. S. 191.

——— *Judgment—Fraudulent Confession.*]—In an action for money had and received against an attorney, evidence that the judgment under which the money was collected, was fraudulently confessed, was held not admissible. *Williams* v. *King*, Dra. 439.

Pleading—*Declaration — Municipal Treasurer—Division Court Clerk—Parties.*]—In an action by a treasurer of a district, under the Division Courts Act, against the clerk of a division court, for not paying over moneys received, it is sufficient to declare in the treasurer's own name for money had and received by defendant to the use of the plaintiff for the purposes of the Act. *Howard* v. *Walton*, 2 U. C. R. 266.

——— *Declaration — Sheriff's Covenant — Particulars.*]—In an action on a sheriff's covenant it is a good breach to state that he was indebted in a named sum for money had and received, without specifying how or on what occasion the money was received. *Commercial Bank* v. *Jarvis*, 6 O. S. 474.

——— *Plea—Abatement—Reply—Nul Tiel Record.*]—A defendant in assumpsit pleaded in abatement a former action pending, and the plaintiff replied nul tiel record. The declaration in the first action contained only a count for money had and received; in the second a count on account stated was added: —Held, that the replication was not supported, and that defendant was entitled to judgment. *Bain* v. *Bain*, 10 U. C. R. 572.

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8. *Privity of Contract.*

Agent—*Payment to Third Person—Recovery by Principal.*]—Plaintiff conveyed his land to G. to raise money by mortgage upon it for the plaintiff's use. G. did so, and for the plaintiff paid defendant's attorney about $160 under pressure, but under protest, which the plaintiff sued to recover back:—Held, after verdict, that it might be presumed that G. had paid, or accounted for, the money to the plaintiff, as he had raised it for the plaintiff, and that the plaintiff might recover. *Sanderson* v. *Gairdner*, 14 C. P. 330.

Division Court Clerk—*Attaching Creditors—Proceeds of Sale of Goods.*]—Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the division court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use:—Held, that he could not recover, for the money was not received by defendant in his official capacity as the plaintiff's, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. *Preston* v. *Wilmot*, 23 U. C. R. 348.

Officers of Foreign Company—*Action against.*]—L. arranged with the Canada Agency Association, an English company investing money in Canada, and having defendant R. as their manager, and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L., and the expenses, &c., the manager sent to L.'s order a cheque for the balance of $89.95, signed by R. and H., the defendants. L., having made a claim for a large amount, sued R. and H. for what he claimed:—Held, that defendants were not liable, as they never received any money to the use of the plaintiff, having no control over it except as manager and director of the association, and acting solely as its officers; and that the evidence did not establish any privity in respect of the money claimed, without which the action would not lie. *Heward* v. *Logan*, 14 C. P. 592.

Payment Made on Transfer of Liability—*Right of Creditor to Recover.*]—Defendant had contracted to supply a railway company with wood. In 1858, by an instrument under seal between them; in consideration of $22,000, defendant released the company from the contract, and the company covenanted to indemnify the defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land: one in South Easthope, which had been leased by plaintiffs to defendant; the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the company, stating that the plaintiffs had claimed from him rent in arrear on these two lots, amounting to $2,000, and offering, if the company would pay him that sum, and reconvey the leases, to assume them for the future. The company assented, paid him the $2,000, transferred to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant, after receiving this money, paid the rent on the South Easthope lot. The plaintiffs having recovered from defendant as for money received to their use:—Held, that the verdict was wrong, for, though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiffs' money, but as the price of the railway company's discharge, and there was no privity between plaintiffs and defendant. *Canada Co.* v. *McDonald*, 25 U. C. R. 384.

Treasurer of Club—*Action against.*]—Defendant, being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made:—Held, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Denison*, 28 U. C. R. 323.

See Owston v. *Grand Trunk R. W. Co.*, 28 Gr. 431, *ante* 6.

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9. *Protest or Compulsion, Payment under.*

Absence of Duress—*Protest.*]—The fact of a payment having been made under protest, but without duress, or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money. *Doe d. Morgan* v. *Boyer*, 9 U. C. R. 318.

Duress—*Threat of Prosecution.*]—Defendant obtained from plaintiff an order for £50 which was paid on a statement that he could prosecute him for felony:—Held, recoverable. *Pasco* v. *Wegg*, 6 C. P. 375.

Excessive Distress—*Tender — Necessity for.*]—An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due, and the excess paid cannot be recovered back as money had and received. *Owen* v. *Taylor*, 39 U. C. R. 358.

Execution — *Sale under — Purchase by Chattel Mortgagee — Representations—Action to Recover Purchase Money.*]—Plaintiff sold to one M. a steam engine for £650, of which M. paid £100 on account, and gave a chattel mortgage on the engine. The plaintiff afterwards received a letter from the defendant stating that the engine was to be sold for the balance of an execution against M. The engine was put up for sale, and the plaintiff became the purchaser, but before the sale defendant told the plaintiff that no chattel mortgage could be given which would prevent any other execution attaching on the engine as long as the execution in his hands was unsatisfied. That sale was not carried out. The engine was afterwards put up for sale again, and a person in plaintiff's employ bought it in for £35, after protesting against the sale. The engine was, however, taken away by plaintiff after the first payment on the mortgage became due:—Held, in an action for money had and received, that the facts as above would not support the action. *Morton* v. *Corbett*, 6 C. P. 251.

Pressure of Action—*Protest—Estoppel.*] Plaintiff, having bought a lot of land from defendant, agreed to pay him $1,000 on a certain day, and to give a mortgage on the lot for the balance of the purchase money, the defendant agreeing to accept in part payment of the latter an assignment of a mortgage held by plaintiff for $1,600, bearing six per cent. interest, which was to be sold to defendant at such a reduction as would pay him eight per cent. On a calculation made as to what this reduction should be, plaintiff objected that it was too great, but defendant replied that if it turned out that there had been a mistake he would rectify it. Defendant then credited plaintiff on his mortgage with the amount at which the other had been taken. It was subsequently ascertained that an error had been made in the calculation, to the extent of some $200. Defendant sued plaintiff on his mortgage for the balance of the purchase money, less the sum for which he had given him credit, and though admitting there had been a mistake in arriving at that sum, he refused to correct it, and plaintiff paid him in full under pressure of the suit, but also under protest:—Held, that the agreement for the sale of the mortgage was not an agreement relating to the sale of land requiring it to have been in writing. Held, also, that plaintiff was entitled to recover back the $200, for that it could not be considered a payment for the recovery of which he was estopped by what took place when he was sued; but that he could not recover on the common counts for money had and received. The court, therefore, instead of entering a verdict for the plaintiff, as moved, pursuant to leave, granted a new trial, with liberty to plaintiff to amend his declaration. *Carscaden* v. *Shore*, 17 C. P. 493.

Revenue Duty—*Payment to Obtain Goods Purchased.*]—The defendant, assignee in insolvency of L. & Co., advertised the whole estate for sale, consisting of a wholesale stock of groceries, &c., and a distillery and plant, which were specified in the advertisement in parcels, with the supposed value of each, the total being said to be about $51,000. He had an inventory prepared, which professed to give the cost price, and the advertisement invited tenders "at so much in the dollar on inventory price," to be paid in three equal quarterly instalments, or five per cent. to be allowed off for cash. Most of the goods were then in bond. W. & Co., on the 12th January, 1875, tendered for the whole stock, "as per inventory, the sum of seventy-six and one-quarter cents on the dollar, payable in cash after having checked over the stock and found it correct." On the next day, at a meeting of creditors, the assignee was instructed to accept this offer, and he wrote to W. & Co. accepting it, repeating the offer almost in their words. Afterwards, acting under the orders of certain creditors, the assignee refused to deliver the goods to W. & Co., unless they would pay the duty as well as the seventy-six and one-quarter cents on the $51,000; and to obtain the goods W. & Co. had to pay $43,000, being about $1,500 more than they would owe according to their offer, without the duty:—Held, that, looking at the advertisement, tender, and acceptance, W. & Co. were not bound to pay the duty; and that the payment by them was not a voluntary one, so as to prevent them recovering back the excess as money had and received. W. & Co., to obtain possession of part of the distillery plant which was affixed to the distillery, had to expend money in order to remove it:—Held, recoverable as money paid. *Wilson* v. *Mason*, *Lamb* v. *Wilson*, 38 U. C. R. 14.

Taxes—*Payment to Stop Tax Sale.*]—Where taxes were paid to the treasurer of the home district on lands in the Ottawa district to be transmitted to the treasurer of the latter district, and, not having been so transmitted, the lands were advertised for sale, and the plaintiff, to save the lands, paid the taxes to the treasurer of the Ottawa district under protest:—Held, that he could not recover them back as money had and received. *Baldwin* v. *Johnson*, 2 U. C. R. 475.

Wrongful Distress.] — Held, following Green v. Duckett, 11 Q. B. D. 275, that the plaintiff was entitled to recover interest paid under protest by compulsion of a wrongful distress. *McKay* v. *Howard*, 6 O. R. 135.

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10. *Receipt of Money, Proof of.*

Bank—*Discount of Promissory Note—Amount Received on Collateral Securities.*]—Certain sale notes were deposited with defendants as collateral security for the payment of a note, indorsed by the plaintiff for the accommodation of one M., and discounted by the defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank and applied on the note, so that when they were paid the note also was to be paid and the plaintiff's liability to cease. After the principal note became due defendants denied that they held the sale notes as collaterals, and refused to give the plaintiff any information as to what had been

paid on them: and the plaintiff then paid the note in full, and demanded an assignment of the collaterals, the plaintiff's payment being made by a part payment in cash, and his note for the balance, which he paid at maturity:—Held, that the plaintiff was entitled to recover, as money had and received to his use, the amount paid to the defendants on the collaterals, and that the fact of his only paying part of the principal note in cash, and giving his note for the balance, did not take away his right. Semble, also that his right would not be affected even if the payment on the collaterals were after his payment. *Cornish* v. *Niagara District Bank*, 24 C. P. 262.

——— *Lost Cheque.*]—Where plaintiff's agent had paid money into the agency of the Gore Bank at Simcoe, partly in cash and partly by cheque on the Commercial Bank at Toronto, to be placed to plaintiff's credit with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter of one per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank, or credited to the plaintiff:—Held that the plaintiff could not sue the Gore Bank for the amount of the cheque as money had and received. *Todd* v. *Gore Bank*, 1 U. C. R. 40.

Partnership — *Dissolution—Discount of Notes—Proceeds Received by One Partner after Dissolution.*]—Defendants H. and G., who had been in partnership as brokers, were sued for money had and received, the cause of action being for the proceeds of two notes made by the plaintiff, payable to them, to be discounted, which it was alleged that they had received and not paid over. G. allowed judgment to go by default. It appeared that the plaintiff had handed the notes to G., acting for the firm, to get them discounted for him; that they were indorsed in the name of the firm while it continued; and that after the partnership had been duly dissolved, G. sold them and received the proceeds, which he applied to pay a debt of his own, contracted by him in the name of the firm, H. not being aware of the sale:—Held, that the plaintiff could not recover against both defendants, for the money was not received by the firm, but by G. alone, after the dissolution and without the knowledge of H. *Hammond* v. *Heward*, 20 U. C. R. 36; *S. C.*, 11 C. P. 261.

Promissory Note — *Collection—Discount—Proceeds.*]—A. left with B. the following receipt: "Mr. John L'Esperance has left with me a note signed by J. G. Tremaine for £97, payable at the Bank of Montreal here, at three months from the 31st ultimo, which I am to account to him for if paid, deducting the amount he owes me. Cobourg, April 1st, 1846. Benjamin Clarke."—A. indorsed the note and got it discounted at a bank. When it became due the note was renewed with B.'s assent, who indorsed the same. Before the renewal became due, B. sued A. for money had and received:—Held, that the action would not lie. *L'Esperance* v. *Clarke*, 4 U. C. R. 12.

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11. *Rescission of Special Contract.*

Lease of Farm on Shares—*Proceeds of Sale of Produce.*]—Where the plaintiff let to defendants a farm on shares by an instrument under seal, and defendants covenanted to deliver to him a portion of the crop by a certain day, but before that day sold the crop and applied the money to their own use:—Held, that the plaintiff could not rescind the contract and sue for his proportion as money had and received. *Ducat* v. *Sweency*, M. T. 3 Vict.

Redemption of Goods—*Part Payment—Sale by Pledgee.*]—The plaintiff and defendant made the following agreement: "I, S. (the defendant), give $20 to M. (the plaintiff) for the colt which I have in possession, but I promise to give back the colt to M. if he will pay the same sum with twelve per cent. interest on or before the 1st May, 1866. If not paid the colt will be the property of S., then he can do with it as he likes, or keep it for himself." The plaintiff paid defendant $15, but failed to pay the balance, and in September, 1867, defendant sold the colt:—Held, that the plaintiff could recover the $15 paid by him, as money had and received. *Moore* v. *Sibbald*, 29 U. C. R. 487.

Sale of Interest in Business—*Purchase Money.*]—Held, that, under the special circumstances of this case, the plaintiff could not recover back the money mentioned in defendant's receipt as having been paid to him by plaintiff on account of stock taken by plaintiff in a certain foundry, in which the plaintiff had purchased defendant's interest under a special agreement, as money had and received, on the ground that the contract had been rescinded. *Kay* v. *Cameron*, 5 U. C. R. 530.

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

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

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12. *Trustees or Agents.*

Assignees for Creditors—*Liability to Creditors — Admission — Parties to Assignment.*] — The assignment contained three parties, C. B., the assignor, being the party of the first part, the defendants, the assignees, of the second part, and "the several other persons whose names and seals are hereunto subscribed and fixed, creditors of the said C. B., of the third part." No creditor executed

the assignment, but the defendants (assignees) admitted part of the plaintiff's claim by letter:—Held, that such admission made him a party to the assignment, although he had not executed it, and that the defendants were liable for money had and received. *Burrows* v. *Gates*, 8 C. P. 121.

Municipal Corporation—*Action against Councillor—Agent or Trustee—Receipt of Money.*]—The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges; that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury: whereas the work had not been done; and plaintiffs thus lost the money. Common counts were added. It appeared that the corporation by one resolution directed that $300 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another, that $100 should be placed to the credit of each councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, though contracted for, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as were expended:—Held, that there could be no recovery on the common counts, for defendant had received no money. Quære, whether this action would lie by the corporation against one of its members, or whether the proper remedy was not in equity against defendant as trustee. *Township of Chatham* v. *Houston*, 27 U. C. R. 550.

School Trustees—*Action against Secretary-Treasurer.*]—A board of school trustees can maintain an action for money had and received against their secretary-treasurer to recover a balance of money in his hands not expended or accounted for. *Stephen School Trustees* v. *Mitchell*, 29 U. C. R. 382.

Trustees—*Liability at Law—Special Action.*]—Under the facts of this case it was held that defendants, as trustees, could be liable only in equity, or, if at law, not for money had and received, but in a special action on the deed. *Harris* v. *Buntin*, 16 U. C. R. 59.

Trust Moneys — *Final Settlement — Surplus.*]—When money is received in the execution of a trust, money had and received cannot be maintained against the trustees so long as such trust remains open. Quære, whether in this case, even if there had been a final settlement of the account, leaving a surplus in the trustee's hands, the cestui que trust could have recovered against him without declaring specially. *McPherson* v. *Proudfoot*, 2 C. P. 57.

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13. *Other Cases.*

Bank—*Deposit by Customer—Cheque of Third Person—Dishonour—Laches in Presentation.*]—The plaintiff, having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of one C. on another bank in the same place, for $350, payable to the plaintiff or bearer, and not indorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. Defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent:—Held, that he could not recover, for defendants were not guilty of laches; and semble, that they could have recovered back the amount from the plaintiff, even if they had paid it to him. *Owens* v. *Quebec Bank*, 30 U. C. R. 382.

——— *Money Paid to Wrong Person—Forgery.*]—The Bank of British North America in England received money there to be transmitted to B. in Upper Canada, and sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (B. having in the meantime died) and B.'s name forged on the letter of credit, and the money received by some person unknown:—Held, that B.'s executrix was entitled to recover the money from the bank in Toronto as money had and received to B.'s use. *Gissing* v. *Hopper*, 6 O. S. 505.

Bills and Notes—*Agent for Collection —Assignment by Agent for Creditors—Action by Principal against Assignee.*]—F. had a demand against one T. on notes and acceptances of about $20,000. The plaintiffs agreed to transfer to him certain bank stock worth $2,-550, as a loan, to secure which he agreed to assign and afterwards delivered to them $14,-200 of these notes, all of which were negotiable, but some only were indorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $300 excepted) came into the defendant's hands:—Held, that the plaintiffs might recover from the defendant as money had and received the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt. *Lee* v. *Woodside*, 22 U. C. R. 15.

——— *Discount—Liability of Person not a Party.*]—The party discounting a bill has, in general, no recourse whatever upon the person from whom he has taken it, when the latter has not in any way made himself a party to it. Peculiar circumstances, however, may render such party liable on the common counts; and it was held that the evidence in this case warranted a recovery against him for money had and received. *Ross* v. *Codd*, 7 U. C. R. 64.

——— *Solicitor — Collection.*]—Where a promissory note was given to an attorney to get the amount of it secured, and the attorney subsequently said he would pay the amount in a few days, and an action was afterwards brought against him for negligence in not suing on the note, with a count for money had and received:—Held, that neither count was supported by the evidence. *Drennan* v. *Boulton*, 3 U. C. R. 72.

——— *Transfer for Collection—Liability of Transferee — Judgment.*]—Plaintiff gave two notes against F. to defendant, a division court clerk, to collect, and directed him to apply the amount collected on a note for $300 on which the plaintiff was liable to defendant. The defendant sold the two notes to one M., guaranteeing recovery thereon, and M., having recovered judgment against F., but made nothing thereon, obtained back from defendant what he had paid. Defendant transferred the note for $300 to T., who sued the plaintiff thereon and recovered judgment:—Held, that the plaintiff could recover from the defendant the money received by him from M. as money had and received, for the defendant had no authority to make the conditional transfer; and as F.'s notes were extinguished by the judgment recovered on them, and the holder of the plaintiff's note had recovered judgment against him, the defendant had rendered it impossible to restore the plaintiff to his original position. *Moorman* v. *Farmer*, 27 U. C. R. 1.

Consignment of Goods for Sale—*Advances by Consignee—Recovery of Excess over Sale Price.*]—Defendant, living at Chatham, consigned to the plaintiff, at Montreal, certain tobacco for sale, and, without authority, drew upon him at the same time a draft for $250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in Montreal, and the plaintiff therefore shipped the tobacco to England, where it was sold. The net proceeds, after deducting freight and charges, were only £14 sterling, and he sued defendant upon the common counts for the difference, $278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due detendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from England had been sent to the defendant, who said, on receiving them, that he did not think he ought to bear the whole loss, but offered $150. The jury gave a verdict for $200:—Held, there being no evidence of any special contract, that the plaintiff was entitled to recover his advances without waiting for the sale of the tobacco, and that if he had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld. *Stewart* v. *Lowe*, 24 U. C. R. 434.

Counsel Fees—*Agreement between Counsel and Solicitor—Payment of Costs to Attorney.*]—On the trial of an election petition against the return of a member to the Provincial Legislature, which resulted in favour of petitioner, to whom the costs were awarded, the defendant was retained by and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received $1,600, including $365 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as money had and received to their use:—Held, that they could not recover, for that the costs, including these fees, belonged to the petitioner and not to defendant as attorney. *Miller* v. *McCarthy*, 27 C. P. 147.

Gaming—*Horse Race — Stakes — Action for—Decision of Stewards.*]—Where, according to the rule of a race for one hundred guineas, the decision of the stewards was to be final, and the plaintiff's horse won the first heat, and came in first in the second, but, in consequence of alleged foul riding, was adjudged by the stewards to have been distanced, and another horse was pronounced the winner:—Held, that the plaintiff could not contest such a decision in an action for money had and received against the treasurer of the race, who had not paid over the purse. *Gorham* v. *Boulton*, 6 O. S. 321.

Infant—*Transfer of Shares—Dividend.*]—Where a father took shares in an association formed to build a steamboat, in the name of his son, then an infant, and during the minority of the child directed two of the shares to be transferred to the defendant, which was done:—Held, that the infant could not, on attaining his majority, maintain assumpsit for money had and received, to recover dividends on these shares, received by defendant. *Hall* v. *Bidwell*, 3 O. S. 22.

Judgment—*Assignment for Joint Benefit—Recovery of Share.*]—Where a judgment was assigned to defendant for the joint benefit of the plaintiff and himself, and he received the whole of it:—Held, that the plaintiff could recover his share as money had and received. *Hooker* v. *McMillan*, 4 O. S. 14.

Sale of Timber—*Agreement—Proceeds of Re-sale.*]—A. was cutting timber on B.'s land. B. refused to allow him to continue to do so, unless C., who was to get the timber when cut, should become answerable for it. C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed between B. and C. that upon the timber being passed at Bytown free of duties to the government—that is, passed as private timber—B. should be paid by C. the price the government would have paid for it had it been Crown timber:—Held, that upon a sale of the timber at Quebec, C. might be liable to B. for money had and received. *McNab* v. *McGill*, 6 U. C. R. 142.

Sheriff—*Deputy of—Action against.*]—No action lies against the deputy sheriff for money received by him and paid over to the sheriff; the action must be brought against the sheriff himself. *Bird* v. *Hopkins*, H. T. 5 Vict.

——— *Money Levied.*]—Money had and received may be had and maintained against a sheriff by the plaintiff in the suit for money levied on an execution. *Shuter* v. *Leonard*, 3 O. S. 314.

——— *Money and Rent Levied—Liability to Execution Creditor — Attachment — Division Court Bailiff.*]—Where an execution

creditor has under the statute of Anne paid rent demanded by a landlord upon an execution against the tenant upon the premises of the former, and the sheriff levies as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums, and liable to him in an action for money had and received, and so does a bailiff under the Division Courts Act; and therefore the execution money in his hands may be attached to satisfy the demand of another execution claimant against the execution creditor. *Lockhart* v. *Gray*, 2 C. L. J. 163.

Wages—*Agreement—Proceeds of Sale of Timber—Statute of Frauds.*]—Where plaintiff had been employed by A. in getting out timber, which A. afterwards sold to defendant, who agreed orally with the plaintiff and others who had been working with him—the timber being in their possession—that he would pay the wages of the plaintiff and others if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there:—Held, that, on shewing the sale there, the plaintiff was entitled to recover for his wages as money had and received; and that the case was not within the Statute of Frauds. *McDonell* v. *Cook*, 1 U. C. R. 542.

See Riddell v. *Bank of Upper Canada*, 18 U. C. R. 139, *post* IV. 4.

III. Money Lent.

Advances on Goods Received for Sale—*Right to Recover.*]—See *Palmer* v. *Holmes*, 14 C. P. 194.

Agreement as to Use of Money Lent—*Repudiation—Recovery of Money.*]—Plaintiff lent defendant £35, upon an oral agreement that he should build with it a house upon a lot belonging to him, in which the plaintiff and her mother should live during the mother's life. The house was built, and they went into possession on this understanding, but afterwards it was orally agreed that defendant should give plaintiff a lease during the life of the mother. He, however, mortgaged the premises to a third party, and brought ejectment to turn plaintiff out:—Held, that the plaintiff might recover back the £35 as money lent. *Harrington* v. *Harrington*, 15 U. C. R. 241.

Company—*Liabilities of—Ultra Vires.*]—On the facts, it was held, that the plaintiff was not precluded from recovering money advanced to B. for the liquidation of liabilities by B. to the N. company, or from enforcing any security for its repayment, because that company, in such transactions, exceeded its power under its charter. *Cayley* v. *McDonell*, 8 U. C. R. 454.

Evidence—*Cheque.*]—The production of a cheque is not even primâ facie evidence of money lent by the drawer. *Foster* v. *Fraser*, M. T. 4 Vict.

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

IV. Money Paid.

1. *For Damages and Costs.*

As to the right, generally, to recover money paid for damages and costs. See Covenant—Damages.

Bail—*Costs of Action against — Recovery from Principal.*] — Bail who have paid the costs of an action against themselves, cannot recover them from their principal as money paid; they must declare specially. *Shore* v. *Burrill*, M. T. 3 Vict.

Guarantor—*Costs of Suit against.*]—A. releases B. from gaol by undertaking to pay C. the debt B. owed him. C. sues A. upon this understanding, and B. requests A. to defend the suit to gain time:—Held, that A. could recover from B. the costs of this suit as money paid to his use. *Smith* v. *Davidson*, 4 U. C. R. 191.

Indemnity against Costs—*Form of Action.*]—An action for money paid will not lie for costs paid by plaintiff against a person who has engaged to indemnify him against such costs; the action should be special on the indemnity. *Miller* v. *Munro*, 6 O. S. 166.

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2. *Payment.*

Principal and Surety — *Conveyance of Land by Surety.*]—Defendant, owing one C., procured K. to give his note to C. for $400, and got the plaintiff to give K. a mortgage by way of indemnity. K. having paid the money called upon the plaintiff, who, being unable to pay, gave K. an absolute deed of the land, which K. accepted in satisfaction:—Held, that the $400 for which the land was thus taken, might be recovered by the plaintiff from defendant as money paid. *Clark* v. *Chipman*, 26 U. C. R. 170.

——— *Mortgage by Surety.*] — H. had leased to defendant certain premises, the plaintiff becoming his surety for the rent. Defendant being in arrear, the three met, and it was agreed that the lease should be given up; that the plaintiff should secure H. by mortgage for the amount due, and that H. should release defendant. The mortgage was executed and H. gave a receipt to the plaintiff for the sum secured. Before the mortgage fell due or had been satisfied, the plaintiff sued defendant as for money paid, and the jury found that the mortgage was received in satisfaction of defendant's debt with his assent:—Held, that the action would lie. *McVicar* v. *Royce*, 17 U. C. R. 529.

Promissory Note — *Payment by Accommodation Maker — Time of Payment.*] — In May, 1852, the plaintiff for defendant's accommodation, gave him his note for £50, which defendant discounted at the Bank of Upper Canada. On the 9th November, 1852, the defendant, being sued by the bank, was obliged to pay this note, together with £5 13s. 2d. costs. On the 10th September, 1852, the plaintiff gave another note to the defendant for £40, for his accommodation, for the purpose of renewing a previous note of the same nature. This note also came into the hands of the bank, and was paid to them by the plaintiff, but not until after this suit, though defendant had discounted and obtained the money on it before. The plaintiff having sued upon the common counts, for money paid, &c.:—Held, that he could recover only the amount of the £50 note; as to the claim on the £40 note, the payment made by the plaintiff could not be referred back to the time when the defendant received the money from the bank: in other words, it could not be said that the money was paid by the bank for the plaintiff, and so paid by him to the defendant, before the commencement of this suit. Held, also, that the fact of the plaintiff having been arrested only for the amount of the first note, would be no objection to his recovery on the second, if he were otherwise entitled. *Lees* v. *Westley*, 11 U. C. R. 322.

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

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3. *Request.*

Averment—*Pleading.*] — In declaring for money paid, it must be averred that the money was paid by the plaintiff at defendant's request. *Aikin* v. *Howcutt*, 7 U. C. R. 143.

Bank—*Agent of Municipal Corporation—Treasurer of—Account in Bank—Overdraft—Liability of Corporation.*] — One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and, having misapplied the moneys of the council, overdrew that account without the knowledge or authority of the bank nearly £8,000, to pay debts due by the county for interest on debentures and other claims. The coupons on some of these debentures were stamped by S. as paid by the Gore Bank. S. having absconded, the bank sued the council for the amount thus over-drawn, as money paid to their use:—Held, that no portion of it could be recovered. *Gore Bank* v. *Municipal Council of Middlesex*, 16 U. C. R. 559.

Implication of—*Sheriff—Bailiff—Ca. Sa.—Escape of Defendants—Payment of Debt by Sheriff—Action against Defendants.*]—A ca. sa. against both defendants was given to the deputy sheriff, and a warrant made to the plaintiff, a bailiff, to execute it; he arrested both defendants, and one escaped. The sheriff paid the debt and sued his deputy, who recovered over against the bailiff, and the bailiff then sued both defendants as for money paid. A nonsuit was directed, on the ground that the payment by the sheriff satisfied the plaintiff in the original suit, and therefore this plaintiff could not recover as for money paid to the use of the defendants, because their debt was satisfied before:—Held, that the nonsuit on this ground was wrong. Quære, however, whether, under the facts proved, an assent to the payment could be implied on the part of both defendants, so as to sustain this action. *Sumner* v. *Kirkpatrick*, 10 U. C. R. 483.

——— *Ship — Transhipment of Cargo—Shortage.*] — The master of the appellant's vessel, on the transhipment of a cargo of wheat, on its way from Owen Sound to Quebec, into the respondent's vessel, gave a receipt to the respondent for the lake freight, stating that the appellant's vessel and her owner were thereby held responsible for the wheat, weighing 5,934 bushels at Quebec. On arrival at Quebec the cargo was found sixty-eight bushels short, and the respondent allowed the value of that quantity to the consignee out of the river freight:—Held, that the respondent was not entitled to recover the amount deducted as for money paid for the appellant, there being no request on the appellant's part, express or implied. *Waddle* v. *McIntosh*, 7 C. P. 49.

Landlord and Tenant—*Taxes—Payment by Tenant—Oral Agreement.*] — Defendant took a written agreement for a lease of certain premises which was silent as to taxes, but when it was signed he orally agreed to pay them. No lease was ever executed, owing to a disagreement on another point. Defendant occupied the premises for four years, paying taxes for three years without objection, but when sued for rent subsequently accrued he claimed to set off such taxes, on the ground that, as the agreement made no provision for them and could not be added to by oral evidence, they must fall upon the landlord:—Held, that having made the payment voluntarily, in pursuance of his own agreement, even if it were without consideration, he could not recover back or set off such payment. *McAnnany* v. *Tickell*, 23 U. C. R. 499.

——— *Taxes—Sewer Rate — Payment by Tenant.*]—Certain premises in the city of Toronto which drained into a ravine were demised by defendant to one A., of whom the plaintiff in replevin was assignee. The city of Toronto, in making improvements, closed up the ravine, and thereby occasioned an accumulation of water on the premises in question, rendering a drainage into the common sewer necessary. The plaintiff then drained his premises into such sewer, and paid the frontage or sewerage rate charged by the city by-law upon the proprietor of the property, and claimed to set off the amount of such payment against defendant's rent:—Held, on demurrer, that such payment was voluntary and could not be recovered back from the defendant, although it might enure to his benefit. *Aldwell* v. *Hanath*, 7 C. P. 9.

Liability—*Absence of—Sum Paid by Purchaser of Land to Obtain Possession.*]—Defendant conveyed land to the plaintiff by a statutory deed with covenants for title, taking back a mortgage for the purchase money, in which it was provided that the plaintiff should retain possession until default. Before making the deed the defendant had leased the land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession:—Held, that this could not be recovered as money paid, for it was not money paid at defendant's request, or for which defendant was liable to D. *Proctor* v. *Gamble*, 16 U. C. R. 110.

Mortgage—*Money Paid to Mortgagee by Purchaser — Request of Mortgagor — Contract.*]—S., having mortgaged certain land to F., agreed to sell it to the plaintiff, and went to the office of defendant, who acted as agent for F., where S. executed a bond to convey to the plaintiff on payment of £200 down and the balance by instalments, and at the request of S. the plaintiff paid this £200 to defendant for F. on account of the mortgage. Afterwards, at their joint request, defendant returned £50 to the plaintiff, and S. having released to F. his equity of redemption, the plaintiff sued defendant to recover back the £150 remaining, as money paid to his use. Some evidence was given at the trial to shew that the title was defective:—Held, that the plaintiff clearly could not recover, for the money was not paid to defendant on any contract between him and the plaintiff, but was a payment by S. of his debt due to F. Semble, that the evidence was not sufficient to shew a failure of title, but that if it had been, F., under the circumstances, could at most have been liable only, on receiving payment of his mortgage, to convey to the plaintiff such title as he had derived from S. *Branigan* v. *Cartwright*, 23 U. C. R. 264.

Principal and Surety—*Money Paid by Surety—Mortgage.*]—T., being the owner of a lot of land, mortgaged it to the Kingston Building Society, and subsequently agreed to sell it to S., getting P. and B. to join him in a bond, conditioned that T., on a certain day in March, 1855, or as soon after as the society should expire, should convey the land to the obligee on his making certain payments to T. T. having neglected to make the monthly payments due to the society on the mortgage, the society, under a power of sale therein contained, on the 15th September, 1855, sold the land to one W. for £200, being £35 more than the amount due to the society. P., B., and S., having heard of the sale, entered into an arrangement with W., whereby he agreed, in consideration of the payment to him of £350, to convey the land to S. T. gave to P. an order to receive the balance of the £200, in the possession of the society after the payment of the claim, which being deducted from the £350 to be paid to W., left the sum of £214 18s. 11d. to be made up to complete the payment to W. This sum was paid by P., B., and S. paying each one-third, amounting to £71 12s. 11d. T. was apprised of this arrangement, and said he would pay the whole amount if he could, and that he would make up $100, which he did not do. The jury having found a verdict for P. for the amount paid by him and interest thereon:—Held, that there was evidence sufficient to justify a finding that the money was paid by P., at the request of the defendant, T. *Preston* v. *Twigg*, 11 C. P. 281.

——— *Money Paid on Mortgage by Surety—Partnership—New Mortgage — Liability of New Mortgagor.*] — The plaintiff in 1875 indorsed a promissory note for the accommodation of the defendant N., and the latter delivered it as collateral security to mortgagees of his freehold. The mortgagees procured the defendant B. to enter into partnership with N., and threw off $1,000 of their mortgage debt, releasing their original securities, and taking a new mortgage from both defendants for $1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of B.'s connection with the matter:—Held, that the plaintiff was entitled to recover against both defendants for the amount paid, as money paid at their request. *Purdom* v. *Nichol*, 16 O. R. 699, 15 A. R. 244, 15 S. C. R. 610.

Promissory Notes — *Solicitor—Compromise of Action — Evidence of Request.*]—Defendants were trustees under the will of one K., the plaintiff being in partnership with one of them, S., as attorneys. The plaintiff and S. brought an action of ejectment in the name of the trustees, which was compromised at the assizes by S., and $1,800, which was agreed to be paid to the defendants in that suit, was secured to them by the notes of S. and the plaintiff, his partner, on receiving which the defendants released the land to the plaintiffs. This land was conveyed to J., a son of testator, by whom it was mortgaged to pay all claims arising out of the compromise, and the money thus obtained was handed to S. The plaintiff was afterwards sued on one of the notes given by him and S., S. having paid the others, and the amount, $658.25, levied from him by execution. The other trustees were not aware of the compromise when made, but did not dissent when informed of it, and, on being told of the action brought against the plaintiff, said he ought to be repaid. The plaintiff having sued them, however, they defended at the desire of J.; and the court being left to draw such inferences as a jury might:—Held, that the plaintiff could not recover, for there was no sufficient evidence that he became liable at the defendants' request, and he could not be said to have paid the money for them or to their use. *Armour* v. *Jeffrey*, 21 U. C. R. 513.

Rent—*Payment by Chattel Mortgagor—Recovery against Tenant—Privity—Absence of.*]—B. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On the 1st February the defendant took possession of the premises under an oral agreement with P. that the latter should assign the lease to him, and it was so assigned on the 4th June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the

promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled payment. The plaintiff now sued the defendant to recover the amount so paid:—Held, that, there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shewn to have been liable for; that the plaintiff's payment therefore was voluntary, so far as concerned the defendant, and he could not recover. *Herring* v. *Wilson*, 4 O. R. 607.

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4. *Other Cases.*

Bank — *Proceeds of Draft — Crediting Wrong Person.*]—The plaintiffs drew upon J. a bill for £200, payable to their order, which they indorsed to the Gore Bank, by whom it was sent to the agent of defendants for collection. When it fell due, J., with the agent's consent, drew upon the plaintiffs to meet it, but the proceeds of this draft, contrary to J.'s direction, were placed to his credit with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received. Quære, whether they might also recover as for money paid. *Riddell* v. *Bank of Upper Canada*, 8 U. C. R. 139.

——— *Shortage in Deposit—Payment by Teller.*]—Plaintiff was teller of a bank at which a note of defendant became due. Defendant paid in to plaintiff a sum afterwards discovered to be £25 short, and plaintiff was compelled to make it good to the bank:—Held, that he could recover it from defendant as money paid to his use. *Rivers* v. *Roe*, 4 C. P. 21.

Bill of Exchange—*Corporation—Ultra Vires — Accommodation Indorsement.*]—See *Brockville and Ottawa R. W. Co.* v. *Canada Central R. W. Co.*, 41 U. C. R. 431.

——— *Forgery—Money Paid by Drawee—Bank.*]—The plaintiff, at the request of Y., the business manager of the Hamilton Cotton Company, received from him a draft in the name of the company on a New York firm for $4,989.65, at three months, which plaintiff discounted at the Toronto agency of the defendants, and, in pursuance of an arrangement to that effect, Y. drew on the plaintiff, in the name of the cotton company, a draft payable to their own order for $4,800, which plaintiff paid on presentment out of the proceeds of the New York draft. About seven weeks afterwards plaintiff discovered that the signatures to and indorsements on both these drafts had been forged by Y., and immediately communicated such information to the defendants, and demanded from them a return of the amount paid by him to retire the $4,800 draft, which was refused. Plaintiff, however, paid the draft on New York at maturity. In an action brought to recover the money paid to retire the $4,800 draft, the Queen's bench division held that the plaintiff was entitled to recover. An appeal from this judgment was dismissed, the Judges of the court of appeal being equally divided. *Ryan* v. *Bank of Montreal*, 12 O. R. 39, 14 A. R. 533.

Joint Debtors—*Contribution—Judgment—Execution — Notice—Demand.*]—One defendant in assumpsit who has paid all the damages under an execution, may recover contribution from the other. In such action the regularity of the judgment in the original suit cannot be questioned; and it is not necessary to shew any notice of the execution, nor demand of the money, before action. *Woodruff* v. *Glassford*, 4 O. S. 155.

Legatees — *Overpayment — Liability to Refund.*]—See *Anderson* v. *Bell*, 8 A. R. 531.

Master and Servant—*Payments on Account— Res Judicata.*]—Where two masons brought an action for work and labour against their employer, and recovered a verdict for £99, it was held that the employer could not afterwards bring an action against them for money he had paid them on account, and which he had attempted to prove in the former action. *Hunt* v. *McCarthy*, 6 O. S. 434.

Parent and Child—*Advancement—Conveyance of Land—Promise to Pay Part of Value — Executors — Estoppel.*]—Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying £125 for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then for a nominal consideration conveyed to the son the land received in exchange:—Held, that the executors of the father might maintain an action against the son for the £125 as money paid to his use; that they were not estopped by the consideration stated in the deed, and it was not for an interest in lands within the Statute of Frauds. *McBride* v. *Parnell*, 4 O. S. 152.

Partnership — *Accommodation Indorsement for Firm—Note Signed by One Partner.*]—A. and B., being in partnership, applied to C. to indorse a note for their accommodation. The note was signed by A. alone, but was represented by both as drawn on account of the firm, and that both were liable to pay it. When it became due A. had absconded. C. having paid the note:—Held, that he might recover the amount he so paid from B., as money paid to his use. *Annis* v. *Lowes*, 5 O. S. 198.

Principal and Agent—*Advance by Agent on Account of Goods.*]—The plaintiffs sued on the common counts for money advanced by them to defendants on account of oil furnished by the defendants to the plaintiffs, to be shipped to Liverpool and sold. The defendants pleaded never indebted; and also a plea setting up a special contract, which was not proved:—Held, that the plaintiffs were entitled to recover on the common counts. *Palmer* v. *Holmes*, 14 C. P. 194.

See, also, *Craig* v. *Corcoran*, 23 U. C. R. 441; *Stewart* v. *Lowe*, 24 U. C. R. 434.

——— *Advance by Agent on Account of Goods.*]—Defendant, at B., consigned for sale to the plaintiff, a commission merchant at M., a lot of butter for sale, and drew upon him

at five days for $2,000, which the plaintiff accepted, and paid at maturity. At that time his instructions were not to sell for less than eighteen and one-half cents per pound, which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agent at H., who wrote that no sale could be effected there, and advising J. Plaintiff then sued defendant upon the common counts for the money paid by him:—Held, that he was entitled to recover, and that there was nothing in the facts to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected. *Cowie* v. *Apps*, 22 C. P. 489.

——— *Money Paid by Agent—Evidence.*]—M., formerly deputy sheriff of the L. district, sued R., the sheriff, for services in the execution of his office. At the trial the plaintiff produced an order drawn on him by defendant in favour of one R., desiring him to pay the latter £50 out of the moneys he had received for sheriff's fees:—Held, that, in the absence of any further information, the mere proof of the payment of that order did not entitle the plaintiff to recover. *Moore* v. *Rapelje*, 5 O. S. 452.

Principal and Surety—*Payment by Surety—Illegal Contract.*]—Held, that money paid on a promissory note on which the plaintiff was guarantee or joint maker with defendant, given for the value of goods which, as the plaintiff knew, were to have been smuggled into this Province, could not be recovered. *Anguish* v. *House*, 5 O. S. 642.

——— *Payment of Debt by Principal—Subsequent Payment by Surety.*]—Defendant held the joint and several note of plaintiff and one B. as security for the debt of the latter, after payment by whom, unknown to plaintiff at the time, he indorsed it to one W., who sued the plaintiff, and under pressure of judgment obtained payment from him of the amount covered by it:—Held, that the money paid to W. by plaintiff was money paid to the use of the defendant, from whom plaintiff could therefore recover it back in this form of action. *McKindsey* v. *Stewart*, 20 C. P. 265, 21 C. P. 226.

——— *Discharge of Surety—Subsequent Payment.*]—A surety paying the debt of his principal after arrangements between the creditor and the principal debtor, which would have discharged the surety, cannot recover back the money so paid. *Geary* v. *Gore Bank*, 5 Gr. 536.

Promissory Note—*Money Paid to Take up.*]—Where a plaintiff takes up a note which defendant has given him, and which he was bound to pay at maturity, he may recover against the defendant as for money paid. *McNab* v. *Wagstaff*, 5 U. C. R. 588.

Rent—*Payment by Execution Creditors—Recovery Back.*]—The defendants, under assumption of a lawful distress for rent, part of which was in arrear, and the other part of which was claimed in advance, entered and seized goods which had been assigned to the plaintiff B. in trust for the benefit of creditors. Three executions were shortly afterwards placed in the sheriff's hands, and the solicitor for the plaintiffs under the first and third executions, relying upon being repaid from the proceeds of the goods, and with full knowledge of all the facts, and to get the distress out of the way and and let in the executions, paid the rent claimed to prevent the sale of the goods, though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitor. B. did not act under the assignment, and in no way asserted his rights against the execution creditors:—Held, reversing the judgment in 11 O. R. 735, that the money so paid could not be recovered back either by the execution creditors on whose behalf it was paid, or by B. as assignee. *Baker* v. *Atkinson*, 14 A. R. 409.

Tenant for Life—*Payment of Mortgage—Action against Reversioner.*]—P. conveyed land to defendant, "subject to a mortgage," and with a covenant for quiet enjoyment free from incumbrances. Defendant then demised the same land to P. and wife for their respective lives, and P. assigned to plaintiff all his interest therein, to hold during the life of P. The mortgagees, or their assignee, brought ejectment against both plaintiff and P., when the plaintiff paid the amount due under the mortgage, and sued defendant for money paid to his use:—Held, that he could not recover in this form of action. *Snyder* v. *Snyder*, 22 C. P. 361.

Vendor and Purchaser—*Acceptance of Bond and Note as Payment—Subsequent Abandonment—Recovery against Purchaser.*]—Where A. sold land to B. for £225, and B. sold it to C. for the same sum, and C. sold it to D., and it was agreed between A., C., and D. that D. should pay A., who thereupon discharged B., who discharged C., and A. agreed to take from D. land in payment of £200 of the purchase money, and took D.'s promissory note for £25, the residue; but having subsequently borrowed £95 of D., instead of receiving at once a deed of the land in payment of the £200, he took a bond that a deed should be made to him on the repayment of the £95 by instalments; but having made default in the payment of these, he abandoned the bond and note given by D., and brought an action against B. for the £225, as money paid to his use:—Held, that the action could not be maintained, A. having lost his remedy on D.'s bond through his own default, and therefore having no right to make B. pay the money. *Holmes* v. *Spencer*, 3 O. S. 161.

Warehouseman—*Delivery of Goods to Stranger—Payment to True Owner.*]—A received a hogshead of sugar to be stored in his warehouse. It belonged to B., but through mistake was delivered to C., who claimed it. B. convinced A. that he had made a mistake in delivering it to C., and A. paid B. the price of the sugar:—Held, that A. need not declare specially, but could recover against C. for money paid. *Kitson* v. *Short*, 4 U. C. R. 220.

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V. Pleading in Actions for Money.

Declaration—*Count for Interest—Rate.*]—A count for interest for the forbearance of money at the rate of thirty per cent. per annum:—Held, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged. *Bleakley* v. *Easton*, 22 U. C. R. 348.

——— *Deed.*]—The common counts cannot be used where the claim is by virtue of a deed. *County of Wentworth* v. *City of Hamilton*, 34 U. C. R. 585.

——— *Fines—Recovery — By-law.*]—A by-law of the plaintiffs provided that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of one year, when the share or shares in default shall be declared forfeited to the society," &c.:—Held, that such fines could not be recovered on a common count, but that the declaration should set out the by-law. *Ottawa Union Building Society* v. *Scott*, 24 U. C. R. 341.

Plea—*Payment—Admission—Effect of.*]—In an action on the common counts for money paid, money lent, goods sold, &c., the plea of payment admits only that something not ascertained is due in respect of the causes of action sued upon, leaving plaintiff to prove the precise amount. *Mulholland* v. *Morley*, 7 L. J. 323.

——— *Request — Denial — Subsequent Promise.*]—To an action on the common counts for board, &c., found for the defendant's illegitimate child, at defendant's request, alleging a subsequent promise of defendant to pay, &c., a denial of the request was held a bad plea. *Flaherty* v. *Mairs*, 1 U. C. R. 221.

Reply—*Traverse of Plea—New Assignment.*]—To a declaration on the common counts, for goods sold, &c., defendant pleaded that the causes of action, if any, accrued against defendant and one S.; and that after the goods were sold, &c., and before suit, to wit, on, &c., by indenture made between defendant, then a partner, and for and on behalf of the firm of S. & I., B. and H., and plaintiff and other creditors of said firm, in consideration of defendant assigning all his goods to B. and H., they agreed to pay 7s. 6d. in the pound on the amount of their respective claims as set opposite their respective names in the schedule to said indenture annexed; and that defendant did assign to said B. and H., and that they paid to plaintiff 7s. 6d. in the pound, who accepted and received the same in full satisfaction of all debts and claims, &c., against defendant from the beginning of the world to the day next before the date of said indenture, with an averment that the causes of action in the declaration mentioned accrued in respect of debts, &c., in said indenture and schedule mentioned, and before the day next before the date of said indenture; to which the plaintiff replied, by traversing the averment that the causes af action accrued in respect of debts in said indenture and schedule mentioned, &c.:—Held, bad, on demurrer, on the ground that the plaintiff should have new assigned. *Hall* v. *Irons*, 4 C. P. 351.

See next sub-title.

VI. Right of Action on Money Counts—Miscellaneous Cases.

Agreement—*Proof of.*]—Where the defendant agreed that if the plaintiff would give up his claim against A. B. for £46, he would pay him £35 out of the proceeds of a certain raft when it would arrive at Quebec:—Held, that the plaintiff could sue the defendant on such an agreement upon the common counts, and without producing proof of the agreement in writing. *McDonald* v. *Glass*, 8 U. C. R. 245.

Agreement to Accept and Pay Order in Plaintiff's Favour—*Subsequent Payment to Drawer of Order—Right of Action on Common Counts.*]—*Mitchell* v. *Goodall*, 44 U. C. R. 398, 5 A. R. 164.

Building Contracts—*Right to Recover on Common Counts.*]—See Work and Labour.

Mortgage of a Mortgage—*Proviso to be Void on Payment, but no Covenant to Pay.*]—See *Pearman* v. *Hyland*, 22 U. C. R. 202.

Municipal Corporation—*Compensation for Land Taken—Special Declaration.*]—Where the plaintiff brought an action of debt on the common counts against the Huron District Council for compensation awarded to him by a jury for making a road across his premises before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded, the court held, that the action would not lie against the Huron District Council at all; but, even if the council had been responsible, the declaration should have been special. *McKee* v. *Huron District Council*, 1 U. C. R. 368.

Promissory Note.]—Though a note declared on vary from the pleadings, it is still evidence under the common counts. *Hathaway* v. *Malcolm*, Tay. 182.

——— *Foreign Note.*]—A note made in Albany, U. S., may be declared on under the common counts, under the statute of Anne. *Kirk* v. *Tannahill*, Tay. 448.

Special Counts—*Failure on.*]—A plaintiff who fails on the special counts of his declaration will not be allowed afterwards to resort to common counts. *Holden* v. *McCarthy*, 5 O. S. 99.

——— *General Damages — Venire de novo.*]—When there is a special count and common count in the declaration, the effect of the special count being bad, when general damages have been assessed, is, that there must be a venire de novo, unless it can be said that the verdict was given wholly upon evidence applicable to the common count alone, and not to the special count. *Dodge* v. *Muir*, 7 U. C. R. 526.

Verdict—*Distributive Pleas—Different Issues.*]—In an action on the common counts the plea of nunquam indebitatus and payment are distributive, and a verdict may be entered on these issues for the defendant, for so much of the amount sued for as the plaintiff fails to recover. Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiff's right to a sum of $410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of $20, which defendants had never disputed, and had, as they asserted, unintentionally omitted to pay. Under these

circumstances the verdict was entered in defendants' favour for the residue. *Hope* v. *Stewart*, 25 U. C. R. 89.

See BANKS AND BANKING, II., IV.—COMPANY—GIFT, II.—INFANT, II. 2, 3.

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See MONEY, VI.

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I. ASSIGNMENT AND TRANSFER.

1. *Covenants by Assignor.*

For Payment — *Extent of Covenant—Breach.*]—The declaration claimed £1,500, being the amount secured by a mortgage made by one B. to defendant, and assigned by him, with a covenant in the assignment that he should be personally liable for the due payment of all the moneys and performance of the things stipulated in the mortgage, in case of any deduction, defalcation, or abatement. Breach, that B. did not pay the £1,500 on the days appointed, but made default, and that defendant had not fulfilled his covenant. The defendant, besides non est factum, pleaded pleas denying his indebtedness, except as to all moneys remaining due at the time of the assignment, and also after the assignment, but before the 25th December, 1860; and demurred to the declaration, denying his liability merely on B.'s default, without shewing any means taken to recover the amount:—Held, that the declaration was good, the assignment as stated in the declaration being large enough to pass all the debt secured by the mortgage, and it not being shewn to be in any part paid. 2. That defendant's covenant bound him to pay all moneys secured by B. upon his, B.'s, default. 3. That the breach claimed no more than the plaintiff might possibly be entitled to upon the assignment and covenant. *Morson v. Hunter*, 11 C. P. 585.

——— *Moneys Paid by Assignor — Lien for.*]—Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and assignee, that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant:—Held, that he was entitled to a lien therefor as against the mortgagor. *Fleming v. Palmer*, 12 Gr. 226.

For Payment on Default — *Surety.*]—On the transfer of a mortgage the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same:—Held, that this did not constitute him a surety, within the meaning of s. 4 of the 32nd of the orders of 1853. *Clarke v. Best*, 8 Gr. 7.

——— *Surety—Discharge.*]—Declaration, that the defendant assigned to the plaintiff a mortgage, and by the deed of assignment covenanted that the mortgagor should pay the principal and interest when due, and that upon default the defendant would pay; that the mortgagor made default, but the defendant did not pay. Plea, on equitable grounds, that the defendant covenanted as surety only for the mortgagor; that the plaintiff when he took the deed knew him to be so, and accepted him as such; and that the plaintiff afterwards, without the defendant's knowledge or consent, and for good consideration, agreed with the mortgagor to give and did give him time for payment of the mortgage money, beyond the time when it fell due:—Held, a good plea; that the declaration clearly shewed the defendant to be only a surety; that the consideration was sufficiently stated; that the agreement might be by parol; and that it was not necessary to shew that the defendant was prejudiced by the giving time. At the trial it was shewn that when the mortgage fell due, the plaintiff told the mortgagor that he would wait on his paying twelve per cent. No time was settled, but the mortgagor signed two notes for £24 each, for one year's interest, which he paid, and afterwards two others, on which the plaintiff had sued and obtained judgment. Nothing was said about the defendant's liability when this arrangement was made, and the defendant was not aware of it until long after:—Held, that the plea was proved and the defendant discharged. *Darling v. McLean*, 20 U. C. R. 372.

——— *Surety—Discharge—Reservation of Rights.*]—A covenant by the assignor with the assignee in an assignment of mortgage that the mortgage moneys shall be duly paid makes the assignor a surety for the mortgagor as to such payment. Darling v. McLean, 20 U. C. R. 372, followed. Gordon v. Martin, Fitz-G. 302, and Guild v. Conrad, [1894] 2 Q. B. 885, distinguished. On the maturity and non-payment of a mortgage, the grantee of the equity of redemption, who had covenanted with the mortgagor to pay the mortgage moneys, executed a new mortgage to the holder, through several mesne assignments, of the original mortgage, the new mortgage extending the time for payment of the principal and reducing the rate of interest, the mortgagee refusing to discharge the original mortgage, and orally reserving his rights against the assignor to him of that mortgage, who had covenanted that the mortgage moneys should be paid:—Held, by a divisional court, that parol evidence of the reservation of rights against the surety was admissible. Held, also, that owing to the reservation of rights against the surety the extension of time given by the new mortgage did not interfere with the right of the surety to proceed against the original mortgagor. Held, by the court of appeal, that a covenant by the assignor of a mortgage with the assignee that the mortgage money shall be duly paid makes the assignor a surety; but he is not discharged merely by the assignee taking a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage; the new mortgage containing a redemise clause, but not being executed by the mortgagee. Judgment of the court below affirmed. *Trusts Corporation of Ontario v. Hood*, 27 O. R. 135, 23 A. R. 589.

For Validity of Security—*Absence of Interest in Mortgagor.*]—A mortgagee who for a valuable consideration transfers the mortgage, and all his estate in the land therein, and covenants that the mortgage at the time of the assignment is in full force, and valid and effectual in law, and not assigned, released, or otherwise made void, and that no part of the money thereby secured has been paid, is liable to the assignee though the mortgagor never had any interest in the premises professed to be mortgaged, and the mortgage never was any lien thereon. *Powell v. Baker*, 13 C. P. 194.

——— *Company — Intra Vires — Incumbrances—Taxes Paid by Assignees—Costs.*]—The defendants in the deed of assignment covenanted that the mortgages assigned were good and valid charges on the lands, and

that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes:—Held, that the covenant was not ultra vires the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold. Arrears of taxes due on the mortgaged lands were paid by the plaintiffs. The taxes were due by the mortgagors; there was no covenant in the assignment against incumbrances, and no evidence of any request by defendants to pay them:—Held, that the plaintiffs were not entitled to recover the amounts so paid. The plaintiffs also claimed a sum of money paid to the defendants' solicitors for costs due them:—Held, under the circumstances, not recoverable, as it was a voluntary payment. *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476.

——— *Costs of Action.*]—Upon a foreclosure suit upon a mortgage for £350, and on which only £250 had been in fact advanced, the court disallowed the additional £100 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Bitner*, 11 C. P. 102.

To Make Good Deficiency — *Improvident Sale under Power—Setting aside.*]—See *Richmond* v. *Evans*, 8 Gr. 508.

See Gooderham v. *Traders Bank*, 16 O. R. 438, *post* 2.

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2. *Form of Assignment.*

(a) *Sufficiency to Pass Mortgaged Estate.*

Operative Words.]—Where the granting part of a deed of assignment of mortgage transfers the indenture simply, and the habendum, the interest in the land described in the indenture, the estate passes. *Doe d. Wood* v. *Fox*, 3 U. C. R. 134.

A mortgagee, by indorsement, assigned to M. "his executors, administrators, and assigns, all his right, title, and interest in and to the within mortgage:"—Held, not to pass the land mortgaged. *Moran* v. *Currie*, 8 C. P. 60.

"Assign, transfer, and set over" in an assignment of a mortgage, are the proper technical words to pass an estate in lands and tenements. *Watts* v. *Feader*, 12 C. P. 254.

An assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned, and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title, and interest therein" of the assignor, "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use for ever:"—Held, that the land mortgaged did not pass by these words; but that had it been a devise, instead of a deed inter vivos, the land would have passed under the term "mortgage." *Auston* v. *Boulton*, 16 C. P. 318.

See Kearney v. *Creelman*, 14 S. C. R. 33, *post* 4.

See Re Mara, 16 O. R. 391.

(b) *Other Cases.*

Administrator—*Assignment by.*]—An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed by her as administratrix. *Yarrington* v. *Lyon*, 12 Gr. 398.

Gift—*Absence of Seal—Invalidity.*]—The holder of a mortgage security while labouring under an attack of sickness, of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed, but did not seal, although the memorandum expressed it to be under seal:—Held, that the wife took no interest under such assignment, either as a gift inter vivos or as a donatio mortis causâ; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs. *Tiffany* v. *Clarke*, 6 Gr. 474.

Second Mortgagee — *Payment of First Mortgage—Right to Assignment — Payment into Court.*]—A bank held a mortgage on certain lands of a customer to secure a current discount account, some of the paper of which consisted of notes made merely for the customer's accommodation. The plaintiff had a second mortgage on the lands, and tendered the bank (who were threatening to sell under their power of sale), together with the amount they claimed as due, a simple assignment to the plaintiff of the mortgage debt and lands, containing a covenant that the amount claimed was due. The bank refused to accept the tender as made. The plaintiff then brought this action to compel the execution of the assignment as tendered, or any valid assignment with a covenant that the mortgage moneys were unpaid and the mortgage a subsisting security for the amount tendered, or for an account. On a motion to restrain the bank from dealing with the securities until the trial:—Held, that the plaintiff could not insist on the execution of the assignment as tendered, nor was he entitled to any covenant save the usual trustee covenant against incumbrances. Held, also, that the bank was entitled to have the assignment shew the exact position of the parties, and also to have the collateral notes specified therein. Although perhaps not essential, it was not unreasonable that the transfer should also shew the nature of the collateral securities held by the bank. Held, lastly, in settling the minutes of judgment, that the plaintiff might pay the amount claimed into court, but there was no reason why it should remain there pending the taking of the account, and the judgment should provide that it might at once be paid out to the bank. *Gooderham* v. *Traders Bank*, 16 O. R. 438.

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3. *Rights of the Parties after Assignment.*

(a) *Agreements.*

Mortgagor and Assignee — *Effect of Agreement.*]—A mortgage was made by T. to W., who assigned it to M. No money was actually advanced on the mortgage by W., but before the assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory

note:—Held, that M. was entitled to hold the mortgage as security for the amount due him from T. The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor as here. *McIntyre* v. *Thompson*, 6 O. R. 710.

Payment by Assignee of Mining Rights—*Satisfaction.*]—H., being seised in fee of certain lands, mortgaged them to W., and subsequently sold the minerals thereon, with the right to mine, to the defendant. The mortgage being overdue, W. recovered judgment in ejectment and issued a writ of hab. fac. poss. Defendant hearing of this wrote to H. that the mortgage must be paid, and that he must give him an order to pay it and deduct the money so paid from the purchase money of the minerals. Thereupon a memorandum was drawn up that the defendant should either pay the mortgage "in full discharge thereof," or take an assignment of it as a subsequent incumbrance, for the purpose of saving the interest of defendant, as also of H., in the lands, the amount so paid to be credited and allowed to defendant upon his purchase money of the minerals. Defendant paid the amount due on the mortgage, though his purchase money was not due to H. Afterwards H. put the plaintiff in possession of the land to farm at a rental, and the defendant, having obtained an assignment of the W. mortgage and judgment, evicted the plaintiff:—Held, that the payment by defendant was in effect a payment by H., whereby the mortgage was satisfied, and as that payment was made for the purpose of saving H.'s interest as well as his own, the defendant would not have been justified in equity in enforcing the mortgage against H., or his assignee, the plaintiff; and that the plaintiff was entitled to damages for the trespass. The plaintiff claimed $500. The jury assessed the damages at $1,500, and the Judge at the trial amended the statement of claim accordingly:—Held, that the damages were excessive, and a new trial was granted. *Robinson* v. *Hail*, 1 O. R. 266.

Purchase for Value without Notice—*Effect of Agreement—Registry Laws.*]—Y., being the owner of certain land, mortgaged it with other lands to the M. P. B. Society by mortgage dated 12th July, 1873, registered 14th July, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he, by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of $700, and have certain of the lands (of which the lot in question was part) released by the society. A second mortgage for the $700 advance was prepared and executed, dated 1st February, 1875, registered 11th February, 1875, which by mistake, as was alleged, included all the lands in the first mortgage; and a release dated 9th February, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, lent Y. certain moneys, and took a mortgage dated 21st May, 1877, registered 6th June, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883, Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B.:—Held, that the combined provisions of R. S. O. 1877 c. 111, s. 81, and c. 95, s. 8, formed a complete defence, and that the defendants as assignees of the mortgage for value, having the legal estate, might defend as purchasers for value without notice, and claim also the protection of the Registry Act, as against the plaintiff, a subsequent purchaser or mortgagee from the original mortgagor. Semble, that, even as against the mortgagor, the defendants would also be entitled to prevail. *Bridges* v. *Real Estate Loan and Debenture Co.*, 8 O. R. 493.

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

(b) *Subsisting Equities—Notice.*

Payment of Prior Incumbrance—*Interest—Assignment—Purchaser of Equity.*]—When a loan is effected for the purpose of paying off incumbrances, at once or as they become due, at the option of the new mortgagees, and one of the incumbrances, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior incumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagee. An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as this, charge the mortgagor with the increased rate. The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees. *Manley* v. *London Loan Co.*, 23 A. R. 139. Affirmed, 26 S. C. R. 443.

Payment to Mortgagee — *Absence of Notice.*]—The holder of a mortgage security assigned the same for value on the 9th October (Saturday). On the 11th the mortgagor, without notice of the transfer, satisfied the mortgage with the mortgagee, one of the assignees being present, and saying nothing of the assignment. On a bill filed by the mortgagor, the court ordered the mortgage to be released, but refused the plaintiff his costs, as he failed to prove fraud which he charged. *Engerson* v. *Smith*, 9 Gr. 16.

A mortgage was held by an assignee for the benefit of the assignor (the mortgagee), and the mortgagor, without notice of such assignment, paid the mortgagee, and obtained from him a discharge under the statute. The court held the payment good, and ordered the plaintiff to execute a release, it being doubtful whether under the circumstances the discharge from the mortgagee would revest the property in the mortgagor. *McDonough* v. *Dougherty*, 10 Gr. 42.

Following the rule in Henderson v. Brown, 18 Gr. 79, the court held the assignee of a mortgage bound by all the equities affecting it in the hands of the mortgagee. And the mortgage having, in a suit to foreclose, set up that before notice of the transfer he had, at the instance of the mortgagee, incurred liabilities for and paid off debts of the mortgagee, equal to the amount due on the mortgage, a reference was directed to the master to inquire as to this; and if found to be so the bill was to stand dismissed with costs. *Baskerville* v. *Otterson*, 20 Gr. 379.

A mortgage for $1,200 was created by a third party, who was indebted to G., in favour of a solicitor, as security for such costs as he might incur in carrying on a suit for G. The client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. The assignee having failed to notify the mortgagor of the assignment, by reason of which a sum of $530 had been by the client allowed to be paid to the solicitor:—Held, that the assignee could only recover what might be found due in respect of such costs over and above the amounts so paid. *Atkinson* v. *Gallagher*, 23 Gr. 201.

——— *Absence of Notice—Fraud.*]—A mortgagor paid off a mortgage after the mortgagee had assigned it, and also a second mortgage obtained by fraud from the same mortgagor to the plaintiffs, who did not procure the mortgagor to join in the assignment of either, or notify him thereof:—Held, that the assignee took the mortgages subject to the equities between the original parties thereto; and as the original mortgagee could not, if plaintiff, have recovered upon the one mortgage, because paid, nor upon the other, because invalid, so neither could his assignee. *Wilson* v. *Ayle*, 28 Gr. 104.

——— *Notice by Registration—Constructive Notice—Pleading.*]—B., being the owner of lot A., mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B., to exchange properties, B. undertaking to have his mortgage to C. transferred from lot A. to lot B., to which C. assented, not informing either of them of the assignment. C., who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B.; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment:—Held, reversing the decision in 23 Gr. 547, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot A., and that the plaintiffs were entitled to a foreclosure. Held, also, that W. was affected with notice of the assignment by reason of the registration; and with constructive notice, by his omission to make any inquiries for the mortgage. Held, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice; and that, if necessary, an amendment should have been allowed under the A. J. Act, 1873, s. 50. *Gilleland* v. *Wadsworth*, 1 A. R. 82.

Prior Equity—*Purchase without Notice.*]—An assignee of a mortgage cannot, as against a prior equity, set up the plea of purchase without notice. *Smart* v. *McEwan*, 18 Gr. 623.

Purchaser for Value without Notice—*Communication with Mortgagor.*]—The assignee of a mortgage is entitled to set up the defence of a purchase for value without notice. But the intending purchaser of a mortgage should communicate with the mortgagor before purchasing; and if he refrains from doing so, and is for that reason without notice of any equities, his assignment is subject to all equities between the mortgagor and mortgagee. *Totten* v. *Douglas*, 15 Gr. 126.

Set-off to Mortgagor — *Agreement—Notice—Costs.*]—The rule that an assignee of a mortgage takes subject to all the existing equities and the state of accounts between the mortgagor and mortgagee, was acted upon and applied in a case where, in 1875, a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband should as soon as ascertained be applied on the mortgage, and that any future accounts that might become due to the husband for lumber and work supplied to or done for the mortgagee should also be so applied; which mortgage was about fifteen months afterwards sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, he having obtained such assignment as security for any deficiency that might be found to exist upon the realization of a mortgage then held by the purchaser against the mortgagee; and having taken the assignment without inquiring as to the state of accounts, or the title to the lands. *Pressy* v. *Trotter*, 26 Gr. 154.

Under the foregoing facts, the court on further directions refused to allow the plaintiff, the wife, costs against the assignee of the security, although it was shewn, on taking the accounts in the master's office, that the mortgagee was indebted to her husband at the

inception of the mortgage in a sum exceeding that mentioned in the mortgage; restricting her right to recover her costs from the mortgagee alone, though, had the mortgage money been satisfied by payments, costs would have been given against the assignee as well. *S. C.*, 26 Gr. 295.

——— *Assignee in Insolvency.*]—A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings:—Held, that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity. *Court* v. *Holland*, 29 Gr. 19.

——— *Notice.*] — Where two were mortgagees, and one assigned his interest to the other, the mortgagor was allowed credit, as against the assignee, for goods delivered to the assignor, until notice of the assignment. *Galbraith* v. *Morrison*, 8 Gr. 289.

State of Accounts—*Mortgagor not Intervening.*]—The assignee of a mortgage, who takes without the intervention of the mortgagor, is bound by the state of the account between the mortgagor and mortgagee. *Goodcham* v. *De Grassi*, 2 Gr. 135.

——— *Other Equities.*]—The rule in equity is, that the assignee of a mortgage takes it subject not only to the state of the account between the mortgagor and mortgagee, but also to the same equities as affect it in the hands of the mortgagee. *McPherson* v. *Dougan*, 9 Gr. 528.

Third Parties—*Equities of.*] — The assignee of a mortgage, like the assignee of a promissory note after maturity, or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument. *Elliott* v. *McConnell*, 21 Gr. 276.

Trustee — *Sale of Mortgage — Notice of Trust.*]—The trustee of a mortgage, who had no authority to transfer it, did nevertheless sell it to a third person:—Held, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust. *Ryckman* v. *Canada Life Assurance Co.*, 17 Gr. 550.

See Henderson v. *Brown*, 18 Gr. 79; *Egleson* v. *Howe*, 3 A. R. 566; *McCormick* v. *Cockburn*, 31 U. R. 436 (*post* 4.)

(c) *Other Cases.*

Assignment as Collateral Security—*Laches in Enforcing.*]—Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand. *Synod* v. *De Blaquiere*, 27 Gr. 536. Affirmed by the court of appeal (not reported), 30th June, 1880, and by the supreme court of Canada, 12th February, 1881. *Cassels' Dig.* 539.

Assignment for Value without Notice—*Beneficial Parties not Named.*]—Mortgage held good in the hands of an assignee for value without notice, though the parties for whose benefit it was given were not named in it or shewn by any writing. *Muir* v. *Dunnet*, 11 Gr. 85.

Interest—*Assignment by Loan Company.*]—A loan company, being the holders of a mortgage bearing eight per cent. interest, transferred the same to a private individual:—Held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that, at the time of the creation of the incumbrance, the company only could legally have reserved such a rate of interest. *Reid* v. *Whitehead*, 10 Gr. 446.

——— *Assignment to Loan Company.*]—An assignment to the Trust and Loan Company of a valid existing mortgage bearing more than eight per cent. interest is not necessarily void. *Trust and Loan Co.* v. *Boulton*, 18 Gr. 234.

Mortgagor Parting with Interest—*Notice to Assignee—Costs.*]—When a mortgagee sells or otherwise disposes of his mortgage security, being aware that the mortgagor has parted with his interest, he is bound to communicate that information to his assignee, otherwise, in the event of such assignee filing a bill to foreclose against the mortgagor, who disclaims any interest in the property, the mortgagee will be bound to pay the costs of the mortgagor, notwithstanding he may have been retained as a party to the suit until the hearing. *Masson* v. *Roblin*, 2 O. S. 41.

Payments made by Mortgagee—*Lien as against Mortgagor.*]—Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and, subject to an agreement between the mortgagee and assignee, that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenants:—Held, that he was entitled to a lien therefor as against the mortgagor. The registered owner of land mortgaged the same, and afterwards conveyed absolutely to a purchaser, who registered before the mortgage, giving a mortgage to secure purchase money; and subsequently the vendor assigned his mortgage to a purchaser who had no notice of the prior mortgage:—Held, that the purchaser's mortgage in the hands of the assignee was subject to the lien or charge of the vendor's mortgagee. *Fleming* v. *Palmer*, 12 Gr. 226.

Sale by Mortgagees of Part of Premises—*Effect of—Mortgage Debt.*]—In 1821 plaintiff mortgaged three properties to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827, the mortgagees being then in great difficulties; and, the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, one property, for about its value, and gave credit for the amount on the mortgage. This property afterwards passed through several hands, and in 1837 it was bought by the present owner, who made considerable improvements on it:—Held, that the effect of the sale and transfer by the

mortgagees of the portion of the mortgaged property was to transfer to the purchasers a part of the mortgage debt, proportioned to the value of the property transferred, as compared with the whole property mortgaged. *McLellan* v. *Maitland*, 3 Gr. 164.

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4. *Other Cases.*

Costs — *Voluntary Payment — Recovery back.*]—See *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 476, *ante*, 1.

Fraud of Solicitor—*Innocent Mortgagor and Assignee—Liability.*]—The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of property, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff desired to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, paid the mortgagee and fraudulently procured from her an assignment of the mortgage to himself, and then assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud:—Held, that the plaintiff was entitled to a re-conveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and could pass no better title to his assignee. *McCormick* v. *Cockburn*, 31 O. R. 436.

Operation of Assignment — *Release of Mortgage Debt—Mortgaged Estate not Passing—Ejectment—Title—Sale.*]—A. M. died in 1838, and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the real estate to one H. P. T., which were subsequently foreclosed, but no sale was made under the decree in such foreclosure suit. In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. C., who, in 1849, assigned and released the same to M. M. In 1841 M. M., the administrator with the will annexed of A. M., filed a bill in chancery under the Imperial statute 5 Geo. II. c. 7, for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor-in-Council, under a statute of the Province, for leave to sell the same, which was refused. A decree was made in this suit and the lands sold, M. M. becoming the purchaser. She afterwards conveyed the lands to the commissioners of the lunatic asylum, and the title therein passed, by various Acts of the Legislature of Nova Scotia, to the present defendants. M. K., devisee under the will of A. M., brought an action of ejectment for the recovery of the lands, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceedings in the foreclosure sale were also attacked:—Held, that, even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment. Semble, that such sale was not invalid but passed a good title, the statute 5 Geo. II. c. 7 being in force in the Province. Held, also, that the statute R. S. N. S., 4th series, c. 36, s. 47, vested the land in the defendants if they had not a title to it before. *Kearney* v. *Creelman*, 14 S. C. R. 33. Leave to appeal to privy council refused.

Parties—*Assignor Retaining Interest.*]—Where an assignment of a mortgage on land is absolute in form, though as a matter of fact the assignor retains a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. *Ward* v. *Hughes*, 8 O. R. 138.

Third Party—*Assignment to—Refusal to Execute.*] — The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vict. c. 20, s. 7 (O.) The plaintiff refused to execute this assignment, on the ground that he held a subsequent mortgage on the same land from the mortgagor, and, although he was willing to execute a discharge of the mortgage, he was unwilling to assign it to a third party, and the defendants moved for a mandamus to compel him to execute the assignment:—Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment. *Rogers* v. *Wilson*, 12 P. R. 322, 545. See *S. C.*, 7 C. L. T. Occ. N. 399.

Trustee—*Assignment to—Interest of Mortgagee—Discharge by Trustee — Liability for Amount Due to Mortgagee—Bona Fides.*]—A mortgage was created by D. in favour of two brothers, who executed an agreement apportioning the amount secured between them, and afterwards joined in an assignment of the security to M. in trust, as to the first instalment, to pay the same equally to the mortgagees, one of whom, J., subsequently conveyed his interest in the mortgage to H. (the plaintiff), for the benefit of creditors. The other mortgagee subsequently acquired the equity of redemption, went into possession of the premises, and succeeded in satisfying the amount of mortgage money other than the first instalment thereof. M. executed a discharge of the mortgage under the statute, declaring that D. had paid all moneys secured by the mortgage. In fact D. never paid any portion of the money, and the first instalment never was paid by any one, and J. was indebted to his co-mortgagee to a greater amount than his share of the first instalment would come to. M. died, and a bill was filed against his personal representatives by H. calling upon them to pay the share of the first instalment coming to J.:—Held, that the estate of M. was bound to make good the amount to which J. was proved to have been

entitled, although no want of bona fides could be imputed to M. *Howland* v. *McLean*, 22 Gr. 231.

Value of Securities Assigned — *Misstatement—Alteration—Notice.*]—The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on the basis of an eight per cent. investment, and a schedule was prepared by the defendants' manager exhibiting each security, amongst which there was stated to be a mortgage by F. for $4,700; whereas in fact there was no such mortgage, but instead two mortgages on the instalment principle, which as an eight per cent. investment were worth only $3,920, making a deficiency of $780. This was caused by F., before the schedule was drawn up, intimating his intention of paying off the mortgages, $4,700 being the amount agreed upon between F. and defendants, which he would have to pay and which defendants' manager therefore, in good faith, put into the schedule. Subsequently and while the schedule was in the plaintiffs' solicitor's hands to prepare and settle the deed of assignment, F. decided not to pay off the mortgages, but to go on with the regular payment of the same, and defendants' manager then corrected the schedule by inserting the two mortgages. There was a difference between the plaintiffs and defendants as to the value of the securities, and finally a lump sum was agreed on and paid by plaintiffs, and the assignment executed:—Held, that, on the evidence, set out in the report, the plaintiffs' solicitor must be deemed to have had notice of the error and alteration in the schedule before the execution of the conveyance or completion of the transaction, and that this was notice to the plaintiffs. Semble, that, although the evidence shewed that there was no intention to deceive on the part of the defendants' manager, still there was such a misstatement of a material fact, as, but for the notice, would render the defendants liable for the damage sustained thereby. On appeal to a divisional court:—Held, as to the claim for the $780, that there could be no recovery, for the true construction of the transaction was that the lump sum was to cover all deficiencies in value as also errors and mistakes, at all events to not an unreasonable amount, which $780 could not be said to be; and there was no fraud, concealment, or misrepresentation. In other respects the judgment was affirmed. *Real Estate Investment Co.* v. *Metropolitan Building Society*, 3 O. R. 178.

II. CONTRACTS OF MORTGAGE.

1. *Form of.*

(a) *Sufficiency to Charge Land.*

In an instrument under seal, the words "And for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land," &c., pass no interest; they only shew an intention to create a charge or lien. *Doe d. Ross* v. *Papst*, 8 U. C. R. 574.

A deed poll to secure a sum of money, in which the words were "mortgage all that certain parcel of land, &c., to have and to hold the aforesaid land unto the said J. R., his heirs, executors, administrators, and assigns:"—Held, sufficient to pass the right of possession to the grantee. *Vandelinder* v. *Vandelinder*, 14 C. P. 129.

An incorporated company having executed a bond, which, though it contained no direct words of charge, was evidently intended to give a lien on the property of the company, it was held that the lien was sufficiently created. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Gr. 27.

A letter in the following form, "I agree to charge the east half of lot number 19 . . with the payment of the two mortgages . . amounting to $750 . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgage," is not a mere executory agreement, but operates as a present charge, in favour of the mortgagees named, upon the lands described, and may be registered against them. *Hoofstetter* v. *Rooker*, 22 A. R. 175. Affirmed, 26 S. C. R. 41.

See cases under III.

(b) *Other Cases.*

Covenant for Payment — *Infant—Approval of Master—Mistake.*]—The defendant was one of several cestuis que trust who joined with their trustee in a mortgage for the purpose of discharging a lien upon the trust estate. It was recited in the mortgage deed that they had agreed to join therein in order to vest all their interests in the mortgagee, but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the master (who had directed the trustee to execute the mortgage) but not by the official guardian. It was stated, however, at the bar that the latter did approve on behalf of the infant, and that some pencil marks on the instrument signified his approval. No order was shewn requiring execution by the infant. Nearly two years after the defendant came of age she was served with the writ of summons in an action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside:—Held, that it was contrary to proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the master's attention had not been called to the fact of infancy. The covenant was void, as the infant had received no benefit from it and had been induced to enter into it per incuriam; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice. *Brown* v. *Grady*, 31 O. R. 73.

Inconsistent Provisions—*Printed Form — Addition of Written Words — Distress Clause.*]—M. gave a mortgage to T. of certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment, the following words were inserted in writing: "It being

understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerased in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay* v. *Howard*, 6 O. R. 135.

——— *Proviso for Redemption—Construction.*]—W. H. conveyed his farm to his son, and took back from him a mortgage on it, with a proviso for redemption on payment of $4,000, without interest, in manner following: To pay W. H. and A. H., his wife, during their joint lives, $300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters $300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. W. H. and A. H. died, and their administratrix brought this action to recover arrears. R. H. contending that in any event he was not to pay more than $4,000, which he had fully paid:—Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeasance clause upon payment of $4,000, without interest, being quite irreconcilable with the particulars regarding the payments, the court must regard the general scope and intent of the deed, and that evidently being to arrange the terms of an annuity for the joint lives of the father and mother, and of the survivor, the deed must be so construed, and that R. H., therefore, could not succeed in his present contention that he was not in any event to pay more than $4,000. *Coleman* v. *Hill*, 10 O. R. 172.

Security for Floating Balance.]—A trader, being indebted to a wholesale merchant for goods supplied, executed a mortgage in favour of the creditor, securing £3,000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than would have been sufficient to pay off his indebtedness; and the firm in rendering their accounts to the mortgagor did not bring in the old debt:—Held, that these circumstances were sufficient to shew that the security was intended to cover a floating balance. *Russell* v. *Davey*, 7 Gr. 13.

Specific Performance—*Mortgage Settled by Master—Form of.*]—In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee a mortgage:—Semble, that it would be improper to insert a power of sale in such mortgage; and quære, if the deed merely contains qualified covenants, whether the mortgage should contain any others. Where a mortgage has been settled by a master, and the party ordered to execute it objects to its form, it is not a proper mode of raising such objections to refuse to execute such mortgage, and to execute a mortgage differing from the one settled. *McKay* v. *Reed*, 1 Ch. Ch. 208.

See Winfield v. *Fowlie*, 14 O. R. 102.

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2. Mortgage or Purchase.

(a) Generally.

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

Agreement for Redemption—*Interest—Arrears—Period for Redemption.*]—In a suit to declare a deed absolute in form to be a mortgage, and to restrain an action of ejectment against the paintiff, it appeared that at the date of the commencement of the action the plaintiff was in arear for payments of interest to the defendant upon the agreement entered into between them when the deed was given:—Held, that the plaintiff was not entitled to six months for payment of the arrears and costs. *Dorwyn* v. *Fralick*, 21 Gr. 191.

Creditor — *Conveyance to — Security — Trustee—Redemption—Parties.*]—The owner, being indebted, conveyed his land to one M. for sufficient to pay off his liabilities, without any reference to the value of the property, of which he remained in possession, and sold to third parties, subject "to a conveyance to M., intended to operate as a mortgage." It was proved that the avowed object of M. was to relieve the owner from his embarrassments, and secure his lands from seizure; but the same having passed under the will of M. to trustees, one of them refused to allow a redemption except under a decree of the court. The court considered that the evidence clearly established the conveyance to have been given by way of security only, and that the vendees had a right to redeem; that the trustees had not acted unreasonably; and that one of the trustees being beneficially interested in the estate, the cestuis que trust were sufficiently represented in the suit. *Kerr* v. *Murray*, 6 Gr. 343.

——— *Conveyance to—Security—Redemption—Question of Law.*]—In October, 1840, the holder of a bond for the conveyance to

him of real estate assigned over the same to a creditor in payment of his demand. The creditor paid at the same time a certain sum in cash, and two years afterwards obtained possession of the property by ejectment against the debtor, who had in the interim been in receipt of the rents. In December, 1855, the debtor filed his bill, stating the transaction to have been by way of mortgage only, and praying to be allowed to redeem. Issues were subsequently directed as to the question of mortgage or no mortgage, and found in favour of the plaintiff; after which, on further directions, a decree for redemption was pronounced in favour of the debtor, which on appeal was reversed, and the bill in the court below ordered to be dismissed with costs; and semble, that such a question is properly one of law, not of fact, and not such as forms an issue to be tried by a jury. *Watson* v. *Monro*, 8 Gr. 60. *S. C.*, in court below, 5 Gr. 662, 6 Gr. 385.

——— *Conveyance to—Security — Subsequent Incumbrance — Redemption — Statute of Frauds — Statute of Limitations.*]—On the 16th January, 1831, an absolute conveyance was made by A., in fee, to secure a loan, the grantor remaining in possession until the spring of 1841. On the 1st March, 1841, the alleged mortgagee wrote to a subsequent mortgagee of the same property, claiming £93 as due from A., and on the 7th and 21st June, of the same year, he again wrote to the same incumbrancer, alleging that he had originally advanced about £60, which, with interest, then amounted to £90 or £100, and suggesting that the land should be sold for the benefit of A., against whom he kept an account in his books of principal and interest in respect of the alleged debt up to the 1st January, 1856. The subsequent incumbrancer purchased the equity of redemption. Upon a bill filed by such mesne incumbrancer in February, 1861, to redeem the premises against the representatives of the alleged mortgagee:—Held, that the letters took the case out of the Statute of Frauds: and that the plaintiff was not barred by the Statute of Limitations. *Malloch* v. *Pinhey*, 9 Gr. 550.

——— *Conveyance to—Repayment of Debt —No Reconveyance.*] — A conveyance absolute in form, but intended as a security, was made by the owner of real estate. The sum secured was paid, but no reconveyance executed. The owner, however, was always permitted to deal with the estate as his own, and mortgaged it with the knowledge of the person holding the legal title, who, after the death of the mortgagor, brought ejectment, claiming under the absolute conveyance. The court restrained the action, and ordered the plaintiff therein to pay the costs of the injunction suit. *Cayley* v. *McDonald*, 14 Gr. 540.

——— *Conveyance to — Promissory Notes —Evidence.*]—Where a deed was absolute in form, and the alleged consideration was, in part, promissory notes theretofore held by the grantee against the grantor, the fact of such notes being left with the grantee, is not alone sufficient to prove that the deed was intended as a mortgage. *Healey* v. *Daniels*, 14 Gr. 633.

——— *Conveyance to — Fraudulent Purpose.*]—Where the plaintiff brought an action to redeem a certain property conveyed by him by a deed absolute in form, and it appeared that the deed in question, which he now sought to cut down to a mortgage, had indeed been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract:—Held, that under these circumstances evidence was not admissible to rectify the form of the instrument, for the court never assists a person who has placed his property in the name of another to defraud his creditor; nor does it signify whether any creditor has been actually defeated or delayed. The decided weight of authority is, that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of court or by the aid of the court. Symes v. Hughes, L. R. 9 Eq. 497, commented upon. *Mundell* v. *Tinkiss*, 6 O. R. 625.

Crown Grant—*Assignment of Right to—Solicitor—Conveyance—Agent — Mortgage.*]—A person in indigent circumstances, being entitled to a grant of land from the Crown, had consulted a solicitor with a view of obtaining it. In the course of their transactions the solicitor wrote, "I think I can manage for you so effectually that I can get your deed from government, probably through some assistance on my part." The client having executed an assignment, as he alleged, by way of security to the solicitor, and the patent for the land having been issued, the solicitor set up the transaction as an absolute purchase, in consequence of which the wife of the plaintiff, acting as his agent, took steps to assert her husband's claim, and procured the assistance of her brother. After repeated applications the solicitor agreed to reconvey upon being paid £170, asserted by him to be due. This the brother advanced, and took a conveyance of the property, said to be worth £800, in his own name, and then alleged that he had purchased for his own benefit. The court declared the deed to the solicitor a mortgage only; that his assignee had in fact acted as agent of the plaintiff, and could not purchase for his own benefit; and directed an inquiry as to certain points left in doubt by the evidence before the court and an examination of the solicitor's books, unless the purchaser would consent to reconvey upon receiving back the amount paid by him to the solicitor. *McIlroy* v. *Hawke*, 5 Gr. 516.

Mortgagee in Fact—*Tenants—Notice—Attornment.*]—Quære, whether a conveyance absolute in form, though a mortgage in fact, comes within the Act 11 Geo. II. c. 19, s. 11, so as to authorize the mortgagee to give notice and receive attornment from a tenant. *McLennan* v. *Hannum*, 31 C. P. 210.

Purchaser—*Conveyance to — Advances—Evidence—Varying Deed—Corroboration.*]—The bill, which was filed in 1876, by the children and heirs-at-law of J. W. R., alleged that the deceased had, in 1861, conveyed certain real estate to his brother I. N. R., upon the express trust that he would advance him $1,000, and hold the property as security for the repayment of that sum with interest; that he never did advance that sum; that J. W. R. died in 1872; that I. N. R. died in 1874, having devised this property to his son; that the trusts upon which it had been conveyed had been fulfilled; and sought an account of I. N. R.'s dealings therewith. The defendants, the

executor and executrix of I. N. R., set up an absolute sale, and relied on the Statute of Frauds and the the Statute of Limitations. It was proved at the hearing that immediately after the execution of the deed, which was an absolute conveyance of the lands in question for $8,000, subject to certain mortgages, I. N. R. had gone into possession; that persons applying to J. W. R. for the purchase of lots were told by him that he had sold the property to I. N. R. C. R., a son of J. W. R., swore that his father, being in difficulties in 1861, I. N. R. told him (C. R.) that he would take an assignment of the property, pay off certain mortgages thereon, advance J. W. R. $1,000, and reconvey it at any time, on payment of advances and interest. In a letter to C. R. in 1865, J. W. R. said that in writing to I. N. R. he had denied that "the sale was in any other light than that in which you placed it. . . . I also asked him if he is willing to relinquish the property on receiving his advances." An account rendered to I. N. R. was produced, dated 16th September, 1863, headed: "J. W. R., debtor—amounts paid for you:" composed of items which, it was alleged, formed the purchase money of the premises in question. On the 25rd February, 1865, I. N. R. wrote to J. W. R. in reply to a letter from him, "Pay me my advances as agreed with C., and you can have your property." A decree was made directing an account, and allowing the plaintiffs to redeem the lands on payment of the amount due to the defendants in respect of advances made:—Held, that the evidence shewed that the transaction was a sale; and the decree was reversed. *Rose* v. *Hickey*, 3 A. R. 309. Affirmed in the supreme court, *Cassels' Dig.* 535.

——— *Assignment of Interest to—Consideration—Promissory Note—Condition.*]—The plaintiffs executed an absolute assignment of their interest in real estate, and the assignee gave his note for £500, which he alleged to be the consideration, payable in two years, subject to a condition expressed in the note, that the maker might retain thereout any advances he should in the meantime make to the assignors. No change of possession within the two years was intended, and none took place. The assignee alleged that the transaction was a sale to him with a right to the assignors to repurchase by repaying any advances he should make within two years; but no evidence of this being given, the court held that the transaction must be treated as a mortgage. *Fallon* v. *Keenan*, 12 Gr. 388.

——— *Assignment of Right—Value—Notice.*]—A. held a bond for the conveyance of property, and assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., and C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely. A. having become bankrupt, his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over, with liberty to C. to give such evidence, upon payment of costs, unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs. *Cherry* v. *Morton*, 8 Gr. 402.

——— *Conveyance to — Cutting down.*]—A married woman, the owner of a leasehold interest, with a right of purchase, joined with her husband in a conveyance thereof to a purchaser. The vendors afterwards filed a bill to declare the conveyance to have been by way of security only, and that the plaintiffs were entitled to redeem the same:—Held, that there was not sufficient to cut down the absolute conveyance to a mortgage interest. *Sampson* v. *McArthur*, 8 Gr. 72.

Surety — *Conveyance to—Security—Redemption—Conflicting Evidence.*]—T. and B., being sureties for W. for the payment of certain moneys to the city of Toronto, obtained from him a mortgage, with a power of sale, by way of indemnity. Afterwards, having been obliged to pay certain money to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1,000, but in fact there was no money paid, and no accounting between the parties. Subsequently the owner of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B.; and it was also shewn that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay the mortgagee, who was pressing, and other creditors. On a bill filed by W. against B. and the representatives of T. (who had died in the meantime), alleging the transaction to have been by way of security only, and praying to be allowed to redeem, a decree was made as prayed, which on appeal was affirmed, notwithstanding the surviving grantee in the deed, B., swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed. *Bernard* v. *Walker*, 2 E. & A. 121.

(b) *Absolute Conveyance with Contract to Reconvey or Repurchase.*

Agreement for Repurchase—*Mortgage—Distinction Between.*]—The distinction between a mortgage and an absolute sale with a contemporaneous agreement for repurchase explained: and an absolute conveyance held to be of the latter character rather than the former, on the weight of evidence, which was conflicting. *Rapson* v. *Hersee*, 16 Gr. 685.

Covenant to Erect Buildings or Reconvey—*Effect of.*]—Certain trustees conveyed to A., and took back from him a covenant to erect buildings on the property to the value of £2,000, or in default that he would reconvey:—Held, to be a mortgage for £2,000, and that subsequent purchasers and incumbrancers were entitled to redeem. *O'Reilly* v. *Wilkes*, 8 L. J. 135.

Defeasance — *Agreement—Destruction of—Ejectment—Injunction.*]—Where an agreement not under seal was entered into by a mortgagee, who obtained from the mortgagor a deed of certain property, whereby the mortgagor was allowed to retain possession of a portion of the property, and the mortgagee the other portion until he was paid, such agreement having been destroyed by the mortgagee, and ejectment brought on the deed, the court restrained the mortgagee from enforcing his legal right. *Harris* v. *Meyers*, 7 L. J. 243.

Purchase of Land—*Bond to Reconvey—Undertaking to Pay—Nature of Transaction*

—*Value of Property.*]—A person to whom application was made for a loan upon real estate refused to lend, but offered to purchase the land, which proposal the owner refused. About two weeks afterwards the owner consented to sell for £400, provided the purchaser would give a bond to reconvey on payment of £512 at the end of two years, and a deed and bond were executed accordingly. When the time for payment was approaching, the purchaser assented to an extension of the time on certain terms, which were not finally carried out. Afterwards the purchaser sued the vendor upon his covenant for good title, and usury was pleaded, which the verdict negatived:—Held, that the transaction was one of sale, with a right to repurchase, and not of mortgage. *Bullen* v. *Rowwick*, 8 Gr. 342.

But on a rehearing the deed was declared to have been made as security only, the bond to reconvey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof. *S. C.*, 9 Gr. 202.

——— *Bond to Reconvey—Repayment of Advance.*]—Where there was a conveyance of land upon an advance of money, and a bond given by the lender to reconvey at the end of a year upon payment of the sum advanced, and an additional sum calculated upon the value of the money for that time, the transaction was held a mortgage, notwithstanding that the instrument termed it a sale and purchase. *Fink* v. *Patterson*, 8 Gr. 417.

——— *Bond to Reconvey — Redemption.*]—In 1838, A. having a life estate in certain land, his wife having the remainder in fee, A. being also owner in fee of property adjoining, and executions against his lands at the suit of B. and others being in the sheriff's hands, A. and his wife agreed orally with B. that B. should purchase at the sheriff's sale; and that they also would convey to B., who should resell to them. Accordingly B. bought at the sale, and A. and his wife conveyed to B., but the wife was not examined before magistrates until 1841. When the omission was supplied, two bonds were executed, one by B., for reselling the property to A. and wife on payment of the money (the amount of the executions), and the other by A. and wife for payment of the money; they agreeing that on default they would give up possession, and that any intermediate payments should be retained by B. as rent. In 1842 new bonds to the same effect were exchanged, naming a larger sum, in order to cover some further advances which B. had meanwhile made to A. A. and wife remained in possession until default, and were then ejected. After A.'s death his widow filed a bill to redeem, claiming that the parties were in effect mortgagors and mortgagee. A decree for redemption was made but was reversed in appeal. *Monk* v. *Kyle*, 17 Gr. 537.

——— *Oral Undertaking to Reconvey—Notice—Redemption.*]—In August, 1866, the plaintiff, in consideration of $500, which she asserted was by way of loan, conveyed to M. 100 acres of land by a deed absolute in form. The plaintiff alleged that M. agreed that if the money was repaid during his lifetime, he would accept the same and reconvey the land. The plaintiff in 1871 applied to M. to accept the amount of principal and interest remaining due (she alleging that she had paid $10 on account thereof), and reconvey the land to her, which request M. refused to comply with. Subsequently, and in June of that year, M. sold and conveyed the land to R. and McK. for $1,200, and they in June, 1872, sold and conveyed to B. for $2,000, alleged to be its full value, taking a mortgage for part of the consideration money, which they transferred for value to one W., not a party to the suit. During the time R. and McK. held the property, they (with knowledge of B.) had cut and disposed of large quantities of wood and timber growing thereon, without any attempt on the part of the plaintiff to restrain them. In November, 1873, plaintiff instituted proceedings in chancery seeking to redeem, alleging that the deed she gave was intended as a security merely, and a decree was pronounced in her favour, the court being of opinion that the transaction was in reality one of mortgage and that on the pleadings set out in the report, the defendants, R. and McK. and B., had distinctly admitted the allegations of the bill in this respect. The court of appeal being equally divided, an appeal was dismissed, and the decree for the plaintiff stood affirmed. *Peterkin* v. *McFarlane*, 9 A. R. 429. See *S. C., sub nom. Rose* v. *Peterkin*, 13 S. C. R. 677.

Redemption — *Conditional Sale—Bond.*]—A lessee of the Crown, being in arrear for rent, assigned his interest to another, taking a bond to reconvey one-half thereof, on payment of half the amount advanced within a year. After the year the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that the transaction was primâ facie one of mortgage; and the party alleging it to be a sale having failed to prove it so, a decree was made for redemption. *Bostwick* v. *Phillips*, 6 Gr. 427.

——— *Cutting down Deed — Discretion—Sheriff's Sale of Interest in Land—Dormant Equities Act — Limitation of Actions.*]—In April, 1830, A., the owner of real estate, owing B. £121, and unable to pay, procured two sureties to join him in a bond for the amount, and to indemnify them conveyed several valuable lots of land by a deed absolute in form, taking back a bond of defeasance. Ten days afterwards one of the sureties delivered to B. a promissory note of two other persons for about one-half the debt and interest, and in May of the following year, A. being still unable to pay, and his sureties desiring to be relieved from liability, it was arranged between A. and B. that A. should convey certain of the lands, which had been so transferred to the sureties, to B., which was accordingly done by an absolute deed, and the bond cancelled; B. at the time giving back this memorandum signed by himself: "Received of Mr. A. McDonell lands as follows," (enumerating them, part being cultivated, the rest waste lands) "for the sum of £126 5s.;" (this being the original debt and interest). "Should he want the above property I should have no objection to giving it back, if Mr. McDonell would pay me the above sum, in three instalments, viz.," (setting out the several instalments), "with interest from this date." A. was then in possession and occupation of the cultivated lands, and also in possession of the wild lands, and so continued until 1848, when B. brought ejectment for the cultivated lands, and obtained possession in 1849. About the same time (1849) other creditors of A. had obtained judgment and execution against him under which his interest in these lands was

sold in 1850, and purchased by B. through an agent. In the books of B. (for the year 1849) entries were found charging A. with interest on the amount from 1831 to 1849. B. never gave credit for the amount of the promissory note received by him, nor did he produce it or account for it in any way. In 1860 a bill was filed by A. claiming a right to redeem, and a decree for redemption was made. On appeal:—Held, affirming the decree, that, under the circumstances stated, the deed to B., together with the memorandum signed by him, operated as a mortgage security only. 2. That the circumstances appearing were such as did not warrant the court in its discretion in refusing redemption under the provision of s. 11 of the Chancery Act. 3. Following McCabe v. Thompson, 6 Gr. 175, that the security of B. having been created by deed absolute in form, the right or interest of A. therein was not saleable by the sheriff under common law process. 4. That the Dormant Equities Act did not apply. 5. That, under the circumstances, the lapse of twenty years since the time appointed for payment did not bar A.'s right to redeem. *McDonald* v. *McDonell*, 2 E. & A. 393.

——— *Lapse of Time.*]—A having purchased land, and paid several instalments, but received no deed, assigned his right to B., taking a bond from him that if he should obtain the deed, on the payment by A. to him of £100, in two years, he would convey to A.:—Held, on ejectment by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem under the Act. *Doe d. Shannon* v. *Roe*, 5 O. S. 484.

Release of Equity — *Agreement to Repurchase—Nature of Transaction.*]—A mortgagee took a release of the equity of redemption, and thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mortgages, not giving the grantor a mere option to purchase, but binding him to buy and pay the stipulated price:—Held, that the transaction was one of mortgage. *Hawke* v. *Milliken*, 12 Gr. 236.

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3. *Other Cases.*

Accounts — *Speculative Securities—Bonuses and Commissions.*]—Where money is lent on securities of a speculative or unsatisfactory nature, bonuses or commissions deducted by the lender at the time of the advance, together with bonuses or commissions charged and agreed to for an extension of time, and which form part of the consideration of the mortgage security, are properly chargeable in an accounting between borrower and lender, provided they were made part of the contract. *Gardiner* v. *Munro*, 28 O. R. 375.

Advance of Money—*Executory Contract to Purchase.*]—On an advance of money on the security of real estate, the lender cannot bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated. *Fallon* v. *Keenan*, 12 Gr. 388.

Infants — *Contracts by.*] — See *Foley* v. *Canada Permanent L. and S. Co.*, 4 O. R. 38.

Landlord and Tenant—*Creation of Relation.*]—The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the bonâ fide purpose of further securing the debt, without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act. *Trust and Loan Co.* v. *Lawrason*, 6 A. R. 286, 10 S. C. R. 679.

Security for Advances — *Taking Accounts.*]—J. and R., living at P., had dealings extending over several years with D., who lived at K., and borrowed money from him from time to time. To secure the money borrowed they executed a mortgage to D., purporting to be for $4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the account in the master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as $4,000 had been advanced by D., J. and R. drew on D. for $1,500:—Held, that, under these circumstances, the presumption that D. owed J. and R. the $1,500 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D. It appeared, also, that during the pendency of these transactions D. gave J. and R. a mortgage, held by him, to collect, and that J. and R. collected what was due on this mortgage, and retained the same:—Held, that the money so collected and retained was covered by the mortgage from J. and R. to D. *Court* v. *Holland*, 4 O. R. 688.

Validity — *Consideration—Stifling Prosecution.*]—The defendant, while a prisoner arrested on a charge of larceny, sent for the agent of the owner of the property stolen and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen. The agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he secured him, but after the security was given he let him know that he would endeavour to get a mitigation of the sentence, which he afterwards did:—Held, that there was no sufficient evidence that there was an agreement to stifle the prosecution and that the security was valid. *Henry* v. *Dickie*, 27 O. R. 416.

Void Contract—*Sunday.*]—Under s. 2 of 8 Vict. c. 45, all sales of real and personal property made on a Sunday are void. Semble, that mortgages would not be void. *Lai* v. *Stall*, 6 U. C. R. 506.

See Wilt v. *Lai*, 7 U. C. R. 535.

See Dewar v. *Mallory*, 27 Gr. 303; *Watson* v. *Lindsay*, 27 Gr. 253, 6 A. R. 609; *McMullen* v. *Polley*, 12 O. R. 702; *Burton* v. *Dougall*, 30 O. R. 543.

III. Equitable Mortgages.

Agreement under Seal — *Construction and Operation—Present Charge—Legal Estate.*]—See *Miller* v. *Stitt*, 17 C. P. 559, *post* XII. 9 (b).

Deposit of Deeds—*Bank—Past Indebtedness—Future Advances.*]—The customer of a bank created a mortgage in favour of it by deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit

had been made to secure certain future advances, all of which had been paid. The officers of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed, at the time of the deposit, on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, decreed in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627.

——— *Delivery up — Extinguishment of Lien.*]—An equitable mortgage by deposit of title deeds had been created for $1,000 by a son in favour of his mother, who had advanced him that sum. The mother subsequently delivered the title deeds to the party in favour of whom a voluntary settlement had been created, but it was not intended to be a transfer of the $1,000 due to the mother:—Held, that the effect of the delivery of the deeds was to extinguish the claim on the land for the $1,000, and that in a decree declaring the settlement void as against creditors the beneficiary under the settlement was not entitled to any lien in respect of this amount. *Masuret* v. *Mitchell*, 26 Gr. 435.

——— *Subsequent Incumbrancer — Right to Sale.*]—A subsequent incumbrancer is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as when the mortgage is by deed. *Kerr* v. *Bebee*, 12 Gr. 204.

Deposit of Mortgages — *Acquisition of Equity—Lien of Depositee.*] — Where mortgages are deposited as security for advances, and the depositor subsequently acquires the equity of redemption, the depositee's lien on the property is not confined to the amount of the mortgages. *Jones* v. *Bank of Upper Canada*, 13 Gr. 74. *S. C.*, 12 Gr. 429.

——— *Memorandum — Registration.*] — Where a mortgage was created by the deposit of mortgages, and the borrower signed a memorandum stating the sum lent and times for re-payment, and agreeing to execute a writing to enable the lender to transfer or control the mortgages so deposited:—Held, that this memorandum did not require registration, not being, in the language of C. S. U. C. c. 89, s. 17, "a deed, conveyance, or assurance affecting lands." *Harrison* v. *Armour*, 11 Gr. 393.

Receiver—*Default—Parties—Prior Mortgagee.*]—An equitable mortgagee is after default entitled to a receiver where the mortgagor is in possession, whether the security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the suit. *Aikins* v. *Blain*, 13 Gr. 646.

Trustee—*Infant—Mortgage by Cestui que Trust — Valid Charge.*] — A., the equitable owner of property, had it conveyed to his son, a minor, in trust for A. himself. A. afterwards signed the son's name to a mortgage of the property to a creditor, and added his own name as witness:—Held, that the instrument, though void at law, created a valid charge in equity. *Dennistoun* v. *Fyfe*, 11 Gr. 372.

See cases under II. 1 (a).

IV. FORECLOSURE.

1. *Generally—When Decreed.*

Ability to Reconvey.]—It seems that the plaintiff will not be entitled to the absolute order of foreclosure against a subsequent mortgagee and the mortgagor, unless he be in a situation to reconvey the legal estate in the mortgaged premises. *Ross* v. *Thompson*, 2 Gr. 624.

Crown—*Equity in—Remedy—Possession.*]—Where the Crown holds the equity of redemption, no absolute order of foreclosure can be pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession. *Dunn* v. *Attorney-General*, 10 Gr. 482.

Default — *Instalment — Interest.*]—Upon default in payment by a mortgagor of any instalment of, or of interest upon, mortgage money, the mortgagor has a right to a decree directing payment or to foreclose on default the whole amount secured by the mortgage. *Cameron* v. *McKea*, *Sparks* v. *Redhead*, 3 Gr. 311.

Illegal Consideration—*Defence.*]—The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements, and therefore to an action for foreclosure of a mortgage given to secure part of the purchase money of a house it is no defence to shew that the house has been purchased, to the vendor's knowledge, for use as a house of ill-fame. The plaintiff being able to make out the right to relief by production of the mortgage without disclosing the illegal transaction, the defendant cannot set up the illegality as a defence. Judgment in 21 O. R. 27 affirmed. *Hager* v. *O'Neil*, 20 A. R. 198. See next case.

——— *Defence—Possession — Pleading — Parties.*]—Judgment of the court of appeal in Hager v. O'Neil, 20 A. R. 198, affirmed. Under the Judicature Act of Ontario an action for foreclosure is not to be regarded as including a right to recover possession of the mortgaged premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and the plaintiff claims possession as original owner and vendor. Under said Judicature Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration. Quære:—Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose, or is the defence confined to the immediate parties to the contract? *Clark* v. *Hagar*, 22 S. C. R. 510.

Immediate Foreclosure.]—See *Gibson* v. *McCrimmon*, 9 C. L. T. Occ. N. 40.

Insolvency of Mortgagor—*Remedy—Insolvent Act.*]—Under the Insolvent Act of 1869, the jurisdiction of this court to decree foreclosure upon a mortgage is not taken away, and a mortgagee must still proceed in this court to obtain such relief against the official assignee of the mortgagor, there being no proper machinery in the insolvent

court under which foreclosure can be obtained, or for serving parties out of the jurisdiction, or for calling in parties to establish their claims upon the mortgaged premises. *Henderson* v. *Kerr*, 22 Gr. 91.

Municipal Corporation — *Remedy — Mortmain.*]—After the passing of 27 Vict. c. 17, a municipal corporation invested, on mortgage, part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the securities; —Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain. *Municipality of Oxford* v. *Bailey*, 12 Gr. 276.

Notice—*Provision for—Application of.*]—A mortgagee with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises without three months' notice to the mortgagor, demanding payment—Held, that such notice was unnecessary before filing a bill to foreclose. *Lamb* v. *McCormack*, 6 Gr. 240.

Priorities—*Reformation—Postponement—Offer to Redeem—Necessity for Subsequent Redemption—Petition—Costs.*]—C., the holder of two mortgages created by H., between whom and the niece of C. a marriage was about to take place, became party to the marriage settlement, which embraced, amongst other properties, the lands mortgaged, and subsequently instituted a suit to reform the settlement so as to leave his mortgage unaffected thereby, and also to reform a mortgage made by H. with the assent of C., after the marriage, to one J. M., for the benefit of creditors, so as to postpone it to his own, and prayed a foreclosure or sale, but did not offer to redeem. After the hearing of the cause the plaintiff paid off this mortgage and other claims upon the estate, and thereupon filed a petition setting forth these facts, and praying a declaration that he was entitled to recover the amounts so paid by him, and the amount due upon his two mortgages, and in default a foreclosure of the mortgaged premises; —Held, that all he was entitled to was a foreclosure against H., with the costs of an ordinary foreclosure suit, the plaintiff paying the costs occasioned by the other parts of his bill in which he was unsuccessful, as also the costs of the defendants appearing on the petition, the court being of opinion that he should, in the first instance, have drawn up a decree for redemption, and acted on it. Quære, whether the plaintiff could, if objected to, even enforce his mortgage against H., or whether the plaintiff was not in the position of a mortgagee who had represented to the wife before marriage that he held no incumbrance on the settled property. *Cornwall* v. *Henriod*, 12 Gr. 338.

Purchase Money—*Mortgage for—Failure of Title.*]—It is no defence to a bill of foreclosure that the mortgage was given for the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title. *Cockcnour* v. *Bullock*, 12 Gr. 138.

——— *Mortgage for—Removal of Prior Incumbrance—Rights of Assignee—Notice.*]—A purchaser of real estate mortgaged to the vendor securing a balance of purchase money, on the understanding that the vendor was to remove an incumbrance existing at the time of the sale. This mortgage was assigned, and the assignee thereof, though unaware of the terms upon which it was executed, had notice of the outstanding incumbrance; and it was not pretended that he supposed that the purchaser had bought subject thereto. Upon a bill by the assignee for the foreclosure of the mortgage:—Held, that the most he was entitled to was, that having reduced the prior incumbrance to a sum not exceeding that secured by the mortgage held by him, the purchaser was bound to pay that amount into court to be applied in clearing the title, or in default that his interest should be foreclosed, unless it was shewn that the existence of this mortgage prevented the purchaser from raising money upon the security of the land, in which case the plaintiff was bound to remove that incumbrance out of the way of the purchaser, who was declared entitled to three months after its being cleared off to procure the money; but that this protection was properly obtainable by an application in chambers. *Church Society* v. *McQueen*, 15 Gr. 281.

Reciprocal Rights—*Redemption — Default — Interest — Notice.*] — The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established, although the identical conditions attached to the one right may not be attached to the other. By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor; but in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable:—Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although as it fell due the interest could be collected. And quære, whether in such a case the mortgagor would have the right to pay the principal money against the will of the mortgagee, by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months, and claim that as the condition on which he was at liberty to redeem. But semble, he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose, before the right to redeem arises in favour of the mortgagor. *Parker* v. *Vinegrowers' Association*, 23 Gr. 179.

Several Mortgages—*One not Due.*]—A mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot foreclose that mortgage with the others. *Thibodo* v. *Collar*, 1 Gr. 147.

——— *Separate Properties—Sale of One.*] —A. lent B. $2,000 and took two mortgages from the borrower, each for $1,000, on separate property. The mortgagee foreclosed on one of the mortgages, and then parted with the property:—Held, no bar to a foreclosure of the mortgage. *Bald* v. *Thompson*, 16 Gr. 177.

Time for Suing—*Costs.*]—A mortgagee has a right to file a bill of foreclosure the day after default; and, though such a

course may be extremely sharp, he cannot be refused his costs. *Bennett* v. *Foreman*, 15 Gr. 117.

Trust for Sale—*Indemnity—Remedy.*]—A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default, but only to a decree to sell. *Paton* v. *Wilkes*, 8 Gr. 252.

Trust to Raise Money—*Mortgagee—Cross-Suit—Costs.*]—A mortgage was created by a trustee with the view of being sold to raise money for the creditors of the owner of the property who had created the trust. The mortgagee had failed to sell it, and a suit was instituted by his representatives after his death, to foreclose the mortgage. The court ordered the mortgage to be delivered up to be cancelled; and the trustee having also filed a bill against the mortgagee's representatives, seeking relief on these grounds, was ordered to receive his costs of that suit, although the bill was not filed until after proceedings had been taken in the suit to foreclose. *Worthington* v. *Elliott*, *Elliott* v. *Worthington*, 8 Gr. 234.

Trust Estate—*Construction of Deed—Description—Accretion—After-acquired Title—Contribution to Redeem—Parol Evidence to Explain Deed—Estoppel.*]—On the dissolution of the firm of A. & Co. by the retirement of C. D. A., the business was carried on by the remaining partners T. A. and B. A., on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay, and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in the mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "Stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description, adding a further or alternative description and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff; and they gave at the same time a collateral bond to the mortgagees for the amount of the mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property, and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due, and the foreclosure proceedings were continued for their benefit:—Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and, as they were afterwards obliged to pay the outstanding incumbrance, they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands. Held, further, that, as the construction of the mortgage depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected; that, as there were no specified descriptions or recitals tending to shew that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage; that, even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt. *Imrie* v. *Archibald*, 25 S. C. R. 368.

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2. *Bill of Complaint.*

(a) *Amendment.*

Adding Parties after Decree—*Purchasers—Petition.*]—After decree pronounced in a suit for foreclosure, the plaintiff discovered that portions of the mortgaged premises had been sold by the mortgagor before bill filed:—Held, in accordance with previous decisions, that the purchasers of such portions might be brought before the court by amendment, and that the proper mode of proceeding was by petition, although, but for those decisions, a motion for that purpose would have been considered the proper proceeding. *Rumble* v. *Moore*, 1 Ch. Ch. 59.

Character of Plaintiff—*Administrator—Creditor.*]—In a suit upon a mortgage, instituted by an administrator with the will annexed, the defendant produced a release for the mortgage money, given by the testator in his lifetime, whereupon the plaintiff sought to be allowed to proceed against the defendant as a creditor of the estate, but, as this would involve such an amendment as would create an entirely different record, the court refused such permission, and dismissed the bill with costs. *Barrett* v. *Crosthwaite*, 9 Gr. 422.

Description of Land—*Decree.*]—After decree and report in a foreclosure suit, the court refused to amend a mistake in the description of the property in the bill. *Lawrason* v. *Buckley*, 15 Gr. 585.

——— *Decree—Ex Parte Motion.*]—On an application ex parte for leave to amend after the decree by correcting the description of the mortgaged premises:—Held, that the application could not be granted ex parte. *Bank of Montreal* v. *Power*, 2 Ch. Ch. 47.

(b) *Dismissal.*

Claim for Subsequent Advances—*Abandonment—Costs.*]—A bill of foreclosure on a mortgage made by the churchwardens of a church claimed a lien for advances made by the mortgagee subsequent to the execution of the mortgage. One of the defendants, who had ceased to be churchwarden, put in

an answer disputing this claim, the other defendants allowed the bill to go pro confesso. At the hearing the plaintiffs abandoned their claim for the subsequent advances. The court dismissed the bill without costs, as far as it related to this claim. *Crooks* v. *Hughes*, 13 Gr. 485.

Payment—*Interest—Computation of.*]—When a bill is filed to foreclose a mortgage payable by instalments, and defendant moves to dismiss on payment of the instalments and interest then due, the interest on mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application. *Strachan* v. *Murney*, 6 Gr. 378.

(c) *Form of.*

Consideration—*Statement of—Offer to do Equity.*]—A demurrer will not lie to a bill of foreclosure on the ground that the bill does not shew that the plaintiff had actually paid a money consideration for the mortgage, or because it does not offer to do equity. *Kingsmill* v. *Gardner*, 1 O. S. 325.

Executors—*Probate.*]—A bill to foreclose filed by the executors of the mortgagee did not allege that probate had issued to them:—Held, defective, on demurrer. *Lawrence* v. *Humphries*, 11 Gr. 269.

An allegation that the defendant had been appointed executor by the will, was held insufficient in the absence of any allegation that he had proved the will, or had acted as executor. *Kelly* v. *Ardell*, 11 Gr. 579.

Indorsement—*Relief.*]—The indorsement on an office copy of the bill must specify distinctly which relief the plaintiff seeks, whether sale or foreclosure. *Drewry* v. *O'Neal*, 2 Ch. Ch. 204.

Judgment Debtor—*Description of Lands—Value.*]—A court will not grant a decree of foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out and the value of them stated in the bill. *Glass* v. *Freckelton*, 8 Gr. 522.

Jurisdiction—*Presumption of.*]—A bill for foreclosure need not state the property or the parties to be within the jurisdiction of the court. If necessary that will be presumed in favour of the bill till the contrary appears. *Duncan* v. *Geary*, 10 Gr. 34.

Multifariousness—*Charge by Will—Subsequent Mortgage.*]—Where a testator devised his real and personal estate to A., subject to a charge of $200 in favour of B.; and A., after the testator's death, mortgaged the real estate to B. to secure a further sum, a bill by B. for payment of the two sums, praying in default a foreclosure or sale, was held not to be multifarious. *Kelly* v. *Ardell*, 11 Gr. 579.

——— *Several Mortgages—Redemption of one—Foreclosure of another—Surety—Demurrer.*]—Where a person who had given a mortgage to secure a debt for which he made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, &c., afterwards filed a bill to foreclose the latter and redeem the first mortgage, and the principal at the hearing objected to the bill on the ground that it was multifarious:—Held, that the objection, if tenable, should have been taken by demurrer, and was too late at the hearing; and quære, if such objection would have been sustainable under the circumstances of the case. *Schram* v. *Armstrong*, 1 O. S. 327.

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3. *Costs.*

Appeal from Report—*Failure on Main Ground.*]—Where an appeal from the report in a foreclosure suit failed on the main point, and succeeded only in respect of a redemption, the court gave the respondents the costs of appeal. *Brownlee* v. *Cunningham*, 13 Gr. 586.

Disallowance of—*Assignee of Mortgage—Covenant of Assignor.*] — In a foreclosure suit upon a mortgage for £350, on which only £250 had been in fact advanced, the court disallowed the additional £100 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Ritner*, 11 C. P. 102.

Loss of Mortgage Deed — *Costs Occasioned by.*]—After the loss of a mortgage deed, the mortgagor offered to pay the overdue interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults:—Held, that the plaintiffs must bear the expense of proof of loss and the expense of the indemnity bond, but were entitled to the other costs of the suit. *McDonald* v. *Hime*, 15 Gr. 72.

Payment—*Question as to—Reservation of Costs.*]—Where a mortgagee files a bill to foreclose, and a question arises at the hearing whether he has not received sufficient to pay off the incumbrance before the commencement of the suit, the costs will be reserved. *Goodcrham* v. *DeGrassi*, 2 Gr. 135.

——— *Question as to Amount—Tender—Slight Insufficiency.*] — A mortgagee having omitted to give credit on the deed, or in his books, for payments to him by the mortgagor, his executors, after his decease, claimed a large sum to be due on the foot of the mortgage. The mortgagor tendered a certain amount, saying that he was willing to pay any additional sum that might appear due after giving him credit for the alleged payments. A bill was afterwards filed to foreclose, and on taking the account a sum of between £2 and £3, over and above the amount tendered, was found due. The court ordered the plaintiffs to pay costs. *Cornwall* v. *Brown*, 3 Gr. 633.

Personal Order for Costs.]—Where in a suit to foreclose, the defendant improperly resists the claim of the plaintiff, the costs occasioned thereby will be ordered to be paid to the plaintiff whether the defendant redeems or not. *Bryson* v. *Huntington*, 25 Gr. 265.

Powers of Attorney — *Unnecessary Costs.*]—A mortgagee should not create unnecessary expense against the mortgagor, by executing several powers of attorney. *Goodhue* v. *Carter*, 1 Ch. Ch. 13.

Reference as to Incumbrances—*Periculo Petentis.*]—Where a plaintiff in suits for foreclosure or sale asks for a reference to the master to inquire as to other incumbrances, he takes such reference at the peril of costs, if there are in reality no other incumbrances. *Hamilton* v. *Howard, Burnside* v. *Lund*, 4 Gr. 581.

Scale of Costs—*Amount — Aggregate of Incumbrances.*]—Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appear that there is an incumbrance beyond that sum. *Hyman* v. *Roots*, 11 Gr. 262.

——— *Amount — Jurisdiction of County Court—Residence.*]—When a plaintiff files a bill in the court of chancery to foreclose a mortgage for a sum within the jurisdiction of the county court, no costs will be allowed him. The fact that defendant is resident in a county other than where the land is situate, will not vary this rule. *Connell* v. *Curran*, 1 Ch. Ch. 11.

Security for Costs—*Assignment of Mortgage Pendente Lite — Residence abroad.*]—Where a defendant had by answering waived his right to security for costs, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction:—Held, that the defendant was entitled to security for costs against the new plaintiff. The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that anything was due, and the master being directed to inquire "what, if anything, was due." *Thompson* v. *Callagan*, 3 Ch. Ch. 15.

Settlement of Suit—*Summary Application—Consent.*]—The rule of the court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless defendant consents, applies to mortgage suits. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where under such circumstances the referee refused an application by plaintiff for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. *McLean* v. *Cross*, 3 Ch. Ch. 432.

Several Mortgages—*Several Suits—Taxation—Powers of Master.*]—A special order directing the master to inquire as to the necessity of bringing two suits of foreclosure respecting two mortgages between the same parties, will not be granted, as the master has jurisdiction to make such inquiry and disallow the whole bill without any special direction, under the common order to tax. *In re Atkinson and Pegley*, 1 Ch. Ch. 193.

——— *Several Suits — Discretion.*]—The court will not compel a mortgagee who holds several mortgages from the same party on the same land to proceed only on one bill filed for the foreclosure of one of the mortgages, as the decree for redemption and reconveyance is at the mortgagee's risk; but his filing more than one bill may influence the discretion of the court as to costs. *Noble* v. *Line*, 5 L. J. 163.

Several Suits—*Election as to Costs—Law and Equity.*]—Where a mortgagee proceeds both at law and in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the chancery costs instead of those at law, if the defendant object. *Weir* v. *Taylor*, 1 Ch. Ch. 371.

——— *Preservation of Property—Law and Equity.*]—Where it is shewn that a mortgagee has, for the bonâ fide purpose of preserving the mortgage premises from destruction or dilapidation, instituted proceedings at law to obtain possession, he will not be deprived of his costs in equity. *Dallas* v. *Gow*, 1 Ch. Ch. 65.

——— *Trustees — Law and Equity.*]—A mortgage was vested in trustees. One of them sued at law on the mortgage as plaintiff's attorney. A bill was afterwards filed by another solicitor to foreclose the mortgage:—Held, that the plaintiffs were not entitled to the costs at law in addition to those in equity. *Ontario* v. *Winnaker*, 13 Gr. 443.

Subsequent Mortgagee—*Separate Suit.*]—A mortgagee is always entitled to his costs, and therefore where a subsequent mortgagee who has filed a bill to foreclose offers to consolidate his suit in that of the prior mortgagee, who has filed a bill after him, he will be allowed his prior costs in such suit. *Allan* v. *McDougall*, 6 L. J. 64.

Unnecessary Suit—*Interest — Small Amount—Offer to Pay.*]—Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and defendant's solicitor had called at the plaintiff's solicitor's office and left word that he was ready to pay the money, the court refused the plaintiff his costs. Held, that the bill was unnecessarily and improperly filed. *McLean* v. *Cross*, 3 Ch. Ch. 432.

See Worthington v. *Elliott, Elliott* v. *Worthington*, 8 Gr. 234, *ante* 1.

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4. *Decree.*

(a) *Amending, Varying, and Setting aside.*

Omission of Direction — *Inquiry as to Priorities — Terms.*] — A summary reference for foreclosure had been made, and on proceeding in the master's office it was discovered that there were several registered judgments against defendants. On the plaintiff's motion, the decree was amended by inserting a direction to the master to inquire and report upon the priorities, &c., of the judgment creditors, on payment of costs, and without a reservation of further directions. *Moffatt* v. *March*, 3 Gr. 163.

Petition to Vary—*Leave — Time.*]—An incumbrancer, made a party to the master's office, under the general orders of the 6th February, 1865, cannot, after fourteen days from

the service of the decree, file a petition to vary it, without first obtaining leave in chambers. *Ivor v. Stanton*, 15 Gr. 137.

Sale in Lieu of Foreclosure—*Deficiency—Striking out—Terms.*] — Where, on a bill praying foreclosure only, a decree for sale was drawn up, with a direction that the mortgagor should pay any deficiency, the court, at the instance of the mortgagor, four years afterwards, amended the decree by striking out this direction, but ordered him to pay the costs of the proceedings under the decree. *Cockenour v. Bullock*, 12 Gr. 158.

Setting aside Absolute Decree—*Purchaser—Notice.*]—A decree of foreclosure absolute, drawn up and entered, was set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the institution of the suit to foreclose, but without notice of it. *Hilliard v. Campbell*, 7 Gr. 96.

(b) *Foreclosure or Sale.*

Deposit — *Application of.*]—See *Gzowski v. Beaty*, 8 P. R. 146.

——— *Dispensing with.*]—After a decree of foreclosure, defendant applied in chambers for an order for sale, the property mortgaged being worth $1,000, and the mortgage being for $157; and that the usual deposit might be dispensed with. The secretary considered the general order imperative, and refused the application. *Thompson v. Macaulay*, 3 Ch. Ch. 111.

——— *Sale instead of Foreclosure.*]—The orders of June, 1861, do not entitle a defendant to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without making the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the court to grant the defendant that indulgence upon the consent of the plaintiff in cases where the plaintiff desired to bid at the sale. *Taylor v. Walker*, 8 Gr. 596.

——— *Increase of.*]—See *Cruso v. Close*, 8 P. R. 33.

——— *Trustee.*]—The trustee of a mortgaged estate asking a sale in a suit for foreclosure, is not released from the payment of the usual deposit required on such a decree. *Machell v. Campbell*, 5 L. J. 117.

Mortgagee—*Option.*]—A mortgagee is entitled to a decree for a sale or foreclosure, at his option, as against the mortgagor. *Meyers v. Harrison*, 1 Gr. 449.

Parties — *Pro Confesso.*]—Where a bill prays a foreclosure, and some of the parties interested are not before the court, a sale cannot be decreed. A bill of foreclosure having been taken pro confesso against some of the defendants under the general orders of the court, is not a reason for decreeing a sale as against those defendants. *Bethune v. Caulcutt*, 1 Gr. 81.

Reference—*Inquiry as to Benefit—Final Order of Sale.*]—In this case a reference was directed to the accountant to inquire whether a sale or foreclosure would be for the benefit of the infant defendant. By his report made under this decree the accountant did not certify specially as to this reference, but the accounts were taken and those of the incumbrancers who had proved were ordered to be paid in the usual manner under a decree for sale. An application was made for a final order for sale, but was refused. *Edwards v. Bailey*, 2 C. L. J. 302.

Sale — *Insufficiency of Proceeds — Foreclosure.*]—Where the prayer of the bill is for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and, in the event of a sale failing to cover the claim of the plaintiff, order foreclosure. *Blachford v. Oliver*, 8 Gr. 391.

Subsequent Mortgagees — *Permitting Foreclosure.*]—The mortgage, given to secure certain notes, was a second one, and defendant, the indorser of the notes, alleged that by the neglect of the plaintiffs in permitting a foreclosure of the first mortgage instead of obtaining a sale, he had suffered loss, which he claimed to deduct from plaintiffs' balance. Upon the evidence stated in the report:—Held, that no such negligence was shewn; and the court refused a reference to the master, or leave to amend the pleadings. *Molsons Bank v. McDonald*, 40 U. C. R. 529.

(c) *Form and Directions of.*

Decree — *Several Mortgages—Widow.*]—Where a mortgagor has executed several mortgages, in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow and the devisees of the mortgagor, is one in the usual form against them all, with a declaration that upon payment of the mortgage executed by the widow, she shall, if she choose, be let into her dower. *Thibodo v. Collar*, 1 Gr. 147.

Equity of Redemption — *Dispute.*]—Where there is a dispute as to the ownership of the equity of redemption, the decree should usually contain a direction to the master to inquire as to the ownership before a day is appointed for payment. *Cayley v. Hodgson*, 13 Gr. 433.

Execution Creditors — *Surplus after Sale—Creditors' Relief Act.*]—The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale after payment of the mortgaged debt, interest, and costs. Semble, in the case of foreclosure the old form of decree giving execution creditors as subsequent incumbrancers liberty to redeem according to their priorities is no longer applicable. *Harvey v. McNeil*, 12 P. R. 362.

Immediate Foreclosure and Possession.]—See *Gibson v. McCrimmon*, 9 C. L. T. Occ. N. 40.

Judgment Creditors — *Redemption.*]—Semble, when there are several judgment creditors, the decree should give the creditors successive rights of redemption, although very short periods must be fixed for that purpose. *Carroll v. Hopkins*, 4 Gr. 431.

Order for Immediate Payment—*Reference as to Incumbrances.*]—On motion ex parte for a direction to the registrar to insert in a præcipe judgment of foreclosure in a mortgage suit, an order for immediate payment of the amount due by the defendant, under his covenant, up to judgment (the registrar to take the account), where a reference to the master as to subsequent incumbrances was also sought:—Held, that the usual course must be followed, and that the defendant should be ordered to pay the amount found due forthwith after the master should have made his report. *North of Scotland Canadian Mortgage Co.* v. *Beard*, 9 P. R. 546.

Several Mortgages — *Assignment—Conveyance of Equity of Redemption.*]—A. and B. mortgaged to C., and afterwards sold and conveyed the same property to D., receiving back a mortgage for the purchase money, which exceeded the amount due to C. A., without B.'s authority, assigned this mortgage to C. by way of further security for the debt due to him by A. and B. On a bill by B. against all parties:—Held, that the proper decree was the same as if the purchaser had been the original owner, and had executed a first mortgage to C., and a second mortgage to A. and B. *Grahame* v. *Anderson*, 15 Gr. 189.

——— *Sale of Part of Land.*]—V. executed a mortgage to A., then sold part of the property to H., then mortgaged the residue with other property to P., who obtained an assignment from A. of his mortgage, and filed a bill of foreclosure against V. and H. The proper form of the decree in such case stated. *Perkins* v. *Vandertip*, 11 Gr. 488.

(d) *Other Cases.*

Executors—*Debts of Testator — Absolute Decree.*]—Where a bill of foreclosure had been filed by the executor and devisees of the mortgagee, and the executor alone attended at the time and place appointed by the master for payment of the mortgage money to the plaintiffs, as it did not appear that the debts of the testator had been paid, the court considered the plaintiffs entitled to an absolute decree of foreclosure in default of payment. *Evans* v. *Parker*, 2 Gr. 555.

Leave to Issue — *Lapse of Time—Minutes.*]—In January, 1841, an original decree of foreclosure had been made. In pursuance thereof the master made his report, and in May of the same year the cause was set down for hearing on further directions, but the decree then pronounced was not drawn up or any entry made thereof. A motion now made to allow the plaintiff to draw up and enter nunc pro tunc the decree on further directions, from minutes alleged to have been prepared by the registrar, was refused. *Drummond* v. *Anderson*, 3 Gr. 150.

Motion for Decree — *Forum.*]—In suits for foreclosure or sale, motion for a decree is to be made in chambers under order 435 only when infants alone are concerned. If there be also adult defendants, the case should be regularly set down for hearing before the court. *Fullerton* v. *Keely*, 9 C. L. J. 54.

Motion for Speedy Judgment—*Immediate Foreclosure.*]—Where on a motion for speedy judgment in an action for foreclosure it was shewn that the mortgage debt was in excess of the value of the land, immediate possession and foreclosure were ordered without the consent of the defendants. *Gibson* v. *McCrimmon*, 9 C. L. T. Occ. N. 40.

Non-disclosure of Facts—*Misrepresentations—Acting on Decree.*]—A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed, or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated. *Wilson* v. *Hodgson*, 14 Gr. 543.

Præcipe Decree — *Dispute — Interest—Tender—Costs.*]—Where in a foreclosure suit a defendant by answer admitted the making of the mortgage, but denied an alleged agreement to pay an increased rate of interest, and set up a tender of the amount he contended was properly due, and claimed his costs, it was held not to be a case where the plaintiff was entitled to a præcipe decree. *Ross* v. *Vader*, 3 Ch. Ch. 236.

Stay of Decree—*Payment of Instalments—Subsequent Default.*]—Where a decree of foreclosure obtained upon a mortgage payable by instalments has been stayed upon payment of the amount actually due, and a subsequent default occurs, the proper order to make is to direct the whole sum secured to be paid, with liberty to defendant to pay the sum actually due, and stay proceedings thereon. *Strachan* v. *Devlin*, 1 Ch. Ch. 8.

See Glass v. *Freckelton*, 8 Gr. 522, *ante* 2 (c).

5. *Final Order.*

(a) *Practice on Application for.*

Abatement of Suit—*Additional Time for Payment.*]—This suit became abated between the date of the report and the time fixed by it for payment by subsequent incumbrancers. An application for a final order for foreclosure was refused, and a new day was appointed, allowing the incumbrancers an additional time for payment, equal to the time the suit remained abated. *Biggar* v. *Way*, 8 P. R. 158.

Abortive Sale.]—Where at the hearing a sale instead of foreclosure had been asked for, and was directed by the decree, which omitted however to provide that in the event of the sale failing the defendant should stand foreclosed, the court, upon petition setting forth the facts, and that the attempted sale which had been made had proved abortive, ordered defendant to pay the amount which had been found due, within one month, or, in default, foreclosure. *Goodall* v. *Burrows*, 7 Gr. 449.

It is unnecessary to present a petition for foreclosure after abortive sale; it is sufficient to serve a notice of motion on the mortgagor; and the extra costs of a petition and service thereof on parties other than the mortgagor will be disallowed. *Odell* v. *Doty*, 1 Ch. Ch. 207.

Where a foreclosure is asked after an abortive sale, the mortgagor must first be allowed three months to redeem. *Girdlestone* v. *Gunn*, 1 Ch. Ch. 212.

In deciding as to whether there should be a long or short period for redemption, or, in default, foreclosure, after an abortive sale of the mortgaged premises, in an action to enforce a mortgage, the facts and circumstances of the case should be taken into consideration. And where the amount of money to be paid was about $150,000, and the mortgaged property was of very great value, though at the time there was much difficulty in converting it into ready money, the period of three months was allowed. Campbell v. Holyland, 7 Ch. D. 166, followed. Goodall v. Burrows, 7 Gr. 449, and Girdlestone v. Gunn, 1 Ch. Ch. 212, considered. *Scarlett* v. *Birney*, 15 P. R. 283.

Affidavit of Non-payment.] — Where the plaintiff resides out of the jurisdiction, the affidavit of non-payment being made by an agent of the plaintiff, it must be shewn where the custody of the mortgage has been. *Rae* v. *Shaw*, 1 Ch. Ch. 209.

Where the plaintiff resides out of the jurisdiction, and the affidavit as to non-payment is made by his solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorized to receive the money. *Taylor* v. *Cuthbert*, 1 Ch. Ch. 240.

Where co-mortgagees are made co-plaintiffs, the affidavit as to non-payment, to obtain a final order, should be made by all of them. *Annis* v. *Wilson*, 1 Ch. Ch. 217.

Where the affidavit of non-payment is made by an agent of the plaintiff, it should state that he is authorized to receive the money. *Powers* v. *Merriman*, 1 Ch. Ch. 225.

On an application by a company for a final order for sale, the affidavit of the officer of the company as to non-payment should shew that he is the proper officer to receive the mortgage money. *Western Assurance Co.* v. *Caprcol*, 1 Ch. Ch. 227.

Where the usual affidavit of non-payment is made by the agent of the plaintiff his authority need not be produced. *Radclyffe* v. *Duffy*, 1 Ch. Ch. 302.

The affidavit of non-payment should be made after the day the money is due. *Blong* v. *Kennedy*, 2 Ch. Ch. 453.

——— *Attendance at Place Named.*]—On an application for a final order of foreclosure the affidavit of the attorney appointed by the mortgagee shewed an attendance of only a quarter of an hour at the appointed place, the solicitor's office. There was also another affidavit from the solicitor that no one attended during the two hours appointed by the master's report to pay the mortgage money. Order granted. *Mitchell* v. *Hayes*, 5 L. J. 232, 1 Ch. Ch. 56.

——— *Power of Attorney — Assignee.*]—Where a mortgagee had become bankrupt, and he, with his assignees, had filed a bill to foreclose, a final order was granted, although one of the assignees being absent had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment. *Lyman* v. *Kirkpatrick*, 2 Gr. 625.

——— *Power of Attorney—Partnership.*]—Where a mortgage was made to secure a partnership debt, a final order was granted, although one partner had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment, it appearing that such partner was and had been for some time resident out of the country, and had never interfered in the mortgage transaction in any way. *Counter* v. *Wylde*, 1 Gr. 538.

Amount—*Smallness of—Default—Refusal of Order.*]—The court of chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10. Where, therefore, after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused. *Shaw* v. *Freedy*, 8 C. L. J. 136.

See, also, *Gilbert* v. *Braithwait*, 3 Ch. Ch. 413.

Bank Certificate.]—The manager of the bank where mortgage money is directed to be paid should certify that the money has not been paid before, as well as on or since, the day appointed. *Farrell* v. *Stokes*, 1 Ch. Ch. 201.

The bank certificate of non-payment should be made by the cashier, or other like officer. A certificate of the accountant, as such, is not sufficient. *Campbell* v. *Garrett*, 1 Ch. Ch. 255.

Confirmation of Report.] — Where the report appointing the time and place for payment has not been confirmed before the day appointed for payment, a final order will not be granted. *Mountain* v. *Porter*, 1 Ch. Ch. 207.

Costs—*Unnecessary Parties—New Day.*]—On a motion for a final decree, it appeared that several unnecessary parties were added in the master's office. The motion was refused, and the costs thus caused were deducted from the plaintiff's bill; the amount then appearing due was ordered to be paid in two weeks, or in default foreclosure. *Rice* v. *Brooks*, 1 Ch. Ch. 71.

Erroneous Decree.]—A decree for foreclosure being erroneous, the court refused to pronounce a final decree on default of payment. *Commercial Bank* v. *Graham*, 4 Gr. 419.

Infants—*Reservation of Day.*]—A final order for foreclosure should reserve a day for infant defendants to shew cause. Spragge, C., was of opinion that the practice should be changed for the sake of putting an end to litigation, and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian L. and A. Co.* v. *Everitt*, 8 P. R. 489.

Notice of Motion—*Decree for Sale.*]—Where the decree is for sale, the court will not on default grant an order of foreclosure, ex parte. *Garratt* v. *McDonald*, 1 Ch. Ch. 335.

——— *Delay in Applying.*]—Where a party entitled to a final order of foreclosure neglects to apply until nearly two years after his

right to the order first accrued, the order will not be granted ex parte. *Ardagh* v. *Orchard*, 2 C. L. J. 303.

After a lengthy period has elapsed since the day appointed for payment, it is necessary to give notice of the motion for the final order. *Kirchoffer* v. *Stafford*, 2 Ch. Ch. 52.

——— *Infants.*]—A motion for a final order is an ex parte proceeding; it is unnecessary to serve notice thereof even on infant owners of the equity of redemption who have answered. *Henderson* v. *Cowan*, 1 Ch. Ch. 297.

——— *Receipt of Rents—New Account.*]—A plaintiff who goes into possession of the mortgaged premises and receives rents after the day appointed for payment by the mortgagor, is entitled to a final order of foreclosure without a new account being taken and a new day for payment given to the mortgagor. Semble, the plaintiff in such a case should serve the mortgagor with notice of the motion for the final order. *Portman* v. *Smith*, 2 C. L. J. 167.

Possession — *New Account—Occupation Rent—New Day.*]—Where the usual affidavit of the plaintiff shews that he has been in occupation of the property, it must be referred back to the master to take a new account, set an occupation rent, and appoint a new day for payment, although the plaintiff in his affidavit swears that he was in occupation merely as caretaker, and has received no rents or profits. *Cummer* v. *Tomlinson*, 1 Ch. Ch. 235.

——— *Receipt of Rents—Negativing.*]—On application for a final order, the plaintiff should shew that he has not been in possession, or in the receipt of the rents and profits. *Scott* v. *McDonell*, 1 Ch. Ch. 193.

Possession after Day—*New Account.*]—After the day appointed for payment the plaintiff entered into possession of the mortgaged premises:—Held, that the plaintiff was entitled to a final decree of foreclosure without a new account being taken. *Greenshields* v. *Blackwood*, 1 Ch. Ch. 60.

Service of Papers—*Absconding Defendant.*]—In proceeding under a reference before the master, one of the defendants, after being served with the first warrant, absconded from the jurisdiction, and papers connected with the subsequent proceedings in the master's office were left at his former place of abode. The court, under the circumstances, made the decree for foreclosure absolute for default of payment. *White* v. *Courtney*, 1 Ch. Ch. 66.

Time for Redemption—*Incumbrancers.*]—Where by his report under a foreclosure decree the master appointed a time for all the subsequent incumbrancers who proved before him to redeem the plaintiff, one of whom at the time appointed paid the amount and took an assignment:—Held, that the incumbrancers who did not redeem were entitled to three months' further time before the co-defendant could obtain a final foreclosure against them. *Ardagh* v. *Wilson*, 2 C. L. J. 270.

See Edwards v. *Bailey*, 2 C. L. J. 302, *ante* 4 (b).

(b) *Setting aside.*

Laches — *Objection not Taken before Master.*]—Seven months after the final order the mortgagor moved to set it aside, on the ground that several mesne incumbrancers had not been made parties, either before decree or in the master's office. The application was refused with costs, on the ground of laches and because the objection was not taken in the master's office. *Cameron* v. *Lynes*, 1 Ch. Ch. 42.

Mortgagee in Possession—*Account of Rents—New Day—Rights of Purchaser after Decree.*]—Mortgagees had been in possession of several of the parcels of land comprised in their mortgage before they commenced an action for foreclosure. In that action the usual judgment was pronounced, and, while the reference thereunder was pending, the plaintiffs agreed to sell some of the parcels to B. in case the mortgagors should not redeem; and B. went into possession. The master made his report on the 13th February, 1900, fixing the 14th August, 1900, as the day for redemption, and ascertaining the amount due by the defendants up to that day. On the 15th May an order was made amending the report for deducting amounts received by the plaintiffs for rent, and directing that any other rents received up to that time should be credited on the final adjustment. On the 15th August the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report. No other statement was made by the plaintiffs. The application was refused, and on the 17th August a final order of foreclosure was granted:—Held, that the statement of the plaintiffs was insufficient; the mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem; and the modes in which that amount may be ascertained, where it has been changed after report, are pointed out in rule 387. Held, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the court to open the foreclosure. Campbell v. Holyland, 7 Ch. D. 166, and Johnston v. Johnston, 9 P. R. 259, followed. Gunn v. Doble, 15 Gr. 655, distinguished. In this case the mortgagors were in no default; an examination of the proceedings on the part of the purchaser would have shewn him that the mortgagors had never been properly foreclosed, and that no day had ever been fixed for payment of the balance due to the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out:—Held, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party. *Independent Order of Foresters* v. *Pegg*, 19 P. R. 254.

Parties to Application—*Purchasers—Irregularity.*]—Where mortgagors had been foreclosed, and the mortgagees had subsequently sold the property, it was held that the mortgagors could not, several years afterwards, move in the suit against the final order for irregularity, without having made the purchasers or their assignees parties to the suit. *Boulton* v. *Don and Danforth Road Co.*, 1 Ch. Ch. 335.

Purchaser for Value—*Irregularity in Bank Certificate—Parties to Application.*]—A purchaser from a party having a decree for final foreclosure has a right to presume that the court has taken the necessary steps to investigate the rights of the parties, and has properly decreed foreclosure. The court will not set aside a foreclosure, after the estate has been acquired by a bonâ fide purchaser for value, on account of a slight irregularity in one of the papers on which the order was granted. Where therefore a party who was a second mortgagee and had been solicitor for the plaintiff, purchased the estate from one who had, for aught that appeared, purchased in good faith for value from the plaintiff, without notice of any irregularity, and the order for foreclosure was set aside by the secretary on account of the absence of a date in the bank manager's certificate, an application by the purchaser from the plaintiff, in which the subsequent purchaser joined, to set aside the secretary's order, was granted with costs. It was held that the joining in such application by the subsequent purchaser was not irregular, but surplusage at most. The defendant having, as it was alleged, sold his interest or equity of redemption to a third party, who was notified of this application, it was held that it was not necessary to notify the defendant, as the purchaser from him had been notified. *Collins* v. *Denison*, 2 Ch. Ch. 465.

See, also, *Gunn* v. *Doble*, 15 Gr. 655, *post* 6 (b).

Solicitor for Several Plaintiffs—*Application not for All.*]—Where there were several plaintiffs in a suit, and a final order had been obtained by their solicitor:—Held, that their solicitor could not afterwards move on behalf of the defendants foreclosed to set aside the order, though two of the plaintiffs concurred in the application and only the third objected. *Boulton* v. *Don and Danforth Road Co.*, 1 Ch. Ch. 329.

(c) *Other Cases.*

Effect of Order—*Action for Mortgage Money.*]—Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines to receive the money, the court will restrain him from afterwards suing for the mortgage debt. *Munsen* v. *Hauss*, 22 Gr. 279.

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6. *Opening Foreclosure.*

(a) *Application to Open.*

Absence of Defendant — *Ignorance—Mistake—Purchaser for Value—Terms—Interest—Costs—Execution.*]—Proceedings were instituted in 1876 against two persons interested in a mortgaged estate, one of whom was resident out of the jurisdiction, and the usual decree was made and account taken. The application to make such decree absolute was not made until May, 1882, and, in the early part of the month following, a petition was presented praying that the defendants might be allowed to redeem, alleging the ignorance of the absent defendant of the proceedings until his return to the country, a few days before signing the petition, and the ignorance of both defendants of any proceedings subsequent to the filing of the bill; and that the defendant upon whom the bill was served was about ninety years old, of feeble intellect, and unfitted to transact business. It was shewn that in March, 1882, before the order making the decree absolute, the plaintiffs had sold to another person, who bought relying on the plaintiffs' title under the final order of foreclosure, which, on its face, was expressed to be subject to Ch. Gen. Ords. 114 116. Under the circumstances the court (reversing the order in 2 O. R. 348) made on order to open the foreclosure on the usual terms of paying principal, interest, and costs of plaintiffs, and of the purchaser (not including any costs of the appeal), together with any costs incurred by the purchaser in connection with his purchase of the property, and, in default of payment on or before the day appointed for payment, the appeal to be dismissed with costs. *Trinity College* v. *Hill*, 10 A. R. 99.

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed (2 O. R. 348). The court of appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal, interest, and costs, including the plaintiffs' costs of opposing the petition (10 A. R. 99):—Held, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs, as found by the decree of November, 1877. Held, also, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the court of appeal. Held, also, that the plaintiffs were not entitled to the costs of a writ of execution issued by them to recover their costs taxed under the order dismissing the petition, for the vacating of that order levelled the writ of execution, and the costs of it were not part of the taxed costs of the petition but incurred subsequently. *Trinity College* v. *Hill*, 8 O. R. 286.

Excuse—*Prospect of Payment—Value of Property.*]—A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time,—also that he has a prospect of paying the mortgage debt if time be given him, and that the property is of much greater value than the amount due. *Johnson* v. *Ashbridge*, 2 Ch. Ch. 251.

Laches.]—The court will not open foreclosure in aid of a defendant who has been guilty of laches, and shews no efforts to avoid foreclosure, or save his estate. *Brothers* v. *Lloyd*, 2 Ch. Ch. 119.

Mistake—*Payment into Court — Wrong Cause—Knowledge of Solicitor—Estoppel.*]—The decree declared that the defendant was a trustee of the premises in question for the plaintiff, and that the plaintiff was entitled to redeem on payment of what the master should find due, within six months after report, etc., and in default of payment the plaintiff was to be foreclosed. The report was dated 4th March, 1882, and appointed 18th April, 1882, for payment. The money was paid into the bank on that day, but by mistake to the credit of a suit of Johnston v. A. Johnston. On the 22nd April, 1882, the defendant's solicitor, on the usual affidavit of non-payment and certificate of bank manager, obtained an order ex parte dismissing the bill with costs. On the 25th April the defendant's solicitor became aware that the money had been paid in to the credit of the wrong suit, but on the 20th April he had been aware that the money was paid, though not aware of the exact nature of the mistake On the 27th April the defendant sold the premises:—Held, that the defendant must be considered identified with his solicitor as to all the information the solicitor had; that the order made dismissing the bill instead of foreclosing the plaintiff, and the master's report giving six weeks instead of six months for payment as required by the decree, were irregularities, sufficient to notify the purchaser of something unusual in the proceedings, and therefore that he could not rely on the final order dismissing the bill alone; that, even if the order had been for foreclosure, under the facts of this case it would be a proper exercise of the discretion of the court to open it up; and that a suit commenced by the plaintiff to set aside the sale, did not estop him from obtaining relief under the motion. Gunn v. Doble, 15 Gr. 655, distinguished. *Johnston* v. *Johnston*, 9 P. R. 259.

——— *Want of Advice—Value of Property.*]—A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate and had no solicitor in the cause, and misunderstood the object of the bill, which was the only paper served on him; the mortgage bearing twelve per cent. interest, the property appearing to be three times the value of the incumbrance, and the whole or greater part of the property being still in the possession of the mortgagor. *Platt* v. *Ashbridge*, 12 Gr. 105.

Negligence of Defendant — *Forbearance of Plaintiff—Value of Property.*]—On a motion to open foreclosure it appeared that the debt and costs amounted to about $3,000, and the property was worth $7,000. The master, under the circumstances set out in the report, refused the motion, the plaintiff having been forbearing, and the defendant negligent throughout. *Miles* v. *Cameron*, 9 P. R. 502.

Replacing Mortgagee in Position—*Prospect of Payment.*]—Where the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damage he may have suffered, and where there appears a prospect of the amount of the mortgage money being paid within the period asked for, the court will not refuse to open the foreclosure. *Waddell* v. *McColl*, 2 Ch. Ch. 62.

See Warnock v. *Pricur*, 12 P. R. 264. See, also, *ante* 5 (b).

(b) *Questioning in Subsequent Action.*

Irregularity in Proceedings — *Purchaser for Value.*]—Where the purchaser of mortgaged premises had perfected his title thereto by a conveyance from a mortgagee who had obtained a final order of foreclosure, and it was sought by the mortgagor to impeach the title of such purchaser, by reason of irregularities in the foreclosure proceedings, of which, however, it was not shewn that the purchaser was aware; but the decree and final order on the face of them were regular:—Held, that the purchaser was not bound to inquire into the regularity of the proceedings upon which the decree and final order were founded; and the bill was dismissed with costs. *Gunn* v. *Doble*, 15 Gr. 655.

Principal and Agent — *Fraud—Purchaser for Value.*] — The plaintiff, being owner of land, after having mortgaged it, emigrated to Australia, and subsequently remitted money to his agents here to pay off the incumbrance; but they applied the money to their own use. Subsequently the assignee of the mortgage began a suit for foreclosure in which an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained; and the plaintiff in that suit conveyed to defendant A. for $1,002, the value of the property; and on the same day defendants M. and S., as attorneys of the plaintiff, conveyed the premises to A., who was ignorant of any fraud in the matter. The plaintiff having returned to this country, and ascertained the frauds which had been practised upon him, filed a bill against his agents and the purchaser A:—Held, that the plaintiff, so far as the purchaser was concerned, was bound by his answer, and was not entitled to relief as against him; that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser. *McLean* v. *Grant*, 20 Gr. 76.

Prior Formal Defect—*Lapse of Time.*]—Held, following Gunn v. Doble, 15 Gr. 655, and McLean v. Grant, 20 Gr. 76, that a sale in 1854, by a mortgagee who had obtained a final order of foreclosure in respect of real estate of a lunatic, valid on its face, could not be questioned by reason of a prior formal defect discovered a number of years afterwards. *Shaw* v. *Crawford*, 4 A. R. 371.

(c) *Result from Subsequent Proceedings.*

Action on Covenant—*Offer to Pay — Subsequent Mortgage — Ability to Reconvey — Waste.*] — Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines to receive the

money, the court will restrain him from afterwards suing for the mortgage debt. If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if, at the time of bringing the action, he has paid off the mortgage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing. Gowland v. Garbutt, 13 Gr. 585, observed upon. *Munsen* v. *Hauss*, 22 Gr. 279.

——— *Recovery of Judgment — Terms of Opening.*]—The recovery of a judgment against defendant after a final order opens the foreclosure and lets the defendant in to redeem. In such a case the secretary made an order giving time for redemption, that part of the order being acquiesced in; putting the defendant on terms to pay subsequent interest and costs; and directing that a writ of assistance issue without further order if default made in payment at time named. *Mills* v. *Choate*, 2 Ch. Ch. 433.

——— *Recovery of Judgment—Foreign Court — Concealment.*]—The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action. *Paisley* v. *Broddy*, 11 P. R. 202.

——— *Recovery of Judgment — Redemption.*] — Mortgagees of a property, with a power of sale exercisable on default without notice, took foreclosure proceedings on their mortgage, and pending these obtained judgment in a separate action on the covenant against the executors of the mortgagor, and, after foreclosure of the mortgage, issued execution on the judgment, and sold thereunder other lands of the mortgagor, crediting the proceeds on the mortgage debt. Previous to the foreclosure proceedings the mortgaged lands had been offered for sale by public auction under the power of sale and also privately, but without result. About a year after the foreclosure the mortgagees sold the premises by private contract, conveying to the purchaser by ordinary short form deed without recitals, and the purchaser shortly afterwards sold again at a large advance, but purchaser and sub-purchasers being aware of the sale of the other lands under execution on the judgment on the covenant. The plaintiff, a creditor of the mortgagor at the time of his death, did not recover a judgment for his debt until a year after the sale of the property by private contract, and subsequently purchased it at a sheriff's sale under his own execution, and now claimed to be let in to redeem, or, in the alternative, that the mortgagees should account to him for the value of the property:—Held, that the foreclosure was opened by the proceedings on the covenant, and any person entitled to redeem had a right to bring the action without first setting aside the final order; the right to redeem under such circumstances not being merely a personal equity in the mortgagor. Held, however, that the sale by private contract and conveyance must be deemed an exercise of the power of sale, the equity of redemption then being at large. Carver v. Richards, 27 Beav. 488, and Kelly v. Imperial Loan Co., 11 A. R. 526, 11 S. C. R. 516, followed. Held, also, that the mortgagees had not acted negligently or carelessly in the sale, but had taken all reasonable care, and that they were not bound to offer the property a second time by public auction without some reasonable prospect of a sale. Held, lastly, that under any circumstances, the plaintiff not being an incumbrancer at the time of the sale, and the legal and equitable title having been vested in the purchaser before the sheriff's sale to the plaintiff, the latter was not entitled to an account from the mortgagees. *Chatfield* v. *Cunningham*, 23 O. R. 153.

Action on Promissory Note—*Collateral Security.*]—Suing at law for part of the mortgage money, for which the note of a third party had been given as collateral security, will not open the foreclosure if such suit is brought before foreclosure completed. *Mills* v. *Choate*, 2 Ch. Ch. 374.

See cases under VII. 2, 8, 9.

See Pegg v. *Hobson*, 14 O. R. 272; *Bank of Toronto* v. *Irwin*, 28 Gr. 397, *post* VIII. 11 (a).

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7. *Order for Delivery of Possession.*

Actual Possession.]—On an application it must be shewn that the mortgagor is actually in possession. *Hodkinson* v. *French*, 1 Ch. Ch. 223.

After Final Order.]—The court, after the final order had been made, and acted on by plaintiff, ordered the delivery up of possession of the mortgaged premises, though not asked for upon the order being obtained. *Lazier* v. *Ranney*, 6 Gr. 323.

Application of General Order.] — G. O. 464, for delivery of possession, applies only to mortgage cases. *Chisholm* v. *Allen*, 2 Ch. Ch. 411.

Costs—*Demand.*]—Where costs were not asked for, by the notice or on argument, and no demand of possession was proved, the order was made without costs. *Mills* v. *Choate*, 2 Ch. Ch. 374.

Disobedience of Order—*Committal—Demand.*]—In moving to commit for a contempt in not delivering possession of mortgaged premises in obedience to an order to that effect, it must be shewn that the possession was demanded. *Novieux* v. *Labadie*, 1 Ch. Ch. 13.

Ejectment — *Bar* — *Discontinuance* — *Laches.*]—The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession, but the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it. A delay of two years after the final order for foreclosure is no bar. *Moffatt* v. *White*, 1 Ch. Ch. 227.

Final Order—*Prior Proceedings.*]—On the motion the court will not, as a general rule, look behind the final order for foreclosure. *Mills* v. *Choate*, 2 Ch. Ch. 374.

Notice—*Necessity for.*]—Where the application is made for a purchaser for the delivery of possession, and of the title deeds, notice must be served on the plaintiff (the mortgagee), or, if he has been paid off, on some other party interested in the proceeds of the sale. *Walker* v. *Matthews*, 1 Ch. Ch. 232.

A motion for delivery of possession must be made on notice. *Buckley* v. *Ouillette*, 2 Ch. Ch. 439.

——— *Necessity for—Demand.*] — Such order after final order of foreclosure will not be granted ex parte, notice must be served; it is not necessary, however, to demand possession. *Hodkinson* v. *French*, 1 Ch. Ch. 201.

Persons Acquiring Possession Pendente Lite.]—An order for delivery of possession is only made against persons who are not parties, when they acquired possession pendente lite from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators. *Bank of Montreal* v. *Wallace*, 13 Gr. 184.

Strangers — *Jurisdiction over.*] — After sale under a decree an order for delivery of possession will not, as a general rule, be made against a person not a party to the suit; and quære, if there be any jurisdiction over strangers except in the plain case of persons taking possession, pendente lite, without any pretence of paramount title. *Trust and Loan Co.* v. *Start*, 6 P. R. 90.

Tenants.]—Under the orders of the 29th June, 1861, a mortgagee is not entitled to an order for the delivery of possession as against the tenants of the mortgagor, although such tenancy may have begun after the mortgage was made. *Bank of Montreal* v. *Ketchum*, 1 Ch. Ch. 117.

——— *Trespassers — Trying Right.*]—An application for an order for possession cannot be made the means of trying the right to possession between a landlord and his tenant, or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another person, an order for possession against such person was refused. *Scott* v. *Black*, 3 Ch. Ch. 323.

Tenants or Third Persons—*Possession of Defendant.*]—It must be shewn on moving that the defendant is in possession. No order will be made against a tenant or third person in possession, not a party to the cause. *McKenzie* v. *Wiggins*, 2 Ch. Ch. 391.

Time—*Lapse of—Circumstances of Possession.*] — Where more than three years had elapsed since the final order, the court required an affidavit shewing the circumstances of the possession since the final order, and that defendant had never relinquished possession. *Irving* v. *Munn*, 1 Ch. Ch. 240.

Title Deeds — *Delivery up—Solicitor.*]—The mortgagor, after foreclosure, having retained the title deeds, delivered them to a third person to whom he had sold, whose solicitor claimed a lien as against such third person, and declined to deliver them to the mortgagee. On a motion for that purpose an order was made for their delivery. *Stennett* v. *Arnyn*, 2 Ch. Ch. 218.

See Imperial L. and I. Co. v. *Boulton*, 22 Gr. 121; *Clark* v. *Hagar*, 22 S. C. R. 510; *Gibson* v. *McCrimmon*, 9 C. L. T. Occ. N. 40.

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8. *Parties.*

See X. 4 (b) and XIII. 5, *post.*

(a) *Adding Parties.*

Amendment after Decree — *Petition—Motion—Costs.*] — An application to amend after decree, under order 438, by adding a party interested in the equity of redemption need not be on petition, but is properly made on motion. Where such a motion was opposed on grounds of irregularity, as not being by petition, the costs of opposing it were refused. *Harrison* v. *Greer*, 2 Ch. Ch. 440.

Master's Office — *Execution Creditor—Priority—Setting aside Judgment — Amendment.*]—C. recovered judgment against L. in 1882, and placed a fi. fa. lands in the sheriff's hands, which had ever since been regularly renewed; in 1883 L. bought land from the plaintiff, giving back a mortgage for the purchase money. Under a judgment for foreclosure recovered upon that mortgage, C. was added as a subsequent incumbrancer in the master's office, and appealed:—Held, that C. was not properly added as a party in the master's office; that the plaintiff was only entitled to have the claim to postpone the execution to the mortgage tried at the hearing. But the plaintiff was allowed, following Glass v. Freckelton, 10 Gr. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority. *Lally* v. *Longhurst*, 12 P. R. 510.

——— *Order—Notice.*]—An order to make persons interested in the equity of redemption parties in the master's office will not be granted ex parte. Notice should be served on the owners of the equity of redemption already before the court, but not on those proposed to be added. *Penner* v. *Canniff*, 1 Ch. Ch. 351.

But such order was granted ex parte in *Cummings* v. *Harrison*, 1 Ch. Ch. 369.

——— *Order — Setting aside—Petition—Forum.*]—Where, under an order in chambers after decree, persons interested in the equity of redemption of mortgaged premises have been added as parties to a suit in the master's office, an application to set aside such an order must be made to the court upon petition. *Tice* v. *Myers*, 3 C. L. J. 102.

——— *Purchaser of Equity in Portion—Petition—Trial.*] — After a final order had been obtained it was discovered that prior to the filing of the bill the mortgagor had sold his equity of redemption in a portion of the land. An application for a fiat on a petition praying that the purchaser might be made a party in the master's office was granted, the court, however, expressing an opinion that the prayer of the petition could not be granted. *Municipality of Orford* v. *Bayley*, 1 Ch. Ch. 272.

Persons Interested in Equity—*Adding after Judgment.*]—In a foreclosure suit, after final judgment, an order was obtained ex parte adding as defendants two persons who had, pendente lite and before judgment, become interested in the equity of redemption, and directing that they be bound by the judgment unless, within fourteen days, they should move against the order. On application by the added defendants this order was rescinded on the ground that they should not have been made parties after the judgment. *Abell* v. *Parr*, 9 P. R. 564.

Reference—*Interlocutory Order—Subsequent Incumbrancer—Amendment.*]—There is no authority in a mortgage action for foreclosure to make a reference by interlocutory order to a master to add parties with the object of allowing them to redeem or having them foreclosed. Where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under con. rules 780 and 781 so as to convert it into a judgment under con. rule 776, with a reference to the master in ordinary to add incumbrancers, take the accounts, &c. *Wilgress* v. *Crawford*, 12 P. R. 658.

(b) *Creditors*

Creditors of Mortgagor.]—To a suit brought by mortgagees, being trustees for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties. *Fraser* v. *Sutherland*, 2 Gr. 442.

Execution Creditors of Subsequent Incumbrancer.]—The plaintiff was execution creditor of one S., who became a mortgagee of the premises in question. To a suit instituted by a prior mortgagee the plaintiff was not made a party:—Held, that the plaintiff's position was that of a derivative mortgagee in invitum, and as such he ought to have been made a party. *Darling* v. *Wilson*, 16 Gr. 255.

Judgment Creditors of Mortgagee.]—The judgment creditors of the mortgagee are necessary parties. *Sanderson* v. *Ince*, 7 Gr. 382.

Judgment Creditors of Mortgagor.]—A master made the usual order making certain judgment creditors parties, on the 28th April, 1861; but they were not served till the 3rd June. They did not appear before the master, and, after he had made his report, they applied by motion to be allowed to come in and prove their claims:—Held, that they were parties to the suit from the day that the master made his order; that the application by motion was regular, and need not be by petition; and that they might come in and prove their claims on terms. *Sterling* v. *Campbell*, 1 Ch. Ch. 147.

(c) *Mortgagees.*

A mortgagee who has been in possession, and who has assigned his interest to his co-mortgagee, is not a necessary party in a suit of foreclosure. *Russell* v. *Robertson*, 5 L. J. 118.

To a bill filed by the assignee of the mortgagee, the mortgagee is not a necessary party, even when the mortgagor alleges that the mortgagee has been paid in full. *Gooderham* v. *DeGrassi*, 2 Gr. 135.

Where a mortgagor subsequently leased part of the mortgaged property, and one of the two lessees mortgaged his interest therein, the mortgagee was made a party in the master's office to a suit by the original mortgagees to foreclose their mortgage. *McMaster* v. *Demorcy*, 12 Gr. 193.

A debtor of the plaintiff deposited with him certain mortgages as security. The plaintiff filed a bill against the owners of the equity of redemption of one of the mortgages for payment or foreclosure. The defendants, at the hearing, objected that the debtor was a necessary party, but the court overruled the objection, as it had not been taken by answer, and the debtor might be ordered to be made a party in the master's office. *Jones* v. *Bank of Upper Canada*, 12 Gr. 429.

(d) *Real and Personal Representatives.*

The representatives of a deceased tenant for life of an equity of redemption, are not necessary parties to a bill to foreclose. The representatives of the survivor of several joint mortgagees cannot, merely as such, sustain a suit to foreclose, without making the representatives of the other mortgagees parties. *Forsyth* v. *Drake*, 1 Gr. 223.

The heirs of a deceased mortgagee of an equity of redemption are not necessary parties to a suit of foreclosure by the prior mortgagee—the proper party being the personal representative of such mortgagee. *Grimshawe* v. *Parks*, 6 L. J. 142.

Three partners took a conveyance of real estate, "as and for partnership property, for the purposes of the partnership," and one having left the Province, and another died, a mortgagee of the property filed a bill to foreclose:—Held, that the personal representative of the deceased partner was a necessary party, and that the plaintiff must prove the absence from the jurisdiction of the non-resident partner, and perhaps the plaintiff's inability to serve him with process. *Baxter* v. *Turnbull*, 2 Gr. 521.

Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of a deceased partner, are not necessary parties. *Stephens* v. *Simpson*, 12 Gr. 493.

On a bill filed by A. and B., as executors of the mortgagee, to foreclose:—Held, that the heirs of the deceased mortgagee, or the persons beneficially interested under his will, were not necessary parties. *Lawrence* v. *Humphries*, 11 Gr. 209.

A testator devised his real and personal estate to A., subject to a charge of $200 in favour of B.; and A., after the testator's

death, mortgaged the real estate to B. to secure a further sum. To a bill by B. for payment of the two sums, praying in default a foreclosure or sale, the personal representative of the testator was held to be a necessary party. *Kelly* v. *Ardell*, 11 Gr. 579.

Where a bill by a mortgagee against the infant heir of the mortgagor prays a foreclosure, and the court, for the protection of the infant, directs an inquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the master to make the executor of the mortgagor a party in his office, in case of the master's opinion being in favour of a sale. *Trust and Loan Co.* v. *McDonnell*, 12 Gr. 196.

Where a mortgagee proceeds to foreclose against the mortgagor, and the estate of a deceased mesne incumbrancer, the real representatives of such incumbrancer are not necessary parties. *Taylor* v. *Stead*, 1 Ch. Ch. 74.

In a foreclosure suit, the mortgagor being dead, one of the heirs-at-law, who was originally a defendant, appeared, from the affidavit filed to obtain service by publication, to be dead, and the bill was thereupon amended by striking him out. The foreclosure was completed as against the other defendants, and after decree (on some objection to the title being made by an intended purchaser) a petition by the plaintiff for an order foreclosing such heir-at-law, and another person to whom one of the female defendants had been married, and parted from, some fifteen years previously, and who had not since been heard of, was refused. *Street* v. *Dolan*, 3 Ch. Ch. 227.

In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them. Rules 309 and 1005 considered. *Keen* v. *Codd*, 14 P. R. 182.

In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure, and possession were claimed, and the executors, to whom the real estate had been devised, were the only defendants. Judgment for possession, inter alia, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action:—Held, that the sheriff, by virtue of rule 1141 (b), was entitled to interplead. Held, also, that the action, as regards the claim for possession, was properly constituted; and the infants were bound by the judgment against the executors. Keen v. Codd, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death:—Held, that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the court, no administrator having been appointed, and no caution registered under 54 Vict. c. 18, s. 1 (O.), amending the Devolution of Estates Act. *Ramus* v. *Dow*, 15 P. R. 219.

Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available. Werderman v. Société Générale D'Electricité, 19 Ch. D. 246, followed. In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the grounds that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them:—Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under rule 324 (a) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

(e) *Trustees and Cestuis que Trust.*

Devise of Equity—*Devisees—Majority.*]—A mortgagor having devised his equity of redemption to trustees for his children in fee on their attaining twenty-one:—Held, that to a bill to foreclose against the cestuis que trust after they attain twenty-one, the trustees were not necessary parties. *Forsyth* v. *Drake*, 1 Gr. 223.

Mortgage for Benefit of Creditors—*Creditors not Necessary Parties.*]—See *Fraser* v. *Sutherland*, 2 Gr. 442, *ante* (b).

Voluntary Conveyance by Mortgagee—*Beneficiaries under.*]—Until a deed, alleged to be fraudulent, is declared void, it must be deemed valid. Therefore, where at the hearing of a foreclosure suit it appeared that after the execution of the mortgage a voluntary deed had been executed by the mortgagee, purporting to vest all his property in trustees; that he alleged and had gone into evidence to shew this deed void, as obtained from him fraudulently; that some of the cestuis que trust had released their interest under the deed, and that the others had not any part in obtaining, and had not executed it:—Held, that such other cestuis que trust must, notwithstanding, be made parties to the suit; and leave was given to the plaintiff to amend for that purpose. *Rogers* v. *Rogers*, 2 Gr. 137.

(f) *Wife.*

To a suit for the foreclosure of a mortgage, in which the wife of the mortgagor has joined to bar her dower, the wife is not a necessary party; and if made a defendant the bill as against her will be dismissed with costs. *Moffatt* v. *Thompson*, 3 Gr. 111.

But see *Sanderson* v. *Caston*, 1 Gr. 349.

A married woman is not in respect of dower a necessary party to a bill for the foreclosure of a mortgage in which she has joined to bar dower. On an application, however, for a married woman so made a party to answer separately, an order will be granted, but the plaintiff will take it at the risk of having the costs of making her a party afterwards disallowed. *Davidson* v. *Boyes*, 6 P. R. 27.

Where the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage since the coming into force of 42 Vict. c. 22 (O.) *Building and Loan Association* v. *Carswell*, 8 P. R. 73.

The wife of a person to whom the mortgagor conveys his equity of redemption is not a proper party to an action by the mortgagee for foreclosure. Semble, if such person died after judgment but before final order for foreclosure, his widow would have a right to redeem and might be made a party. *Monk* v. *Benjamin*, 13 P. R. 356.

The wife of a mortgagor who has joined in the mortgage, made after 11th March, 1879, only for the purpose of barring her dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question can arise as to her dower being effectually extinguished. *Ayerst* v. *McClean*, 14 P. R. 15.

The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower, to the extent of the mortgage only, has the right to redeem during her husband's lifetime, and is a necessary party to an action of foreclosure in the first instance. And where she was not so made a party, and judgment of foreclosure was recovered in her absence, she was after judgment and report added as a defendant upon her own petition, and permitted to redeem or pay off and obtain an assignment of the mortgage. *Blong* v. *Fitzgerald*, 15 P. R. 467.

(g) *Other Parties.*

Assignees of Mortgagee.]—T., one of the defendants, the assignee of the mortgagee, by his answer stated that he was not interested in the mortgage, or at all events only by way of security, and that it belonged to A.; and that he and A. had concurred in an assignment of it to B.:—Held, that A. and B. were necessary parties; and that, notwithstanding the defendant consented to withdraw his answer, a decree could not be made in their absence. *Vankleek* v. *Tyrrell*, 8 Gr. 321.

Bankrupt Mortgagor.] — To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party. *Torrance* v. *Winterbottom*, 2 Gr. 487.

A mortgagor of lands in this Province, who afterwards becomes a bankrupt in England, is not a necessary party to a bill to foreclose by force of the English statutes relating to bankruptcy. *Goodhue* v. *Whitmore*, 7 L. J. 124.

Persons Interested in Equity.] — Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties. *Buckley* v. *Wilson*, 8 Gr. 566.

A final order of foreclosure was refused when a person entitled to a part of the equity of redemption in a mortgaged estate was made a party in the master's office; he should be made a defendant by the bill. *Whan* v. *Lucas*, 1 Ch. Ch. 58.

It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title. *Walker* v. *Dickson*, 20 A. R. 96.

See Independent Order of Foresters v. *Pegg*, 19 P. R. 254.

Principal and Surety.]—Where there is only one principal and one surety, both must be made parties to a bill for foreclosure or sale. Where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for a foreclosure of the mortgage. *Scidler* v. *Sheppard*, 12 Gr. 456.

Railway Company — *Expropriation.*]—See *Scottish American Investment Co.* v. *Pritie*, 20 A. R. 398.

Subsequent Incumbrancers.] — See *London and Canadian Loan, &c., Co.* v. *Pulford*, 8 P. R. 150.

Tenant of Mortgagor.]—To a bill upon a mortgage for relief by sale or foreclosure a tenant of the mortgagor is a proper party, in order that he may redeem if he desires to do so, or in case of default of payment be ordered to deliver up possession. *Canada Permanent L. and S. Society* v. *Macdonnell*, 22 Gr. 461.

——— *Protection of Interest — Staying Proceedings—Order for Sale.*]—In an action for foreclosure of a mortgage, the defendants were the administrator and heirs-at-law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of a part of the mortgaged property, under lease from some of the heirs, were not made parties. None of the defendants appeared, and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed, and the lands ordered to be sold on a day named. On that day, on application of the lessee, an ex parte order was made directing that, on payment into court of $37,019 by S. and K., further proceedings by the plaintiff should be stayed until further order, and that the plaintiff should convey the mortgaged lands and the suit and benefit of proceedings therein to S. and K., which direction was complied with. On 26th December, 1889, the defendants moved to rescind this order. The motion was refused, and the order amended by a direction that the lessee should be made a defendant to the action, and S. and K. joined as plaintiffs, and that the stay of proceedings be removed. On 4th January, 1890, a further order was made directing that the leased property be sold subject to the rights of the lessee:—Held, that the order of 26th December, 1889, was right.

The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of fi. fa., and, being made at the instance of a lessee, and as such a purchaser pro tanto, of the mortgaged lands, who had a right to redeem, it was in the discretion of the Judge so to order. To the direction that the plaintiff should convey the lands to S. and K., the defendant had no locus standi to object, and they were not prejudiced by the addition of parties made by the order. Nor had the defendants a right to object to the removal of the stay of proceedings; and any right subsequent incumbrancers not before the court might have to complain would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal, the property having been sold under the decree, the purchaser not being before the court was sufficient ground for dismissing the appeal. Held, further, that the order of 4th January, 1890, was right. In selling the mortgaged property the court had a right to endeavour to preserve the rights of the lessee by selling first the portions in which she had no interest. *Collins* v. *Cunningham*, *Cunningham* v. *Drysdale*, 21 S. C. R. 139.

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9. *Other Cases.*

Acceleration of Payment — *Election—Acceptance of Principal.*]—A mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due and in respect of which a bill for foreclosure has been filed. *Green* v. *Adams*, 2 Ch. Ch. 134.

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of the clause, and calls in the whole mortgage debt, he is bound by his election, and must accept principal, interest, and costs, whenever tendered, although he does not pray for a personal order for immediate payment. Drummond v. Guickard, cited in Green v. Adams, 2 Ch. Ch. 134, overruled. *Cruso* v. *Bond*, 1 O. R. 384. Reversing *S. C.*, 9 P. R. 111.

Alternate Relief by Way of Foreclosure.]—See *Dominion L. and S. Society* v. *Darling*, 27 Gr. 68.

Application of General Order.]—Section 8 of G. O. 9th June, 1853, does not apply to any cases other than those for foreclosure, or specific performance of an agreement. *Bank of Montreal* v. *Hatch*, 1 Ch. Ch. 57.

Application of Statute — *Incumbrancer.*]—The Act 20 Vict. c. 56, s. 14, applies only to cases of foreclosure or sale by an incumbrancer. *Monro* v. *Keiley*, 1 Ch. Ch. 23.

Foreign Lands.]—See next sub-title.

Mistake—*Order for Sale—Vacating.*]—Where an order for sale has been taken out ex parte by mistake, in lieu of an order for foreclosure, the court will vacate the order for sale and grant an order for foreclosure ex parte. *McGillivray* v. *Cameron*, 1 Ch. Ch. 197.

Redemption Decree—*Relief not Prayed by Bill—Subsequent Dismissal of Bill—Operation as Foreclosure.*]—See *Cornwall* v. *Henriod*, 12 Gr. 338.

Service — *Order Allowing—Pracipe Judgment.*]—An action for foreclosure of a mortgage is governed by rule 78, O. J. Act, and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe according to the former practice in chancery. *Chamberlain* v. *Armstrong*, 9 P. R. 212.

Venue—*Claim for Possession — Local Venue.*]—An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in rule 254, O. J. Act, and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour* v. *DeMarsh*, 1 P. R. 472.

Winding-up Proceedings—*Order for Foreclosure.*]—See *Re Essex Land and Timber Co., Trout's Case*, 21 O. R. 367.

V. Foreign Lands.

Foreclosure—*Waiver of Right to Sale—Conveyance.*]—Where in a suit on a mortgage covering lands in the Province of Ontario, and also in Quebec, the defendant (the mortgagor) waived his right to claim a sale of the property and elected to have a decree of foreclosure pronounced, the court on further directions ordered, in the event of default being made in payment, that defendant should execute to plaintiff such a conveyance as would vest in him all the estate or interest of defendant in the lands in Quebec. *Bryson* v. *Huntington*, 25 Gr. 265.

Fraudulent Conveyance—*Action to Set aside—Jurisdiction.*]—See *Purdom* v. *Pavey*, 26 S. C. R. 412, reversing *Pavey* v. *Davidson*, 23 A. R. 9, and approving *Burns* v. *Davidson*, 21 O. R. 547.

Redemption—*Action for — Jurisdiction.*]—An Ontario court will not grant a decree for redemption of a mortgage over lands in Manitoba at the suit of a judgment creditor of a mortgagor, whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario. The only locus standi the judgment creditor would have in an Ontario court would be to have direct relief against the lands by means of a sale, to which relief he would be restricted in such a case in a suit in the courts of Manitoba, and a decree for a sale would have been unenforceable in the latter Province. A court of equity will, where personal equities exist between two parties over whom it has jurisdiction, though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands but directly in personam, but such relief will never be extended so far as decreeing a sale in the nature of an equitable execution. Judgment in 20 A. R. 646, reversing that in 23 O. R. 327, affirmed. *Henderson* v. *Bank of Hamilton*, 23 S. C. R. 716.

——— *Action for—Jurisdiction—Declaration—Constructive Trustees—Limitation of*

Actions.]—Action to have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1883 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—Semble, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but held, that the court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country. *Gunn* v. *Harper*, 30 O. R. 650.

Sale of Lands—*Decree—Jurisdiction.*]—Although in an action on a mortgage of lands situate out of the Province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating in personam as an extinguishment of a personal right, yet the court will not extend the doctrine by ordering a sale of land over which it has no territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale. *Strange* v. *Radford*, 15 O. R. 145.

See Peck v. *Custead*, 10 L. J. 302.

VI. Leasehold Mortgage.

Acquisition of Reversion by Mortgagor.]—Where the assignee of a term, subject to a mortgage of the term and of the rights of renewal and of purchase given by the lease exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage. Judgment in 28 O. R. 316 affirmed. *Building and Loan Association* v. *McKenzie*, 24 A. R. 599.

The assignee of a term, who takes the assignment subject to a mortgage, and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. Emmett v. Quinn, 7 R. A. 306, distinguished. Judgment in 24 A. R. 599 affirmed. *Mackenzie* v. *Building and Loan Association*, 28 S. C. R. 407. (Leave to appeal to privy council refused.)

Terms of Mortgage—*Assignment or Sublease.*]—A lease of real estate for twenty-one years, with a covenant for a like term or terms, was mortgaged by the lessee. The mortgage, after reciting the terms of the lease, proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description, and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" and the habendum of the mortgage was: "to have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc.:"—Held, reversing the judgment in 23 A. R. 602, that the premises of the mortgage above referred to contained an express assignment of the whole term, and the habendum, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning land or property but referring to the recital which described the lease as one for a term of twenty-one years. Held, further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sublease. *Jameson* v. *London and Canadian Loan and Agency Co.*, 27 S. C. R. 435.

———*Assignment or Sublease—Discharge.*]—The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and reconveying the security. Judgment in 26 A. R. 116 affirmed. *Jamieson* v. *London and Canadian Loan and Agency Co.*, 30 S. C. R. 14.

See Peck v. *Custead*, 10 L. J. 302.

VII. Payment, Satisfaction, Discharge, and Merger.

1. *Attorney or Agent.*

(a) *Payment to Solicitor.*

Mortgagee's Solicitor.]—An authority by plaintiff to his attorney to collect the interest due on a mortgage in the plaintiff's, and not in the attorney's, possession, does not entitle the attorney to receive payment of the principal. In this case the defendant, the mortgagor, being unable to pay off plaintiff's mortgage, at the suggestion of the plaintiff's attorney borrowed the required amount from the moneys of another client in the attorney's hands, with which the attorney was to pay off the plaintiff's mortgage, the defendant giving another mortgage therefor. Quære, whether this arrangement amounted to a payment of the plaintiff's mortgage to the attorney. *Palmer* v. *Winstanley*, 23 C. P. 586.

The holder of a mortgage, upon which an instalment of interest was due, instructed his attorneys "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagor called on the 12th April, and told the attorneys that he intended to pay off the mortgage shortly, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment, and prepared notice of sale, and served them on the mortgagor on the 23rd April, when he called to pay off the mortgage. They also refused to take the principal money:—Held, that the attorneys had no

authority to collect the principal, and that they were entitled to the costs of the ejectment suit, but to no other costs whatever. *In re Flint and Jellett*, 8 P. R. 361.

The custody of a mortgage gives no right to the custodian, whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but it affects the land, and so for its effectual discharge not only payment but reconveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security. G., a mortgagee, left her mortgage in the office of M., her solicitor. F., the mortgagor, paid the interest and $3,000 on account of principal to M., who paid over the interest, but retained the $3,000, of which the mortgagee knew nothing. F. subsequently paid a further sum of $1,500 on account of principal, and other sums of interest, all of which were paid over to G.:—Held, that there was no implied authority to receive the principal, and that the adoption of a later payment of principal could not of itself be held to ratify the prior unknown payment. *Gillen* v. *Roman Catholic Episcopal Corporation of Diocese of Kingston*, 7 O. R. 146.

The onus of shewing that a solicitor, who is in possession of a mortgage and collects the interest, has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds. *In re Tracy, Scully* v. *Tracy*, 21 A. R. 454.

Mortgagor's Solicitor.]—Plaintiff, desiring to raise money upon mortgage of his lands, part whereof was to go to pay off certain existing incumbrances thereon, arranged with a solicitor that the latter should get him the money, and he and his wife executed a mortgage for the amount, and left it in the hands of the solicitor. The latter received the mortgage money from the mortgagee and absconded. Plaintiff now sued the mortgagee, claiming the money or a discharge of the mortgage:—Held, that leaving the mortgage with the solicitor did not prove that the latter was plaintiff's agent to receive the money, and the defendant had not satisfied the onus resting upon him of proving this fact, and therefore plaintiff was entitled to judgment as claimed. *McMullen* v. *Polley*, 12 O. R. 702.

See McCormick v. *Cockburn*, 31 O. R. 436, *ante* 1.

(b) *Other Cases.*

Authority to Receive Payment.]—A person had authority to collect rent, and to contract for the sale of property, and to receive the down payments:—Held, that such authority did not entitle him to receive payments on a mortgage given for the unpaid purchase money. Where such an agent had at one time, without authority, received some payments on such mortgages, which the principal did not publicly repudiate, and another mortgagor, who did not appear to have had notice of these payments, made a payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held not to be a good payment. *Greenwood* v. *Commercial Bank*, 14 Gr. 40.

Authority to Sign Discharge.]—A discharge of mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power, upon payment of all or any debts, to give proper and sufficient acquittances and discharges for the same:—Held, sufficient authority to sign the statutory certificate. *Lee* v. *Morrow*, 25 U. C. R. 604.

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2. *Bar to Recovery of Mortgage Money.*

Inability to Reconvey.]—Defendant, being seised in fee of land, mortgaged it to H. in 1867. In January, 1868, an attachment in insolvency issued against him, and in May following he gave a second mortgage to the plaintiff. H. filed a bill to foreclose W., defendant's assignee in insolvency, and the master's report in the suit treated the plaintiff as an incumbrancer. The plaintiff assigned his mortgage to H., and W. assigned the equity of redemption to G. Pending the foreclosure suit, but after the report had become absolute, G. paid to H. part of the money due on defendant's mortgage, and received an assignment from him and a release of the land from this mortgage. It was contended that H., having disabled himself from conveying to defendant, could not as beneficial plaintiff recover from him the balance of the mortgage money:—Held, otherwise, for defendant, having conveyed nothing by the mortgage, his equity of redemption being then vested in W., could have nothing to get back. The replication setting forth the facts above stated having been proved:—Held, that the plaintiff should have had a verdict, without reference to its validity in law as an answer to the plea. *Ryan* v. *Wilson*, 32 U. C. R. 553.

Where, after the mortgagor had assigned his equity of redemption, the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor:—Held, that he could not call on the mortgagor for payment of any deficiency resulting upon such sale of the estate. *Burnham* v. *Galt*, 16 Gr. 417.

If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if at the time of bringing the action he has paid off the mortgage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing. Gowland v. Garbutt, 13 Gr. 578, observed upon. *Munsen* v. *Hauss*, 22 Gr. 279.

See cases under IV. 6 (c); *Pegg* v. *Hobson*, 14 O. R. 272, *post* 5; *Bank of Toronto* v. *Irwin*, 28 Gr. 397, *post* VIII. 11 (a).

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3. *Certificate of Discharge.*

Alteration after Execution—*Agent.*]—A mortgagee executed a statutory discharge

which was incorrectly dated, and his agent, in good faith and in order to make the instrument conform to the intention of the mortgagee, altered the date, which alteration was, under the circumstances, immaterial, and, as altered, the document stated correctly what was intended by the parties to it. Under these circumstances a bill impeaching the validity of such discharge was dismissed with costs. *Sayes* v. *Brown*, 28 Gr. 10.

Authority of Agent to Sign.]—See *Lee* v. *Morrow*, 25 U. C. R. 604, *ante* 1 (b).

Discharge by Assignee.]—A discharge of mortgage executed by an assignee thereof contained these words, "and that such mortgage has been assigned to me," without giving the particulars of the dates of and parties to the assignment:—Held, sufficient. *Re Mara*, 16 O. R. 391.

Easement—*Effect of Discharge in Determining.*]—See *Carter* v. *Grantt*, 14 A. R. 685.

Erroneous Statement as to Payment.]—In ejectment it appeared that defendant had purchased under execution, and there being a mortgage on the land he paid it off, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due, not such a certificate as is provided for by C. L. P. Act, s. 258, on sale under execution of a mortgagor's interest:—Semble, that the taking the certificate of discharge as stated could not defeat the purchaser's title by vesting the mortgagee's estate in the mortgagor, but that it would enure to the benefit of such purchaser as the mortgagor's assignee. *Lee* v. *Howes*, 30 U. C. R. 292.

A mortgagor before his death paid about three-fourths of the mortgage money, and his widow, acting for his estate, paid the rest. The certificate of discharge, given four years after his death, under 29 Viet. c. 24 (O.), and duly registered, stated that the mortgagor had satisfied the mortgage, and that it was therefore discharged:—Held, sufficient. Semble, that it would have been sufficient, also, if the payer's name had been altogether omitted. *Carrick* v. *Smith*, 35 U. C. R. 348.

Estoppel — *Payment.*]—A discharge of mortgage, not being under seal, is not an estoppel as to the fact of payment. *Bigelow* v. *Staley*, 14 C. P. 276.

Evidence of Discharge—*Certificate of Registrar.*]—Semble, that the certificate of the registrar of the discharge of a mortgage, indorsed on the mortgage deed, is a sufficient evidence of a reconveyance under the statute, without shewing the execution of the discharge itself. *Doe d. Crookshank* v. *Humberstone*, 6 O. S. 103.

——— *Entry in Books of Registrar—Certificate Signed but not Recorded.*]—In an action by vendor against vendee on an agreement to purchase land, the question was, whether the vendor had a good title. It appeared that there were two mortgages upon the land, both paid; of the one an entry of discharge had been duly made in the registry office, of the other a certificate of discharge had been signed but not recorded:—Held, that from the entry by the registrar the certificate, which was not produced, must be assumed to have been in proper form, and as such entry had by the statute the force of a reconveyance, the first mortgage could form no objection; but that as to the second mortgage, though it was paid, the legal estate remained in the mortgagee, and the plaintiffs therefore could not succeed. *Lee* v. *Morrow*, 25 U. C. R. 604

Non-registration of Certificate — *Effect of Signing.*]—The plaintiffs advanced $2,000 on certain land, on condition that three incumbrances against it should be discharged out of the proceeds of their loan and otherwise. The first and third incumbrancers were paid off, and the former executed a statutory discharge of their mortgage, which was never registered. Subsequently the second incumbrancer, who had not been paid, claimed priority over the plaintiffs. They then obtained an assignment of the first mortgage:—Held, that the discharge, not having been registered, operated only as a receipt, and the amount paid the first incumbrancer being paid by the plaintiffs and not by the original mortgagor, the plaintiffs were entitled to priority to the extent of the first mortgage. *Trust and Loan Co.* v. *Gallagher*, 8 P. R. 97.

A certificate of discharge is of no effect to revest the legal estate until registered. Where a certificate of discharge was lost before registration:—Held, that the disclaimer of the mortgagees, who were trustees, and the consent to their solicitors, was not sufficient to enable the court to declare the petitioner entitled to the legal estate in fee simple. *Re Moore*, 8 P. R. 471.

In respect to discharges of mortgages, what the Registry Act makes tantamount to a reconveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. *In re Music Hall Block, Dumble* v. *McIntosh*, 8 O. R. 225.

Omission in Affidavit—*Effect of Registration.*] — The registrar having recorded a certificate of discharge of mortgage under C. S. U. C. c. 89, upon an affidavit which did not state the place of execution, as required by the statute:—Held, that though he should properly have refused to register it, yet being registered, it was effectual as a reconveyance of the legal estate to the mortgagor. Robson v. Waddell, 24 U. C. R. 574, distinguished. *Magrath* v. *Todd*, 26 U. C. R. 87.

Part Discharge — *Registration.*] — The registrar is bound to register or file a certificate of discharge of a portion of the lands contained in a mortgage. *In re Ridout*, 2 C. P. 477.

Registration — *Effect of — Conveyance Registered same Day — Reconveyance to Grantee.*]—The equity of redemption conveyed by a certain deed was subject to a mortgage, a discharge of which was registered on the same day as the deed:—Held, that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a reconveyance to the grantee, who was the assignee of the mortgagor within the meaning of the Act. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

——— *Effect of—Statute of Limitations—New Starting Point.*] — See *Henderson* v. *Henderson*, 23 A. R. 577.

Right to Reconveyance — *Owner of Equity not Bound to Accept Discharge.*]—A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgaged premises, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute. The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the plaintiff as the person paying, or to execute a reconveyance in his favour, the plaintiff offering to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The court on a bill filed for that purpose, ordered the mortgagee to execute the reconveyance and pay the costs of the suit. *McLennan* v. *McLean*, 27 Gr. 54.

Several Mortgages — *Separate Certificates—Necessity for—Entries.*] — Under 31 Viet. c. 20 (O.), a registrar cannot be required to register a certificate of discharge of mortgage, applying to more than one instrument. Each mortgage to be discharged should have a separate certificate. Quære, as to the effect and validity of a certificate embracing several mortgages, or of its registration. In this case, the certificate related to two mortgages, stating that they were respectively registered in the registry office for the county of Brant, on the day and hour named, in letter A of the general register for the county, as numbers 53 and 66 respectively. The registrar registered it in the general register book, but refused to record it in the books for the town and township of Brantford, though the mortgages included land there, on the ground that it only mentioned the number of each mortgage as registered in the general registry book:—Held, that this reason was insufficient. *In re Smith and Shenston*, 31 U. C. R. 305.

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

Sufficient Reference to Mortgage.]—A discharge of mortgage referred to the mortgage as 5764, whereas it was registered as 5764 C. W.:—Held, that it was nevertheless a valid discharge properly registered. The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the officials for convenience of reference. *Re Clarke and Chamberlain*, 18 O. R. 270.

Survivor of Several Mortgagees—*Acceptance of New Security—Purchaser—Notice—Registration.*]—The registration of a certificate given by the survivor of several mortgagees, upon payment in money of the mortgage debt, effectually discharges the mortgage and revests the legal estate. C. executed two mortgages (duly registered) in favour of M. B. and her two sisters, for moneys advanced by them. He afterwards sold portions of the land to D. and E., giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her, instead, a mortgage on other lands of ample value, by way of security, and, after the registration of these discharges, he sold the rest of the land comprised in the original mortgages to others. These purchasers took in good faith for value, having no actual notice of the two original mortgages. C. afterwards induced M. B. to accept in lieu of this mortgage, which she discharged, a mortgage upon other lands, which proved almost worthless. Upon the death of M. B., the personal representatives of herself and sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due thereon:—Held, reversing the decision in 26 Gr. 99, that the discharges by M. B. were, after registration, valid and effectual, so far as the purchasers were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person entitled by law to receive the money, was registered, and they were not bound to inquire whether payment in money had been actually made; but that the discharges were inoperative in favour of C. and D. and E., who purchased from him with notice of the mortgage by reason of the registry, to extinguish the interest of the deceased sisters other than M. B., as she could only discharge the mortgages upon payment of the debt, and not by the acceptance of another security. *Dilke* v. *Douglas*, 5 A. R. 63.

Tenant in Tail—*Mortgage by—Effect of Discharge.*]—Held, reversing the judgment in 6 A. R. 312, that the execution and registration, in accordance with R. S. O. 1877 c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail, reconveys the land to the mortgagor barred of the entail. *Lawlor* v. *Lawlor*, 10 S. C. R. 194.

It is, at least, doubtful whether a mortgage in fee by a tenant in tail in possession bars the entail; and whether, upon a discharge being executed, the mortgagor does not take back his original estate. *Re Dolsen*, 4 Ch. Ch. 36.

Trustee of Mortgage—*Discharge by—Claim of Cestui que Trust—Estoppel—Bona Fides.*] — See *Howland* v. *McLaren*, 22 Gr. 231, *ante* I. 4.

See Jamieson v. *London and Canadian L. and A. Co.*, 26 A. R. 116, 30 S. C. R. 14, *ante* VI.

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4. *Executors and Administrators.*

Conveyance by — *Purchaser—Payment.*]—C. S. U. C. c. 87, s. 5, only authorizes executors to convey the legal estate on payment of the mortgage debt; it does not authorize them to convey to a purchaser from themselves. *Hunter* v. *Farr*, 23 U. C. R. 324; *Robinson* v. *Byers*, 9 Gr. 572.

Foreign Administrator—*Power to Release.*] — A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him, and a release by

the heirs, are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the Act for Quieting Titles. *In re Thorpe*, 15 Gr. 76.

Several Executors—*Discharge by One.*] —Under 31 Vict. c. 20, s. 62 (O.), one of several executors can execute a valid discharge of a mortgage. *Ex p. Johnson*, 6 P. R. 225.

——— *Mortgage by one to Testator—Discharge — Liability.*] — One of two executors was indebted to the estate on a mortgage given to their testator, of which fact his co-executor was aware, but he took no steps to compel payment; and the mortgagor, as executor, executed a discharge of the mortgage under the statute, and registered the same:—Held, that the co-executor was liable to make good any loss occasioned to the estate thereby. Quære, whether the discharge, to be valid, did not require the signatures of both executors. *McPhadden* v. *Bacon*, 13 Gr. 591.

——— *Mortgage by one to Testator—Payment — Liability of Co-executor.*] — A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor. The mortgagor afterwards agreed with B., the owner of other property, for an exchange free from incumbrances, and that B. should pay $2,000 for the difference in value. The mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,000, no part of which, however, was payable. B. satisfied the $1,000, partly in money paid to the mortgagor, partly by a debt owing to B. by the mortgagor, and partly by moneys which had theretofore been lent by B. for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for $1,000 in full. The contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:—Held, that the contemporaneous payment was a valid payment pro tanto, the same having been made with the assent of the co-executor; but that the estate, or the co-executor, was not bound by the receipts indorsed on the mortgage; and that B. was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan. *Bacon* v. *Shier*, 16 Gr. 485.

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5. *Merger of Mortgage Debt.*

Conveyance of Equity to Mortgagee—*Bargain.*]—Where a mortgagee of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to the bargain between the parties at the time of his obtaining the transfer. *Finlayson* v. *Mills*, 11 Gr. 218.

See Barker v. *Eccles* 18 Gr. 440.

Covenant—*Conveyance of Equity after Action—Satisfaction of Mortgage—Mistake.*] —Covenant on a mortgage. Plea, that defendant conveyed to the plaintiff his equity of redemption in the land mortgaged, which the plaintiff accepted in satisfaction of the claim. It appeared that when the plaintiff commenced this action, defendant offered to convey the land in satisfaction of the debt, but the plaintiff declined. His attorney afterwards, hearing that one G. would buy the land and pay the mortgage, told the plaintiff, who said it was all the same to him from whom the money came, and at G.'s wish the deed was made by defendant to the plaintiff instead of to G., and left with the attorney. Afterwards, however, it appeared that G. had referred to another lot owned by defendant, and he refused, therefore, to carry out the agreement:—Held, that the plea was not proved. *Baar* v. *Henley*, 18 U. C. R. 494.

——— *Conveyance of Equity to Mortgagee—Absence of Stipulation—Collateral Arrangement.*]—In response to a notice from the plaintiffs (the mortgagees) of an instalment being due on the defendant's mortgage, the defendant's solicitor wrote that, as defendant was unable to pay the claim or redeem, and to save plaintiffs' costs, he would give them a conveyance of his equity of redemption. The plaintiffs thereupon conferred with H., their local agent and valuator, who advised them to take a deed, which they agreed to do, but only to enable them to sell the property, and defendant was to have any surplus over the mortgage debt, and they were not to release him from his covenant. An ordinary deed in fee simple was thereupon sent to defendant, and executed by him and his wife, H. at the time informing defendant that he was to have any surplus; and also then informed him, and after the transaction had been closed wrote to him, that the plaintiffs would send a discharge, though without any authority from the plaintiffs to do so; and defendant stated that he signed on this understanding:—Held, that there was no merger of the mortgage debt, but the defendant still remained liable therefor, the equity of redemption having been released only to enable the plaintiffs more conveniently to sell. *North of Scotland Mortgage Co.* v. *Germain*, 31 C. P. 349.

——— *Conveyance of Equity to Mortgagee—Absence of Stipulation—Inference.*]—The plaintiffs held a mortgage made by the defendant, who covenanted to pay the mortgage money and interest. Defendant conveyed his equity of redemption to A., who subsequently released to the plaintiffs for a nominal consideration, after striving for a substantial one. The defendant, as part of the arrangement, gave the plaintiffs his note for some interest. The plaintiffs having sued on the covenant for payment, the jury were directed that if the release and note were taken by the plaintiffs in satisfaction of the liability on the covenant, to find for the defendant; if taken under a stipulation that it should not have that effect, to find for the plaintiffs; and that in the absence of evidence upon the points the inference would be that it was taken in satisfaction of plaintiffs' claim, the charge being thereby merged. The jury found for the defendant:—Held, that there was no misdirection, the onus of proving that there is no merger being upon the plaintiff in such a case; and the verdict was sustained. *North of Scotland Mortgage Co.* v. *Udell*, 46 U. C. R. 511.

——— *Conveyance of Equity to Mortgagee—Subsequent Sale — Indemnity — Power to Redeem.*] — The defendant executed a mortgage on certain land to the plaintiffs, dated 5th November, 1881, to secure $2,200 and

interest, and on 8th May, 1882, conveyed the land to L. subject to the mortgage. On 12th May, 1883, L. conveyed to the plaintiffs. Afterwards the plaintiffs entered into an agreement with C. for the sale of the land to him for a sum less than the amount due them, which was followed by a conveyance to him. Subsequently the plaintiffs brought an action against defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L., when they took the conveyance from her, was that defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them:—Held, that, whether there was such an agreement or not, it would not be binding on defendant, for he having sold to L. subject to the mortgage, it was L.'s duty to indemnify him against it, and plaintiff took with knowledge of this and never communicated with him; and, moreover, by their subsequent sale to C. they put it out of the defendant's power to redeem. North of Scotland Mortgage Co. v. Udell, 46 U. C. R. 511, and North of Scotland Mortgage Co. v. Germain, 31 C. P. 349, commented on. *British and Canadian L. and I. Co.* v. *Williams*, 15 O. R. 366.

——— *Conveyance of Equity to one of Several Joint Mortgagees.*]—A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt. *Scarlett* v. *Nattress*, 23 A. R. 297.

——— *Purchase of Equity by Mortgagee—Conveyance to Trustee — Intention.*]—The defendant, having mortgaged certain lands, conveyed them to one P., and afterwards, becoming insolvent, he included the mortgage debt in his schedule as an indirect liability. The conveyance was silent as to whether it was a sale of the equity of redemption merely, or of the whole estate, the payment of the mortgage being part of the consideration, but from the evidence the court inferred the latter. The mortgagee, who had been no party to the arrangement, afterwards obtained from P. the equity of redemption, which he caused to be assigned to his wife, in order, as he said, to prevent a merger; and he then sued the defendant on the covenant for the mortgage money:—Held, that there was no merger, and that the plaintiff was entitled to recover. *Macdonald* v. *Bullivant*, 10 A. R. 582.

——— *Sale under Power—Subsequent Conveyance to Mortgagee.*]—In an action on the covenant for payment in a mortgage for the amount of the deficiency after the exercise of a power of sale, defendant set up the sale under the power to one W. and a retransfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land:—Held, no defence. *Pegg* v. *Hobson*, 14 O. R. 272.

——— *Vessel—Purchase by Mortgagee at Sale for Wages — Independent Title — No Right to Redeem—Offer to Reconvey.*]—Declaration on a covenant to pay money. Plea, that the plaintiff sold a vessel to defendants, and the deed containing the covenant sued on was a mortgage and reconveyance thereof to the plaintiff to secure the purchase money; that while the plaintiff was such mortgagee, the vessel, and all defendant's interest therein, was sold, and the plaintiff became and is the absolute owner of said vessel, whereby said mortgage became merged and satisfied. Equitable replication, that the vessel was seized and libelled for wages due to her crew, and condemned and sold in Detroit, in the United States, under the admiralty law there, and the plaintiff purchased her for about $2,300; that she was so sold without plaintiff's privity or consent; that by the foreign law the purchaser acquired an absolute and paramount title thereto, and purchased at the sale as any stranger might, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants therein, as in the plea alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof; and that said mortgage did not thereby become merged and satisfied as alleged:—Held, that defendant was not liable, for that the mortgagee could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem. *Parkinson* v. *Higgins*, 37 U. C. R. 308.

The replication, having been amended after the judgment on the previous demurrer, alleged that the vessel, being a British ship, was seized for wages due to the crew and sold at Detroit, in the United States, solely through defendant's default; that by the law of the United States the wages formed a lien prior to the mortgage, and the plaintiff, wholly to protect himself, and not to gain any advantage over defendant, became the purchaser; that he offered and was always willing to reconvey and deliver her to defendants on being paid the mortgage money and the money paid by him at such sale, which defendant refused to pay; that the plaintiff, having possession of the vessel, insured her, and on her loss by the perils of the sea received the insurance money, which the plaintiff is and always has been ready to apply on the purchase money:—Held, a good replication, and that the plaintiff, under the circumstances stated, was not precluded from recovering on the covenant. *S. C.*, 40 U. C. R. 274.

Derivative Mortgagee—*Conveyance of Equity to — Absence of Stipulation — Inference from Circumstances.*]—Where a derivative mortgagee took a conveyance from the original mortgagors, and there was no express stipulation as to whether there should be a merger or not; but the conveyance taken from the mortgagors was therein declared to be made in consideration of the settlement of a suit of foreclosure between the parties to the deed, and in satisfaction of the grantee's lien, claim, and interest in the property, and subject to the lien and interest of the original mortgagee; and the grantee gave to one of the mortgagors a bond of indemnity against any claim of the original mortgagees against him in respect of the original mortgage debt:—Held, that the debt to the derivative mortgagee was at an end, and that the balance due to the original mortgagee was the only charge on the property. *Finlayson* v. *Mills*, 11 Gr. 218.

Dower—*Purchase of Equity by Mortgagee—Extinguishment of Mortgage—Intention.*]—L. purchased from S., who conveyed to him,

and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another party. L. having died, his widow sued at law for dower. A bill was filed praying an injunction to stay the action, and for a declaration that the widow was, under the circumstances, not entitled to dower:—Held, that the mortgage was not extinguished as a charge, on the purchase of the equity of redemption by S. from H., or merged in his legal estate. *Henry* v. *Low*, 9 Gr. 265.

Ejectment—*Action by Second Mortgagee—Bar—Subsequent Merger of First Mortgage—Evidence.*]—The plaintiff brought ejectment on the 6th September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McL., assigned to him. The mortgage to McL. was given on the 9th November, 1861, and that to the plaintiff on the 21st March, 1864. On the 21st September, 1865, McL., by deed reciting an interlocutory decree in chancery in respect of the foreclosure of W's mortgage to him, conveyed to him as W.'s appointee, and on the 9th November, 1865, by a decree in the same suit, this mortgage was finally foreclosed. It was contended that the mortgage to McL. had merged in the inheritance, and could not be set up against the plaintiff:—Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards. It was proved that the defendant in April or May, 1865, asserted that he had got a deed of the equity of redemption from W.:—Held, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864. *McKay* v. *McKay*, 25 U. C. R. 133.

Owner of Equity — *Purchase of First Mortgages—Assignment to Trustee—Offer to Treat as Discharged — Failure of Negotiations.*]—C., being the sixth mortgagee, filed his bill against the holder of the equity of redemption and other incumbrancers. The prior mortgagees were not parties to the suit. A sale having been directed was conducted by the solicitors for one of the defendants, and C. purchased the premises for less than his mortgage debt. The conditions of sale contained the following clause: "The said premises will be sold subject to prior mortgage incumbrances, amounting in the aggregate to the sum of £1,831." C. then bought up the three first mortgages and had them assigned to a trustee for his benefit, and in other respects shewed his intention to retain them as outstanding liens. He also negotiated for time with the holders of the fourth and fifth mortgages, proposing as part of the terms to treat the first three mortgages as discharged. These negotiations failed. G., the fifth mortgagee, redeemed the first and foreclosed C. as owner of the equity of redemption. The three first mortgages having been assigned to the plaintiff:—Held, on a bill by him on them, against G., that these three mortgages had not merged in C.'s equity of redemption, and that the negotiations between him and the present holders of the equity of redemption, having proved abortive, could not be set up to bar the right of action of C, and his assignee upon these mortgages. *Beaty* v. *Gooderham*, 13 Gr. 317.

Purchaser at Sheriff's Sale—*Assignment of Mortgage to.*]—Premises having been twice mortgaged were sold at sheriff's sale to S., who afterwards obtained an assignment to himself of the first mortgage:—Held, that he might still claim the sum due on the first mortgage, no merger having taken place. Semble, that in this respect our law is more favourable to S.'s position than English law would be. *Elliott* v. *Jayne*, 11 Gr. 412.

Several Mortgages — *Conveyance of Equity to First Mortgagee—Provisoes in Conveyance.*]—Under 14 & 15 Vict. c. 45 (C. S. U. C. c. 87) a mortgagee has a right to get in the equity of redemption in any way without thereby merging his security, and thus enabling a puisne incumbrancer to compel him to pay off such puisne incumbrancer's claim. Therefore, where a first mortgagee took from the mortgagor a release of the equity of redemption, the consideration therefor being expressed to be the amount due on the mortgage for principal and interest, "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises . . . freed from the proviso of redemption;" and the mortgagor covenanted for further assurance, and that he had done no act to incumber:—Held, reversing the decree below, 21 Gr. 242, that the security of the first mortgagee was not thereby merged, and that the only relief a subsequent incumbrancer was entitled to, was that of redeeming the first mortgagee. *Hart* v. *McQuesten*, 22 Gr. 133.

——— *Conveyance of Equity to First Mortgagee—Subsequent Sale to Several Purchasers — Extinguishment of Charge.*]—The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:—Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as puisne incumbrancers, and that the purchasers were entitled to an inquiry as to the enhanced value of the property by reason of their improvements. *Wearer* v. *Vandusen*, *Wills* v. *Agerman*, 27 Gr. 477.

——— *Conveyance of Equity to Second Mortgagee — Crops—Chattel Mortgage—Intention—Evidence.*]—A. C., owner of certain lands, mortgaged them to a loan company, and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed a quantity of fall wheat, and in January, 1888, made a chattel mortgage of this wheat to G., which chattel mortgage was properly registered. On 4th April, 1888, before the harvest, under pressure from H., A. C. conveyed the lands to H. for a consideration equal to what was due on the three mortgages, and a small additional unsecured debt due from him to P. On the 5th April, 1888, H. leased the property to A. J. C. for a year. When the fall wheat was ripe A. J. C. cut and harvested it, but G. sent and seized it

under his chattel mortgage, and A. J. C. now brought this action to recover its value:—Held, that on his taking the conveyance from A. C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G.'s right as chattel mortgagee became prior in point of time to the title of M., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security. *Cameron* v. *Gibson*, 17 O. R. 233.

——— *Purchase by One Mortgagee—Notice.*]—Where a third mortgagee, who took without notice of the second mortgage, obtained an assignment to himself of the first mortgage after he had notice of the second, and then purchased the interest of the mortgagor:—Held, that the second mortgage was the only subsisting incumbrance on the property. *Emmons* v. *Crooks*, 1 Gr. 159.

See Woodruff v. *Mills*, 20 U. C. R. 51, *post* 9.

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6. *Payment—Presumption and Proof of.*

Mortgagor in Possession—*Lapse of Time.*]—When the mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time for payment of the mortgage money. *Doe d. McGregor* v. *Hawke*, *Doe d. McGregor* v. *Crow*, 5 O. S. 496.

See, also, *Doe d. Dunlop* v. *McNab*, 5 U. C. R. 289.

Question of Payment — *Conflicting Evidence — Custody of Securities — Absence of Demand.*] — In 1859 a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with M., who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought, and had for many years been under the impression, that the whole claim under the assignment had been paid: that the plaintiff M. was not interested in this note, and that the same had, through oversight, not been delivered up. The attorney who had acted for M. having sworn that this note was the one in which M. was interested, and that it had never been paid, the court, in view of the fact that the mortgage and note were both found in the hands of the assignee, and that no demand during so many years had been made for their discharge, pronounced the usual decree in favour of plaintiffs. *Scatcherd* v. *Kiely*, 21 Gr. 30.

——— *Trial—Reference.*]—In a suit for the recovery of mortgage money the question between the parties was, whether the mortgage money had been paid; both parties offered evidence at the hearing, and the court received the same and adjudged thereon without a reference. *Bacon* v. *Shier*, 16 Gr. 485.

Quieting Titles Act — *Mortgage More than Twenty Years Old—Notice to Mortgagees—Dispensing with.*]—In a petition under the Act for Quieting Titles a mortgage more than twenty years old appeared on the registrar's abstract. A discharge of this did not appear to have been registered. None was produced, nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagees, and that no demand had ever been made for the mortgage debt, though nothing had been paid, and that no acknowledgment had been given within twenty years or more:—Held, that evidence should be adduced of search for the mortgagees or their representatives; that a single ex parte affidavit that no payment or demand had taken place would not bar claims of mortgagees who could be served with notice; but if they could not be found notice might be dispensed with after a great lapse of time, and satisfaction presumed. *Re Caverhill*, 8 C. L. J. 59.

Vacant Land—*No Re-demise—Lapse of Time—Remedy on Covenant — Limitation of Actions.*]—Where there is no re-demise to the mortgagor until default in payment of the mortgage moneys, and the land is vacant at the time of the execution of the mortgage:—Semble, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment of the mortgage moneys after the lapse of twenty years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account of the mortgage. The mere fact that the mortgagee is barred by the Statute of Limitations of his remedy on the covenant for the recovery of the money will not establish a payment, so as to reconvey the legal title to the mortgagor. *Mahar* v. *Fraser*, 17 C. P. 408.

Vendor and Purchaser — *Abstract of Title—Old Mortgage—Presumption.*]—In examining a title the purchaser found a mortgage which had matured over eighty years previously, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do:—Held, that, under all the circumstances, the mortgage must be presumed to have been paid. *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467.

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

7. *Payment—What Constitutes.*

Agreement—*Settlement of Cross-claims—Release of Mortgage Debt.*]—A tenant in possession being mortgagee of the property, and indebted to the mortgagor under an award in a sum exceeding the amount due under the mortgage, a settlement was effected, whereby the mortgagor agreed to discharge the amount due under the award, and also pay the mortgagee $100 to go out of possession. Although not distinctly shewn, yet the circumstances induced the belief that the arrangement embraced a discharge of the mortgage debt, and the court dismissed a bill of foreclosure filed by the mortgagee several years afterwards. *Fair* v. *Tate*, 13 Gr. 160.

Agreement to Release—*Condition—Performance.*]—M. mortgaged lot 11 to Y. for £50; he then also holding a lease renewable in perpetuity of lot A. at a rental of £4 per annum. The rent being in arrear, judgment was obtained and execution issued by the lessor against M. therefor. Y. then agreed with M. to pay this execution, M. to assign to him the lease of lot A.; and further, it was agreed that if the lessors "will give to the party of the first part (Y.) a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and release a mortgage," &c., being that above mentioned. Y. afterwards obtained a conveyance from the lessors of lot A.; but it did not appear that it was made for the sum contemplated at the time of the agreement between Y. and M. Y. afterwards pressed for payment of the mortgage debt, when M. made excuses for delay, and did not rely on the agreement as a bar to Y.'s claim. Y. having brought ejectment on his mortgage, M.'s bill to stay it, and to have the agreement and subsequent purchase by Y. construed into a satisfaction of the mortgage debt, was dismissed with costs. *McKenzie* v. *Yielding*, 11 Gr. 406.

Purchaser — *Payment by — Account of Mortgagor.*]—Where a purchaser of the equity of redemption paid the amount found due to plaintiff, it was held that this was a payment by defendant, or some one on his account, and the final order of foreclosure was set aside. *Reid* v. *Cooper*, 2 Ch. Ch. 90.

See Palmer v. *Winstanley*, 23 C. P. 586, *ante* 1.

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8. *Release of Part of Premises.*

Assignee of Equity in Part—*Non-concurrence in Release of Other Part—Liability to Reconvey—Sale under Power—Sale under Decree—Lien on Unsold Portion—Revival—Consent.*]—Where a mortgagee and mortgagor sold and conveyed part of the mortgaged property, without the concurrence of a person to whom, subsequently to the mortgage, the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee; and the mortgagee covenanted for freedom from incumbrances: — Held, that, the mortgagee having thereby put it out of his power to reconvey the whole of the mortgaged property, he could not call on the owner of the remaining portion for payment of the balance of the mortgage money. This rule does not apply where the sale is under a power contained in the mortgage, or where the mortgage is of chattels, which a mortgagee has a right to sell without any express power. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party. Where the mortgagee's right to claim a lien on the unsold portion has thus been put an end to, it is not revived by his, two years afterwards, obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money. *Gowland* v. *Garbutt*, 13 Gr. 578.

See, also, *Guthrie* v. *Shields*, *ib.* 585 *n.*

——— *Notice—Release of Other Parts.*]—Possession by an adverse claimant is no notice of his interest, to a party parting with the estate. A mortgagor sold one of the mortgaged parcels, and the purchaser went into possession; the mortgagees afterwards, having no notice of the sale, released the other parcels to the mortgagor, retaining the mortgage on the sold parcel; upon which the purchaser of that parcel filed a bill to have it declared that by the release his parcel was discharged from the mortgage:—Held, that he was not entitled to such relief; and that, not having offered to redeem, his bill should be dismissed with costs; but the defendants having prayed a foreclosure in default of payment, a decree to that effect was pronounced. *Beck* v. *Moffatt*, 17 Gr. 601.

Concurrence of Mortgagor — *Recovery of Mortgage Money — Lien.*] — A mortgagor conveyed part of the mortgaged property to a purchaser, the mortgagor covenanting against incumbrances; and the mortgagee subsequently released the part so sold from his mortgage:—Held, that, as the release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the mortgaged property. *Crawford* v. *Armour*, 13 Gr. 576.

Several Mortgages—*Release of Part of Premises by First Mortgagee — Priority.*]—First mortgagees with a power of sale released portions of the mortgaged property to the mortgagor:—Held, that this did not give priority to a subsequent incumbrancer, with respect to the remainder of the property; but might render the first mortgagees responsible to the second for the fair value of the parcels released. *Trust and Loan Co. of Canada* v. *Boulton*, 18 Gr. 234.

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9. *Sale of Equity of Redemption.*

Sheriff's Sale—*Purchase by Executors of Mortgagee—Satisfaction of Debt.*]—A. mortgaged lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one-half of the principal and interest. To an action on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself

and the other plaintiffs, as such executors and devisees:—Held, that the plaintiffs, as devisees of Z., were assignees of the mortgage within 12 Vict. c. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime. 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and semble, that the defendant, instead of setting out the facts, might have pleaded payment in the ordinary form. 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers. 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore, that the second plea (which was demurred to) shewed a good defence. *Woodruff* v. *Mills*, 20 U. C. R. 51.

——— *Release of Mortgagor—Surety—Indemnity.*]—One C. gave a mortgage, on which a covenant by one S. was indorsed as security for the interest. C. having made default, the mortgagees recovered judgment on the mortgage, and under a fi. fa. lands sold C.'s equity of redemption. S. having been called upon under his covenant, his executor sued C., the mortgagor, in this action, for indemnity:—Held, that under the facts as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, nor of defendant's liability to indemnify his surety. *Stewart* v. *Clark*, 13 C. P. 266.

Tax Sale—*Purchase by Mortgagee—Action for Mortgage Money — Redemption.*]—Mortgaged land, the taxes upon which had been allowed to run into arrear was offered for sale by the sheriff, under the wild land assessment law, at which sale the mortgagee became the purchaser, and subsequently obtained the usual conveyance from the sheriff. The mortgagee afterwards instituted proceedings against the mortgagor to enforce payment of the mortgage money and interest, whereupon the mortgagor filed a bill to restrain the action so brought against him, asserting that the sale by the sheriff had the effect of discharging him from all further liability in respect of the mortgage debt. The court, under the circumstances, refused the application, the effect of such purchase by the mortgagee being not greater than that of a final decree of foreclosure, which is opened up by the mortgagee proceeding to enforce payment of the mortgage money; and semble, that after such a sale the mortgagor might have treated the mortgagee as liable to be redeemed, and have filed his bill for that purpose. *Smart* v. *Cattle*, 10 Gr. 59.

10. *Subrogation—Right of.*

The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search:—Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge; and that he was not disentitled to relief because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby. *Brown* v. *McLean*, 18 O. R. 533. See *Abell* v. *Morrison*, 19 O. R. 639; *McLeod* v. *Wadland*, 25 O. R. 118.

In matters of insurance. See INSURANCE, III. 12.

See Jack v. Jack, 12 A. R. 476; *Coursolles* v. *Fookes*, 16 O. R. 691; *Maclennan* v. *Gray*, 16 A. R. 224, 18 S. C. R. 553; *Purdom* v. *Nichol*, 16 O. R. 639, 15 A. R. 244, 15 S. C. R. 610; *Goldie* v. *Bank of Hamilton*, 31 O. R. 142, 27 A. R. 619.

11. *Other Cases.*

Agreement for Release of Equity—*Death of Mortgagor — Infant Heirs.*]—The holder of a mortgage on real estate, and of a judgment recovered against the mortgagor, agreed, after the death of the mortgagor, with his widow and two of the heirs, for the release, on certain terms, of the equity of redemption in the mortgaged premises, and also for the conveyance to him of another portion of the real estate in discharge of the mortgage and judgment debts. On a bill filed to enforce this agreement, it appeared that the other children of the mortgagor, who were infants, were interested in the estate. The court refused the relief prayed, but directed a reference to the master to inquire if it would be more for the advantage of the infants to adopt the agreement, or that a sale of the estate should be made under the decree of the court. *McDougall* v. *Barron*, 9 Gr. 450.

Amount of Payment—*Release—Credit.*]—A mortgagor wrote to his mortgagee stating that a sale had been arranged of a portion of the property for £100, and urging him to release the same for that sum. Subsequently the mortgagee released upon receipt of £50 only:—Held, that the mortgagor was entitled to credit on his mortgage for £100 mentioned in his letter. *Ball* v. *Jarvis*, 10 Gr. 568.

Appropriation of Payments.]—Where a mortgage was to secure advances to be made from time to time, and interest thereon, and there were mutual accounts, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor, who was his clerk:—Held, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged. *Ross* v. *Perrault*, 13 Gr. 206.

Discharge without Consideration—*Gift or Alienation—Attack by Execution Creditor—Parties.*]—S., by arrangement between himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances,

praying that the discharge might be declared void, as being within 13 Eliz. c. 5, under 20 Vict. c. 57 (C.), and for foreclosure or sale, and an order against H. to pay the deficiency:—Held, that the interest of a mortgagee is of a nature to bring it within the statute of Elizabeth, if it can be seized under 20 Vict. or can be compulsorily applied to the payment of the debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute; that the mortgage would have been seizable had it not been discharged; that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received, the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee; that when the mortgage debt is to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled; that the discharge of the mortgage, and the arrangement between H. and S., had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again; and therefore that G. would not have been a proper party. *Bank of Upper Canada* v. *Shickluna*, 10 Gr. 157.

Ejectment—*Proviso as to Possession—Default—Several Mortgages—Estoppel.*]—Defendant, being lessee for years with the right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee, for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff, and to an action of ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default:—Held, that the plaintiff was not estopped, for 1, the second mortgage might take effect by passing an interest; 2, if the plaintiff were estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but 3, semble, that the re-demise in a mortgage cannot operate by estoppel, or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. Quære, whether, although the proviso could form no defence in this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract not to disturb his possession. *James* v. *McGibney*, 24 U. C. R. 155.

Insolvent Mortgagor — *Conveyance by Assignee to Subsequent Mortgagee—Interest — Statute of Limitations.*]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but, notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—Held, on a case stated in the action for the opinion of the court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of s. 19 of the Insolvent Act of 1865 had been complied with; that under that section the subsequent mortgagee, taking over his security, would be primarily bound to pay off the prior incumbrances; and that therefore his payments kept alive the plaintiffs' rights. Judgment in 21 O. R. 571 reversed. *Trust and Loan Co. of Canada* v. *Stevenson*, 20 A. R. 66.

——— *Discharge—Reconveyance of Estate—Fi. fa.—Release of Equity.*] — This court will not order a fi. fa. against an insolvent mortgagor whose estate has, after he has obtained a discharge, been reconveyed to him; although it may be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption. *Smith* v. *Elliott*, 25 Gr. 598.

Money Payment—*Foreign Currency—Equivalent.*]—A mortgage being payable in lawful money of the United States of America, the holder thereof, in seeking to foreclose, is entitled only to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequent at his option. Crawford v. Beard, 14 C. P. 87, approved and followed. *Morrell* v. *Ward*, *Dow* v. *Ward*, 10 Gr. 231.

Outstanding Equity — *Release—Pleading.*]—Declaration for an instalment due by defendant to plaintiff on a mortgage. Equitable plea, that at the time of executing the instrument declared on there was a prior mortgage on the property, which, before this action, had been foreclosed; that the mortgagee in this prior mortgage had agreed to convey and had conveyed to an appointee the estate in the lands upon condition that the surplus value thereof, above the first mortgage, should go towards satisfaction of defendant's mortgage; and that the surplus value thereof was the full amount of the principal and interest of the defendant's mortgage, and thereby in equity defendant was relieved from his covenants:—Held, that the facts shewed an outstanding equity of redemption in defendant; that a release would have to be executed by him, which this court had no power to compel; and therefore the plea was bad. *Brown* v. *Osborne*, 11 C. P. 500.

Parties—*Suit for Reconveyance and Account—Husband of Life Tenant.*]—Where the husband of one of several tenants in common, in order to secure a debt due by another of them, executed a mortgage which conveyed a life estate only; and on default in paying the mortgage money the mortgagee had sued and obtained judgment and execution against all the mortgagors for the debt, and under the execution had sold their reversion, and the mortgage was thereby satisfied, but the purchaser went into possession during the life of the mortgagee:—Held, that the personal representative of the husband was a necessary party to a suit by the mortgagors for a reconveyance of the mortgagee's life estate, and an account of the rents and profits. *Nelson* v. *Robertson*, 1 Gr. 530.

Payment to Mortgagee—*Notice by Registration—Constructive Notice—Pleading—Amendment.*] — See *Gilleland* v. *Wadsworth*, 23 Gr. 547, 1 A. R. 82, *ante* I. 3 (b).

Promissory Notes — *Instalments—Suspension of Remedy.*]—A mortgage was made

for £1,196, payable £200 in four, £200 in eight, and £224 in twelve months, the residue at later periods. The third instalment was paid. For the first and second the mortgagor gave two notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W. his notes for £200 at four months and £200 at eight months from the 1st June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following indorsement was made on the mortgage: "Received from R. B. W. two notes of hand, indorsed by L., for £200 each, to complete the two first payments on the within mortgage." The notes not having been paid:—Held, that the right to recover upon the mortgage was only suspended, and not barred, by taking the notes. *Gibb* v. *Warren*, 7 Gr. 496.

Tender — *Validity of — Condition.*]—A tender of mortgage money, with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to repay the excess, was held, not to have been invalidated by this statement. A tender to the owner of a mortgage (who claimed a larger sum), with a condition that the mortgage, on the sum tendered being accepted, should be given up, was held bad, as being a conditional tender. *Peers* v. *Allen*, 19 Gr. 98.

Trust to Raise Money — *Failure of Trust—Cancellation of Trust Mortgage.*]—A party procured a release of a mortgage from a mortgagee, in order that a mortgage might be made to another party, by way of trust to raise money. The trust was never carried out, the party for whose benefit it was intended having died. His executors then filed a bill to foreclose, and thereupon the mortgagor filed a bill, on the ground that, the trust having failed, the mortgage should be delivered up to be cancelled:—Held, that he was entitled to the relief. *Worthington* v. *Eliot*, *Eliot* v. *Worthington*, 6 L. J. 65.

VIII. Proceedings in Mortgage Actions.

1. *Accounts.*

Amending Accounts after Decree.]—Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed after decree, in the master's office. *Court* v. *Holland*, 4 O. R. 688.

Amount Advanced—*Bill Taken pro Confesso—Mortgagee's Duty.*]—Where a reference is directed to take an account on a mortgage, the parties may shew the real object for which it was made, if not apparent on its face; and when the bill has been taken pro confesso the master must require the mortgagee to shew how the money secured was advanced; and semble, that such a course would be desirable in all cases. *Sterling* v. *Riley*, 9 Gr. 343.

——— *Impeaching Statement in Mortgage —Evidence.*]—A debtor executed a mortgage in favour of his creditors, reciting that he was indebted in a sum named, upon which a suit to foreclose was subsequently instituted. The master, on a reference to take an account of what was due, required the production of the accounts on the footing of which the mortgage debt was created, and the usual four-day order had been issued for non-production:—Held, on a motion to set this order aside, that the parties were primâ facie bound by the amount stated in the mortgage as the true debt, and that the master, in the absence of evidence to impeach this, could not go behind it. *Pollock* v. *Perry*, 5 Gr. 591.

——— *Impeaching Statement in Mortgage —Usury.*]—Where the money advanced on mortgage was less than the sum mentioned as the consideration money, the mortgagor is at liberty, in taking the account in the master's office, to shew the true sum advanced, to reduce his liability, although he has not appeared to or answered the bill. He cannot, however, shew that the contract was usurious. *Penn* v. *Lockwood*, 1 Gr. 547.

——— *Repayments—Agreement to Reborrow—Estoppel.*]—Two years after a mortgage had been in part paid, the mortgagor applied to the mortgagee to reborrow the money, agreeing orally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so reborrowed should be covered as of the original charge created by the mortgage. Some, but not all, of the receipts were returned to the mortgagee, and the money re-advanced to him upon the terms proposed. The master, in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage:—Held, correct, and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. *Inglis* v. *Gilchrist*, 10 Gr. 301.

Amount of Debt—*Indorsement on Bill.*]—On taking the account in foreclosure suits no more can be found due than the amount claimed by the indorsement on the copy of the bill served. *Boyd* v. *Wilson*, 1 Ch. Ch. 258.

——— *Indorsement on Bill — Insurance Premiums Paid after Service.*] — The special indorsement on a bill claimed a certain amount to be due under the mortgage (which contained the usual covenant to insure). After the service of the bill the plaintiffs paid certain premiums of insurance. The court directed notice of settling decree and taking accounts to be served, and the plaintiffs' claim to be allowed on proof of the payments being produced. *English and Scottish Investment Co.* v. *Gray*, 8 P. R. 199.

——— *Just Allowance — Insurance Premiums—Subsequent Account.*]—Under the head of "just allowances," the master may on taking the account of subsequent interest, and taxing subsequent costs on a first or subsequent foreclosure, allow a sum paid for insurance since the last foreclosure, and interest, under a provision of the mortgage, although the decree simply directed him on each successive foreclosure to compute subsequent interest and tax subsequent costs. *Bethune* v. *Calcutt*, 3 Gr. 648.

——— *Master's Report—No Alteration except on Appeal.*]—*See Gordon* v. *Gordon*, 11 O. R. 611, 12 O. R. 593.

——— *Mortgage Impeached by Judgment Creditor—Proof.*]—Where a judgment creditor filed a bill impeaching a mortgage created by the debtor in favour of his brother, a partner in business, and after evidence the usual decree was made:—Held, that the production of the ordinary affidavit by the holder of the mortgage, stating the amount due, was sufficient primâ facie evidence, as in other cases; and that, if the party entitled to redeem desired to reduce the amount claimed, it rested on him to adduce evidence for that purpose. *Elliott* v. *Hunter*, 24 Gr. 430.

——— *Mortgagee with Absolute Deed—Redemption by Execution Creditor—Surplus—Liens—Priorities—Parties.*]—Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee, who held the title under a deed absolute in form, brought into the master's office with his account certain orders signed by the mortgagor, directing him to pay to the parties named in them, any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered:—Held, that such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands, prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lienholders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442.

——— *Payment of Prior Incumbrances—Credit for—Decree.*]—A decree for sale was directed at the suit of a surety of the mortgagor. In taking the accounts it appeared that the mortgagee had paid off several prior incumbrances, and the master allowed him credit for the sum so paid, although no direction to that effect was given by the decree. On appeal by the surety, the master's finding in that respect was affirmed. *Tecter* v. *St. John*, 10 Gr. 85.

——— *Personal Representative of Mortgagee—Affidavit of—Onus.*]—The only evidence before the master, besides what was used at the hearing, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the master's report finding the whole amount due was allowed. Semble, that the onus of proof under such a reference rests upon the holder of the mortgage. *Elliott* v. *Hunter*, 15 Gr. 640.

——— *Proof—Affidavit—Reduction—Onus.*]—Where the usual affidavit proving the mortgage debt is made, the onus of reducing the amount lies on the opposite party. *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Gr. 59.

A decree for redemption was made, which directed an account to be taken of the amount due by the plaintiff, representing the mortgagor, to the defendants. The defendants, on proving their claim in the master's office, produced their mortgages, and filed an affidavit verifying their claim, and stating that $20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages:—Held, that their claim was primâ facie proven, and the onus of reducing the amount of it rested on the plaintiff. *Court* v. *Holland*, *Ex p. Doran*, 8 P. R. 213.

——— *Proof — Affidavit — Production of Books—Inconsistency.*]—To shew the balance due, the party proving the claim, in addition to swearing to the balance, produced certain books, and made affidavit that by these books the balance claimed on the mortgage could be discovered. Neither party asked him any questions in reference to or to explain them; and the master stated that from the books he could not understand the account:—Held, that the oath of the claimant standing unimpeached, though not supported by the partial statement furnished by him, which he offered to make complete, if required, from the books, the master should have acted on it, and allowed the claim. *Hancock* v. *Maulson*, 10 Gr. 483.

Death of Person Bound to Pay.]—Semble, that the account of principal and interest in a foreclosure suit directed to be taken before the decree was drawn up, could not be taken after the death of the party bound to pay, who had died before this was done. But, the point being one of considerable importance to suitors, it was suggested that the opinion of the full court should be taken upon it. *Galbraith* v. *Armstrong*, 1 Ch. Ch. 33.

Incumbrancer—*Attaching Creditor of Mortgagee.*]—A creditor of a mortgagee who has sued out an attaching order against the mortgage debt, is not an incumbrancer, within the terms of G. O. 448, of whose claim the master is to take an account. *Crosbie* v. *Penn*, 26 Gr. 283.

Interest—*Arrears—Statute of Limitations—Dispute Note.*]—See *Wright* v. *Morgan*, 24 Gr. 457, 1 A. R. 613; *Cattanach*, v. *Urquhart*, 6 P. R. 28.

Method of Taking Mortgage Account.]—See *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677, 18 A. R. 347.

Mortgagee in Possession—*Carrying on Business—Improvements—Redemption—Subsequent Charges for Salary and Remuneration—Mingling of Accounts—Report.*]—See *Peck* v. *Custead*, 10 L. J. 302.

Mortgagee's Account after Sale—*Agent's Commission—Approval of Mortgagor—Execution Creditor—Costs of Prior Litigation.*]—The defendants, being mortgagees of land in Ontario, held a collateral mortgage on lands in Kansas. Default occurring, they sold the lands in Ontario, through a land agent, who had acted also under a power of attorney for the mortgagor, who had agreed to a commission being allowed to him for selling. The agent did not, however, actually sell until after the mortgagor's death, when the defendants paid him his commission:—Held, in an action for an account brought by an execution creditor, who had obtained his execution after the power of attorney had been given to the agent, and after the said agreement as to commission, that the commission was a proper item to allow the defendants in their account. After the mortgage on the Kansas lands had been executed,

the mortgagees discovered that the lands comprised in it had been sold for taxes, and that there were also several executions against them, and they incurred expenses in attempting to stay the executions, and set aside the tax sales. The mortgagor had approved of these proceedings being taken:—Held, that these expenses ought to be allowed to the defendants in their accounts, for whatever bound the mortgagor in taking the accounts bound the plaintiff to the same extent. The defendants further incurred expenses in prosecuting unsuccessful litigation arising out of a claim made by them as landlords, under the distress clause in their mortgage, to certain goods of the mortgagor seized by the sheriff under executions against the mortgagor, who did not sanction this litigation:—Held, that this expenditure could not be allowed to the defendants in taking the accounts, but that, as they made a certain sum by this litigation, the costs up to that point should be allowed to them. The general rule is, that a mortgagee is not allowed to add to his mortgage debt the cost of unsuccessful proceedings at law instituted by himself, and not undertaken with the approval of the mortgagor. *Wells* v. *Trust and Loan Co. of Canada*, 9 O. R. 170.

Plea of Payment—*Proof of Mortgage—Interest Overdue—Onus.*]—This action was brought to recover the principal and interest due upon a mortgage, and also upon certain other claims. The interest was alleged to be overdue, and the principal to have become due by virtue of an acceleration clause. The defendant pleaded payment of the interest. A reference was directed, and upon such reference the plaintiff proved his mortgage, and it appeared therein that certain instalments of interest were overdue:—Held, that the plaintiff had made out a primâ facie case, and could not be called on to prove the non-payment of interest. *Markle* v. *Ross*, 13 P. R. 135.

Reference to take Accounts—*Scope of Original Loan—Ultra Vires.*]—On a reference to take accounts in a mortgage case it is not open to the defendants to contend that the original loan was ultra vires; nor can any defence be raised in the master's office which, if allowed, might result in determining that the court had made a nugatory order of reference. *Wiley* v. *Ledyard*, 10 P. R. 182.

——— *Scope of—Validity of Mortgage.*]—The plaintiff, as mortgagee of the defendants by an instrument dated 30th January, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under rule 17, O. J. Act, and default being made, judgment was obtained under rule 78, O. J. Act, referring it to a master to make and take the inquiries and accounts prescribed by G. O. Chy. 441. The master gave certain execution creditors, who had been made parties in his office and proved their claims, priority over the plaintiff, on the ground that the instrument in question was invalid, the terms of s. 85 of the Canada Joint Stock Companies Act of 1877, which requires the sanction of a two-thirds vote of the shareholders, not having been complied with:—Held, that under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors, not having moved against the decree by virtue of which they were made parties, were also bound by it. *McDougall* v. *Lindsay Paper Mill Co.*, 10 P. R. 247.

——— *Scope of—Inquiry as to Sale by Mortgagee.*]—A judgment directed that the master should take the usual accounts for redemption or foreclosure of the mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment:—Held, that the proposed inquiry was not within the scope of the pleadings or the judgment, or of con. rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the master. Bickford v. Grand Junction R. W. Co., 1 S. C. R. at p. 725, McDougall v. Lindsay Paper Mill Co., 10 P. R. 247, and Wiley v. Ledyard, 10 P. R. 182, referred to. *Rowland* v. *Burwell*, 12 P. R. 607.

Rests—*Mortgagee in Possession—Application of Rents—Prior Incumbrances—Acceptance of Payment—Reference back—Procedure—Affidavit.*]—Where the master had taken the account against the mortgagee with rests, and on appeal it appeared that at the date of the mortgage a balance was due to the mortgagor, and that the mortgagee went into possession, part of the arrangement being that he should apply the rents, etc., to the paying off of two prior mortgages, but it was not shewn that they were due when the moneys were received, so that the holder of the incumbrances could have been compelled to accept payment, the court ordered a reference back to the master to ascertain this fact. Where a report was referred back at the instance of defendant, a mortgagee, to ascertain a particular fact, and the master, without being directed so to do, called upon defendant for an affidavit shewing what moneys he had received, &c.: and defendant filed his own affidavit shewing that the moneys with which he was chargeable had been received by him at dates subsequent to what the master had previously found by his report, and which he varied accordingly:—Held, that the master was wrong in thus proceeding. *Williams* v. *Haun*, 10 Gr. 553.

Surety for Mortgagor—*Rights of—Sale — Credit for Proceeds.*] — An agreement was entered into by the lender, borrower, and surety, that a judgment against the surety should "stand as additional or collateral security for the payment of such mortgages to pay and make up any deficiency that might arise or exist, should it at any time become necessary to sell the said farms," &c.:—Held, that the surety was entitled to have an account taken, the property sold, and credit given on his judgment for the amount realized, before he could be called upon to pay anything; and that the surety was not bound in the first instance to pay off the creditor and take an assignment of the mortgages for the purpose of proceeding against his principal, the mortgagor. *Teeter* v. *St. John*, 10 Gr. 85.

See Morrison v. *Nevins*, 5 Gr. 577, *post* 2; *Boulton* v. *Rowland*, 4 O. R. 720, *post* 2; *Morton* v. *Hamilton Provident and Loan Society*, 10 P. R. 636, *post* 2; *Purdy* v. *Parks*, 9 P. R. 424, *post* 2; *Knottinger* v. *Barber*, 1 Ch. Ch. 258, *post* 5 (e); *Bank of British North America* v. *McDonald*, 2 Ch. Ch. 88, *post* 5 (j).

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2. *Costs.*

Account—*Costs of Reference—Unreasonable Dispute by Representative of Mortgagee—Powers of Revising Officer.*]—A reference in a mortgage suit was directed to take accounts and to inquire whether a sale or foreclosure would be more beneficial. There were no incumbrancers. The defendants claimed credit for payments indorsed on the mortgage, which were in the deceased mortgagee's handwriting, but for all of which the defendants did not hold receipts. The plaintiff disputed the payments not covered by the receipts. On revision the taxing officer disallowed the costs of the reference, as the master had found in favour of the defendants' contention:—Held, on appeal, that under G. O. Chy. 312, the revising officer might refer to the papers before the master, and determine from them whether the proceedings were unnecessarily taken, and that so much of the reference as related to the question whether foreclosure or sale was most beneficial ought to be allowed. Held, also, that if the credits indorsed on the mortgage were made by the mortgagee or signed by him, the plaintiff, his executor, ought not to have questioned the amount, and so much of the costs of the reference caused by taking the account should not be allowed. *Purdy* v. *Parks*, 9 P. R. 424.

Amount Involved—*Account of Surplus Proceeds of Mortgage Sale—Scale of Costs.*]—Where a mortgagee sold under a power of sale in his mortgage, and the mortgagor afterwards brought action against him for an account, and payment over to him, of the surplus which he alleged was in the mortgagee's hands, and on taking the account it was found that a balance of $136 was payable to the mortgagor:—Held, that the mortgagees must pay to the mortgagor his full costs of suit. *Boulton* v. *Rowland*, 4 O. R. 720.

———*Account of Surplus Proceeds of mortgage Sale—Scale of Costs—Equitable Claim.*]—Mortgagees, after the exercise of the power of sale in their mortgage, claimed that $182.61 was still due to them, but on an account being taken $20.07 was found due to the mortgagor:—Held, that, laying aside the question of the whole amount of the mortgage money ($6,705), the amount involved was $202.68, and therefore the case was not within rule 515, O. J. Act (C. S. U. C. c. 15, s. 34, s-s 8), and the costs were properly taxed on the higher scale. The claim of a mortgagor against a mortgagee for an account in such a case is not a legal one as for a money demand, but a proper subject for equitable relief. *Morton* v. *Hamilton Provident and Loan Society*, 10 P. R. 636.

———*Jurisdiction of Division Court—High Court Action—Refusal of Costs.*]—The practice of bringing an action, for an amount due on a mortgage within the proper competence of the division court, in the high court, by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceeding in the high court, no costs will be given to the plaintiff. In this case, where the amount claimed under a mortgage was within the proper competence of the division court, but the suit was brought in the high court, and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandecaters* v. *Horton*, 9 O. R. 548.

Disclaimer by Defendant — *Right to Costs.*]—A person interested in an equity of redemption informed the mortgagee before suit that he was willing to release to him his interest in the property. The mortgagee, notwithstanding, made him a defendant to a bill for sale of the mortgaged premises, and he filed an answer setting forth his willingness to release, and that he had before suit informed the plaintiff of such willingness:—Held, that he was entitled to costs. *Waring* v. *Hubbs*, 12 Gr. 227.

Where a defendant, having an interest in the property in question in a foreclosure suit at the time of the filing of the bill, puts in a disclaimer, he will not be entitled to any costs. *Berrie* v. *Macklin*, 1 Ch. Ch. 351.

See Hatt v. *Park*, 6 Gr. 553.

To a bill of foreclosure, an assignee in insolvency filed an answer and disclaimer, admitting the statements of the bill, and alleging that he was willing, and offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to the plaintiff, or to whom he did make it:—Held, that he was not entitled to costs. *Drury* v. *O'Neil*, 15 Gr. 123.

Dismissal of Bill—*Untrue Sworn Answer—Refusal of Costs.*]—The owner of land deposited his title deeds on the 19th May, to have a mortgage thereof prepared, which was accordingly made out and executed on the 30th. The preceding day the mortgagor made a lease, of which the mortgagee had no notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed; but, the mortgagee having in his answer deliberately sworn either to what was untrue, or to what he did not know to be true, the court refused him his costs, although costs were given to the other defendants. *McKay* v. *Davidson*, 13 Gr. 498.

Executors—*Personal Order.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

Infant—*Bill for Partition—Unnecessary Suit — Next Friend.*] — The court will not countenance the unnecessary incurring of costs of filing a bill for the partition and sale of the estate of infants for the purpose of discharging a mortgage thereon, which object could be obtained as effectually in the ordinary way by proceedings being taken at the instance of the mortgagee; and where such a suit was brought in the name of infants, the court on dismissing the bill ordered the costs

of the defendants to be paid by the next friend of the infants. *Carroll* v. *Carroll*, 23 Gr. 438.

Loss of Mortgage Deed.]—After the loss of a mortgage deed, the mortgagor offered to pay the overdue interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults:—Held, that the plaintiffs must bear the expense of proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. *McDonald* v. *Hime*, 15 Gr. 72.

Mortgagee in Possession — *Account—Refusal to Give Statement.*]—A person in possession of land under an agreement in the nature of a Welch mortgage having refused to give any statement of rents received or information as to the amount due on the agreement, a bill was filed by the mortgagor for an account. Although on taking the account a balance was found still due to defendant, the court ordered him to pay the costs. *Morrison* v. *Nevins*, 5 Gr. 577.

Mortgagor's Costs—*Order over against Assignee of Equity.*]—G., the owner of real estate, executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one H., which he transferred to the plaintiff. Afterwards G. mortgaged the same lands to R. and D.; and subsequently assigned the equity of redemption to them, reciting the mortgage to the plaintiff and that to R. and D., but not the intermediate one to H., though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against G. upon his covenants and against his assignees R. and D., as the owners of the equity of redemption and entitled to redeem:—Held, that, under these circumstances, G., having claimed such relief by his answer, was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of R. and D. in not paying the plaintiff, they were also bound to pay G. his costs. *Campbell* v. *Robinson*, 27 Gr. 634.

Receiver — *Petition by Mortgagees for Leave to Proceed.*] — Where actions were brought by mortgagees without the leave of the court for sale of mortgaged premises after appointment of a receiver to receive the rents and profits of such premises, an order was made, upon the petition of the mortgagees, allowing the proceedings in the actions to stand, and allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver. The receiver was served with notice of the presentation of the petition and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged, or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages and the costs of the actions and the petition:—Held, that if the petitioners wished to protect themselves from paying costs they should have proceeded under con. rule 1193 and tendered the receiver $5 with the petition; and this not having been done, and the relief asked in the alternative prayers being such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt. *Gardner* v. *Burgess*, 13 P. R. 250.

Redemption Suit—*Allowance in Subsequent Suit—Estoppel.*]—On proceeding with the reference under the decree pronounced on the hearing, 28 Gr. 356, the master by his report found that there was due to the plaintiff $1,104.99, which included a sum of $171.32 costs incurred in the suit brought by him to redeem:—Held, that the plaintiff was entitled to claim the costs so incurred—that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption, with the concurrence of C., through whom the appellant claimed; and (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as the person under whom they claimed would have been, the proceeding being not in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument; and that therefore the rules as to estoppel by deed applied. *Pierce* v. *Canavan*, 29 Gr. 32.

Taxation of Mortgagee's Costs—*Statute—Retroactivity.*] — 42 Vict. *c.* 20, s. 11 (O.), authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act. *Ferguson* v. *English and Scottish Investment Co.*, 8 P. R. 404.

See Nixon v. *Hunter*, 17 Gr. 96, *post* 5 (i).

See next sub-head.

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3. *Multiplicity of Actions.*

Ejectment—*Stay of—Bill for Sale.*]—A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in chancery against him for a sale:—Held, that, as the mortgagee could, since the Administration of Justice Act, obtain in the chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay* v. *McArthur*, 8 P. R. 321.

Promissory Notes—*Collateral Mortgages—Several Actions — Costs.*] — A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties by several bills upon their respective mortgages, and to sue at law in different actions the same parties on notes held by the plaintiffs, to which the mortgages were collateral:—Held, that only one suit in equity was necessary, as all parties might have been brought before the court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits, and the court would not be deterred from granting the relief by the circumstances of the decree being complicated. There were consent minutes between the parties except as to costs at law and in chancery. The plaintiffs were, however, ordered to pay the costs of the argument before the court, unless they were found to be

included in the matters the subject of the consent minutes. *Merchants Bank* v. *Sparkes*, 28 Gr. 108.

Sale under Power—*Proceedings at Law—Costs.*]—In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of $10 was found in his favour. Plaintiff having made charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him, and certain special matter pleaded by the defendants being found against them:—Held, neither party entitled to costs. *Beatty* v. *O'Connor*, 5 O. R. 747.

——— *Proceedings at Law—Concurrent Proceedings—Ontario Mortgage Act, 1884.*]—The plaintiff gave to the defendant a notice of sale under the power of sale in a certain mortgage, and also began an action against the defendant upon the covenant for payment contained in the same mortgage. The notice of sale was dated 2nd May, the writ was issued on the 3rd May, and both were served on the defendant on the 3rd May. No order was obtained permitting the action to be commenced. Upon motion to set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. c. 16:—Held, that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute to fulfil the very words of it, that one of the acts should be prior to the other. Service of writ set aside with costs. *Perry* v. *Perry*, 10 P. R. 275.

See In re Flint and Jellett, 8 P. R. 361; *Beatty* v. *O'Connor*, 5 O. R. 731; *Smith* v. *Brown*, 20 O. R. 165.

——— *Proceedings at Law—Second Mortgagee — Action for Surplus — Bill for Sale.*]—Where a bill is filed to enforce a sale of mortgaged premises, the court, under the Administration of Justice Act, will, in addition to the relief formerly given, grant an order for immediate payment, on which a writ of fi. fa. may at once issue; and will also order possession to be given to the mortgagee, charging him with an occupation rent. And where a mortgagee was suing at law on the covenant, and in ejectment, and was also proceeding on a power of sale in the mortgage, the court refused to interfere, as complete justice could be done in the court of law. And, in like manner, where an action had been brought by a second mortgagee to recover a surplus of purchase money, after payment of the first mortgagee, the court refused to restrain such action at the instance of the mortgagor, although it was sworn that the second mortgage had been obtained by fraud and undue influence. *Imperial L. and I. Co.* v. *Boulton*, 22 Gr. 121.

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4. *Payment or Redemption.*

(a) *Place of Payment.*

Attendance of Mortgagee.]—The mortgagee need not remain at the place appointed by the master's report during all the time limited for payment of the mortgage money; his attendance so early as to allow a reasonable time for payment before the expiration of the hour named will suffice. *Saunderson* v. *Caston*, 2 Gr. 436.

Change of Place.]—An order granted changing place for paying mortgage money. *Jones* v. *Bailey*, 1 Gr. 353.

——— *New Day — Service of Order.*]—Where mortgage money was ordered to be paid into an agency of a bank, and before the day appointed the agency was closed:—Held, on a motion to substitute another bank, that a new day for payment must be fixed, and the order served. *King* v. *Connor*, 1 Ch. Ch. 274.

(b) *Service of Order—Dispensing with.*

Service of an order appointing a new day for payment will be dispensed with where the mortgagor is an absconding defendant, against whom the bill has been taken pro confesso after service by publication. *Ellwood* v. *Scott*, 1 Ch. Ch. 190.

On an application for an order appointing a new day for payment, it was asked that service of the order should be dispensed with, defendant being out of the jurisdiction; but the court declined to treat an affidavit of the plaintiff as evidence of the fact, and directed the order to be served if possible. *Adams* v. *Eamer*, 1 Ch. Ch. 260.

(c) *Time for Payment—Extending.*

Time enlarged for payment of mortgage money, on affidavit that defendant had sold the mortgaged premises for £300, the mortgage money being £250, and that he expected to receive payment in full in two or three months. *Ford* v. *Steeples*, 1 O. S. 282.

A motion to enlarge the time appointed for payment of mortgage money must be made in chambers. On the motion being made there, on an affidavit of defendants' solicitor, stating his belief that defendants had exerted themselves, and were still endeavouring to raise the money, and that the property was worth much more than the debt, the motion was refused with costs. *Anonymous*, 4 Gr. 61.

In opposing such a motion the mortgagee swore that in consequence of non-payment he had been obliged to raise money to meet his liabilities at a rate much beyond that payable under the mortgage. On granting the extension, the mortgagor was required to pay such a sum as would cover the interest payable by the mortgagee. *Howard* v. *Macara*, 1 Ch. Ch. 27.

Where through default of payment of mortgage the mortgagee had to raise money by security on the land, and great delay took place, the secretary refused to set aside a final order, and extend the time for payment. *Waddell* v. *McColl*, 2 Ch. Ch. 58.

A Judge in chambers, though not as a matter of right, extended the time for payment of mortgage money where the mortgage was for purchase money and the vendor had made a prior mortgage on the property, which he had not paid off according to his covenant for title, and it appeared that the existence of the first

mortgage prevented the plaintiff from raising money to pay off the second. *G.* v. *V.*, 2 Ch. Ch. 33.

The time for payment was extended where it was shewn that defendant was hampered and hindered in selling or raising money on the lands, in consequence of an advertisement signed and circulated by the plaintiff's solicitors; and the motion was granted without costs to the plaintiff. *Gilmour* v. *Myers*, 2 Ch. Ch. 179.

Where the day to pay money reported due on a mortgage was past, the court allowed the mortgagor six months' further time to redeem, on condition of paying the costs of the motion, and interest on the whole sum found due, it appearing that the security was good, and the mortgagor in a fair way to raise money. *Street* v. *O'Reilley*, 2 Ch. Ch. 270.

Six months' further time was given for payment, on an application made the day before the money was due, on payment of interest on principal, and interest due, and the costs of the application, when it was shewn that the property would be greatly enhanced in value in the meantime by the construction of a contemplated railway. *Cameron* v. *Cameron*, 2 Ch. Ch. 375.

Where there was delay on the mortgagor's part, but he shewed a reasonable prospect of being able to pay in a few months, the time was extended, the principal and interest were directed to be capitalized, and interest on the whole paid, and the costs of the application to be paid in a week. *Cahuac* v. *Durie*, 2 Ch. Ch. 394.

See, also, IV. 5.

(d) *Time for Payment—Other Cases.*

Mistake—*New Day.*]—Where the master's report directing the payment on a day being six months from the date, is not dated, and the decree gives six calendar months, a new day must be appointed for payment. *Scott* v. *McKeown*, 1 Ch. Ch. 186.

——— *Report—New Day—Postponement of Sale.*]—After the advertisement of sale, it was discovered that the report had omitted to include two items of interest. The court held that there was no necessity for appointing a new day for payment, and referred it to the master to take a fresh account of plaintiff's claim, and to amend the report; and leave was given to fix a new upset price and to postpone the sale if necessary. *Bessey* v. *Graham*, 9 L. J. 82.

Redemption by Subsequent Incumbrancers.]—Where the master appointed a time for all the subsequent incumbrancers who proved before him to redeem the plaintiff, one of whom at the time appointed paid the amount and took the assignment:—Held, that the incumbrancers who could not redeem were entitled to three months' further time before the co-defendant could obtain a final foreclosure against them. *Ardagh* v. *Wilson*, 2 Ch. Ch. 70.

See also *S. C.*, 1 Ch. Ch. 389.

Several Owners of Equity—*One Day.*]—Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption. *Hill* v. *Forsyth*, 7 Gr. 461.

Sunday.]—Where the day appointed by the report for payment of the fund due fell on a Sunday, the court refused a final order of foreclosure. *Holcumb* v. *Leach*, 3 Gr. 449.

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5. *Practice (Generally).*

(a) *Adding Parties in Master's Office.*

Execution Creditors.]—A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding in the master's office, it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency:—Held, that it was proper to add such creditors as parties in his office. *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593.

Husband and Wife—*Separate Claim—Notice.*]—G. H., and H. D., his wife, incumbrancers, were made parties in the master's office, and not appearing on the day named in notice A.:—Held, that an order in chambers must be obtained giving the wife liberty to come in and prove her claim separate and apart from her husband. The order in chambers was afterwards obtained. Service of a fresh notice A. dispensed with. *Marshall* v. *Widder*, 3 C. L. J. 24.

Service of Decree.]—In proceeding under the orders of February, 1856, to make incumbrancers parties in the cause, the plaintiff must serve the incumbrancers with office copies of the decree, duly stamped. *Elliott* v. *Helliwell*, *Feehan* v. *Hayes*, 1 Ch. Ch. 6.

(b) *Answer.*

Bill Taken pro Confesso—*Leave to Come in — Discretion — Appeal.*]—After a foreclosure suit had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in chambers allowed the personal representative of a deceased party to the cause, who had purchased from the mortgagor, and against whom the bill had been taken pro confesso, to put in an answer setting up what in the opinion of the Judge was a meritorious defence. Quære, whether this was not a matter of discretion for the Judge, and therefore not the subject of appeal. *Anonymous*, 12 Gr. 51.

Husband and Wife.]—Husband and wife being defendants to a suit of foreclosure in respect of property belonging to the wife, the husband put in an answer alone, and the plaintiff moved to take the answer off the files for irregularity, and to take the bill pro confesso against the husband, which was refused with costs. *Elliott* v. *Hunter*, 1 Ch. Ch. 158.

It is not necessary that the bill should be taken pro confesso against a husband before an order to answer separately can be obtained against his wife; it is sufficient that the time

for the joint answer shall have elapsed. In a foreclosure suit to which a married woman is a defendant, it is not necessary that the bill be taken pro confesso against either husband or wife; the proper practice is, when the time for answering by both has elapsed, to apply in chambers for a direction to draw up the decree on præcipe. *Walker* v. *Tyler*, 1 Ch. Ch. 189.

The fact that a married woman is a defendant to a foreclosure suit (the time for her separate answer having elapsed) does not render it necessary to apply to a Judge for a direction to the registrar to draw up the decree on præcipe, as the registrar has power to do so without any direction. *Macfie* v. *McDougall*, 1 Ch. Ch. 259.

An order to take a bill pro confesso against a married woman is unnecessary. *Hare* v. *Smart*, 1 Ch. Ch. 316.

Leave to File after Decree—*Default—Rescission of Order.*]—After decree in a foreclosure suit, defendant applied for leave to answer, which was ordered on his paying the costs, and answering in two weeks, in default the decree to remain in force. No action having been taken under this order for several weeks, an order to discharge it with costs was made, although the order already drawn up declared that under the circumstances which had occurred the decree should remain in force. *Williams* v. *Atkinson*, 1 Ch. Ch. 34.

(c) *Appearance.*

Default—*Noting Pleadings Closed.*]—By analogy to rule 393, where, in a mortgage action for foreclosure or sale, some of the defendants do not appear to the writ of summons, and others do appear, against whom judgment cannot then be obtained, the officer may note the pleadings closed as against the former, and the action may be brought on for judgment against them without further notice to them. *Morse* v. *Lamb*, 15 P. R. 9.

Disputing Amount Claimed — *Judgment.*]—In a mortgage action for payment, foreclosure, &c., the defendant entered an appearance in which she stated that she did not require the delivery of a statement of claim, and added: "Take notice that the defendant disputes the amount claimed by the plaintiff:"—Held, that the record was then complete, and that a statement of claim was unnecessary and irregular. Peel v. White, 11 P. R. 177, approved and followed. Held, also, that the case was not within rule 718, and the plaintiff could not obtain a judgment on præcipe. Upon motion to the court upon the record as contained in the writ of summons and the appearance, an order was made under rules 551 and 753, directing a reference to take the mortgage account, and directing that if the referee should find any amount due to the plaintiff, the plaintiff should have judgment according to the writ with costs. *Mahoney* v. *Horkins*, 14 P. R. 117.

Judgment.] — Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in rule 718, enters an appearance in which he disputes the amount, judgment cannot be entered on præcipe; a motion to the court becomes necessary, and the defendant so appearing must pay the additional costs of it. Semble, in such a case, that where there are several defendants, there should be only one judgment against all. *Rice* v. *Kinghorn*, 17 P. R. 1.

(d) *Dispute Note.*

Correctness of Account.]—Under a note disputing the amount of the plaintiff's claim filed in a mortgage suit questions as to the correctness of the account alone can be entered into. *Cattanach* v. *Urquhart*, 6 P. R. 28. See *Wright* v. *Morgan*, 24 Gr. 457, 1 A. R. 613, *post* XII. 11 (b).

See also cases under (c).

(e) *Notice.*

Notice of Credit—*Change in Account—Day for Payment.*]—Where the account is changed in a foreclosure suit after the master's report, and a notice of credit is given under the order of 29th June, 1861, such notice should be given before the day appointed for payment. *Knottinger* v. *Barber*, 1 Ch. Ch. 258.

Notice to Mortgagee of Tenant in Common—*Payment into Court—Interest.*]—Where lands incumbered by a mortgage are sold in a partition suit, a mortgagee of the interest of a tenant in common, though a party to the suit, is entitled to notice of the payment into court of the money out of which his claim is to be satisfied; and where the rate of interest reserved in the mortgage is more than the legal rate, it is incumbent on the mortgagor to see that such notice is given, in order to protect him from liability to such higher rate. *McDermid* v. *McDermid*, 15 C. L. J. 84.

Notice to Mortgagor—*Bill Taken pro Confesso.*] — Under the orders of February, 1858, relative to foreclosure suits, when the bill is taken pro confesso against the mortgagor, it is not necessary to serve him with the notice set forth in schedule B. to said orders. *Baby* v. *Woodbridge*, *Murney* v. *McLellan*, 5 L. J. 67.

As a general rule, notice of the proceedings in the master's office should be served upon a mortgagor against whom the bill has been taken pro confesso, whenever the plaintiff proves a claim in addition to that alleged in the bill. *McCormick* v. *McCormick*, 6 P. R. 208.

(f) *Reference.*

Incumbrancers not Named in Bill.]—Where the mortgagor is the only defendant, and an immediate decree is taken against him, by consent, without any reference or day of payment, a reference cannot be directed as to other incumbrancers not named in the bill. *Taylor* v. *Ward*, 13 Gr. 590.

Incumbrancers—*Search for Registered Judgments.*]—On proceeding in the master's office, upon a reference as to incumbrances in

foreclosure cases, it is not necessary to search in the office of any deputy-registrar of the court to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed. *Grainger* v. *Grainger*, 1 Ch. Ch. 241.

New Defence at Trial—*Leave to Establish before Master.*]—The plaintiffs filed a bill of foreclosure. Defendants set up that they were absolute owners by virtue of a tax sale and the proceedings in a foreclosure suit. Both defences failed: and the defendants claiming at the bar that the plaintiffs should redeem the prior mortgage, the court granted a reference in such terms as would enable the defendants to establish that claim, if well founded, in the master's office. *Jones* v. *Bank of Upper Canada*, 13 Gr. 201.

Summary Order — *Married Woman Defendant.*]—Where a mortgage was created by husband and wife upon lands of the wife, and the mortgagee, together with the husband, joined in a conveyance of all their interests to a purchaser, the court in a foreclosure suit refused an immediate reference under the orders of 1853, and directed the cause to be brought to a hearing in the regular way. *Wallis* v. *Burton*, 5 Gr. 352.

(g) *Revivor.*

Death of Plaintiff—*Application by Subsequent Incumbrancer.*]—In a suit for sale of mortgaged property, an incumbrancer had proved a claim. The plaintiff (the mortgagee), who had been paid in full, having died:—Held, on an application by such subsequent incumbrancer for the usual order for redemption and foreclosure after an abortive sale, that it was unnecessary to revive the suit. *Coulson* v. *Sheehey*, 1 Ch. Ch. 216.

——— *Devisee.*]—Where a sole plaintiff in a foreclosure suit dies after decree, his devisee is entitled, on præcipe, to the common order to revive. *Geddes* v. *Allan*, 1 Ch. Ch. 336.

(h) *Service.*

Of Bill — *Allowance—Hearing pro Confesso.*]—In mortgage suits, where the bill has not been personally served, it is not the practice to move for allowance of service. An order pro confesso must be taken out, and the cause set down and heard pro confesso. The decree in such cases is made in court, not upon præcipe. *Glass* v. *Moore*, 2 Ch. Ch. 327.

Of Writ — *Infants—Personal Service.*]—In a mortgage action, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession. *Sparks* v. *Purdy*, 15 P. R. 1.

(i) *Stay of Proceedings.*

Offer to Pay Costs when Taxed—*Effect of.*]—A mortgagor who desires to stay an action brought against him by the mortgagee, cannot insist on the mortgagee's taxing his costs and staying the suit meanwhile, on the promise of the mortgagor to pay the amount when taxed. Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the master should tax, it was held that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer. *Nixon* v. *Hunter*, 17 Gr. 96.

Payment of Instalments.]—After payment of what is due upon a mortgage payable by instalments, pursuant to the orders of 1853, it is irregular to take any further proceeding in the cause until another instalment falls due. *Carroll* v. *Hopkins*, 4 Gr. 431.

Payment of Interest and Costs.]—See *Wilson* v. *Campbell*, 15 P. R. 254; *Tylee* v. *Hinton*, 3 A. R. 53; *S. C.*, 7 P. R. 190; *Gemmel* v. *Burn*, 7 P. R. 381.

(j) *Other Matters of Practice.*

Absent Defendant — *Decree.*] — When proceedings are taken against an absent defendant, a decree cannot be obtained on præcipe. *McMichael* v. *Thomas*, 14 Gr. 249.

Agreement to Postpone Incumbrance —*Evidence of—Dismissal of Bill.*]—In a suit by a prior against a mesne incumbrancer, on the argument of the cause, by consent an affidavit was read which stated an agreement on the part of the prior incumbrancer to be postponed to the latter; when the court gave liberty to the plaintiff to cross-examine the deponent upon statements contained in his affidavit, which permission not being acted upon by the plaintiff, his bill was dismissed with costs. *Miller* v. *Start*, 10 Gr. 23.

Amending Writ of Summons after Judgment.]—Under the liberal powers of amendment now given by rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment. And where the plaintiff by mistake omitted from the description of the lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

Appeal—*Additional Security.*]—C. S. U. C. c. 13, s. 16, s.-s. 4, as to giving additional security pending appeal, does not apply to mortgage cases. *Bank of Upper Canada* v. *Pottroff*, 8 L. J. 328.

——— *Master's Report—Delay—Leave.*]—See *Rowe* v. *Wert*, 7 P. R. 252.

Bill of Complaint—*Personal Representative of Mortgagee—Averment.*]—A bill to enforce payment of a mortgage after the death

of the mortgagee, where his estate remains interested therein, must be filed by the executor or other personal representative; his widow (as such) has no right to file such a bill. Where a bill stated that "H., the widow of the said C. (the mortgagee), and the person entitled by law to receive the moneys secured by said mortgage, exhibited her bill of complaint:"—Held, bad, on demurrer, as not shewing with sufficient distinctness how she was entitled. *Garrett* v. *Saunders*, 23 Gr. 566.

Decree on Praecipe.]—Since the passing of the order (435) of 20th December, 1865, the registrar has the power of issuing any decree on praecipe in mortgage cases that the court would, previously to that order, have made upon a hearing pro confesso. *Kirkpatrick* v. *Howell*, 22 Gr. 94.

See also *Buell* v. *Towns*, *ib.* 95.

Disclaimer — *Costs.*] — See *Waring* v. *Hubbs*, 12 Gr. 227; *Berrie* v. *Macklin*, 1 Ch. Ch. 351; *Drury* v. *O'Neil*, 15 Gr. 123, *ante* 2.

Infant—*Heir of Mortgagee—Foreclosure — Conveyance by Infant — Petition — Intituling.*]—On an application by the executor of a mortgagee, for the infant heir of a mortgagee to convey after the executor has obtained a final order for foreclosure, the petition and affidavit should be intituled, not in the cause, but in the matter of the infant. Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises, the infant heir is a person seised upon trust, within the meaning of the English statutes 11 Geo. IV. and 1 Wm. IV. c. 10, s. 6, and may be ordered on petition, without suit, to convey the estate to the executor, or to a purchaser from the executor. In such a case, however, the court will not make the order, unless it appear that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a reference as to this will be directed. *Re Hodges*, 1 Gr. 285.

Issue between Defendants—*Ownership of Equity.*]—A mortgagee having filed a bill to foreclose against two rival claimants of the equity of redemption, the court directed the usual redemption by, and conveyance to, the person primâ facie entitled to the equity, with a right to the other claimant, at any time before the day appointed for payment, to shew himself to be entitled. *Rumsey* v. *Thompson*, 8 Gr. 372.

——— *Ownership of Equity—Determination of.*]—In a foreclosure suit a question was raised as to whether the equity of redemption in the principal portion of the mortgaged premises was in certain defendants against whom the bill had been taken pro confesso, and who did not appear at the hearing, or in the other defendants, some of whom were infants. The court refused to decide this at the hearing, at the instance of the defendants who appeared. *Robinson* v. *Dobson*, 11 Gr. 357.

Joinder of Causes of Action—*Counterclaim.*]—A counterclaim for the recovery of land is an action for the recovery of land, within rule 341 as to joinder of causes of action. Compton v. Preston, 21 Ch. D. 138, followed. And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in rule 341 (a). And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession:—Held, that if leave were necessary, it was a proper case for granting it, the rights being correlative. *Hunter* v. *Stark*, 17 P. R. 4..

Judgment Creditor—*Overpayment—Refund—Costs.*]—Where a judgment creditor in a mortgage suit proved for too much, and was paid in full, the mortgagor not appearing in the master's office, an application some months afterwards to have the amount refunded was allowed with costs. *Bank of British North America.* v. *McDonald*, 2 Ch. Ch. 88.

——— *Sale under Execution—Injunction—Foreclosure Decree—Costs.*]—The solicitor of a mortgagee in a suit for foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises. The decree so pronounced was subsequently set aside, and a decree nisi directed to be drawn up directing, inter alia, a sale of the mortgaged premises, and that all judgment creditors should be served with the decree and made parties to the suit. Notwithstanding this, however, the solicitor, who was also judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgaged premises under execution. The court restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application. *Goodwin* v. *Williams*, 5 Gr. 178.

Lunatic—*Judgment against — Forum.*]—Held, that the term "adult," in G. O. Chy. 645 does not include a lunatic or person of unsound mind; and therefore that a judgment against a lunatic could not be obtained in chambers under G. O. Chy. 434. *Warnock* v. *Pricur*, 12 P. R. 264.

Order for Examination—*Default of Attendance—Motion to Commit—Service.*]—A motion to commit defendant or take the bill pro confesso for non-attendance of defendant for examination pursuant to a special order, was refused, where the order had not been previously served. *McAvilla* v. *McAvilla*, 12 C. L. J. 120.

Order for Immediate Payment and Possession.]—See *Imperial L. and I. Co.* v. *Boulton*, 22 Gr. 121.

Subsequent Incumbrancer — *Foreclosure—Leave to Come in—Terms.*]—An incumbrancer, who had been foreclosed by the master's report, was admitted to prove on explaining his neglect to come in and undertaking to rank after a puisne incumbrancer who had already proved his claim. *Becher* v. *Webb*, 7 P. R. 445.

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6. *Other Cases.*

Evidence — *Contradicting Answer—Parties.*] — Evidence taken by the plaintiff in an action for foreclosure to contradict statements made in the answer is admissible, though not put in issue by the bill. Evidence not read in the cause cannot be made use of by the defendant to shew that the suit is

defective for want of parties; such defect must be apparent from the pleadings and evidence. *Schram* v. *Armstrong*, 1 O. S. 327.

——— *Amount Due — Representative of Mortgagee.*] — When evidence affecting the amount represented as due by the second mortgage is taken in the absence of the personal representative of such second mortgagee (deceased) it cannot be read against the equitable holder of such mortgage, although such equitable holder was a party to the suit when the evidence was taken, and cross-examined the co-defendant whose evidence affected the mortgage. *Grimshawe* v. *Parks*, 6 L. J. 142.

Evidence of Mortgagor—*Amount Due on Prior Mortgage.*]—A party foreclosing subject to a prior mortgage cannot call the common mortgagor, if he has the equity of redemption, to give evidence as to the amount due upon the prior mortgage. *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Gr. 59.

Judgment Creditor—*Fraudulent Conveyance—Prior Mortgage.*]—In a suit by a judgment creditor to set aside a fraudulent settlement and to realize his judgment, praying a sale of the property on default in payment, if the sale should prove abortive:—Semble, that the usual order for redemption, or in default foreclosure will be granted; at all events it would be so if the judgment debt was subject to a prior mortgage which the judgment creditor would be entitled to redeem. *Commercial Bank* v. *Cooke*, 1 Ch. Ch. 205.

Limitation of Actions—*Foreclosure Suit —Recovery of Money—Acknowledgment.*]—A suit for foreclosure or for the sale of mortgaged premises in default of payment is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon land, within s. 24 of C. S. U. C. c. 88. Where, therefore, a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever lent to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was held sufficient to take the case out of the statute. *Barwick* v. *Barwick*, 21 Gr. 39.

Loss of Mortgage Deed—*Evidence of—Indemnity.*]—Where a mortgagee loses the mortgage, he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand of third persons, by deposit of the deed or otherwise, to the money or any part thereof *McDonald* v. *Hime*, 15 Gr. 72.

Purchase Money—*Mortgage to Secure—Failure of Title.*]—It is no defence to a bill for foreclosure that the mortgage was given to secure the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title. *Cockenour* v. *Bullock*, 12 Gr. 138.

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

Receiver—*Appointment of—Leave to Proceed with Mortgage Action—Right of Mortgagee to Rents—Commencement of.*]—In an action by cestuis que trust against executors and trustees of a certain will, a decree had been made for the general administration of the testator's estate, real and personal, a portion of the real estate being at the time under mortgage made by the executors. The conduct of the proceedings having been given to certain creditors, a receiver was, at their instance, appointed to collect the rents of the real estate. Afterwards the mortgagees commenced an action upon their mortgage (see 8 O. R. 539), making the executors and trustees and the tenants of the mortgaged property defendants, asking payment, possession, and foreclosure, when, finding the receiver in possession, they, after some delay, applied for and obtained leave to proceed with their action, a defence, however, being made thereto, at the instance of the receiver, contesting the validity of the mortgage. The mortgagees, having succeeded in establishing their mortgage and their right to possession, then applied to be added as parties to the reference in the administration proceedings, claiming to be entitled to all rents collected by the receiver between the commencement of the action on their mortgage, and their obtaining possession from him. They were accordingly added as parties in the master's office, and a report was made finding them entitled to the rents as claimed:—Held, that the mortgagees were only entitled to the rents from the date of the application for the order allowing them to proceed with their action, notwithstanding the appointment of the receiver. *Wallace* v. *Wallace*, 11 O. R. 574.

Redemption by Mortgagor — *Foreclosure Suit—Vesting Order.*]—A mortgagor, who has in the course of a foreclosure suit duly redeemed the property, is not obliged to accept a simple discharge of the mortgage, but may, at his option, have a vesting order of the property. *Ellis* v. *Ellis*, 1 Ch. Ch. 257.

Redemption by Subsequent Incumbrancers — *Time for—Registry Laws.*]—A mortgagee, whose mortgage was made before the registry laws required registration to insure priority, filed a bill to foreclose. The mortgage had not been registered:—Held, that subsequent mortgagees were bound to redeem him, his application being to fix a time for them to redeem; and that purchase for valuable consideration without notice could not be pleaded against him. *Vansickler* v. *Pettit*, 5 L. J. 41, 164.

Tax Sale—*Purchase by Mortgagee—Undue Practices—Bill to Set aside—Dismissal—Leave to Impeach on other Grounds.*]—It appearing on the evidence, though not mentioned in the pleadings, that the purchaser of land at a sheriff's sale for taxes was a mortgagee of the property:—Held, in dismissing a bill filed to set aside the purchase on the ground of undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that he was disqualified as mortgagee to effect the purchase

for his own benefit. *Schofield* v. *Dickenson*, 10 Gr. 226.

Waste—*Injunction after Decree.*]—After a decree for foreclosure, if the mortgagor in possession commits waste, the court will enjoin him, though an injunction may not have been prayed for in the bill. *Cawthra* v. *McGuire*, 5 L. J. 142.

IX. Railway Lands.

Compensation — *Rights of Mortgagee—Appointment of Arbitrator.*] — The words "opposite party" in s. 150 of the Dominion Railway Act, 51 Vict. c. 29, s. 150, must be read so as to include both mortgagor and mortgagee, and both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for the railway. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Burke*, 27 O. R. 690.

——— *Rights of Mortgagee—Foreclosure — Parties.*] — A railway company took possession of certain lands under warrant of the county court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company:—Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award. Sub-section 25 of s. 20, R. S. O. 1887 c. 170, applies only where the compensation has been actually ascertained and paid into court. *Scottish American Investment Co.* v. *Prittie*, 20 A. R. 398.

——— *Rights of Mortgagee—Redemption.*]—An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by the defendant railway company for the purpose of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

——— *Rights of Mortgagee — Separate Ascertainment.*] — A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who, under s. 13 of R. S. O. 1887 c. 170, are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption, leaving the mortgagee entitled to have his compensation for lands taken separately ascertained. *In re Toronto Belt Line R. W. Co.*, 26 O. R. 413.

Notice of Expropriation Proceedings —*Right of Mortgagor to.*]—A mortgagor who has conveyed his equity of redemption subject to the payment of the mortgage is not entitled to notice of expropriation proceedings taken by a railway company with regard to the mortgaged lands; and the absence of such notice does not constitute any defence to an action brought against him by the mortgagee on a covenant to pay the mortgage money. *Farr* v. *Howell*, 31 O. R. 693.

X. Redemption.

1. *Generally—Right to Redeem.*

Annuitant — *Priorities.*]—The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:—Held, on re-hearing, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 17 Gr. 251, 16 Gr. 239.

Assignee of Equity of Redemption—*Joint Owners—Execution—Sale—Purchase by Mortgagee.*]—Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:—Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgaged estate, was bound to account for the rents and profits. *Cronn* v. *Chamberlin*, 27 Gr. 551.

Assignee of Part of Equity of Redemption — *Mortgagee — Indemnity — Terms.*]—L. and S. were joint owners of certain lands, and L. had created a mortgage on a part of his undivided interest in favour of R. With a view of effecting a partition, L. conveyed his interest to his co-tenant S., who thereupon reconveyed to L. a certain defined portion; and in order to protect S. against the mortgage outstanding in R.'s hands, L. executed back to S. an indemnity mortgage. L. did not pay off R.'s mortgage; and R., having obtained a final decree of foreclosure, sold his interest in the property to S. L., after the partition, had sold a portion of the estate to the plaintiffs, who in respect of their interest had been made parties to the foreclosure suit by R. Subsequently, in an action of ejectment, S. set up title under the indemnity mortgage from L.:—Held, that he had thus let in the plaintiffs to redeem, who were entitled to do so upon paying what S. had paid or was liable to pay to R., and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those S. was ordered to pay the costs. *Read* v. *Smith*, 16 Gr. 52, 14 Gr. 250.

Devisees of Mortgagor — *Assignee of Mortgagee Purchasing at Sheriff's Sale.*]—Upon a fi. fa. against the executors of a mortgagor, a writ against the lands of the testator

was sued out, under which his interest in the mortgaged premises was sold, and afterwards the purchaser obtained a conveyance of the legal estate from the mortgagee, all of which took place after 7 Wm. IV. c. 2:—Held, that the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Gr. 344.

——— *Rights against Co-devisee Purchasing from Mortgagee.*]—Where there were several defendants interested in the equity of redemption, and one purchased several outstanding shares of co-devisees also interested, and so dealt and acted that the other parties interested assumed that he intended to redeem for their mutual benefit, instead of which he arranged with the mortgagee, to suffer foreclosure, and then bought from him:—Held, that he could properly do so for his own sole benefit. *Ruttan* v. *Levisconte*, 2 Ch. Ch. 108.

Execution Creditor — *Rights against Mortgagor and Mortgagee — Priorities — Surety.*]—In a suit to redeem, the plaintiff was a judgment creditor with execution in the hands of the sheriff against the lands of the defendant S., which lands were subject to a mortgage to L., whose executors were also defendants. At the hearing the court declared the plaintiff entitled to the same relief as upon a bill by a puisne incumbrancer against a prior mortgagee and the mortgagor; and that, notwithstanding R. S. O. 1877 c. 49, s. 5, inasmuch as he could not establish his right in the county court in which he had recovered his judgment, so as to obtain as effectual a remedy as that sought in the redemption suit, he might resort to equity to obtain relief. The executors of B. were also liable upon the judgment recovered by the plaintiff, B. having been a defendant in the action, and by their answer set up that they were liable only as sureties for the defendant S. All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of B.'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in Campbell v. Robinson, 27 Gr. 634. *Chamberlin* v. *Sovais*, 28 Gr. 404.

Executor of Mortgagee — *Derivative Mortgage—Fraudulent Acquisition of Equity.*]—In 1856 R. mortgaged certain lands to J. D. C. to secure £550, payable on 1st January, 1863. In 1857 J. D. C. died, having appointed the defendant and another his executors, who duly proved the will. In 1864, after the death of defendant's co-executor, the mortgage was deposited with H. as security for an advance of $401, as set out in McLean v. Hime, 27 C. P. 195, whereby H. was declared entitled to hold the mortgage as collateral security for the said sum. In 1856 R. sold the equity of redemption to Z. In 1877 H., by representing that he controlled the mortgage, procured the executors of Z., for a nominal consideration, to give a conveyance of the equity of redemption to A. B. H. as bare trustee for him; and in 1878 obtained conveyances from other parties interested therein. In 1879 H. sold the equity of redemption to M. for $5,000. In 1880 S. C., a beneficiary under J. D. C.'s will, having made a claim on defendant for her share of the estate, a settlement was effected by defendant agreeing to pay $2,050, and assigning the mortgage to her as collateral security. S. C. commenced foreclosure proceedings thereon, H. and M. being made parties, when a settlement was effected by H. paying S. C. $500, and procuring an assignment of the mortgage to be made to plaintiff as bare trustee for him. The plaintiff commenced proceedings against defendant, claiming the $2,050 secured by the agreement made between S. C. and defendant, and in default of payment foreclosure:—Held, that H. by representing himself to be mortgagee obtained the conveyance of the equity of redemption, and must therefore account to defendant for the amount realized on the sale thereof to M. The plaintiff's claim was therefore dismissed, and judgment entered for the difference between the $5,000 with interest and the $401 with interest, together with the amount payable to S. C. under the agreement. *Wilkins* v. *McLean*, 10 O. R. 58. Reversed 13 A. R. 467, but restored, 14 S. C. R. 22.

Foreign Lands.]—See *ante* V.

Mortgagor—*Compensation for Lands Expropriated—Recovery by Mortgagee—Right to Redeem in Respect of.*]—*Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11, *ante* IX.

——— *Purchase by Mortgagee at Sheriff's Sale—Unpatented Lands.*]—A mortgagee of lands not patented purchased them at sheriff's sale under executions against the mortgagor, to whom the lands had been conveyed at the instance of the execution creditors, in order to enable them to take the lands in execution, during the absence of the mortgagor from the country, and the mortgagee then claimed to hold the lands absolutely:—Held, that the estate was still redeemable. *Aitchison* v. *Coombs*, 6 Gr. 643.

——— *Sale by Mortgagee — Purchase by Agent.*]—L., being the owner of certain property, mortgaged to McL., who sold under the power of sale in the mortgage to G., who attended the sale under instructions from McL., and purchased as his agent. McL. deeded the property to G., and G. reconveyed it to McL. I. was not aware that G. was McL.'s agent. McL., being aware that the sale might not be valid, subsequently bargained with I. for the purchase of two other lots, and made it a condition that the deed should cover the two lots and the mortgaged property, and that I's wife should join in it, which she had not done in the mortgage. McL. swore that the bargain was that he was to get a clear deed of the mortgaged property. I. swore that nothing was said about a clear deed. Before the deed was delivered I. ascertained that G. was McL.'s agent at the sale, and he refused to deliver it, and brought an action for redemption:—Held, that the plaintiff was entitled to redeem. *Ingalls* v. *McLaurin*, 11 O. R. 380.

——— *Time — Notice — Res Judicata.*]—Held, that where the right of redemption stipulated for by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months. There was no chose jugée between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with. *Leger* v. *Fournier*, 14 S. C. R. 314.

Purchaser at Sheriff's Sale—*Reversion—Term.*]—Held, that a sale by the sheriff, under a fi. fa. against lands, of the reversion after a term of 1,000 years had been created by way of mortgage, carries with it the right to redeem the term. *Chisholm* v. *Sheddon*, 3 Gr. 655, 1 Gr. 108, 2 Gr. 178.

Held, that the purchaser at sheriff's sale of a reversion in lands mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit. *Waters* v. *Shade*, 2 Gr. 457.

Second Mortgagee—*Lessee—Covenant.*]—A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—Held, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. *Brewer* v. *Conger*, 27 A. R. 10.

Tenant by the Curtesy—*Heirs of Mortgagor.*]—In an action for redemption and possession against a mortgagee by the tenant by the curtesy and the heirs of a deceased mortgagor, who were infants when possession was taken by the mortgagee, it appeared that the right of the tenant by the curtesy had been barred by the statute as against the mortgagee, but that of the heirs had not:—Held, that the heirs were entitled to redeem, subject to the right of the mortgagee and those claiming under him, to hold possession during the life of the tenant by the curtesy, whose estate had by virtue of the statute become vested in the mortgagee. Proper judgment, where in such circumstances the heirs-at-law take proceedings for redemption of the lands during the life of the tenant by the curtesy. *Anderson* v. *Hanna*, 19 O. R. 58.

Tenant for Years—*Refusal of Mortgagee to Accept—Waiver—Offer of Possession—Costs.*]—The right of a tenant for years to redeem a mortgage is absolute, and the court has no discretion to grant or refuse redemption. Where a tenant for years under a demise made subsequently to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party:—Held, the plaintiff had a right to redeem in the event of the mortgagee refusing to accept him as a tenant. Held, that, although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of $40, yet, inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his right of redemption as such lessee by such offer. After action brought, however, the defendant offered to confirm and adopt the plaintiff's lease, though before action she had refused to do so, and had, indeed, sold the property to a purchaser without making the sale subject to the lease, of which, nevertheless, the purchaser had full notice. *Martin* v. *Miles*, 5 O. R. 404.

Tenant in Common—*Creditor of Mortgagee.*]—Where an undivided interest in land is mortgaged by the owner thereof, a co-owner has no right of redemption. A simple contract creditor of a mortgagee, as such, has no right to redeem. *Nichol* v. *Allenby*, 17 O. R. 275.

Wife of Mortgagor—*Bar of Dower.*]—Plaintiff, being the wife of a person who mortgaged his lands, she joining therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime. A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed. *Casner* v. *Haight*, 6 O. R. 451.

See Peck v. *Custead*, 10 L. J. 302.

See ante IV.

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2. *Bar of Right.*

(a) *Conduct of Parties.*

Assignee of Mortgagor—*Defective Foreclosure—Subsequent Sale—Attornment—Notice.*]—A mortgagor conveyed his equity of redemption in certain lands, together with the absolute estate in other property, and took back a mortgage on the whole for part of the purchase money. The purchaser afterwards transferred to a third party. The mortgagee, with a knowledge of the transfer by the mortgagor, filed a bill of foreclosure against him alone, and having obtained a final decree, conveyed to another, who afterwards died intestate. The person really interested, considering that the foreclosure had the effect of binding his interest, rented the property from the grantee of the mortgagee, and also contracted for the purchase of it from him; but, upon discovering his rights, he filed a bill against the heir-at-law to redeem. The denial of notice was imperfect, and it appeared that what the purchaser paid for the property was just what was due on the mortgage, and less than the fair value. At the hearing the court directed an inquiry as to whether the ancestor had notice, actual or constructive, at the time of his purchase of the title of the defendant or his vendor, as to the sufficiency of the consideration paid, and as to the circumstances generally attending the purchase; reserving further directions and costs. *Hogg* v. *Willis*, 6 Gr. 150.

Heirs of Mortgagor — *Acquiescence of Mortgagor.*]—On a bill to redeem, it appeared that plaintiff's ancestors had executed an absolute conveyance under circumstances which entitled him to redeem, but that he had afterwards acquiesced in the grantee's claim of absolute ownership, and had thenceforward, and for ten years before his death, accepted from such grantee leases and paid him rents, making no claim to any other interest in the property:—Held, that the grantor must be taken to have abandoned his equity, and that his heirs were not entitled to redeem. *Roach* v. *Lundy*, 19 Gr. 243.

Mortgagor—*Possession — Purchaser from Mortgagee — Arrears.*]—The court refused leave to redeem, in 1852, on a mortgage to several executors in 1827, payable in 1832, of property of not greater value than the amount secured, the mortgagees having, in 1833, after the mortgagor's default, sold the property for less than was due on it, and the mortgagor having thereupon given possession to the purchaser, in pursuance of a letter from the act-

ing executor (since deceased) to the mortgagor, informing him of the sale, and requesting him to give the vendee possession, "in which case the executors relinquish all claim against you for the interest in arrear," &c. *Clute* v. *Macaulay*, 4 Gr. 140.

Trustees for Creditors of Mortgagor —*Neglect to Defend Foreclosure.*]—In July, 1859, F., being a member of the firm of R. M. & Co., mortgaged certain lands, the property of the firm, to defendant C. In September, 1860, by the "act and warrant" (under the Imperial Act 19 & 20 Vict. c. 79) of the sheriff deputy of Lanarkshire, all the real and personal estate of R. M. & Co., in Canada as well as in Scotland, became vested in R., under the bankruptcy laws of that country, as trustee; and in August, 1861, the equity of redemption vested in R. and B., as trustees. In June, 1861, C., being ignorant of the proceedings in bankruptcy, filed his bill of foreclosure against F., who took the copy served on him to R.'s solicitor, but no notice was taken of it, and in 1862 a final order of foreclosure was obtained and registered by C., who in 1853 conveyed to defendant G. In 1864 R. and B. filed the present bill of redemption:—Held, that the conduct of the plaintiffs, after service upon F., and notice to R.'s solicitor, disentitled them to redeem. *Robson* v. *Carpenter*, 11 Gr. 293.

(b) *Lapse of Time.*

Foreclosure — *Death of Mortgagee before Final Order—Notice—Purchaser for Value—Irregularity—Solicitor.*]—The owner of real estate created a mortgage, which became absolute for default of payment, before the passing of the Chancery Act, 7 Wm. IV. c. 2. Proceedings were subsequently instituted to foreclose, and in December, 1842, a final foreclosure was pronounced; and the mortgagor continued to reside in the neighbourhood of the property, until January, 1854, when he died, having devised all his real estate to his widow. The mortgaged premises, after passing through several hands, were purchased by the solicitor for the plaintiff in the foreclosure suit. It having been discovered that the mortgagee had died some time before the day appointed for the payment of the money, the widow filed a bill to redeem, but neither the solicitor nor his agent who conducted the suit to foreclose, nor either of the purchasers of the property, were aware of that fact, or of any defect in the proceedings:—Held, by Blake C., that the proceedings after the death of the plaintiff were nullities; that the solicitor must be taken to have had notice thereof; and that the right to redeem had never been foreclosed. Per Spragge, V.C., that the proceedings were merely irregular; that the solicitor was a purchaser for value without notice, and was not bound by the facts within the knowledge of his agent; and that the right to redeem had been extinguished. *Arkell* v. *Wilson*, 5 Gr. 470.

Held, on appeal, that this was a proper case in which to withhold redemption, under the discretion given to the court under s. 11 of the Chancery Act; and that the purchasers could not reasonably be held to have constructive notice of the defect in the proceedings. *S. C.*, 7 Gr. 270.

——— *Defect in Proceedings—Parties—Owner of Equity—Devisee—Innocent Purchaser.*]—In 1835 D., the owner of land, sold and conveyed the same to S. for £310, and a mortgage was executed by the purchaser for the whole of the consideration money. In 1838 S. sold and conveyed his equity of redemption to K. In 1842 the original vendor filed a bill of foreclosure against S., on which a final decree of foreclosure was obtained in August, 1845; but to this suit K., through some oversight, was not made a party. Sixteen months afterwards D. sold the same property to another purchaser, who, in October, 1854, mortgaged to defendant W., and he in September, 1860, obtained a final order of foreclosure by reason of default in payment, and subsequently conveyed to his co-defendant. During the time W. held the land he paid a sum for taxes exceeding the original purchase money; K. never having paid anything on account thereof, or of the money or interest secured by the mortgage from S. to D. (of 1835). In 1876 K. died, and the plaintiff, his heir-at-law and devisee, in June of that year for the first time discovered the conveyance of 1838 from S. to K., and thereupon filed a bill seeking to redeem:—Held, under the circumstances stated, that whether the original transaction between D. and S. was to be looked at as one between mortgagor and mortgagee, or as one between vendor and vendee, the plaintiff was not entitled to relief, and the bill filed by him was, therefore, dismissed with costs: and semble, that S. having been an innocent purchaser at a time when registration was not notice, would have afforded a good ground of defence, if it had been taken by the answer. *Kay* v. *Wilson*, 24 Gr. 212.

Mortgagee in Possession — *Statutory Period—Entry.*]—Held, affirming the judgment in 24 Gr. 212, that there was sufficient evidence of possession having been acquired by the mortgagee more than twenty years before the bill was filed, and that the plaintiff's right to redeem was barred. Held, also, that where actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for twenty years. *Kay* v. *Wilson*, 2 A. R. 133.

——— *Sale by—Bill to Redeem—Adding Vendee as Party—Statutory Period—Costs.*]—A mortgagee took possession of the mortgaged premises in order, it was alleged, to pay himself the balance due to him by reception of rents and profits, and subsequently sold and assigned his interest. A bill to redeem was afterwards filed against the mortgagee, in ignorance of the transfer, and after the lapse of twenty years from the time the mortgagee entered, his vendee was added as a party:—Held, that the vendee was, under the circumstances, entitled to set up the lapse of time as a defence under the statute; and the mortgagee having claimed an amount greatly exceeding the sum actually due, the court, though unable to afford the plaintiff any relief by reason of the defence of the statute, refused the mortgagee his costs. *Dedford* v. *Boulton*, 25 Gr. 561.

Mortgagor in Possession—*Proviso for Redemption — Commencement of Statutory Period—Infancy—Dormant Equities Act.*]—Held, that the Dormant Equities Act does not apply to cases of actual mortgage—that is,

where the proviso for redemption appears on the face of the instrument creating the incumbrance. Such cases are to be dealt with under s. 11 of the original Chancery Act. So long as the mortgagor remains in possession of the mortgaged estate, the twenty years limited for him to redeem does not begin to run, for so long as he holds possession he is entitled to pay or tender the mortgage money and interest, and if in the meantime the mortgagee should take proceedings to dispossess him by ejectment, he could at any time before judgment stay proceedings by paying the amount due into court, with costs. In mortgage, as well as other cases, the disability on account of infancy is to be allowed for in the computation of the time allowed by the statute (C. S. U. C. c. 88) for the bringing of actions. *Hall* v. *Coldwell*, 8 L. J. 93.

——— *No Proviso for Redemption—Statute of Frauds—Statute of Limitations—Dormant Equities Act.*]—On the 16th January, 1831, an absolute conveyance was made in fee to secure a loan, the alleged mortgagor remaining in possession until the spring of 1841. On the 1st March, 1841, the alleged mortgagee wrote to a subsequent mortgagee of the same property, claiming £94 12s. 8d. as due from the mortgagor; and on the 7th and 21st June of the same year he again wrote to the same incumbrancer alleging that he had originally advanced about £60, which with interest then amounted to £90 or £100, and suggesting that the land should be sold for the benefit of the alleged mortgagor, and he kept an account in his books against the alleged mortgagor of principal and interest in respect of the alleged debt up to the 1st January, 1856. The subsequent incumbrancer purchased the mortgagor's equity of redemption. Upon a bill filed by such mesne incumbrancer in February, 1861, claiming a right to redeem the premises against the representatives of the alleged mortgagee, who had died in the meantime:—Held, that the letters written by the mortgagee were sufficient to take the case out of the Statute of Frauds, and that the right of the plaintiff was not barred by the provisions of the Statute of Limitations; that the Act relating to Dormant Equities did not apply to the facts of this case; and that s. 11 of the Chancery Act did not affect the plaintiff's right to redeem. *Malloch* v. *Pinhey*, 9 Gr. 550.

Successive Purchasers—*Improvements.*]—In 1821 the plaintiff mortgaged three properties to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827: the mortgagees being then in great difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, one property for about its value, and gave credit for the amount on the mortgage. This property afterwards passed through several hands, and was bought in 1837 by the defendant, who made considerable improvements on it:—Held, that this property was not redeemable by the mortgagor in 1840. *McLellan* v. *Maitland*, 3 Gr. 164.

In November, 1834, the owner of land conveyed in fee for £159, with a proviso that if the grantor during his life, or his heirs, &c., in one year after his decease, should pay that sum and interest, the conveyance should be void. In August, 1835, the grantor died without having paid anything, and his representatives had paid nothing. Between 1841 and 1845 the grantee offered the heir-at-law of the grantor to reconvey on payment of the principal and interest then due (£225), but he declined, stating that the land was not worth it, and subsequently went to reside in the United States, where he died, having conveyed his interest in the land to M., who died in 1849, without having registered his deed, or made any claim to the property. In 1856 the heir of M., a minor, filed a bill to redeem against the grantee and his vendee, who had been in possession since his purchase in 1851, and had made improvements to the value of about £700. On appeal, the court, reversing the decree below, refused the relief asked. *Stanton* v. *McKinlay*, 1 E. & A. 265.

——— *Improvements—Notice—Expiry of Less than Statutory Period.*]—The principle on which an equity of redemption is founded is relief against forfeiture: and the equity is not to be allowed where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued. Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds; but, for seventeen years before the filing of the bill to redeem, sales and resales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected; some burnt down; new buildings put up; houses built for one purpose altered to suit other purposes; other changes and improvements thereon made, fields and commons being converted into sites for shops, hotels, a bank, and other places of business, and into gardens and yards; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim, and made defendants to the suit, numbered nearly one hundred:—Held, that redemption would be inequitable, and the bill was dismissed with costs. The effect in such a case of 36 Vict. c. 22 (O.), giving a lien for improvements, remarked upon. *Skae* v. *Chapman*, 21 Gr. 534.

Wild Lands — *Statute of Limitations—Possession.*]—In 1831 a mortgage was created by a conveyance, absolute in form, with a bond of defeasance, on several lots of land, one of which was occupied and cultivated by the mortgagor as a farm, the others being wild lands and unoccupied. No attempt was made to disturb such occupation until 1848, when ejectment was brought, and the mortgagee put into possession of the cultivated lands in 1849, but no step was taken to obtain possession of the wild lands, other than the fact that the mortgagee had always from the date of the mortgage paid the wild land taxes thereon, and had also, but not until after 1852, sold some of the lands, the purchasers of which had taken possession of them and had continued therein ever since. On a bill filed to redeem in 1860:—Held, that as to the lands not sold, the Statute of Limitations did not apply to bar the mortgagor of the right to redeem. And as to the lands sold, the court

ordered the mortgagee to account for the purchase money thereof, with interest. *Macdonald* v. *Macdonell*, 2 E. & A. 393.

(c) *Sale by Mortgagee.*

Absolute Conveyance — *Bond to Reconvey — Notice to Purchaser.*] — A security was effected by an absolute conveyance, and a bond to reconvey, but the mortgagee sold and conveyed to other persons, who, the plaintiff alleged, knew the true nature of the title. The only notice was a mere casual conversation in the bar-room of a tavern, fifteen years before the filing of a bill by the mortgagor to redeem. The court refused redemption with costs. *Clarke* v. *Little*, 5 Gr. 363.

——— *Bond to Reconvey—Notice to Purchaser—Account.*]—In 1836 R., being under obligations to S. as accommodation indorser, and being about to leave Canada, conveyed land to S. by an absolute deed. A bond was executed contemporaneously, explaining the transaction and providing for reconveyance on satisfaction to S. of any damages or loss by his liability as indorser. A tenant occupied the premises till 1845, treating R. as landlord and paying the rent to S. as his agent. In 1846 S. sold the premises, the purchaser having no notice of R.'s claim:—Held, on a bill filed by the representative of R. to redeem, that no relief could be granted as against the purchaser, but that the representative of S., he being dead, was bound to account as mortgagee from the time that he went into possession. *Robertson* v. *Scobie*, 10 Gr. 557.

——— *Unregistered Bond—Notice to Purchaser.*]—The owner of land conveyed the same, taking from the grantee a bond or agreement for payment of $30 a year, and the keep of a cow, which was to form a first charge or lien on the land. No part of this consideration was ever paid or performed. Before the bond or agreement was registered, the grantee mortgaged the property to a building society, who subsequently sold for the amount of their claim to a person who had notice of the effect of the bond:—Held, that the purchaser was liable to be redeemed on payment of what should be found due in respect of the mortgage to his vendors. *Waddell* v. *Corbett*, 21 Gr. 384.

Purchase by Mortgagee at Sheriff's Sale—*Unpatented Lands—Sale by Mortgagee to Partner—Notice.*]—The equitable owner of unpatented lands, for which he held a bond for a deed, mortgaged his interest therein, and put the mortgagee in possession of the lands, whereon he and his partner carried on business for some time. Subsequently the mortgagee purchased the lands at sheriff's sale, under an execution against the mortgagor. Upon winding up the partnership, the mortgagee was indebted to his partner in a large sum, in payment of which he accepted a conveyance from the mortgagee of the mortgaged estate, and a bill was filed to redeem, charging him with notice of the nature of the title. In the course of his examination, he stated, "I had heard from J. B. (the mortgagee) that there was such a bond, but I thought in my own mind that the sheriff's deed had killed a good deal of that:"—Held, that he was affected with notice of the mortgagor's title, and therefore liable to be redeemed. *Aitchison* v. *Coombs*, 9 Gr. 643.

3. *Equity of Redemption—Incidents of.*

Annuity—*Covenant to Pay off—Enforcement — Postponement.*] — M., the owner of lands subject to a mortgage in favour of S. and B., and to a charge for an annuity, mortgaged them to S. and B., with covenants for title, right to convey, freedom from incumbrances, and for further assurance. S. and B. took proceedings upon their several mortgages, and, ultimately M. was foreclosed, but the person entitled to the annuity was not made a party to the cause. Subsequently M. became the assignee of the annuity, and instituted proceedings against the defendants, who were purchasers from S. and B. It appeared that the whole of the land subject to the annuity was not covered by the mortgage from M. to S. and B.:—Held, that as to the other portion of the lands covered by the mortgage, M. being bound by the covenant to pay off the annuity, the court would not enforce it in M.'s favour against such portion; but held, that this would not prevent the charge being enforced, the effect being only to postpone the charge of the annuity, as against such portion of the lands, to the mortgage given by M.; and that M. was entitled to redeem in order to make the charge available to this extent. Semble, that if the lands covered by the annuity and the mortgage from M. were identical, the court would not enforce the charge in favour of M. *Matthews* v. *Mears*, 21 Gr. 643.

Bond for Deed—*Several Assignments—Redemption—Parties — Collateral Securities.*] —W. sold land to M., giving a bond for a deed. M. assigned to plaintiffs his interest in this bond, as also certain chattels, in security, but retained possession of the instruments. Subsequently M. assigned absolutely the bond to C., to whom (with notice of the prior security) W. conveyed the premises, taking back a mortgage for unpaid purchase money, upon which W. filed a bill for foreclosure against C., making the plaintiffs and their co-partners in the business defendants as incumbrancers by reason of a registered judgment, but they omitted to set up any interest in the premises by reason of the security given to them by M., in which suit the bill was taken pro confesso, and a final order for foreclosure was obtained against all the other defendants. On a bill against W. seeking to redeem, or that he should pay off the claim of the plaintiffs under the security from M.:—Held, that M. was a necessary party to the suit; and also, that W. had a right, upon paying the plaintiffs' claims against M., to call for an assignment of the other securities held by them for such claim, the amount of which M. was bound to pay to the plaintiffs or W., in case of his paying. *McQuestion* v. *Winter*, 10 Gr. 464.

Judgment Creditor — *Bill to Redeem Prior Mortgages and Foreclose Subsequent Purchaser with Notice.*]—See *Bloor* v. *Bank of Upper Canada*, 2 O. S. 31.

——— *Redemption of Prior Incumbrance—Collateral Securities.*]—A judgment creditor coming in to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore, where judgment had been recovered and duly registered

against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor had effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor:—Held, that the judgment creditors of the mortgagor, upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, were entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment. *Gilmour* v. *Cameron*, 6 Gr. 290.

Payment by Instalments — *Relief — Bill.*]—Semble, that the relief given to a mortgagor by s. 5 of the 32nd of the general orders of June, 1853, in a suit brought against him upon a mortgage, payable by instalments, would also be afforded him, or those claiming under him, upon a bill filed on their own behalf. *Moore* v. *Merritt*, 6 Gr. 550.

Purchaser for Value—*Constructive Notice—Dismissal of Bill — Prayer — Personal Relief.*]—In a redemption suit, upon its appearing that K., a purchaser for value, with constructive but without actual notice, held a registered title of the lands, as well as S., to whom he had sold, the bill was dismissed as against K., with costs; and the plaintiff praying specifically for a reconveyance of the mortgaged premises:—Held, on rehearing, that he was not entitled to personal relief under the prayer for general relief. *Graham* v. *Chalmers*, 9 Gr. 239. See *S. C.*, 7 Gr. 597.

Refusal of Decree—*Chancery Act, s. 11 —Lapse of Time—Discretion—Terms.*]—Per Robinson, C.J., and McLean, J.—The court of chancery, under s. 11 of the Chancery Act, may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession. Per Macaulay and Smith, Ex. CC.—The court has not, under this section, power to refuse redemption, where by the law of England the party would be entitled to redeem, but has only a discretion of imposing terms different from those which would be imposed according to the strict rules in England. The court under that section may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession. *Simpson* v. *Smyth*, 1 E. & A. 9, 172.

Several Estates—*Redemption as to One —Payment by Second Mortgagee—Refusal—Estoppel.*]—Although the holder of several mortgages by the same mortgagor, on separate properties, has the right of refusing to be redeemed in respect of one of the securities, yet he may by his acts deprive himself of this advantage. The plaintiffs were mortgagees of lots 27 and 29, created by the same person, and K., being about to purchase the equity of redemption in 29, wrote to the secretary to ascertain the amount due thereon, adding, "How is it made up, as I would like to take it up?" The answer was, "$741 will pay off . . . loan on lot No. 29 . . . . if paid before 1st February, 1875." Subsequently K. enclosed to the secretary his cheque for first instalment, saying, "I wish to pay your mortgage on this property, or pay it up and take assignment at some future time if necessary, as I hold the second mortgage on it, and make this payment on that condition," which the secretary acknowledged the receipt of as "first instalment, interest and costs on L.'s first loan:"—Held, that under the circumstances the company were precluded from afterwards insisting on their right to be paid the amount secured on lot 27 before releasing lot 29 to the injury of K., who had subsequently purchased the equity of redemption; and this although at the time of making such inquiry K. was aware of the mortgage on lot 27, and had dealt with the mortgagor in respect thereof by accepting a second mortgage. *Dominion S. and L. Society of London* v. *Kittridge*, 23 Gr. 631.

——— *Redemption as to One—Sale—Subsequent Incumbrancer — Purchaser—Lien.*]—The rule that a mortgagee of several estates may refuse to be redeemed in respect of one only, does not apply where a sale is asked by a prior incumbrancer. *Merritt* v. *Stephenson*, 6 Gr. 567.

On a rehearing the court ordered an account to be taken of what was due on both the securities, and in default a sale, but intimated that in the event of a sale the premises would be conveyed to the purchaser relieved of any lien of such subsequent mortgagee. *Ib.*, 7 Gr. 22.

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4. *Suits for Redemption.*

(a) *Costs.*

Balance in Favour of Mortgagee—*Insignificant Sum.*]—In proceeding under a consent decree to redeem, the defendant, being in the position of a mortgagee, brought in an account for $905, while the master found the balance to be only $1.32:—Held, that, as the defendant had advanced his claim honestly, and under a reasonable belief that the sum claimed was justly due, he was entitled, notwithstanding the insignificant sum remaining unpaid, to the benefit of the rule that a mortgagor coming to redeem is liable for the costs of suit where a balance is found in favour of the defendant. *Little* v. *Brunker*, 28 Gr. 191.

Compromise of Suit — *Payment into Court — Subsequent Suit.*] — A suit for redemption having been compromised by payment into court of a sum of money for the benefit of those entitled to the equity of redemption, a decree was made in a suit subsequently brought by an execution creditor of the mortgagor, directing an inquiry as to other incumbrancers, and payment to them according to priority; and the defendants having made no improper defence were held entitled to receive their costs out of the fund. *Robertson* v. *Beamish*, 16 Gr. 676.

Consolidation — *Unsuccessful Claim to, by Mortgagee.*] — Mortgagees having insisted on their right to consolidate two mortgages as against a purchaser of the equity of redemption in one of the properties, which claim was decided against them, were ordered to pay the costs up to the hearing, that being the only point raised thereat. *Dominion S. and L. Society of London* v. *Kittridge*, 23 Gr. 631.

Denial of Right to Redeem.]—A mortgagee who takes a deed absolute in form, and

then fraudulently denies the right of redemption, will be made to pay the costs of the suit. *Le Targe* v. *DeTuyll*, 3 Gr. 595.

Fraud—*Estate of Mortgagee.*]—Although the general rule is, that if a balance is found due to defendant he will receive his costs, still, under the special facts in this case, the court, upon a bill by the mortgagor against the executors of the mortgagee, impeaching the whole transaction for fraud, ordered his estate to pay all the costs of the litigation. *Souter* v. *Burnham*, 10 Gr. 375.

Hearing on Disputed Facts.]—Where defendant submitted by answer to be redeemed on payment of costs, and made statements which, if true, would have entitled him to costs:—Held, that the plaintiff was justified in going to a hearing to prove facts which entitled him to costs against defendant. *Brand* v. *Martin*, 16 Gr. 566.

Second Mortgagee—*Dismissal of Bill for Default—Second Suit.*]—A first mortgagee is entitled, as against the owner of the equity of redemption, to add to his debt the necessary costs of a suit to redeem brought by a second mortgagee, and dismissed with costs for default of the plaintiff therein. But where a first mortgagee had taken a decree for dismissal on the plaintiff's default, instead of giving to the owner of the equity of redemption a day to redeem under general order 466, and a second suit became necessary in consequence, he was refused the extra costs thus occasioned. *McKinnon* v. *Anderson*, 17 Gr. 636.

Several Issues—*Distributive Costs.*]—In answer to a bill for the redemption of a mortgage, alleging usury in the original transaction, the mortgagee set up several defences, which were decided against him. The court, in decreeing redemption, ordered the plaintiff to pay the costs as of a common redemption suit, and defendant the costs of the issues found against him. *Isherwood* v. *Dixon*, 5 Gr. 314.

——— *Distributive Costs — Subsequent Costs.*]—The plaintiff alleged several grounds for relief which he failed to establish, although he succeeded in shewing a right to redeem, which right defendant had contested. The court refused costs to either party up to the hearing, and gave defendant the subsequent costs as of a redemption suit where the right to redeem is admitted. *Boswell* v. *Gravley*, 16 Gr. 523.

Subsequent Lease—*Mortgage of—Costs Occasioned by.*]—Where a mortgagor executed a lease of part of the mortgaged property, and one of the two owners of the lease mortgaged his interest therein, the mortgagee of the lease was made a party in the master's office to a suit by the original mortgagees for the foreclosure of their mortgage:—Held, on further directions, that, in case the mortgagor redeemed the plaintiffs' mortgage, he was not entitled to claim against his co-defendants, or any of them, the costs occasioned by the mortgage of the leasehold. *McMaster* v. *Demorcy*, 12 Gr. 193.

Summary Reference—*Question of Costs Included — Mortgagee — Excessive Distress—Insignificant Balance.*] — Where a plaintiff moves for a summary reference, and seeks to deprive the mortgagee of his costs, a case should be made for that relief upon the pleadings, and the question of costs should be included in the reference to the master. Where, after a mortgage debt had been reduced to about £1 14s., the mortgagee, who had taken an absolute deed, distrained for £40, alleging it to be due, the court, upon a bill to redeem, refused the mortgagee his costs. *Long* v. *Glenn*, 5 Gr. 208.

See Crawford v. *Meldrum*, 19 Gr. 165, *post* (b).

(b) *Parties.*

Assignee of Insolvent Defendant.]—Where one of several defendants has become bankrupt, his assignees are necessary parties, and the court will not proceed to make a decree in their absence. *Barnhart* v. *Patterson*, 1 O. S. 321.

Judgment Creditor of Mortgagee—*Conveyance Absolute in Form—Party before Decree—Amendment.*]—G., a creditor of F. under a judgment recovered in 1856, filed his bill to redeem W., the alleged mortgagee, under a deed of conveyance to him from F., absolute in form. A creditor of W., under a judgment recovered in 1859, and kept alive by fi. fa. lands, was made a party in the master's office, as an incumbrancer subsequent to plaintiff:—Held, that he could not properly be thus made a party; but the plaintiff was allowed to amend his bill by making him a party, in order that an opportunity might be afforded him of contesting the plaintiff's right to treat the conveyance from F. to W. as a mortgage as against him. *Glass* v. *Freckelton*, 10 Gr. 470.

Mortgagee — *Consequential Relief—Assignee of Mortgagor — Collateral Security — Mortgagor—Offer to Pay.*]—The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage. But this rule does not necessarily exclude the right of obtaining in the same suit against other parties relief consequent upon such redemption. Where a mortgagor had assigned the mortgaged property, and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and the mortgagor was held not to be improper. But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed. *Rogers* v. *Lewis*, 12 Gr. 257; *Rogers* v. *Wills*, 2 Ch. Ch. 13.

Mortgagor—*Suit by Purchaser of Part of Premises—Sale by Mortgagee—Notice.*]—The owner of land sold and conveyed one acre thereof. Before the registration of the deed he mortgaged the whole estate, 200 acres, which mortgage was duly registered, and the purchaser of the acre then registered his deed. The assignee of the mortgagee proceeded, upon default, to sell and duly conveyed the whole estate. The purchaser of the acre filed a bill to redeem by virtue of his interest in the one acre, and alleging want of notice of the intention to proceed to sell under the power:—Held, that to obtain the relief prayed by the bill, the mortgagor was not a necessary party, although if the bill had sought for payment of the surplus, if any, of the purchase money

over and above the amount due on the mortgage, it would be necessary to bring him before the court. *Daniels* v. *Davidson*, 9 Gr. 173.

Owners of Equity—*Suit by Subsequent Incumbrancer—Creditor—Costs.*]—To a suit by a second incumbrancer to redeem the prior incumbrancer, the owners of the equity of redemption are necessary parties. *Long* v. *Long*, 16 Gr. 239.

Quære, in such a case, if the prior incumbrancer should afterwards put the judgment creditor to file a bill to redeem, whether he would be entitled to his costs. *Crawford* v. *Meldrum*, 19 Gr. 165.

Prior Mortgagee—*Absolute Conveyance—Offer to Redeem.*]—Although the rule is that a prior mortgagee can be made a party only to redeem him, still if such prior security has been created by a deed absolute in form, a subsequent mortgagee is at liberty to bring him before the court for the purpose of shewing his interest to be redeemable, without offering to redeem him. *Moore* v. *Hobson*, 14 Gr. 703.

Purchasers of Parts of Premises—*Alternative Prayer — Demurrer — Appeal — Waiver.*]—The plaintiffs filed their bill to redeem, setting forth in a schedule the names of certain persons who had purchased portions of the mortgaged premises, and charging them with notice of a defect in the title, but making none of them parties. One defendant put in a general demurrer for want of parties, which was overruled, on the ground that the prayer of the bill was in the alternative, and to the relief prayed by one alternative the plaintiffs were entitled without those parties being present:—Held, on appeal, that if for any part of the relief prayed other parties are necessary to be brought before the court, a demurrer to the whole bill will lie; but, as the defendant had, subsequently to the order overruling the demurrer, put in his answer, he was too late in appealing from that order, and his appeal was dismissed without costs. *Simpson* v. *Smith*, 1 E. & A. 9, 2 O. S. 129. See, also, for judgment in privy council, 5 Gr. 104, 7 Moore P. C. 205.

See, also, *ante*, IV. 8, *post*, XIII. 5.

(c) *Pleading.*

Bill of Complaint—*Trustees of Life Estate — Reconveyance — General Relief—Multifariousness.*]—Where a mortgage vested in the mortgagee a life estate only, and he, after default, sold the interest of the mortgagor under execution in 1836, for more than the principal, interest, and costs, and the purchaser afterwards sold, and his vendee went into possession, and afterwards conveyed to trustees of a settlement his interest in the property, but, with their assent, remained in possession, and it appeared that the trustees claimed the whole estate upon the trusts of the settlement:—Held, on a demurrer by one of the trustees to a bill filed by the mortgagors against the settlor and the mortgagee, together with the trustees, praying redemption, a reconveyance by all parties, and general relief, that though the plaintiffs were not entitled to what they specifically prayed, yet they were entitled, under the general prayer, to a reconveyance of the life estate of the mortgagee, and an account of the rents and profits; and that the bill was not multifarious. *Nelson* v. *Robertson*, 1 Gr. 530.

——— *Third Mortgagee — Default.*] — A third mortgagee filed his bill for redemption against the two prior incumbrancers and the mortgagor, but did not allege either that his own mortgage or that of the second mortgagee was past due. A demurrer on these grounds by the second mortgagee was allowed. *Parsons* v. *Bank of Montreal*, 15 Gr. 411.

———*Offer to Redeem.*]—Held, that a bill to redeem need not contain an offer to redeem, because the form given in the orders contained no such offer. *Pearson* v. *Campbell*, 2 Ch. Ch. 12.

——— *Absence of Specific Prayer—Owners of Equity.*]—A person having a second charge on land filed a bill against the holder of a prior mortgage, and the owners of the equity of redemption, praying redemption and general relief:—Held, that the absence of a specific prayer as to the latter defendants did not disentitle the plaintiff to relief against them. *Long* v. *Long*, 17 Gr. 251.

(d) *Practice.*

Admission of Right to Redeem—*Production of Mortgage Deed.*]—A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute, the bill being for redemption, and the right to redeem being admitted by the answer. *Bell* v. *Chamberlen*, 3 Ch. Ch. 429.

Bill by Second Mortgagee—*Default.*]—Where a second mortgagee files a bill of redemption, and makes default in paying at the time appointed, the mortgagor (as well as the first mortgagee) has, under general order 466, the option of having a day thereupon appointed for redemption of the first mortgage by the mortgagor. *McKinnon* v. *Anderson*, 18 Gr. 684.

Decree—*Form of—Payment of Mortgage.*]—The owner of an equity of redemption filed a bill impeaching the mortgagee's title, on the ground that no money was advanced, but the court, being of opinion that the evidence was sufficient to establish the fact of payment, directed, at the option of defendants, that the bill should be dismissed with costs, or the usual decree made for redemption upon payment of what should be found due upon a reference. *Bedson* v. *Smith*, 10 Gr. 292.

Dismissal of Bill—*Decree for Redemption—Foreclosure.*]—Although a bill does not pray redemption, but a decree for redemption is issued upon it, it would seem that a subsequent dismissal of the bill operates as a foreclosure. *Cornwall* v. *Henriod*, 12 Gr. 338.

Evidence — *Affidavit—Proof of Intestacy of Mortgagor.*]—It being doubtful when the mortgagor died, his widow and children joined in a suit to redeem, in order that all questions under the Act abolishing the law of

primogeniture might be avoided. At the hearing, the court allowed proof of intestacy by affidavit, with a view to making the decree as asked. *Constable* v. *Guest*, 6 Gr. 510.

Summary Decree—*Allegations of Bill.*] —In a cause in the nature of a redemption suit, the bill stated the existence of three mortgages; alleged one to be usurious, and the two other to have been for larger sums than had been advanced; prayed special relief, and that an account might be taken of the sums actually advanced, and of the amount due, and for redemption. A motion for an immediate decree under the 77th order of May, 1850, was refused with costs. *Kelly* v. *Mills*, 2 Gr. 253.

(e) *Other Cases.*

Delay after Judgment—*Statute of Limitations—Quieting Title.*]—That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action, whether before or after judgment. After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceeding were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his curator, the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought, after notifying the curator of the facts and proceedings, to quiet his title under the Quieting Titles Act, R. S. O. 1887 c. 113:—Held, that after the great and unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title. *Re Leslie*, 23 O. R. 143.

Jurisdiction — *Foreign Lands.*] — See *Henderson* v. *Bank of Hamilton*, 23 O. R. 327, 20 A. R. 646, 23 S. C. R. 716.

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5. *Terms of Redemption—Amount Payable.*

Administratrix of Mortgagor — *Purchase at Sheriff's Sale—Redemption by Heir of Mortgagor.*] — Where the administratrix, having bought at sheriff's sale the interest of the deceased mortgagor, paid off the mortgage debt, and, treating the property as her own absolute estate, afterwards mortgaged it, the court, at the instance of the heir-at-law of the mortgagor, directed an inquiry as to whether the property was purchased at sheriff's sale with the assets of the mortgagor, and that the amount so applied should be deducted from the amount due upon the mortgage, and that the heir should be let in to redeem upon payment of the balance. *Warren* v. *McKenzie*, 1 Gr. 436.

Building Society — *Advertisement—Repayment of Loans — Rules of Society.*] — A circular was issued, with the knowledge of the directors of the defendant company, which, amongst other things, set out that "loans can be paid at any time and a discharge of the mortgage will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." The plaintiff saw the circular exposed in the office of an appraiser of the company through whom the loan was effected, and was thereby induced to mortgage his land for twenty years, the loan to be repayable on the instalment plan:—Held, that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independent contract. Held, also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society agreed to pay him in advance on receiving security therefor, &c., yet, without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules. *Hodgins* v. *Ontario Loan and Debenture Co.*, 7 A. R. 202.

Interest — *Arrears—Period.*] — A mortgagee sold the mortgaged property under a power of sale:—Held, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford* v. *Allen*, 15 Gr. 565.

R. S. O. 1887 c. 111, s. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment out of the lands of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

In an action of redemption by a second mortgagee against a first mortgagee, the latter is entitled to only six years' arrears of interest. Delaney v. Canadian Pacific R. W. Co., 21 O. R. 11, overruled on this point. *McMicking* v. *Gibbons*, 24 A. R. 586.

——— *Arrears — Period — Pleading — Amendment after Report.*]—Since the passing of the Administration of Justice Act, 36 Vict. c. 8 (O.), and to avoid circuity of action, the court will allow interest to a defendant, for more than six years, in a suit to redeem. Where the answer of a defendant omitted to set up a claim to interest for a period exceeding eight years, the court offered, if it was necessary that such a claim should be set up, to allow the defendant then to do so, as all the facts were before the court. *Howeren* v. *Bradburn*, 22 Gr. 96.

——— *Excessive Payment—Application on Principal — Mistake.*] — A mortgage having

properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. All the receipts given stated that the payments made were on account of interest. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal:—Held, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action. Rogers v. Ingham, 3 Ch. D. 351, followed. *Stewart* v. *Ferguson*, 31 O. R. 112.

Mortgagee—*Purchaser at Sheriff's Sale—Credit for Purchase Money.*]—In a suit for setting aside a purchase by a mortgagee at a sheriff's sale, and giving the parties interested in the equity of redemption liberty to redeem, the court, while granting that relief, refused actively to enforce the sale by requiring the mortgagee to give credit for the purchase money in reduction of his debt. *McLaren* v. *Fraser*, 17 Gr. 533.

Payment by Instalments — *Default—Judgment on Covenant—Crops—Damages—Set-off.*]—The owner of property sold and took a mortgage for the purchase money by instalments. Default having been made in the first instalment, judgment was recovered upon the covenant; whereupon the purchaser filed a bill setting up that a tenant of the vendor, under a lease previously made, had carried away the crops, and praying to redeem upon payment of the judgment, less the value of these crops. The court, by consent, directed a reference as to the damages sustained by the removal of the crops, but refused to interfere with the judgment, the remaining instalments being more than sufficient to cover such damages. *Moore* v. *Merritt*, 6 Gr. 550.

Proviso in Mortgage—*Payment of Principal "at any time"—Default—Redemption after Maturity—Notice—Interest post Diem—Damages—Legal Rate.*]—T. borrowed money from the defendants and gave a mortgage over certain lands as security, with other securities as collateral, giving a second mortgage over the same lands to the plaintiff. Both mortgages being in default, the defendants agreed in writing with the plaintiff, who began foreclosure proceedings, that if he obtained a final order subject to their claim, they would accept from him a new mortgage over the same property for $15,000, payable in five years from the date of the order, with interest at eight per cent., and that he was "to have the privilege of paying any part of principal at any time." Upon payment as aforesaid the defendants were to assign to the plaintiff their mortgage from T. and all collaterals. The plaintiff obtained a final order and gave the defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years, with interest at eight per cent. half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for assignment to the plaintiff of the original securities, and had a clause that "the mortgagor may at any time pay off the whole or any part of the $15,000, before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years the plaintiff paid interest at the specified rate, until the 1st January, 1887, and on the 22nd March following, tendered the defendants the principal and interest at that rate up to that day, and demanded an assignment of the original mortgage and securities. The defendants refused to accept, contending that they were entitled to six months' notice of the mortgagor's intention to pay, or to six months' interest in advance:—Held, that the rule followed by courts of equity in England that a mortgagor must, after default by him in payment of the principal money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, has the force of law in Ontario. 2. That there were no circumstances in the present case to do away with its effects, the proviso for payment of the principal being limited to the five years within which the plaintiff had covenanted to pay the same. 3. That after the expiration of five years from the date of the mortgage, there was no contract in force for the payment of interest, and the defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months' notice. 4. That in this case the defendants were entitled to the six months' notice, and the tender of 22nd March, 1887, was insufficient, and as no evidence was given by the defendants as to the rate of interest after default, and evidence offered by the plaintiff on the point was refused at the trial, the legal rate of six per cent. should be taken as the measure of damages. *Archbold* v. *Building and Loan Association*, 15 O. R. 237.

Held, on appeal, that upon the evidence the parties after the maturity of the mortgage continued to deal upon the terms therein contained as far as applicable, and therefore that the option to pay off at any time the moneys secured by the mortgage still operated after maturity in favour of the plaintiff. *S. C.*, 16 A. R. 1.

Purchaser of Equity of Redemption—*Statement of Amount Due on Mortgage.*]—The solicitors of the mortgagees gave the mortgagor a memorandum of the amount due, and, relying upon this, B. purchased the equity of redemption. Upon a bill to redeem, the court held the mortgagees not bound by this amount, the evidence shewing that the solicitor was not aware that the mortgagor had inquired on behalf of B. *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374.

Tender after Action—*Costs of Plaintiff.*]—Held, that in an action of redemption, if tender is made after action commenced, it must be enough to cover the costs of the plaintiff already incurred; and if it be so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense. *Martin* v. *Miles*, 5 O. R. 404.

Usury — *Void Security — Repayment of Actual Advance.*] — A security void at the time of its creation on the ground of usury is not rendered valid by 16 Vict. c. 80, passed at a subsequent date. Where, therefore, a mortgage had been made upon a usurious agreement:—Held, that a judgment creditor of the mortgagor was entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment. *Isherwood* v. *Dixon*, 5 Gr. 314.

See cases under XII. 12.

XI. REGISTRATION.

(*See* REGISTRY LAWS.)

Building Mortgage—*Subsequent Mortgage — Priorities — Application of Registry Act.*]—See *Pierce* v. *Canada Permanent L. and S. Co.*, 24 O. R. 426, 25 O. R. 671.

Estate Tail—*Bar of Entail—Will.*]—By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1890 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—Held, per Maclennan and Lister, JJ.A., that under this will the son took an estate tail; but held, also, per curiam, that even if the son did take an estate tail, that estate had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages. Lawlor v. Lawlor, 10 S. C. R. 194, applied, and Plomley v. Felton, 14 App. Cas. 61, distinguished. *Culbertson* v. *McCullough*, 27 A. R. 459.

Indian Lands—*Mortgage before Patent—Notice—Priorities.*]—See *Re Reed* v. *Wilson*, 23 O. R. 552.

Judgment — *Mistake—Priorities.*]—See *Miller* v. *Duggan*, 21 S. C. R. 33.

Loss of Mortgage Deed—*Duplicate Recorded—Protection on Payment.*]—Action by the plaintiff, administrator of M., against defendant, on his covenant in a registered mortgage to pay M. the amount due thereon. Plea, on equitable grounds, in substance, that the plaintiff told defendant before the instalment sued for fell due, that he could not find the mortgage, and defendant then informed him that he would be prepared to pay when it fell due; that when he received notice of this action he notified the plaintiff's attorneys that he was prepared to pay on production of the duplicate copy of the mortgage, which was held by M., or on proof of the loss; and that he was and is so prepared; but plaintiff refused to shew said copy or furnish any proof of the loss. The plea also averred that testator had made a will, and appointed certain persons executors, who had possession of the will; and the defendant submitted that he was entitled to such duplicate or proof of loss, and alleged that he was prepared to pay or deposit the money as the court should direct, to be paid over to plaintiff on such production of proof:—Held, plea bad, for it must be assumed that the mortgage was recorded at length; no assignment either directly or by deposit was averred; and under the Registry Act defendant would be fully protected on payment of the mortgage and recording the discharge; and the alleged will was not said to be valid or existing. *Macauley* v. *Boyle*, 25 C. P. 239.

Priorities—*Mortgage for Balance of Purchase Money — Estoppel.*] — The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser, the mortgage being delivered to the vendor's agent to be registered. The purchaser had obtained a loan of the cash payment from the defendant upon the security of a first mortgage to be given upon the land in question, and this mortgage was prepared, executed, and delivered before the execution and delivery of the deed and was registered before the deed to the purchaser and before the mortgage to the plaintiff. Upon receiving the deed the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith and each without knowledge or notice of the other's mortgage:—Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the right of the plaintiff to have a legal mortgage for the balance of purchase money; and that the plaintiff's mortgage was therefore entitled to priority. Nevitt v. McMurray, 14 A. R. 126, applied. *McMillan* v. *Munro*, 25 A. R. 288.

——— *Subrogation — Contribution.*]—In 1849 G., being the owner of Whiteacre and Blackacre, contracted to sell half of the former to B., by a bond, which was never registered. In 1852 G. executed a mortgage covering both lots to C., which was immediately registered, but the Christian name of the grantor's wife (who executed to bar dower) did not appear in the memorial. In 1853 G. gave a mortgage of Blackacre to P., who immediately registered his conveyance. In 1855 G. sold the remaining half of Whiteacre to M., and in the following year B. conveyed his interest in the other half to S. In 1861 C. sold Blackacre under a power of sale in his mortgage, and the sale realized fully what was due thereon. In 1862 P. filed his bill against M. and S. in order that he might be subrogated to the rights of C. as against Whiteacre for the amount due him on his security. S. and H. had previously paid all their purchase money:—Held, that P. was not entitled to any relief against S., but that if C.'s mortgage was duly registered, P. was entitled to contribution against M. *Boucher* v. *Smith*, 9 Gr. 347.

Witness—*Affidavit of Execution—Irregularity.*]—See *Hoofstetter* v. *Rooker*, 22 A. R. 175, 26 S. C. R. 41.

XII. Rights and Liabilities of the Parties and Those Claiming under Them.

1. *Action, Right of, by Mortgagee.*

Damages for Impairing Security—*Action for — Removal of Machinery — Legal Estate—Acquiescence.*] — See *Western Bank of Canada* v. *Greey*, 12 O. R. 68.

Fraudulent Conveyance—*Action to Set aside.*]—Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him, if his claim is left unsatisfied, from suing on the covenant in the mortgage, and proceeding to a sale under execution or applying to the court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim. *Parr* v. *Montgomery*, 27 Gr. 521.

Partition — *Locus Standi.*] — Quære, whether the appellant, whose only interest was that of mortgagee of one of a number of trustees in common, had any locus standi to bring a suit for partition or to appeal without his co-plaintiff. *Laplante* v. *Seamen*, 8 A. R. 557.

Trespass—*Trover—Cutting Timber—Depreciating Security.*]—See *Mann* v. *English*, 38 U. C. R. 240.

See Lovelace v. *Harrington*, 27 Gr. 178; *Ward* v. *Hughes*, 8 O. R. 138, *ante* I; and cases *post* 11 (a).

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2. *Action, Right of, by Mortgagor.*

Ejectment—*Heirs-at-Law—Executors.*]—The owner of certain land mortgaged it in fee, with a proviso that until default he should remain in possession. Upon his death, the plaintiffs, his heirs-at-law, during the currency of the mortgage, brought ejectment to recover possession from a tenant, no default having been made on the mortgage:—Held, that the proviso for remaining in possession until default made would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not to the heirs-at-law, and therefore the defendant was entitled to recover. *Ford* v. *Jones*, 12 C. P. 358.

Injury to Land—*Depreciation in Value —Interest of Mortgagee.*]—In an action against defendant to recover damages for depreciation in the value of a farm caused by defendant selling plaintiff barley seed mixed with weed, it was contended that, as the farm was mortgaged, the plaintiff (mortgagor) could not maintain the action:—Held, that in equity the mortgagor is the owner in a case like this where the land is worth considerably more than the mortgage, and it is for the Judge to direct the mortgagee to be added as a party or to direct the sum recovered to be paid into court for his protection if it appear that his interests are being affected prejudicially by the litigation, but it is no reason for dismissing the action; and a new trial was ordered. *McMullen* v. *Free*, 13 O. R. 57.

Injury to Reversion.]—The mortgagor of a property, where the mortgage deed contains a clause providing for the retaining possession until default (such default not having taken place), is entitled, so long as the mortgage continues in force without default, to maintain an action for an injury done to the reversion. *Rogers* v. *Dickson*, 10 C. P. 481.

Trespass—*Judicature Act.*]—Held, that O. J. Act, s. 17, s.-s. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection that the mortgagees should be parties ought not to prevail. *Platt* v. *Grand Trunk R. W. Co.*, 12 O. R. 119.

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3. *Covenant by Mortgagor for Payment.*

Acceleration of Payment—*Judgment on Covenant — Setting aside — Interest.*] — Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside. The acceleration is not in the nature of a penalty, but it is to be regarded as the contract of the parties. Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. 1887 c. 107, sched. B., s. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

Concealment of Prior Incumbrance—*Action on Covenant against Husband.*]—See *Lovelace* v. *Harrington*, 27 Gr. 178.

Construction of Mortgage—*Covenantor not Named—Receipt Clause.*]—In a mortgage for $103, purporting to be made in pursuance of the Act respecting short forms of mortgages, between A. and B., described only as the parties of the first and second parts, the grant of the land was by "the said mortgagor unto the said mortgagee," and the parties were afterwards described throughout as "mortgagor" and "mortgagee," the covenant for payment being "the said mortgagor covenants with the said mortgagee that the mortgagor will pay," &c. In the margin was this receipt: "Received on the date hereof, from the said mortgagee, the sum of $103, being the full consideration money herein mentioned:" signed by the party of the first part. The mortgage was executed by A. only. It was objected in an action against A. on the covenant to pay, that there was nothing in the deed to shew who was covenantor and who covenantee:—Held, that by referring in the receipt for the date and sum received to the mortgage, the defendant had made the receipt part of the mortgage, and it clearly shewed him to be the mortgagor; or, if this were not so, that the possession of the deed by the plaintiff, delivered to him by defendant, and the acknowledgment in the receipt, shewed the plaintiff to be the mortgagee. *McDonald* v. *Clarke*, 30 U. C. R. 307.

See, also, *Coghlan* v. *Tilbury East School Trustees*, 35 U. C. R. 575.

Liability of Mortgagor—*Conveyance of Equity of Redemption—Notice of Expropriation Proceedings—Absence of—Defence to Action on Covenant.*]—See *Farr* v. *Howell*, 31 O. R. 693.

——— *Remedy over—Lien.*]—The defendant mortgaged certain land to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of the purchase money. S. then gave a second mortgage to the plaintiffs, and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount unpaid; but neither sale nor foreclosure was asked:—Held, that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage; but that defendant was entitled to a lien on the land for the amount of the mortgage, which, as between him and S., S. had bound himself to pay; and leave was given to defendant to amend, and bring the proper parties before the court so as to enforce his lien. *Hamilton Provident L. and I. Co.* v. *Smith*, 17 O. R. 1.

Restriction of Liability—*Dependent or Independent Covenants.*]—The proviso for payment in a mortgage made by the defendant was that the mortgage was to be void on payment of $3,250 and interest. Then followed the usual short form covenant for payment, to which was added in writing the words, "but before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and that the mortgagor shall then be liable only to the amount of $600, or such lessor sum as will with the net proceeds from the lands make the $3,250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed $600:"—Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result shewed a deficiency, and then only to the extent of $600. *Wilson* v. *Fleming*, 24 O. R. 388.

Summary Judgment—*Rule 739—Unconditional Leave to Defend.*]—Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shews a good defence, he should be allowed to defend unconditionally. Upon a motion for summary judgment under that rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up:—Held, that the defendant should have unconditional leave to defend. *Munro* v. *Orr*, 17 P. R. 53.

Trustees—*Personal Liability.*]—Where a person holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor or intention to become personally liable, for the benefit of such owners executed a mortgage on the land, the mortgage deed without his knowledge containing a covenant to pay the mortgage debt:—Held, that the covenant was not enforceable against the mortgagor personally, by the assignee of the mortgage for value without notice; and that his remedy was restricted to foreclosure proceedings against the lands. *Patterson* v. *McLean*, 21 O. R. 221.

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

——— *Personal Liability—Indemnity.*]—Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his cestui que trust. *Williams* v. *Balfour*, 18 S. C. R. 472.

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

See Parr v. *Montgomery*, 27 Gr. 521, *ante* 1; *Scarlett* v. *Nattress*, 23 A. R. 297, *ante* VII. 5; *Farr* v. *Howell*, 31 O. R. 693.

See also cases under 11 (a).

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4. *Crops.*

Direction of Mortgagee — *Ejectment—Demand.*]—Where a mortgagor in possession, after default made in payment of the mortgage money, received a letter from the mortgagee, who was in a foreign country, directing him to put a spring crop into the land, unless he came into the country in time for the mortgagor to remove in the spring, and he did not come until the summer:—Held, that notwithstanding the relation between the parties of mortgagor and mortgagee, the defendant could not be turned out of possession of the land while crops were growing, nor without a demand of possession. *Doe d. Patterson* v. *Brown*, H. T. 6 Vict.

Right to Growing Crops.]—Upon default made in payment of a mortgage the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security. Therefore, when land was sold in July under a decree made in a mortgage suit, without any reservation of crops:—Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the unsevered growing crops, mature and immature. *McDowall* v. *Phippen*, 1 O. R. 143.

C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiffs took formal possession of the land. On the 17th July, 1882, the defendant, having obtained judgment against C., placed a fi. fa. in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August. The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year. The plaintiffs claimed the crops, and an interpleader issue was tried:—Held, affirming the judgment in 5 O. R. 371, that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops, as C.'s property. The seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs. *Hamilton Provident and Loan Society* v. *Campbell*, 12 A. R. 250.

A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested. Laing v. Ontario Loan and Savings Co., 46 U. C. R. 114, explained. *Bloomfield* v. *Hellyer*, 22 A. R. 232.

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5. *Diminishment of Security.*

Removal of Building — *Mandatory Injunction—Inquiry as to Value.*]—A mortgagee filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that though the building had been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 15 Gr. 616.

Removal of Machinery — *Damages for Impairment of Security—Second Mortgagees—Estoppel.*]—B., the owner of a mill, subject to a first mortgage for $4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B., being desirous of having the mill converted from the "stone" to the "roller" system, applied to M., manager of the Ontario Loan and Savings Company, for an advance of $7,300 to enable him to pay off the mortgage and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the company agreed to make, and a mortgage for that amount was duly executed by B. in favour of the company. B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for $4,800, $2,000 to be paid on completion of mill, and balance in three equal annual payments, secured by a second mortgage on the property, and it was one of the terms of the said agreement that defendants should be furnished with a letter from M. agreeing to pay the $2,000 on completion of the mill. Defendants, without communicating with M., commenced work and did not ask him for such letter until after the work had progressed for several weeks. When applied to for such letter, M. informed plaintiffs that he did not agree with B. to give a letter for any specific sum, but only for whatever balance there might be left out of said sum of $7,300, after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about $1,200, which latter amount he was willing to undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay $2,000, they removed the new machinery put in and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiffs' mortgage was about $1,700. The mill, whilst in such dismantled state, was sold under power of sale in K.'s mortgage and only realized enough to satisfy it, and plaintiffs, contending that defendants by their acts had diminished the value of the security, and that B., the mortgagor, was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the loan company, was also plaintiffs' manager, and that he was aware that B. had made a contract with defendants for remodelling the mill, although he did not know the precise terms of such contract, and that he saw the work in progress and raised no objection. At the trial the action was dismissed (following Baker v. Mills, 11 O. R. 253) on the ground that plaintiffs, second mortgagees, not having the legal estate, and not being in possession, or entitled to possession, could not maintain any action:—Held, by a majority of the court, that plaintiffs must fail, not on the ground upon which the trial Judge dismissed their action, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it. *Western Bank of Canada* v. *Grey*, 12 O. R. 68.

——— *Sufficiency of Security — Injunction.*]—A mortgage having been created on land on which was a steam saw mill, the mortgagor was restrained from removing the machinery, although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises. *Gordon* v. *Johnston*, 14 Gr. 402.

Removal of Timber—*Disrepair of Buildings—Possession—Terms.*] — The defendant, who was entitled to purchase land, had made default in paying the purchase money secured by mortgage, and had agreed to release to the plaintiffs the equity of redemption with the option of repurchasing; had failed to erect a new saw-mill on the land, as stipulated for; had allowed the saw-mills already thereon to fall into disrepair; and had been cutting and removing the timber, so that the saw-mills were in such a condition that they would become utterly lost to the plaintiffs if the defendant was allowed to retain possession; and it appeared that the saw-mills and timber constituted the almost entire value of the mortgage security:—Held, that the plaintiffs were entitled to an order for possession, in

case the defendant did not pay the overdue instalments in a month, without prejudice to the plaintiffs' right to enforce the agreement for sale; and in the meantime he was restrained from cutting or removing timber. *Phillips* v. *Preston*, 14 Gr. 67.

——— *Purchaser of Right to Cut—Registry Laws—Notice—Sufficiency of Security—Injunction—Following Timber—Damages.*]—Semble, that standing timber is within the provisions of the registry laws; and that the purchaser of a right to cut the same is affected with notice of the conveyance from the original owner and a mortgage back from his vendee. Unless a mortgagor prove demonstrably, so as to leave no room for doubt, that the mortgaged premises remain ample security for the mortgage debt, the court will restrain him from cutting over the whole land. The jurisdiction as to restraining the cutting and removal of timber was not preventive only; the court would in a proper case interpose where the timber could be followed. The Administration of Justice Act, 1873, s. 32, it would appear, however, has removed any technical difficulty. Where timber is cut without any intentional wrong, and there is no evidence of mala fides or intentional wrong, the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land. *McLean* v. *Burton*, 24 Gr. 134.

See Mann v. *English*, 38 U. C. R. 240.

See, also, INJUNCTION.

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6. *Insurance Moneys, Application of.*

Bond for Payment of Instalment—*Receipt of Insurance Moneys—Satisfaction—Option of Mortgagee.*]—On 19th February, 1868, H. mortgaged lands to one of the defendants to secure payment of $2,400 as follows: $500 in two years, and the balance in five years, with interest half-yearly. The mortgage was in the usual statutory form, and contained a covenant to insure the buildings in at least $1,500. Subsequently H. insured for $1,500 on the buildings, and $500 on machinery therein. In the body of the policy the benefit of the insurance was secured to the plaintiff (apparently in anticipation of his becoming the holder of the mortgage), thus: "Any claim for loss to be paid to Robert Green, of Guelph." Defendants afterwards assigned this mortgage to plaintiff, and both defendants entered into a bond to plaintiff, of same date, in $1,000, conditioned,—after reciting the assignment, and that the first instalment of $500, under the mortgage, would fall due 19th February, 1870,—that H. should pay that instalment to the plaintiff, when due. H. failed, and the instalment due 19th February, 1870, was not paid. The property was burned some months afterwards, and in January following, plaintiff received the full insurance money, $2,000, which was retained and applied by him to his own use. He then sued defendants on their bond. Defendants set up the retention by plaintiff of the insurance moneys, as a payment on the mortgage debt of more than the first instalment and interest, and contended that their bond was thus discharged:—Held, no defence; for (1) the bond being forfeited by condition broken, the facts relied on could not be set up as a legal bar; and (2) either the insurance moneys received by the plaintiff (there being no stipulation as to their application) had not been legally applied, and could not be regarded as applied in satisfaction of any part of the mortgage debt; or, if capable of being so applied, they might be applied at the sole pleasure of the plaintiff so as to insure to him the full benefit of defendants' bond as security for the first instalment, as mentioned in the condition. *Green* v. *Hewer*, 21 C. P. 531.

Covenant for Payment—*Default in Instalments—Election to Claim Whole—Pleading.*]—Declaration on defendant's covenant in a mortgage to pay $4,400 by instalments with interest at 8 per cent., and that in case of default in payment of any instalment, the whole sum, with all accrued interest, should immediately become due; that the plaintiffs were to be at liberty to insure for $3,500, and to charge the premiums to defendant, who was to pay them with interest; that defendant made default in payment of certain instalments, whereby the whole $4,400 with interest became payable, and remained unpaid until the 19th May, 1864, and from that day a further sum with interest remained due. There was also a claim for $62 for premiums of insurance paid by plaintiffs. Equitable plea, that the forfeiture of the $4,400, by reason of the non-payment of the instalments, was to be at plaintiffs' option; and that it was provided that plaintiffs might insure for the $3,500, and that the policies should be to the use of and in trust for plaintiffs, for better securing to plaintiffs the amount specified in the mortgage, and, subject thereto in trust for defendant, &c.; that plaintiffs did insure, and the premises were destroyed by fire; that the plaintiffs received the amount insured, and paid themselves thereout all instalments with interest overdue, and the premiums, and still had a balance to meet future instalments; that in equity, therefore, plaintiffs were estopped from claiming by way of forfeiture the $4,400 by reason of the default in payment of the first two instalments, and that except by way of such forfeiture, nothing was due:—Held, on demurrer, plea bad, for the plaintiffs did not claim by way of forfeiture but under defendant's covenant, and at most the plea shewed facts which might be evidence of plaintiffs' election to claim the whole. *Trust and Loan Co.* v. *Drennan*, 16 C. P. 321.

Covenant to Insure—*Absence of—Right of Mortgagee—Rebuilding.*]—Where a mortgage contains no covenant by the mortgagor to insure, but he does insure, and a loss by fire occurs, whereby the insurance money becomes payable, the mortgagee is entitled, under 14 Geo. III. c. 78, s. 83, to have the insurance money laid out in rebuilding. *Stinson* v. *Pennock*, 14 Gr. 604.

——— *First and Second Mortgagees—Rights of—Building—Machinery.*]—A mortgage was made by T. H. C. and B. H. C. to D. of certain lands; it contained a covenant to insure in a sum named. A second mortgage was made by the same parties to a bank to secure an indebtedness; it also contained a covenant to insure without specifying any amount. At the date of the first mortgage there was an insurance of $1,400, which was allowed to lapse. On the bank manager discovering this, he procured T. H. C. to effect an insurance, advancing the money to pay the premium, charging T. H. C.'s account therewith, and discounted a note made by T. H. C.

and indorsed by B. H. C. to cover the same. The policy was to T. H. C. alone, and was, on saw mill, $400; on fixed and movable machinery, shafting, gearing, &c., $1,000; on boiler and connections, $100; and on engine and connections, $500; loss, if any, payable to the bank. On a fire occurring and the property being burnt, D. required the insurance company to expend the moneys so far as they would go in rebuilding the insured premises:—Held, following Stinson v. Pennock, 14 Gr. 604, that 14 Geo. III. c. 78, s. 83, is not merely of local application, but extends to this Province and applies to a case like the present. Held, also, that, as between mortgagor and first and second mortgagees, the fixed and movable machinery, &c., boiler, and boiler connections, &c., were included under the word "building," in the said section, so as to entitle D. to the benefit of the insurance thereon, for as between the parties they were treated as part of the freehold and passed as such. *Carr* v. *Fire Assurance Assn.*, 14 O. R. 487.

Loss Payable to Mortgagee — *Assignment to Insurers—Credit on Mortgage.*]—The owner of land mortgaged the same, and, in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mortgagees. The buildings were shortly afterwards destroyed by fire, and the insurance moneys paid to the mortgagees, who assigned the mortgage to trustees of the insurance company, and they thereupon proceeded to foreclose:—Held, on appeal by a puisne incumbrancer from the report of the master, that the plaintiffs were not bound to give credit for the amount paid to the mortgagees. *Westmacott* v. *Hanley*, 22 Gr. 382.

Mortgagee's Benefit — *Credit on Mortgage.*]—A mortgagee insuring the mortgaged premises out of his own funds is entitled to receive the amount of the policy in the event of loss for his own benefit, without giving credit therefor upon the mortgage. *Russell* v. *Robertson*, 1 Ch. Ch. 72.

Mortgagee's Right to Moneys — *Machinery — Lien Agreement.*] — The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery. After the machinery was placed in the mill, the purchasers gave to the plaintiffs a mortgage on the mill property, and this mortgage contained a covenant to insure. Subsequently the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon. The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover on the policies held by them, owing to the breach of statutory condition 8, and they claimed the benefit of the purchasers' insurance of the machinery. The court was equally divided upon the question whether the plaintiffs were entitled to the moneys payable to the purchasers under their policy, and the judgment of the trial Judge in their favour was consequently affirmed. *Waterous Engine Works Co.* v. *McCann*, 21 A. R. 486.

Mortgagee's Rights against Insurers —*Costs—Parties.*]—The mortgagor covenanted to insure, and insured accordingly. The houses having been burned, he attended, with the mortgagee, at the office of the insurance company, and signed an order, drawn up by the secretary of the company, to pay the insurance money to the mortgagee upon an oral agreement on his part to expend it in rebuilding. The mortgagee having withdrawn from this agreement, the mortgagor attended before the board of directors, and obtained from them the usual promissory note of the company at three months, for the amount of the policy, which he transferred to a third party for value, but who was aware of the claim of the mortgagee. The mortgagee thereupon filed a bill against the mortgagor and the company, claiming the insurance money to the extent of the amount due on his mortgage. The court made a decree for payment, and ordered the company to pay plaintiff the costs, but dismissed the bill as against the mortgagor with costs, he being an unnecessary party. Held, also, that the person to whom the note of the company was transferred, was not a necessary party. *Watt* v. *Gore District Mutual Ins. Co.*, 8 Gr. 523.

Receipt of Moneys before Maturity—*Appropriation—Acceleration.*]—The defendant held a mortgage upon the plaintiff's lands to secure $300 with interest, to be paid yearly, together with an instalment of principal money not less than $50, the first instalment of principal and interest to fall due on 16th December, 1888. On 29th June, 1888, a fire occurred, and the defendant received $195, insurance money; without communicating with the plaintiff, he thereupon assumed to apply this as follows: he reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and, no payment of the first instalment being made by the mortgagor, on 16th December, 1888, he proceeded to exercise his power of sale:—Held, on motion for an injunction to restrain the sale, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation. Held, also, that though the mortgagee had the right as declared by R. S. O. 1887 c. 102, s. 4, to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment, nor to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time as payments fell due under the mortgage, unless otherwise arranged between the parties. *Corham* v. *Kingston*, 17 O. R. 432.

See Barber v. *Clark*, 20 O. R. 522.

——— *Appropriation — Acceleration—Arrears—Interest.*]—Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage, had become due:—Held, in the court below, that the defendants had made

their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. 1887 c. 102, s. 4, s.-s. 2, upon arrears of principal and interest. Corham v. Kingston, 17 O. R. 432, approved and followed. Held, in appeal, that under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced. Where insurance moneys are received by a mortgagee under an insurance effected by the mortgagor pursuant to a covenant to insure, contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest. Corham v. Kingston, 17 O. R. 432, considered. Judgment below varied. *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677, 18 A. R. 347.

——— *Reduction of Mortgage — Rebuilding.*]—Where a mortgage deed contains no provision as to the application or appropriation of insurance money coming to the mortgagee before the time appointed for payment of the mortgage money, he is not bound to apply it in reduction of the sum secured, or the interest accruing thereon, until the expiration of the time allowed for payment of the mortgage money. In such a case the mortgagor would be entitled to have the money expended in rebuilding, and replacing all parties, as near as may be, as they stood before the fire. *Austin* v. *Story*, 19 Gr. 306.

Separate Insurance—*Amount of Loss—Settlement.*]—Where there is separate insurance in different companies in favour of mortgagee and mortgagor, the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between the mortgagee and his insurers although assented to by the mortgagor. *Prittie* v. *Connecticut Fire Ins. Co.*, 23 A. R. 449.

Several Mortgages—*Consolidation—Default—Payment of Prior Mortgage.*] — The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage comprising other lands, on which were buildings, which he covenanted to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name "loss, if any, payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings comprised in the second mortgage were destroyed. The insurance moneys payable being more than sufficient to pay the balance due on the second mortgage, which was in default, the mortgagees claimed the right to apply the surplus in payment of the first mortgage, which was also in default: —Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage. *Re Union Assurance Co.*, 23 O. R. 627.

Subrogation — *Interest of Mortgagee—Indemnity.*]—Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and, if he failed to do so, that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor, who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred, the company paid the mortgagees the sum insured, and the mortgagor contended that his mortgage was discharged by such payment. The company disputed this and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage:—Held, that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause, which was inserted in the policy without the knowledge and consent of the mortgagor, could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy in favour of the mortgagor; and that the payment to the mortgagees discharged the mortgage. Held, also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy. Decisions in 15 A. R. 421 and 14 O. R. 322 affirmed. *Imperial Fire Ins. Co.* v. *Bull*, 18 S. C. R. 697.

——— *Machinery—Vendor's Lien—Priorities.*]—Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected, the mill and machinery were destroyed by fire:—Held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him. Judgment in 31 O. R. 142 affirmed. *Goldie* v. *Bank of Hamilton*, 27 A. R. 619.

———*Variation of Statutory Conditions—Agreement between Mortgagee and Insurers.*] —The defendants insured seven houses belonging to the plaintiff situated on land which

had been mortgaged by him to a loan company. A fire occurred by which the houses were destroyed, and defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to have the mortgage assigned to them:—Held, that, although defendants had paid the mortgagees and taken an assignment of the mortgage, they could not hold it against the plaintiff. Imperial Fire Ins. Co. v. Bull, 18 S. C. R. 697, followed. *McKau* v. *Norwich Union Ins. Co.*, 27 O. R. 251.

Subsequent Insurance—*Cancellation of Mortgagor's Insurance—Double Insurance—Proofs of Loss.*]—The plaintiff insured his barn in the defendant company for $2,100, and afterwards mortgaged his farm, including the barn, to a loan company for $1,500, assigning the policy to the company as collateral security. The mortgage, purporting to be under the Short Forms Act, contained a covenant that the mortgagor would insure the buildings, unless already insured, for not less than $1,000, provided that the mortgagees might themselves effect such insurance without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of $600. The property having been destroyed by fire, the plaintiff notified the company, when they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, saying nothing as to furnishing proofs of loss:—Held, that the plaintiff did not cease to be the person assured within the meaning of the Insurance Act, R. S. O. 1897 c. 203, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act in that behalf. Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of s. 168, s.-s. 8, of R. S. O. c. 203; nor could it be deemed a "double insurance." Held, also, there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss. *Morrow* v. *Lancashire Ins. Co.*, 29 O. R. 377.

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7. *Lease by Mortgagor.*

Attornment to Mortgagee—*Action by Mortgagor for Rent.*]—One L., who held a mortgage on the premises from one S. before plaintiff's title accrued, and which was executed and overdue before the lease by plaintiff to defendant, notified defendant to pay the rent to him instead of to the plaintiff, threatening distress and ejectment on default. Defendant thereupon attorned to L., and paid him £50:—Held, that such payment constituted a good defence to an action by plaintiff against defendant for the rent. *Fairbairn* v. *Hilliard*, 27 U. C. R. 111.

——— *Consent of Mortgagor — Right to Rent.*]—In replevin the defendant, who had mortgaged the demised premises to one E., claimed as landlord, under a lease alleged to have been made by him subsequent to the mortgage, three quarters' rent, which had been paid by the tenant to E.:—Held, that the evidence, set out in the report of the case, shewed that E. was the original and actual lessor, or, at all events, that previous to the payment of the rent avowed for the tenant had attorned to E. with the defendant's consent. *McLennan* v. *Hannum*, 31 C. P. 210.

——— *Implied Tenancy—Termination of—Distress.*]—Where a mortgagee received rent from a tenant of the mortgagor by lease subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he did:—Held, that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent. *Lambert* v. *Marsh*, 2 U. C. R. 39.

——— *Trover for Shop Fittings.*] — The tenant of a mortgagor, holding under a lease for years, during the continuance of his term attorned to the mortgagees, and after the term had expired continued to hold the premises from the mortgagees as a yearly tenant, and when his tenancy ceased claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during the continuance of his lease from the mortgagor, and which were not fixtures, and for which, upon the mortgagees' refusal to part with their possession, he brought trover:—Held, that the action was maintainable. *Denholm* v. *Commercial Bank*, 1 U. C. R. 369.

Payment of Rent to Assignee of Mortgagor—*Agreement with Mortgagee.*]—The plaintiff declared that on the 12th December, 1857, one T. mortgaged certain lands to defendant for £300, and defendant by a memorandum in writing, signed by said T. and defendant, then agreed with T. to lease said land from him (T.) for two years at £40 a year, which said rent defendant and T. then agreed should be indorsed on and taken in part payment of the mortgage so soon as the two years should have elapsed; that afterwards, in April, 1858, defendant sold and assigned said mortgage to the plaintiff, and then promised the plaintiff to pay him the said £80 at the end of said two years, but did not pay the same. Plea, that before said agreement T. sold and conveyed the lands to one G., who thereupon gave notice to defendant to pay said rent to him, and that afterwards defendant paid to G. the first year's rent, and then gave up possession of the land to him:—Held, on demurrer, that the declaration was insufficient, for the agreement between the defendant and plaintiff would be without consideration, as they could not without T.'s privity compromise his right to the rent; and that the plea shewed a good defence. *Murdiff* v. *Ware*, 21 U. C. R. 68.

Payment of Rent to First Mortgagee—*Assignment of Lease to Second Mortgagee—Reformation—Intervention of First Mortgagee.*]—M., being possessed of certain lands subject to a mortgage, made a lease thereof for a term of years to the plaintiff, which provided, amongst other things, that $15 should be expended in the first year of the term in procuring manure for the purposes of the farm. Afterwards he created a mortgage in favour

of the defendant, and assigned to him the lease as collateral security. The defendant distrained for rent alleged to be due, and plaintiff replevied the goods seized, asserting that no rent was due; and proved the payment of certain moneys to the first mortgagee, and claimed also credit for $15 a year in respect of manure furnished and expended in each year on the premises, which, at the trial, was proved to have been the true agreement between the landlord and tenant, though not so expressed in the lease, and the lease was ordered to be reformed accordingly:—Held, that the lease should not have been reformed as against defendant, he being a bonâ fide purchaser for value without notice of the facts on which the plaintiff's equity rested. Held, also, that although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent, still, as the circumstances shewed that it was not intended to create such a contract, but rather that the interest being paid, the possession of the mortgagor and his tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee. *Forse* v. *Sovereen*, 14 A. R. 482.

Payment of Rent to Mortgagee—*Application of—Rights of Assignee of Equity.*]—A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where, therefore, a mortgagor created a lease of the mortgaged property, and gave an order for rent in advance to the mortgagee, to be, and which was, applied by him in discharge of other liabilities of the mortgagor, who afterwards transferred the equity of redemption to a bonâ fide assignee, without notice of such advance of rent:—Held, that the owner of the equity of redemption was entitled to have the amount of rent so advanced, applied in payment of the mortgage debt. *Gilmour* v. *Roe*, 21 Gr. 284.

Payment of Rent to Mortgagor—*No Notice of Mortgage.*]—On 1st November, 1856, one S., being seised in fee of certain lands in two lots, demised the same to defendant for five years from date. In July, 1857, S. mortgaged one lot, No. 42, to one C., in fee, and in February, 1858, mortgaged lot 43 to S. in fee. In June, 1861, C. and S. assigned their respective mortgages to plaintiff. In April, 1860, the sheriff, under execution, sold and conveyed the interest of S. in these lands to one T., who, in April, 1860, conveyed to plaintiff. The plaintiff, on 10 February, 1862, sued defendant for use and occupation. On the trial there was no evidence of notice from plaintiff to defendant that he (plaintiff) was possessed of the mortgage above mentioned, or of notice to defendant by mortgagees or plaintiff to pay rent to them or any of them. He (defendant) paid the rent for the whole term to S.:—Held, that though no attornment by defendant was necessary to render him liable, still he could not be prejudiced by any act of plaintiff as holding under S., till he had notice of the mortgage, and no notice having been given, his payments to S. during the term were good. *McFarlane* v. *Buchanan*, 12 C. P. 591.

Prior Lease—*No Notice to Mortgagee.*]—The owner of land deposited his title deeds on the 19th May, for the purpose of having a mortgage thereof prepared, which was accordingly made out and executed on the 30th of the same month. On the preceding day the mortgagor made a lease, of which, however, the mortgagee had not any notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed. *McKay* v. *Davidson*, 13 Gr. 498.

Tenancy at Will of Mortgagor—*Subsequent Tenant of Mortgagor—Ejectment—Demand.*]—A mortgage in fee to secure the payment of $1,490.42, by monthly instalments of $12.42, provided that the mortgagor should become tenant to the mortgagees thenceforth during their will, at the rent of one pepper corn monthly until default, and after default at the yearly rent of $149.04 payable monthly. There was also a proviso that, in case of default, the mortgagees, without any previous demand of possession, might enter and sell. In ejectment by the mortgagees upon default against the lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit or demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees, at their option, either to distrain or at any time to eject the mortgagor himself without demand, but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply tenant at will, semble, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent B. and S. Society* v. *Byers*, 19 C. P. 473.

Tenancy for a Year—*Mortgagee—Ejectment—Notice.*]—Where, before the mortgage was given, defendant became a tenant of the mortgagor for a year:—Held, that at the end of that time his right ceased, and that the mortgagees could eject him without notice. *Canada Permanent B. and S. Society* v. *Rowell*, 19 U. C. R. 124.

Yearly Tenancy—*Mortgagee—Ejectment—Notice—Extinguishment—New Lease—Parties.*]—One L., being the owner in fee of certain premises, by an instrument not under seal, dated 31st October, 1857, leased them to S. O., one of the defendants, for a period of five years. On 31st March, 1858, by indenture, he mortgaged the premises to J. C. and T. C., the plaintiffs, redeemable as therein set forth, and on the 8th June, 1858, by indenture, he again leased for a period of five years to S. O. Upon ejectment brought by the mortgagees:—Held, that the indenture of the 31st October, 1857, not being under seal, did not operate, since 14 & 15 Vict. c. 7, s. 4, as a lease for five years, but enured to the benefit of the lessee as a yearly tenancy; and no notice to quit or other determination of the tenancy having been given, the plaintiffs were not entitled to succeed. 2. That, although the indenture of June, 1858, as between the parties to it, operated as an extinguishment of the original agreement, yet it did not entitle the plaintiffs as mortgagees to succeed, they not being parties to it. *Caverhill* v. *Orvis*, 12 C. P. 392.

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8. *Mortgagee in Possession.*

(a) *Allowance for Improvements.*

Amount of Allowance — *Charge for Rents and Profits.*]—Semble, that when a

mortgagee is charged with rents and profits received from improvements made by himself, he should be allowed the expense of such improvements to a corresponding amount. *Constable* v. *Guest*, 6 Gr. 510.

Belief of Absolute Ownership.]—Improvements made under the belief of absolute ownership are allowed more liberally than to one who improves knowing that he is but a mortgagee. *Carroll* v. *Robertson*, 15 Gr. 173.

——— *Purchase at Sheriff's Sale—Resale—Vendee's Improvements.*]—The holder of a mortgage, having purchased under the power of sale contained in the mortgage, and afterwards under a sheriff's sale, sold and conveyed to a purchaser, who went into possession and made permanent improvements. On his purchase being set aside:—Held, that his vendee was entitled to be allowed for his improvements. Semble, the same rule would apply if the mortgagee himself had made the improvements. *McLaren* v. *Fraser*, 17 Gr. 567.

——— *Principles of Allowance—Trees—Cost Price—Report—Further Directions.*]—The principles upon which improvements by a mortgagee in possession are to be allowed for, considered and acted on. Where the mortgagee in possession had planted fruit and ornamental trees, suitable for carrying out improvements commenced by the mortgagor, he was allowed the cost price of the same, and a reasonable amount for care and cultivation, but not the value thereof at the time of redemption. A mortgagee in possession purchased at sheriff's sale, under an execution issued upon a confession of judgment signed by the administratrix of the estate of the deceased mortgagor in favour of the mortgagee, who was her brother, and acted as her counsellor and agent in the matters connected with the intestate's estate, and who thereupon made large improvements on the mortgaged premises, under the belief that his purchase at sheriff's sale had vested in him the absolute fee in the property. The court, considering the case one of some hardship on the mortgagee, refused on further directions to send the case back to the master, although it was probable some improvements had been allowed for which had been made before the mortgagee's purchase at sheriff's sale, and were not in strictness allowable; the party complaining of the allowance not having objected to the report, and the report not shewing on its face when the improvements were made. *Paul* v. *Johnson*, 12 Gr. 474.

Discretion—*Chancery Act.*]—The allowance for improvements under s. 11 of the Chancery Act (7 Wm. IV. c. 2) is discretionary with the court. Where, therefore, upon a reference to the master, under a decree for redemption, where the mortgage had become absolute before 1837, the master had allowed the price of certain valuable improvements, among others a brick dwelling, stating that he did so solely under the statute, the court referred the matter back to him to allow or disallow such improvements. *Harrison* v. *Jones*, 10 Gr. 99.

Erection of Mill without Consent.]—A mortgagee in possession of a grist mill and other property erected a carding and fulling mill. This was disallowed to him, as being an improvement that a mortgagee could not make without consent. *Kerby* v. *Kerby*, 5 Gr. 587.

Laches in Making Claim—*Petition—Special Circumstances.*]—A foreclosure suit had been instituted in 1865, and brought to a conclusion: after which, in 1866, to supply a defect in the first suit a second one was brought, and the report of the master obtained therein in December, 1868, which was appealed against and a reference back ordered. In proceeding under this order in 1875, the personal representative of the mortgagee, who had died during the pendency of the appeal, claimed a sum of $2,937, with interest, for permanent improvements, but for which the mortgagee had never put forward any claim during the proceedings under the original decrees. The master having refused to entertain the claim, a petition was presented to the court praying for an order to be allowed to prove such claim notwithstanding the delay; but the court, in view of all the circumstances, refused the application, and dismissed the petition with costs. The circumstances under which a claim may be made for improvements by a mortgagee while in possession, and the effect of 36 Vict. c. 22 (O.), in respect of improvements made on the lands of others through mistake as to the ownership, considered. *Romaues* v. *Herns*, 22 Gr. 469.

Permanent Improvements—*Full Allowance for—Agreement of Mortgagor.*]—Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all cost of improvements made by her:—Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon. And where the mortgagors so agreeing were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them:—Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements. *Brotherton* v. *Hetherington*, 23 Gr. 187.

See Skae v. *Chapman*, 21 Gr. 534; *Bullen* v. *Renwick*, 9 Gr. 202, *post* (b).

(b) *Liability to Account for Rents and Profits.*

Absolute Conveyance—*Cutting down—Rents Received — Improvements.*]—After a treaty with A. for a loan on land, the owner conveyed absolutely to A., receiving back a bond conditioned to reconvey the property, on payment of a certain sum at the end of two years, and made default in such payment. On a rehearing the deed was declared to have been made as security only—the bond to reconvey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof; but under the circumstances the court charged the mortgagee with such rents and profits as were actually received, or an occupation rent, if in actual possession; not with such rents as might have been received; and allowed him for repairs and permanent improvements. *Bullen* v. *Renwick*, 9 Gr. 202.

Account — *Rests — Occupation Rent — Statute of Limitations.*]—In taking the account in the master's office it is improper to charge a mortgagee in possession with annual rests on rents received by him until he is paid off in full. The principle upon which a mortgage is liable to be charged with rents not actually received considered. The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Caldwell* v. *Hall*, 9 Gr. 110.

Grantee Allowing Grantor to Resume Possession—*Liability of Grantee for Rents.*]—The owner of land made a conveyance thereof to the grantee, his heirs and assigns, which was intended as a security for repayment of a sum advanced, with interest, and after the same was fully paid and satisfied, the deed was expressed to be to the use of E. B., wife of the grantor, for life; and, after her decease, to the use of the children of the grantor and the said E. B. in fee; no time being specified for payment of the money. Upon the execution of the deed the grantor put the grantee into possession of the estate, which he continued to occupy for some time. Subsequently the grantee allowed the grantor to resume possession of the property, and afterwards assigned his interest to his sister E. G., who took no step to recover possession or interfere with the occupation of the grantor or those claiming under him. On a bill subsequently filed by the children of the grantor, alleging that the moneys secured by such deed had been fully paid and satisfied:—Held, that, under the circumstances, E. G. was not liable for the rents and profits. *Rice* v. *George*, 19 Gr. 174.

Greater Rent Than Received—*When Chargeable.*]—Although the rule is, that when the mortgagee enters into possession he does so for the purpose of recovering both his principal and interest, and the estate, in the view of a court of equity, is a security only for the money due on the mortgage, and the court requires him to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor, who is in equity the party entitled to it; still he will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same. *Merriam* v. *Cronk*, 21 Gr. 99.

Possession After Payment—*Interest—Rests—Resisting Redemption.*]—If a mortgagee retains possession of the property after being paid in full, the general rule is, to charge him with interest and rests in respect of his subsequent receipts: a fortiori is such a charge proper when a mortgagee resists the mortgagor's right to redeem. *Crippen* v. *Ogilvie*, 15 Gr. 568.

Protection of Mortgagee—*Mortgage Not in Arrear—Rests—Rent Paid to Widow of Mortgagor—Interest.*]—Where it is necessary that a mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear. A tenant of a mortgagor paid and took an assignment of the mortgage after the mortgagor's death, and the representatives of the mortgagor having no means of paying the debt, he agreed with the widow that she and her children should occupy the dwelling house and four acres of the mortgaged property; and that he himself should occupy the residue at a rental of $170, should pay $40 a year to the widow, and apply the residue of the rent on the mortgage:—Held, in a suit by a purchaser of the equity of redemption to redeem, that the defendant was not chargeable with the $40 a year he had paid the widow, nor with rests, though the rent for which he was accountable exceeded the interest *Gordon* v. *Eakins*, 16 Gr. 363.

Second Mortgagee — *Redemption — Account—Timber.*]—In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession, and had cut and removed timber to a greater value than the amount due on his mortgage:—Held, that he was bound to account only for the value of such timber and occupation rent as was taken or received by him as mortgagee, not as owner of the equity of redemption; but that the second mortgagee might ask for a receiver. *Steinhoff* v. *Brown*, 11 Gr. 114.

Several Devisees—*Mortgage by One.*]—One of several devisees claimed to be solely entitled, and mortgaged the property. The mortgagees entered into the receipt of the rents:—Held, that they must account to the other devisees for their shares of the rent. *McIntosh* v. *Ontario Bank*, 19 Gr. 155.

Tenant of Mortgagor—*Eviction of.*]—A mortgagee taking possession, and evicting a tenant of the mortgagor who is willing to remain and pay rent, will be held accountable for the rents from that time. *Penn* v. *Lockwood*, 1 Gr. 547.

——— *Promise to Pay Rent.*]—After default on a mortgage, a tenant put in possession by the mortgagor promised to pay the mortgagee rent, but failed to do so:—Held, that the mortgagee was not chargeable with such rent. *Waddell* v. *McColl*, 14 Gr. 211.

Time for Commencement of Account—*Assertion of Right—Previous Occupation.*]—The holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but asserted no claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave. The brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property. *Paul* v. *Johnson*, 12 Gr. 474.

Time for Termination of Account—*Day for Payment.*]—Where the plaintiff, a mortgagee, is in occupation of the mortgaged premises, the master should charge him with occupation rent up to the day appointed for payment; so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent only to the date of the master's report, and had since continued in possession, the final order for foreclosure was refused. *Pipe* v. *Shafer*, 1 Ch. Ch. 251.

See Constable v. *Guest*, 6 Gr. 510, *ante* (a); *Court* v. *Holland*, 29 Gr. 19, *post* (c).

(c) *Other Cases.*

Agreement with Mortgagor—*Rights of Subsequent Incumbrancer.*] — As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term. But a subsequent incumbrancer—prior to the first mortgagee entering into possession—is not bound by such an agreement; and the master may charge the first mortgagee with a fair occupation rent, although it exceeds that stipulated for. *Court* v. *Holland*, 29 Gr. 19.

Conveyance by Mortgagee—*Form.*] — Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular," the mortgaged land, habendum "as and for all the estate and interest" of the grantors "in and to the same:"—Held, sufficient to pass the fee to the grantees. *Bright* v. *McMurray*, 1 O. R. 172.

Rent Paid to Mortgagee — *Proviso in Lease — Effect of — Mortgagee not in Possession.*]—C., owner of the premises in question, mortgaged them on 6th February, 1880, to a loan company. On 17th March, 1883, C. made a second mortgage to L., who assigned to the plaintiff. On 5th October, 1883, C. leased the premises to the defendant for ten years from 1st April, 1884, at $175 for the first year, and $165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default:—Held, that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant. Held, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor." The plaintiff was therefore held entitled to recover. *Frost* v. *Hines*, 12 O. R. 669.

See McDowall v. *Phippen*, 1 O. R. 143.

See next sub-title.

9. *Possession of Mortgaged Property.*

(a) *Generally—Right to Possession.*

Mortgagee — *When Entitled.*]—A mortgagee is entitled to take possession at any time, even before default, unless the right to possession till default be reserved; and where it has not been, and the mortgagor has died, the widow stands in no better position than her husband. *Doe d. Mowat* v. *Smith*, 8 U. C. R. 139.

Mortgagor — *Continuing in Possession — Rents — Waste.*]—A mortgagor continuing in possession, where the mortgage reserves no such right, is not liable to the mortgagee for rents and profits, or, in general, for waste. *Wafer* v. *Taylor*, 9 U. C. R. 609.

——— *Position and Rights of, under Proviso for Possession until Default— Redemise.*] — Ejectment on a mortgage made by defendant, as a member of the plaintiff society, to them, of a leasehold interest, dated 31st August, 1861, which mortgage contained a proviso for payment of the mortgage money by monthly instalments, for five years from the date, together with charges, fines, &c., due, or to be imposed by said society on the defendant, as a member thereof, and a covenant to pay the instalments, &c., and to indemnify plaintiffs against all payments and covenants, &c., contained in the lease of the premises in question to himself, and an agreement that until default defendant should have possession. Proviso, that in case of default in payment of any of the sums mentioned, for six months, plaintiffs might enter, take possession, and sell, &c. At the trial it was proved that defendant was in default for February, March, April, and May—the instalments for June and July had been paid. Defendant contended that the plaintiffs could not sue till some payment had been six months in arrear:—Held, that the only agreement in the mortgage entitling defendant to hold possession was that providing he should hold till default was made in some or one of the payments in the proviso mentioned; that, therefore, this proviso could be at most but a redemise for the space of five years, with an agreement for a determination thereof at any moment on the defaults specified accruing; that the proviso as to any default for the space of six months, did not amount to a redemise; and that the plaintiffs therefore were entitled to recover. *Toronto Permanent Building Society* v. *McCurry*, 12 C. P. 532.

See, also, *Canada Permanent B. and S. Society* v. *Byers*, 19 C. P. 473; *James* v. *McGibney*, 24 U. C. R. 155.

——— *Proviso for Possession until Default —Pleading.*]—Trespass, for breaking and entering plaintiff's house. Pleas, (2) that the house was not plaintiff's; (3) liberum tenementum of the defendant J. A., and entry of the other defendant by his command. The land had belonged to one C., who mortgaged in fee to S. to secure a sum payable by instalments, with a proviso for possession by the mortgagor until default after three months' notice. C. conveyed to M., and M. to defendant J. A. No default had been made on the mortgage. The plaintiff had entered under an agent of S.:—Held, that the defendant was entitled to succeed on the second plea; and semble, upon the third also. *Dundas* v. *Arthur*, 14 U. C. R. 521.

——— *Omission of Redemise Clause—Intention—Rules of Building Society.*]—Held, that, notwithstanding the omission of the redemise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiff company, that it was the intention of the parties that the defendant should retain possession until default, and the plaintiffs should, therefore, be enjoined from disturbing the defendant's possession until such default. *Superior Savings and Loan Society* v. *Lucas*, 44 U. C. R.106. See *S. C.*, 15 A. R. 748.

See, also, 2, 8, *ante*.

See Peck v. *Custead*, 10 L. J. 302.

(b) *Ejectment.*

Equitable Mortgagee—*Statute of Uses—Legal Estate.*]—In ejectment, the plaintiff claimed under a sealed instrument executed in his favour by one M., witnessing that in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, and of the sum of £25 already paid and advanced by plaintiff to him, &c., he, M., covenanted, granted, and agreed that he would stand seised and possessed of the land in question, to the use of plaintiff, his heirs and assigns, by the way of charge, security, and mortgage on the land for said moneys and costs, and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a charge, mortgage, and security upon the land for the amount so to be ascertained, or M. would, and he covenanted that he, or his heirs, would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c.:—Held, that it could only operate under the Statute of Uses, as being granted on a money consideration which appeared from the express recitals contained in it; and semble, that full effect would be given to the whole instrument, and the real intent of the parties carried out, by holding that it was to operate as a charge, security, and mortgage in equity on the land, until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge, unless plaintiff desired a legal mortgage, which in that case M. covenanted to execute. Quære, whether the plaintiff took the legal estate so as to enable him to maintain ejectment. *Miller* v. *Stitt*, 17 C. P. 559.

Former Action on Covenant—*Settlement—Reconveyance.*]—Held, that a receipt for 1s. in full of damages and costs, in an action in debt, founded upon the covenant in a mortgage, did not operate as a reconveyance of the estate so as to defeat an ejectment brought subsequently upon the same security. *Carter* v. *McLaurin*, 8 C. P. 460.

Infant Mortgagor — *Defence — Avoidance.*]—A mortgage of land given by an infant is voidable only, not void, but it may be avoided during infancy, and defending by a guardian an action of ejectment brought by the mortgagee, is a sufficient act of avoidance. *Gilchrist* v. *Ramsay*, 27 U. C. R. 500.

Judgment by Default—*Interest—Subsequent Payment.*] — Defendants mortgaged land to the plaintiffs for £875, payable on the 23rd June, 1864, and interest half-yearly, on the 23rd June and December, with a proviso for entry by the mortgagees after and possession by the mortgagors until default. The interest due on the 23rd June, 1863, being in arrear, on the 11th December following the plaintiffs brought ejectment. Defendants' attorney paid the interest up to the 23rd of that month, and on the 29th July following, the principal not having been paid, judgment was entered for want of appearance, and a writ of hab. fac. poss. issued. Defendants' attorney swore that this payment was accepted in satisfaction of the suit, which the plaintiffs' attorney denied:—Held, that the judgment was regular, for the admitted default in the interest vested the land absolutely in the plaintiffs, and the subsequent payment could not divest it; defendants' only remedy being an application for relief under 7 Geo. II. c. 20, or under the last proviso in the mortgage. *Goodere* v. *Wallace*, 24 U. C. R. 31.

Judgment — *Possession and Sale—Infants.*]—In an action of ejectment by mortgagees, on the application of the infant defendants, an order for immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts; but $80 was ordered to be paid into court to meet the expenses of the sale. *Western Canada Loan and Savings Co.* v. *Dunn*, 9 P. R. 490, 587.

——— *Summary Judgment.*]—A writ of summons was indorsed under rule 141 with claims for foreclosure of a mortgage, immediate recovery of possession of the mortgaged premises, and immediate payment of the mortgage money:—Held, that it could not be said to be specially indorsed under rule 138 so as to entitle the plaintiffs to move under rule 603 for summary judgment for recovery of land. *Independent Order of Foresters* v. *Pegg*, 19 P. R. 80.

Speedy judgment granted in an action of ejectment by a mortgagee on default in payment of the mortgage, immediately after the service of the writ and summons, it being shewn that the plaintiff had an advantageous offer for purchase, and wished to be in a position to give the purchaser possession. *McNider* v. *Ross*, 10 C. L. T. Occ. N. 17.

Limitation of Actions—*Third Party in Possession.*]—Where a mortgagee has neither taken possession of the land after default, nor received interest within twenty years, the title is in the mortgagor; and the mortgagee, if suing in ejectment a third party in possession, may be nonsuited. *Doe d. McLean* v. *Fish*, 5 U. C. R. 295.

Notice or Demand.]—Where a mortgagor in possession after default received a letter from the mortgagee, who was in a foreign country, directing him to put in a spring crop, unless he came back in time for the mortgagor to remove in the spring, and he did not come until the summer:—Held, that, notwithstanding the relation of mortgagor and mortgagee, defendant, under the circumstances, could not be ejected while the crops were growing, nor without a demand of possession. *Doe d. Patterson* v. *Brown*, H. T. 6 Vict.

A mortgage contained the usual covenant to pay, and that in case of default the mortgagee might enter into possession; also, a

declaration that if the mortgagor should make default, and the mortgagee should, after the time for payment, have given a month's notice demanding payment, the mortgagee might take possession, &c. The mortgagor also covenanted that no means should be taken for recovering possession until after such notice:—Held, that ejectment would not lie until such month's notice had been given after default made. *Copp* v. *Holmes*, 6 C. P. 373.

A mortgage provided that no means should be taken to obtain possession until after a month's notice in writing, after default, demanding payment:—Held, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant more than a month before this action, was sufficient, without any proof of authority. *Keyworth* v. *Thompson* 16 U. C. R. 178.

In ejectment brought upon a mortgage, it appeared that before the mortgage was given defendant became a tenant of the mortgagor for a year:—Held, that at the end of that time his right ceased, and that the mortgagees could eject him without notice. *Canada Permanent Building and Savings Society* v. *Rowell*, 19 U. C. R. 124.

The plaintiff (mortgagee) covenanted with defendant (mortgagor) that no sale of the land and premises or any lease should be made until one month's notice in writing should be given:—Held, that defendant was not entitled to a month's notice before bringing ejectment. *Stevenson* v. *Culbertson*, 12 C. P. 79.

In April, 1861, R. mortgaged the land to defendant for $1,000, payable on the 23rd April, 1863, with interest in the meantime half-yearly, covenanting that after default defendant might enter; that if he should make default, and defendant should after the time for payment have given written notice demanding payment, and a calendar month should have elapsed without payment, defendant might enter and lease or sell; and defendant covenanted that no sale or lease should be made, nor any steps taken by him to obtain possession, until such notice should have been given. There was a proviso that until default after such notice R. might hold possession. In May, 1861, defendant assigned this mortgage to the plaintiff. R. in November, 1862, being in possession, leased to defendant for two years, and in December following he conveyed his equity of redemption to the plaintiff. Nothing had been paid on the mortgage. In July, 1863, the plaintiff brought ejectment:—Held, that the plaintiff might recover without having given the month's notice, for having acquired the land and lost his claim to the debt, there was no one to whom a demand of payment could be made. *Konkle* v. *Maybee*, 23 U. C. R. 274.

By a mortgage in fee to secure payment of $1,490.42, by monthly instalments, it was provided that the mortgagor should become tenant to the mortgagees thenceforth at will, at the rent of one pepper corn monthly until default, and after default at the yearly rent of $149.04, payable monthly. There was also a proviso that in case of default the mortgagees, without any previous demand of possession, might enter and sell. On ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit nor demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees at their option either to distrain or at any time to eject the mortgagor himself without demand; and that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply tenant at will, semble, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent Building and Savings Society* v. *Byers*, 19 C. P. 473.

Second Mortgagee — *Estoppel.*]—Where A. mortgaged his property to two persons at different times, and died after default upon the first mortgage, without having redeemed either, and the first mortgagee having taken possession sold for a valuable consideration to A.'s heir, who entered into possession and died, leaving B. his heir, who was also A.'s heir:—Held, that the second mortgagee, having a mortgage of the equity of redemption only, could not eject B., who was in by purchase, and not by descent, and was therefore not estopped by A.'s deed. *Doe d. Gillespie* v. *Macaulay*, H. T. 7 Wm. IV.

D. mortgaged to the Trust and Loan Company, and afterwards to A., who assigned to the plaintiff. D. then conveyed to the defendant, who took possession, and was recognized by the Trust and Loan Company as holding under them. The plaintiff brought ejectment, there having been no default under the mortgage to the Trust and Loan Company, which contained a proviso for possession by D. until default:—Held, that the plaintiff was entitled to recover, for D. could not, in the face of his mortgage, deny A.'s right of possession (though A. might be ejected by the company), or that of the plaintiff as his assignee. *Reed* v. *McBean*, 8 C. P. 246.

——— *Merger of Prior Mortgage.*]—The plaintiff brought ejectment on the 6th September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McI. assigned to him. The mortgage to McI. was given on the 9th November, 1861, and that to the plaintiff on the 21st March, 1864. On the 21st September, 1865, McI. by deed, reciting an interlocutory decree in chancery, in respect of the foreclosure of W.'s mortgage to him, conveyed to M. as W.'s appointee, and on the 9th November, 1865, by a decree in the same suit, this mortgage was finally foreclosed. It was contended that the mortgage to McI. had merged in the inheritance, and could not be set up against the plaintiff:—Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards. *McKay* v. *McKay*, 25 U. C. R. 133.

Stay of Action — *Concurrent Suit in Chancery.*]—A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in chancery against him for a sale:—Held, that, as the mortgagee could, since the Administration of Justice Act, R. S. O. 1877 c. 49, obtain in the chancery suit all the

remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay* v. *McArthur*, 8 P. R. 321.

——— *Right to Redeem—7 Geo. II. c. 20.*]—A. gave an absolute conveyance of land to B., to secure a sum of money lent by him to A., and B. gave a bond for its reconveyance on the payment of the money lent, at a certain day. On ejectment brought by B., after a lapse of eight years, the court ordered that proceedings should be stayed on payment of the principal, interest, and costs, and refused to allow the plaintiff to include a simple contract debt incurred on the security of the bond, because there was no writing respecting it, and the statute 7 Geo. II. c. 20, under which the proceedings were stayed, did not extend to it. *Doe d. Shuter* v. *McLean*, 4 O. S. 1.

A judgment and execution in ejectment on a mortgage will be set aside in favour of an innocent purchaser without notice, so as to enable him to redeem on payment of costs, under 7 Geo. II. c. 20. *Doe d. Milburne* v. *Sibbald*, 4 O. S. 330.

A., having purchased land, and paid several instalments, but received no deed, assigned his right to B., taking a bond from him that if he should obtain the deed, on the payment by A. to him of £100, in two years, he would convey to A.:—Held, on ejectment by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem under the Act. *Doe d. Shannon* v. *Roe*, 5 O. S. 484.

In ejectment on a mortgage, the court will not order the proceedings to be stayed, and a reconveyance under 7 Geo. II. c. 20 to be executed, on payment into court by defendant of the money due upon the bond and mortgage, together with the costs of the action, where the whole amount secured by the mortgage is not admitted to be due; nor will a reference to the master be ordered to ascertain the amount actually due. *Doe d. McKenzie* v. *Rutherford*, 1 U. C. R. 172.

A defendant in ejectment applying to stay proceedings on payment of the mortgage money, must be the person who has the right to redeem, and therefore a motion by the tenant of an assignee of a lease for years from the heir of the mortgagor, was refused. But, independently of this ground, the facts, as set out, would prevent the court from interfering summarily. *McDonald* v. *Doray*, 11 U. C. R. 318.

Held, that this case could not, upon the contradictory affidavits, be considered as within the Act. A mortgagor is not, under 7 Geo. II. c. 20, entitled as of course to redeem, because the plaintiff has given no notice denying the right; but the plaintiff may still shew that the case is not one within the statute. *Cory* v. *Vale*, 1 P. R. 210.

See Goodeve v. *Wallace*, 24 U. C. R. 31.

Held, that an action of ejectment by a mortgagee against a mortgagor, will only be stayed upon payment of the costs of an abortive sale under the mortgage. *Trust and Loan Co.* v. *McGillvray*, 7 P. R. 318.

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10. *Purchaser of Equity of Redemption*

(a) *Liability to Indemnify against Mortgage.*

Covenant—*Assignment—Subsequent Dealings of Mortgagee with Purchaser—Release*

—*Damages.*]—A mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage, which he assigned to the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser the benefit of similar covenants from sub-purchasers, agreeing to exhaust her remedies against the latter before suing the purchaser;—Held, reversing the judgment in 24 A. R. 492, that the mortgagee, being the sole owner of the covenant of D. with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage. *McCuaig* v. *Barber*, 29 S. C. R. 126.

——— *Assignment — Subsequent Dealings of Mortgagee with Purchaser—Second Action —Res Judicata.*]—In a subsequent action on the same covenant:—Held, that the court might properly examine the pleadings, evidence, and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments might be looked at for the purpose of shewing what was decided; that the dismissal of an action on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection; and that the plaintiff, having, before this action was brought, exhausted her remedies and made an arrangement with the purchaser of the equity of redemption by which she was placed in the same position with respect to him as she was in before she received the securities mentioned, was entitled to recover from the defendant in this action, notwithstanding that she had retransferred the securities to the purchaser and agreed not to sue on his covenant, such agreement having reserved the defendant's right to sue the purchaser of the equity of redemption should the covenant be reassigned by the plaintiff to the defendant. *Barber* v. *McCuaig* (2), 31 O. R. 593.

——— *Enforcement by Judgment Creditor —Receiver.*]—A judgment creditor of a mortgagor upon covenants in the mortgage cannot obtain a receivership order to enforce payment by a purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he sue and make the application on behalf of himself and all other creditors of the mortgagor. *Palmer* v. *McKnight*, 31 O. R. 306.

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

Implied Obligation.] — Irrespective of the form of the contract between the parties, the rule is clear that the purchaser of an

equity of redemption is bound as between himself and his assignor to pay off the incumbrances. *Thompson* v. *Wilkes*, 5 Gr. 594.

The purchaser of an estate subject to his vendor's mortgage is bound to indemnify the vendor against such mortgage debt. *Roberts* v. *Rees*, 5 L. J. 41.

——— *Assignment — Evidence.*]— Although, when a mortgagor conveys his equity of redemption subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary. A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter. *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664.

——— *Assignment — Right of Action.*]— The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. *Campbell* v. *Morrison*, 24 A. R. 224; *Maloney* v. *Campbell*, 28 S. C. R. 228.

A sale for $275 of land on which there was a mortgage for $1,100, the conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against which the vendor was entitled to be indemnified by the purchasers; and the plaintiff having acquired an assignment of such right of indemnity, he was entitled to enforce it against the purchasers. *Goodcrham* v. *Moore*, 31 O. R. 86.

——— *Death of Mortgagor—Administrators—Release of Purchaser.*]—The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made upon them by the mortgagee in respect of the mortgage. Judgment in 30 O. R. 684 affirmed. *Higgins* v. *Trusts Corporation of Ontario*, 27 A. R. 432.

——— *Exchange of Lands.*]—A purchaser of an equity of redemption is bound as between himself and his vendor to pay off the incumbrances, and this quite irrespective of the frame of the contract between the parties. Where therefore lands were exchanged between the plaintiff and defendant which were subject to certain mortgages, the defendant was held bound to pay off those on the lands conveyed to him, and to protect the plaintiff from liability thereon. *Boyd* v. *Johnston*, 19 O. R. 598.

——— *Married Woman.*]—Held, reversing the decision in 19 O. R. 739, that the power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby. Held, also, that the implied obligation to pay off the incumbrance which in the case of a conveyance of land to a person sui juris is imposed by a court of equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property. The practice as to giving relief to one defendant against a co-defendant considered. *McMichael* v. *Wilkie*, 18 A. R. 464.

——— *Married Woman — Disclaimer.*]— Where a deed of lands to a married woman, which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon and a covenant to the same effect with the vendor, his executors, administrators, and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate. *Small* v. *Thompson*, 28 S. C. R. 219.

——— *Nominal Purchaser.*]—The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore, where, at the request of the actual purchaser, the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor. It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title. Application of con. rules 328, 329, 330, 331, 332, 333, discussed. Lockie v. Tennant, 5 O. R. 52, approved. *Walker* v. *Dickson*, 20 A. R. 96.

——— *Rebuttable Presumption.*]—When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract. Waring v. Ward, 7 Ves. 322, explained. *Beatty* v. *Fitzsimmons*, 23 O. R. 245.

——— *Suretyship.*]—When a mortgagor who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, he becomes surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt. *Campbell* v. *Robinson*, 27 Gr. 634.

——— *Suretyship — Parties.*] — Where a purchaser of a mortgaged estate takes the same subject to the vendor's mortgage, and sells to another without paying off said mortgage, he will be compelled to fulfil his undertaking to

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

——— *Trustee for True Purchaser.*]—L. F. agreed in writing to sell land to C. F. and others, subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F., and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L. F. became a member, receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as a third party to indemnify L. F., his vendor, against a judgment in said action:—Held, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf, but for the company, and the company and not C. F. was liable to indemnify the vendor. *Fraser* v. *Fairbanks*, 23 S. C. R. 79.

See British and Canadian L. and I. Co. v. *Williams*, 15 O. R. 366; *Re Crozier, Parker* v. *Glover*, 24 Gr. 537, *post* (b).

(b) *Liability to Pay Mortgage.*

Assumption of Mortgage—*Part of Consideration — Equivalent of Undertaking — Executors.*]—B. sold land to C., who was to pay a mortgage thereon as part of the purchase money, and the deed described the land as being "subject to a mortgage in favour of McF. for $596 with interest as therein mentioned:"—Held, in a suit to administer the estate of C., that the executors were entitled to credit for all moneys paid by them on account of the mortgage; and that the mortgagee was entitled to prove for the balance of the mortgage debt against the general estate of C. The acceptance of a deed reciting that the property is conveyed subject to a mortgage or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration and retained by the vendee as so much money belonging to the incumbrancer. *Re Crozier, Parker* v. *Glover*, 24 Gr. 537.

Covenant—*Unexecuted Deed—Acceptance of Benefit—Action.*]—An action of covenant cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay certain mortgages existing upon the premises, but which has not been executed by the grantee, although she has accepted the benefit of the deed. *Credit Foncier Franco-Canadien* v. *Lawrie*, 27 O. R. 498.

Privity—*Mortgagee and Purchaser.*]—Although a purchaser from the mortgagor of the equity of redemption, covenants with him to pay off the mortgage debt, this, owing to the want of privity, affords no ground for the mortgagee proceeding against the purchaser, either at law or in equity, to compel him to perform his covenant. *Clarkson* v. *Scott*, 25 Gr. 373.

Although the purchaser of the equity of redemption in a mortgaged property covenants with the mortgagor to pay the mortgage money, as the expressed consideration for the conveyance, there is no privity of contract or any implied obligation created thereby, which will enable the mortgagee to sue the purchaser for the amount. *Frontenac Loan and Investment Society* v. *Hysop*, 21 O. R. 577.

The purchaser of land, subject to a mortgage, does not ipso facto become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay mortgage money does not run with the mortgaged lands. *Canada Landed and National Investment Co.* v. *Shaver*, 22 A. R. 377.

——— *Mortgagee and Purchaser — Deficiency.*]—A mortgagor having become insolvent, his assignees sold the equity of redemption:—Held, that the purchaser was not bound to make good any deficiency on a sale to realize the security. *Nichols* v. *Watson*, 23 Gr. 606.

——— *Mortgagee and Purchaser—Suretyship—Discharge—Interest.*]—On the purchase of an estate subject to a mortgage the purchaser agreed to pay off the security, and subsequently agreed with the mortgagee for an extension of time for five years, agreeing in consideration thereof to pay an increased rate of interest, and covenanted that he would pay to the mortgagee the said interest quarterly, so long as the said forbearance should continue, and until the principal money was fully paid. On a bill filed to enforce payment of the incumbrance:—Held, that the purchaser was personally bound to pay only the interest on the debt; and that by the extension of time to the purchaser, who had become the party primarily bound to pay, the personal liability of the mortgagor therefor had been discharged. *Mathers* v. *Helliwell*, 10 Gr. 172.

——— *Mortgagee and Purchaser—Suretyship—Discharge—Novation.*]—Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend, as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them. Mathers v. Helliwell, 10 Gr. 172, distinguished. *Aldous* v. *Hicks*, 21 O. R. 95.

See Hamilton Provident Loan and Investment Co. v. *Smith*, 17 O. R. 1.

See cases under (d).

(c) Rights against Vendor.

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

——— *Covenant—Mortgage by Purchaser —Payment of Prior Mortgage—Injunction.*] —Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify against incumbrances, and the purchaser gave a mortgage on the land for part of the purchase money. He afterwards learned that, before his purchase, these and other premises had been mortgaged to another person for a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee being about to sell under his mortgage the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor and the vendor, claiming a right to apply the amount due by him in discharge of the first mortgage, and an injunction to restrain any action for such amount until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due; and the vendor had become insolvent. Under these circumstances, an interim injunction was granted upon payment of the amount due into court. *Heap* v. *Crawford*, 10 Gr. 442.

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

——— *Reimbursement — Lien — Sale of Portion Retained.*]—On the sale of an estate, the purchaser executed a reconveyance by way of mortgage to the vendor, and afterwards sold and conveyed a part of the property, by a deed without covenants, which contained this clause:—"That I, the said M., and my heirs and assigns, and every of them, from all estate, right, title, interest, property, claim, and demand, of, into, or out of the said parcel or tract of land, or any part thereof, are, is, and shall be by these presents for ever excluded and debarred." Upon a bill by his vendees, the original purchaser (who had executed the mortgage) was decreed to reimburse his vendees the amount they should be compelled to pay in order to discharge such mortgage; and in default a sale of the portion of the estate retained by him. *Maitland* v. *McLarty*, 1 Gr. 576.

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

(d) Other Cases.

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

Mortgagee and Purchaser — *Dealings between—Covenant of Mortgagor — Enforcement.*]—An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected or the value of the mortgaged property impaired he cannot complain. Bristol and West of England Land Co. v. Taylor, 24 O. R. 286, distinguished. *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167.

The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor. Aldous v. Hicks, 21 O. R. 95, approved. Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen. So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights. Mathers v. Helliwell, 10 Gr. 172, explained. Dictum of Maclennan, J.A., in Trust and Loan Co. v. McKenzie, 23 A. R. 167, dissented from. Barber v. McCuaig, 24 A. R. 492, 29 S. C. R. 126, followed. *Forster* v. *Ivey*, 32 O. R. 175.

Payment of Charge—*Obligation—Right to Keep Alive—Mesne Incumbrancer.*]—The

purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract, express or implied, to discharge, cannot keep such charge alive against a mesne incumbrance, which, by the terms of the contract of purchase, express or implied, the purchaser was also bound to discharge. *Blake* v. *Beaty*, *Beaty* v. *Blake*, 5 Gr. 359.

Payment of Mortgage—*Right to Assignment.*]—The purchaser of an equity of redemption in lands, pending foreclosure, who has paid off the plaintiff, is not entitled to an assignment of the mortgage debt; he can only demand a reconveyance of the premises, or a discharge of the mortgage. *Thompson* v. *McCarthy*, 13 C. L. J. 226.

Purchaser at Sheriff's Sale—*Payment of Prior Mortgage*——*Right to Keep Alive*—*Lease*—*Notice.*]—Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process, and the purchaser paid off the prior mortgage:—Held, that the purchaser, being bound to protect the mortgagor against both the incumbrances, was not at liberty to keep alive the prior mortgage as against the second mortgage. In such case, the purchaser, upon the expiration of the term, obtained a new lease from the rector, and created a mortgage on such new term:—Held, that such new lease was a mere graft upon the original one, and as such was subject to the mortgage which had been left outstanding; but, as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority. *McDonald* v. *Reynolds*, 14 Gr. 691.

——— *Tenant to Mortgagee—Possession.*]—The assignee of a mortgagor's interest, through the medium of a sheriff, after the mortgage has been satisfied, cannot be looked upon as a tenant at sufferance to the mortgagee. A conveyance, therefore, made by the mortgagee while such an assignee was in possession, would be void. *Doe d. Carey* v. *Cumberland*, 7 U. C. R. 494.

——— *Validity of Mortgage — Redemption.*]—A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, in order to raise money to pay legacies, mortgaged the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:—Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, 29 Vict. c. 28, s. 12, the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed. *Lundy* v. *Martin*, 21 Gr. 452.

Release to Mortgagee—*Judgment Creditor—Keeping Mortgage Alive.*]—A., the owner of lands, mortgaged them to B. C. then registered a judgment against A. After the time for payment of the mortgage, A. conveyed absolutely to B., who released his mortgage, and then conveyed to D. In a suit by C. to foreclose under his judgment, D. claimed priority in respect of B.'s mortgage over C.'s judgment, on the ground that the conveyance from A. to B. was in substance a release of A.'s equity of redemption, and that B. still held his mortgage against subsequent incumbrancers:—Held, that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, a mortgagee acquiring the equity of redemption would be entitled to such priority; but that the release was strong evidence that there was no such intention here. *Buckley* v. *Wilson*, 8 Gr. 566.

Sale in Parcels — *Right of Prior Purchaser.*]—A., the registered owner of Whiteacre and Blackacre and other lands, mortgaged all to the plaintiff. He then sold Whiteacre to B., and afterwards Blackacre to K., covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after the execution:—Held, that B.'s right, as between him and K., was to throw the whole mortgage, and not merely a ratable part, on Blackacre. *Jones* v. *Beck*, 18 Gr. 671.

Voluntary Conveyance—*Creditor — Estoppel.*]—Where a debtor, at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him. Such a mortgagee cannot charge against the land under his mortgage any advances made after notice of the conveyance. Hopkinson v. Rolt, 9 H. L. C. 514, and similar cases, considered and applied. *Blackley* v. *Kenny*, 16 A. R. 522.

——— *Creditor — Estoppel—Suretyship—Notice—Discharge.*]—One of the defendants, who was the husband of another of the defendants, mortgaged certain lands to the plaintiff, a member of a mercantile firm, to secure an existing indebtedness to the firm and future advances. Subsequently the husband, by the advice of the plaintiff, conveyed his equity of redemption in the lands to his wife, subject to the mortgage. At the time of this conveyance, the debt due the plaintiff's firm was represented by notes under discount which, as they fell due, were retired by the firm, the husband making part payments thereon, procuring fresh goods from the firm, giving renewals for the balances, and getting delivery up of the original notes, the wife not being consulted as to these dealings, and rights against her not being reserved. The husband subsequently made an assignment under R. S. O. 1887 c. 124. In an action for that purpose the conveyance to the wife was declared fraudulent and void as against creditors, but not as against the creditors' assignee, it having been made before the Assignments and Preferences Act: Ferguson v. Kenney, 16 A. R. 276. In the present action on the plaintiff's mortgage, it was held by the court of appeal that the plaintiff was estopped from disputing the validity of the conveyance to the wife, and that the mortgaged lands were not chargeable with advances made after notice of such conveyance, and the action was referred back to

an official referee: 16 A. R. 522. On a second appeal from the referee's report:—Held, that the course of dealing of plaintiff's firm did not operate as a payment of the original notes or debt. Dominion Bank v. Oliver, 17 O. R. 432, followed. Held, however, that the wife, at the time of the conveyance to her, became a surety in respect of the lands, and that the renewal of the notes by the plaintiff's firm discharged the lands from liability. Held, also, following Blackley v. Kenney, 16 A. R. 522, that the mortgage was not a security for advances made after the conveyance to the wife, nor could the plaintiff's firm claim as simple contract creditors against the lands, nor could the creditors' assignee, who was a defendant in this action, claim on behalf of the other creditors, whether execution creditors or otherwise, they not being parties to this action. *Blackley* v. *Kenney*, 19 O. R. 169.

But held by the court of appeal, reversing this decision, that, as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealing with the debtor did not work a release, assuming that the relationship did exist. Per Hagarty, C.J.O., and Osler, J.A., that the defendant, as a volunteer, could not set up the rights of a surety under the covenant of the mortgagor, the grantor of the equity of redemption, against the plaintiff, the creditor of the mortgagor. Northwood v. Keating, 18 Gr. 643, referred to. *Blackley* v. *Kenney*, 18 A. R. 135.

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11. *Recovery of Mortgage Money.*

(a) *Action, When it will Lie.*

Covenant — *Proviso.*]—Covenant cannot be sustained on the proviso for payment in a mortgage. *Martin* v. *Woods*, T. T. 3 & 4 Vict.

Held, that the mere words in the proviso of a mortgage "in three equal payments to be respectively made," did not create a covenant to pay the amount specified. *Jackson* v. *Yeomans*, 19 C. P. 394.

Debt — *Absence of Covenant—Proviso—Loan.*]—Where the proviso in a mortgage is a mere defeasance, but there is no covenant to pay, and no evidence given of a loan or debt, an action of debt will not lie. Where there is evidence of a loan or debt, of course a promise to repay it will be implied. *Hall* v. *Morley*, 8 U. C. R. 584.

——— *Absence of Covenant — Proviso—New Trial.*]—Defendant, in consideration of $530 acknowledged to be paid, assigned to the plaintiff a mortgage for $360, with a proviso that the assignment should be void on payment of the $530 and interest, but no covenant to pay:—Held, approving the last case, that no action could be maintained on the common counts. Under the facts, however, a new trial was allowed on payment of costs. *Pearman* v. *Hyland*, 22 U. C. R. 202.

——— *Absence of Covenant — Proviso—Loan—Promise to Pay—New Trial—Statute of Frauds.*] — Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt. A mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be:—Held, that in this case the evidence of such latter promise was unsatisfactory; and the jury having found for the plaintiff, a new trial was granted. *Jackson* v. *Yeomans*, 28 U. C. R. 307.

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

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

———*Instalment.*]—Debt does not lie for the first instalment of a mortgage before the others are due. *Forsyth* v. *Johnson*, 6 O. S. 97.

But it was held to lie under the facts of this case for an instalment. *De Twytl* v. *McDonald*, 8 U. C. R. 171.

Dismissal of Redemption Suit — *Enforcement of Execution.*]—A writ was in the hands of the sheriff at the suit of the plaintiffs against L., at the time of the dismissal of a bill filed by L. to redeem the plaintiffs, and at the time of the sale to M., which dismissal had the effect of a decree of foreclosure against L.:—Held, notwithstanding, that the plaintiffs might proceed to recover their debt against L., they being in a position to reconvey the mortgaged premises. *Bank of Toronto* v. *Irwin*, 28 Gr. 397.

Final Order of Foreclosure — *Offer to Pay.*]—Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines to receive the money the court will restrain him from afterwards suing for the mortgage debt. *Munsen* v. *Hauss*, 22 Gr. 279.

Preference — *Money Advanced for—Recovery—Security—Charge.*]—If a person borrows money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage from J. and R. to D. in this case, he can charge the money so lent on such security. *Court* v. *Holland*, 4 O. R. 688.

Time of Payment—*Creditors' Security—Settlement—Discharge of Surety.*]—The lessee of a mill assigned his term, less one day, to certain of his creditors as a security against his indebtedness, it being intended that they should send him wheat to grind, receiving the flour therefrom, and it being agreed that a settlement should take place at the end of each year, and that the balance, if any, coming to him should be paid to him:—Held, that this arrangement had not the effect of preventing the creditors from realizing their security before the expiration of the year, and that the arrangement did not discharge a surety of the debtor. *Martin* v. *Hall*, 25 Gr. 471.

See cases under 3.

(b) *Interest.*

Arrears—*Amount—Lien on Land—Covenant—Foreclosure.*]—On an appeal from a report of a master who had allowed more than six years' arrears of interest in taking an account of what was due on a mortgage containing a covenant to pay interest:—Held, that in a foreclosure suit, interest when due for more than six years should be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance. Held, also, that more than ten years' arrears of interest had been rightly allowed. Howeren v. Bradburn, 22 Gr. 96, commented on. Allan v. McTavish, 2 A. R. 278, followed. *Macdonald* v. *McDonald*, 11 O. R. 187.

——— *Amount—Plea of Limitations Act.*]—Held, reversing the judgment in 24 Gr. 457, that it is unnecessary to plead the Statute of Limitations in mortgage suits to prevent the recovery of more than six years' arrears of interest in taking the accounts before the master, as the filing a disputing note is sufficient. *Wright* v. *Morgan*, 1 A. R. 613. See *Cattanach* v. *Urquhart*, 6 P. R. 28.

——— *Amount — Trustee — Promissory Note.*]—A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hands of the assignee of the mortgage, and a suit having been instituted upon the mortgage, by the trustee and the party interested in the note:—Held, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run. *Scatcherd* v. *Kiely*, 22 Gr. 8.

——— *Interest on Interest—Construction of Proviso.*]—A mortgage was to be void on payment of $2,000, at eight per cent., in five years from the date thereof, with "interest in meantime half-yearly on, &c., in each and every year of said term of five years; and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof;"—Held, that the contract between the parties was simply one for payment of interest on any interest which might be in arrear before, but not after, the expiry of the mortgage. *Wilson* v. *Campbell*, 8 P. R. 154.

——— *Lien on Land—Amount of—Death of Mortgagor—Infant Heirs—Tenant by the Curtesy.*]—A mortgage had been created by a married woman upon her estate. After her death a suit was brought against her husband and her children; and the court, in directing a sale of the mortgaged property, refused to make the estate of the children liable to arrears of interest for more than six years; but directed payment to the mortgagee, out of any excess after payment of principal money, costs, and six years' interest, of so much of his balance as would represent the husband's interest as tenant by the curtesy in such balance. *Taylor* v. *Hargrave*, 19 Gr. 271.

——— *Lien on Land—Extent of—Death of Mortgagor.*]—During the lifetime of a mortgagor, the mortgagee has no lien on the property for more than six years' arrears of interest, though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death the mortgagee, to avoid circuity, may, as against the heirs, tack to his debt all the interest recoverable on the covenant. *Carroll* v. *Robertson*, 15 Gr. 173.

——— *Limitations Act—Acknowledgment.*]—Upon the sale of a property which was subject to mortgage, the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memorandum, indorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser:—Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an incumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. *Colquhoun* v. *Murray*, 26 A. R. 204.

——— *Period—Rate.*]—R. S. O. 1887 c. 111, s. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply

to an action for redemption or to actions similar in principal. In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11. Overruled by *McMicking* v. *Gibbons*, 24 A. R. 586.

Extra Interest—*Derivative Mortgage.*]—A bargain for extra interest made between a derivative mortgagee and mortgagor inures to the benefit of the original mortgagee. *Grahame* v. *Anderson*, 15 Gr. 189.

Instalments of Principal—*Computation of Interest.*]—Covenant to pay £292 in eight equal annual instalments, "with interest on the principal sum remaining due at each payment:"—Held, that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable,—not on the instalment only. *Hall* v. *Brown*, 15 U. C. R. 419.

A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided, interest at the said rate should be paid on all sums so in arrear:—Held, that the principal money was an instalment within the meaning of the proviso, and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years. *Biggs* v. *Freehold Loan and Savings Co.*, 26 A. R. 232.

——— *Computation of Interest—Payment after Bill Filed.*]—Where a bill is filed to foreclose a mortgage payable by instalments, and defendant moves to dismiss on payment of the instalment and interest then due, the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application. *Strachan* v. *Murney*, 6 Gr. 378.

——— *Default—Redemption—Computation of Interest.*]—A mortgage made payable by instalments, with interest on each as it became due, contained a stipulation that if any of the instalments should remain unpaid for the space of thirty days after the same became payable, the whole principal sum, with interest remaining unpaid, should forthwith become due and payable. Default was made in payment of some of the instalments; the mortgagee, however, did not call in or insist upon payment of the whole sum remaining unpaid, but continued to receive payments from the mortgagor on account. On a bill to redeem, the mortgagee claimed to be entitled to charge interest on the whole sum due at the time of each payment, in consequence of the default which had occurred:—Held, that he could claim interest only on each of the instalments as it became due, according to the terms of the proviso for redemption. *McLaren* v. *Miller*, 20 Gr. 637.

——— *Payment ante Diem.*] — Under a mortgage given to secure the balance of purchase money, in which the principal is payable by instalments extending beyond five years, the mortgagor is, at any time after such last named period, entitled to a discharge under s. 7 of R. S. C. 1886 c. 147, an Act respecting interest, together with three months' additional interest. *In re Parker, Parker* v. *Parker*, 24 O. R. 373.

Payment—*Default—Acceleration of Principal.*]—*See Wilson* v. *Campbell*, 15 P. R. 254.

Payment in Advance—*Proviso for—Account under Decree.*]—Interest on a mortgage was payable half-yearly in advance on the 1st April and October. The mortgagee filed a bill for sale, and the registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiff interest to that date, but refused to allow him the half year's interest payable in advance on the 1st April. On appeal this ruling was upheld. *Trust and Loan Co.* v. *Kirk*, 8 P. R. 203.

——— *Statute of Limitations.*]—*See Trust and Loan Co. of Canada* v. *Stevenson*, 20 A. R. 66.

Payment to Solicitor.] — *See In re Tracy, Scully* v. *Tracy*, 21 A. R. 454.

Payment without Interest—*Interest from Default—Proviso.*]—A mortgage dated 23rd May, 1846, securing the payment of £112 10s. without interest, on or before the 23rd May, 1847, contained a power of sale on default of payment, and provided that the mortgagee, after deducting the costs and expenses of sale, "and the said sum of £112 10s., without interest," should pay the surplus to the mortgagor:—Held, that interest was payable from default. *McDonell* v. *West*, 14 Gr. 492.

Where no interest is reserved by a mortgage, none is recoverable until after the day appointed for payment of the principal. Quære, as to the effect of a proviso in a mortgage for payment of the amount secured "without interest if paid when due." *Reid* v. *Wilson*, 9 P. R. 166.

The mortgage was on a printed statutory form, the proviso was for payment of $800, the printed words "with interest" being struck out; but the mortgagor covenanted to "pay the mortgage money and interest and observe the above proviso;" and there were the usual provisoes as to distress for arrears of interest, principal becoming due on nonpayment of interest, &c.:—Held, that no interest was payable until after default in the payment of each instalment of principal as it became due. *McDermott* v. *Keenan*, 14 O. R. 687.

Rate—*Proviso for One Year Only—Allowance for Subsequent Years.*]—The covenant provided for payment of interest at nine per cent. up to the end of a year from the date of the mortgage:—Held, that there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1896, when the mortgage was made, and for some years following, the same rate of interest should be allowed for the years subsequent

to the expiry of the first year. *McDonald* v. *Elliott*, 12 O. R. 98.

Rate after Default — *Acceleration—Account under Decree.*]—In proceedings to foreclose a mortgage on which the principal money had become due by default being made in the payment of interest, although the time for which the mortgage was made had not arrived:—Held, that the rate of interest for the six months allowed to redeem should be computed at the same rate as the mortgage provided for, which in this case seemed a reasonable rate. *Muttlebury* v. *Stevens*, 13 O. R. 29.

Rate post Diem — *Absence of Contract for—Damages—Legal Rate.*] — *See Archbold* v. *Building and Loan Assn.*, 15 O. R. 237, 16 A. R. 1.

——— *Absence of Proviso for.*]—Where no rate of interest is fixed by a mortgage to be paid after maturity, the rate of interest mentioned in the mortgage is chargeable primâ facie, but the person seeking to reduce it may shew that it is more than the ordinary value of money. *Simonton* v. *Graham*, 8 P. R. 495.

——— *Construction of Proviso — Legal Rate.*]—A note dated 11th January, 1862, payable to and indorsed by one S. H., was for $3,000, with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of $3,000 on the 11th day of July,1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was, that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John* v. *Rykert*, 10 S. C. R. 278.

——— *Construction of Proviso—Legal Rate —Money Paid into Court—Interest.*]—By the terms of a mortgage in which the principal was payable by instalments, interest was reserved at the rate of eight per cent. per annum "until payment in full:"—Held, affirming the judgment in 12 O. R. 492, that these words related to the period fixed for the payment of principal, and that interest was recoverable after that time only as damages and not by the terms of the contract, and that there was nothing in the circumstances of the case to justify the allowance of a greater rate than legal interest. Semble, (1) that primâ facie the rate stipulated for in the contract up to the time certain may be adopted as a reasonable rate to be awarded as damages; (2) that there is no distinction in principle between ascertaining interest to be awarded as redemption money, and interest to be awarded as damages. During the progress of the action money had been paid into court by the defendants, which remained there on deposit for upwards of seven years. Held, also affirming the judgment below, that on taking the account between the parties the defendants were liable to pay in respect of this sum the rate allowed upon the residue of the principal, and were not limited to the rate allowed by the court. *Powell* v. *Peck*, 15 A. R. 138.

——— *Construction of Proviso — Legal Rate.*]—A mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied:"—Held, affirming the judgment in 17 A. R. 85, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. St. John v. Rykert, 10 S. C. R. 278, followed. *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262.

——— *Parol Agreement—Charge on Land.*]—A parol agreement to add two per cent. to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment:—Held, insufficient to charge the extra interest upon the land. *Totten* v. *Watson*, 17 Gr. 233.

A parol agreement to pay a higher rate of interest than that reserved in the mortgage, is ineffectual to charge the land. Totten v. Watson, 17 Gr. 235, and Matson v. Swift, 5 Jur. 645, followed. *Re Houston, Houston* v. *Houston*, 2 O. R. 84.

——— *Written Agreement — Consideration.*]—A written promise by a mortgagor, after default, to allow more than six per cent. interest reserved by the mortgage, was held binding, though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise. *Brown* v. *Deacon*, 12 Gr. 198.

——— *Stipulation — Increase — Penalty.*]—Where a mortgage stipulated that up to a certain day the interest should be eight per cent.; and if the principal were not then paid, twelve per cent. should be thereafter charged:—Held, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named. *Waddell* v. *McColl*, 14 Gr. 211.

Where a mortgage to secure the repayment of money with interest at ten per cent. provided that "should default be made in payment of the principal money or interest or any part thereof respectively, then the amount so overdue and unpaid to bear interest at the rate of twenty per cent. per annum until paid:"—Held, that the proviso was not invalid, or relievable against on the ground of forfeiture. *Downey* v. *Parnell*, 2 O. R. 82.

Sale under Decree—*Payment into Court —Notice to Mortgagee—Rate.*]—In a partition suit the mortgagors of an undivided share became the purchasers, but they did not pay the purchase money into court until long after the day named in the master's report:—Held, that the mortgagee, though a party to the suit, was entitled to interest at the rate reserved in the mortgage until notice of such payment into court. *McDermid* v. *McDermid*, 7 P. R. 457.

Subsequent Interest — *Computation — Rate.*]—Former practice in respect to computation of subsequent interest altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest, and costs which the puisne incumbrancer has paid for redemption money. Upon the principal money subsequent interest should be regulated by the rate fixed in the mortgage security; upon the interest and costs only statutory interest should be computed. *McMaster* v. *Hector*, 8 C. L. J. 284.

Tender—*Effect of.*]—In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it. *Knapp* v. *Bower*, 17 Gr. 695.

Time of Commencement — *Insurance Moneys—Application.*]—Under ordinary circumstances, a mortgagee can claim interest only from the time the money is advanced. Where insurance moneys are received by a mortgagee under an insurance effected by the mortgagor, pursuant to a covenant to insure contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest. *Edmonds* v. *Hamilton Provident and Loan Society*, 19 O. R. 677, 18 A. R. 347.

Time for Payment—*Ambiguity in Mortgage Deed.*]—A mortgage dated 16th October, 1866, provided for payment of the principal in three years, and interest meanwhile at twelve per cent. half yearly, on the 16th April and October in every year; and declared that to secure prompt payment of said interest the mortgagee would take at the rate of ten per cent. if the interest was paid on the said 17th day of April and October respectively:—Held, that the first reference to the day being unequivocal must govern; that the interest was due on the 16th; and not having been paid then, that a bill on the 17th to foreclose was not irregular. *Bennett* v. *Foreman*, 15 Gr. 117.

See Peck v. *Custead*, 10 L. J. 302.

(c) Right to Call in the Whole on Default.

Bonds—*Collateral Mortgage—Default—Interest—Acceleration.*]—Where bonds were given to pay a certain sum and interest, in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds:—Held, that a breach of the covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security. *Great Western R. W. Co.* v. *Galt and Guelph R. W. Co.*, 8 Gr. 283.

Demand—*Sufficiency of — Several Mortgagors—Nature of Covenant—Penalty—Pleading.*]—The defendants B. and S., with two others, L. and H., mortgaged to the plaintiff to secure £4,000 and interest, and it was provided that if default should be made in any payment of interest, for the period of one month after it should have become due "and been demanded," then the whole principal money and such unpaid interest should immediately be payable. The plaintiff sued the defendants alone upon this mortgage for the principal and the interest, making no mention of the other mortgagors, and alleged in the declaration that, though an instalment of interest was overdue, and although payment thereof had been demanded from the defendants, yet they had not paid within one month after such demand. A demand on the defendants was proved, but not on the others:—Held, that a plea by defendant S. that no demand was made on defendants and on L. and H. was bad, for the other mortgagors not being sued, and defendants not having pleaded in abatement, it was sufficient to prove a demand upon defendants only. Semble, that such a covenant is not to be looked upon in a court of law as a penalty, but merely as fixing the credit to be allowed for the principal. Held, also, that the plaintiff was entitled to succeed on the plea of the defendant B. that no demand was made as alleged, for the demand on the defendants was proved, as alleged in the declaration. *Case* v. *Burton*, 19 U. C. R. 540.

Foreclosure Decree—*Buildings—Fire — Application of Insurance Moneys—Payment of Arrears—Stay of Proceedings.*]—A decree was made in this suit for foreclosure, and a day fixed for payment of the moneys due. The mortgage purported to be under the Act respecting short forms, 27 & 28 Vict. c. 31, but, in lieu of number 16 of the second schedule, it contained a covenant that upon default in payment of any part of the interest, the principal, which was payable on the 1st August, 1879, should forthwith, at the option of the mortgagee, become payable; and that the mortgagor would pay the same forthwith after such default. Before the day named for payment the buildings mortgaged were burned, and $1,000 of the insurance money was applied by the mortgagee, to whom the policy had been assigned, on the mortgage account. A new account was then taken, and a new day was fixed for redemption, or, in default, foreclosure:—Held, that G.O.O. 461 and 462 applied, notwithstanding the covenant, and that defendant was entitled to an order staying proceedings until the 1st August, 1879, on the ground that the $1,000 so received was more than sufficient to pay the arrears of interest and costs. *Gemmel* v. *Burn*, 7 P. R. 381.

Instalment — *Default — Payment into Court—Forfeiture—Pleading.*]—Upon default in payment of an instalment in a mortgage, the mortgagees sued for the whole amount of the mortgage money. The mortgage purported to be under the Act respecting short forms of mortgages, 27 & 28 Vict. c. 31, but number 16 of the second schedule was omitted; and it contained a covenant (not following the statutory form) that on default in the payment of any one instalment or any part thereof, the whole unpaid principal and interest should immediately become due, and that he (the mortgagor) would pay the same forthwith, should the mortgagees so require, without demand. Defendant paid into court the amount actually due for the instalment of principal and interest, and pleaded, on equitable grounds, that the residue, $12,500, was the balance of the

purchase money of land bought by him from the plaintiffs for $14,000, of which defendant had paid $1,500; and that the sum claimed above that paid into court was claimed only by way of forfeiture for the default; and he prayed for relief from such forfeiture and for a stay of proceedings. Upon this plea issue was joined; and at the trial the mortgage was put in and all the facts alleged in the plea were proved:—Held, in the court below, 42 U. C. R. 228, that such relief might be granted under G. O. 461, which is not confined to suits for foreclosure; and a verdict was entered for defendant. Held, on appeal, affirming that judgment, without deciding whether G. O. 461 applied to suits for redemption or entitled the defendant to relief in an action at law on the mortgage, that defendant was entitled to succeed, on the ground that the equitable plea, upon which the plaintiffs had chosen to join issue, had been proved, and no amendment having been asked for, the defendant was strictly entitled to a verdict. Remarks as to the lax system of pleading frequently adopted in joining issue, when the question is really one of law. Quære, whether the court of chancery has power to grant relief in such a case, either by virtue of G. O. 461, or its inherent jurisdiction to relieve against penalties or forfeitures. *Tylee* v. *Hinton*, 3 A. R. 53. See also *S. C.*, 7 P. R. 180.

See Robertson v. *Hetherington*, 8 C. L. T. Occ. N. 141.

Payment of Interest — *Acceptance of Draft—Subsequent Dishonour.*]—The plaintiff held defendant's mortgage, with a condition that the whole principal should become payable if the interest was in arrear for ten days. By agreement between them plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to the expiration of the ten days, and was afterwards accepted by defendant; but upon maturity was dishonoured and charged to plaintiff's account:—Held, that this was no payment, and that the whole mortgage money was due. *Cameron* v. *Knapp*, 7 C. P. 502.

——— *Default — Proviso — Penalty—Relief.*]—A mortgage to secure a sum of money by instalments, with interest in the meantime quarterly, stipulated, in case of default in payment of the interest within ten days after any of the days or times when the same was made payable, in any year, that the whole of the principal money should become payable immediately, and the mortgagor covenanted to pay the same accordingly:—Held, that this was in the nature of a penalty only, and that an action to enforce payment of the whole sum due, after default in one gale of interest, would be restrained. The mortgagee, by arrangement between the mortgagor, himself, and his assignee, drew upon the mortgagor for a quarter's interest, but for some reason not accounted for the draft was not presented until after the ten days, when it was accepted, but owing to some mistake it was not paid at maturity. The holders of the mortgage insisted upon this as a default making the whole mortgage money due, and proceeded at law to enforce it:—Held, that this relieved the mortgagor from tendering the next quarter's interest when it became due, and that the mortgagee, or his assigns, could not insist upon that default in answer to a motion to restrain the proceedings at law. *Knapp* v. *Cameron*, 6 Gr. 559.

Pleading—*Claim for Principal—Non-payment of Interest—Default.*]—Held, that looking at the form of the mortgage in this case (which provided that on default in payment of the interest the principal should fall due), and the declaration, the plaintiff was not entitled to a verdict for the whole principal, for the declaration did not clearly shew that he was claiming it by reason of non-payment of the interest, and he was not bound to sue for the whole amount. Quære, there being no day named for payment of the interest, when would there be a default so as to make the whole principal due? *Northey* v. *Trumenhiser*, 30 U. C. R. 426.

Proviso for Redemption — *Foreclosure—Default.*]—The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established; although the identical conditions attached to the one right may not be attached to the other. By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor; but, in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable:—Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although, as it fell due, the interest could be collected. And quære, whether, in such a case, the mortgagor would have the right to pay the principal money against the will of the mortgagee by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months, and claim that as the condition on which he was at liberty to redeem. But semble, he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose before the right to redeem arises in favour of the mortgagor. *Parker* v. *Vine Growers' Association*, 23 Gr. 179.

See Trust and Loan Co. v. *Drennan*, 16 C. P. 321; *McLaren* v. *Miller*, 20 Gr. 637; *Wilson* v. *Campbell*, 15 P. R. 254; *In re Parker, Parker* v. *Parker*, 24 O. R. 373, *ante* (b).

(d) *Other Cases.*

Acknowledgment that Lesser Sum Due.]—The court refused to interfere in a summary manner to stay proceedings in an action of covenant on a mortgage to secure money, brought for the benefit of an assignee, though it was shewn that the mortgagee had signed a writing, not under seal, by which he acknowledged that the instalments mentioned in the mortgage were for a larger sum than was really due. *Baby* v. *Milne*, 5 O. S. 76.

Assignment of Mortgage—*Action by Mortgagee.*] — Defendant, being indebted to plaintiff, by an indenture reciting his indebtedness and that he had agreed with the plaintiff for the repayment of the sum due within six months from date, with interest, conveyed to plaintiff certain lands, habendum in

fee. Proviso, that plaintiff, if the debt was duly paid, would reconvey; but there was no covenant for payment by defendant. Indorsed on the indenture was a deed poll executed by plaintiff, stating the debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for said J. L., and, in consideration of the trust and of 5s., he absolutely assigned all interest in the lands in the said indenture, as well as the indenture, to the said J. L. On motion to set aside nonsuit:—Held, that it was not open to defendant to deny that he was at the date of the said indenture indebted to the plaintiff. *Allnutt* v. *Ryland*, 11 C. P. 300.

Loss of Mortgage Deed—*Action by Administrator—Registry Act.*]—Action by the plaintiff, administrator of M., against defendant on his covenant in a registered mortgage to pay M. the amount due thereon. Plea, on equitable grounds, in substance, that the plaintiff told defendant before the instalment sued for fell due that he could not find the mortgage, the defendant then informed him that he would be prepared to pay when it fell due: that when he received notice of this action he notified the plaintiff's attorneys that he was prepared to pay on production of the duplicate copy of the mortgage, which was held by M., or on proof of the loss; and that he was and is so prepared; but plaintiff refused to shew said copy or furnish any proof of the loss. The plea also averred that the testator had made a will, and appointed certain persons executors, who had possession of the will; and defendant submitted that he was entitled to such duplicate or proof of loss, and alleged that he was prepared to pay or deposit the money as the court should direct, to be paid over to plaintiff on such production or proof:—Held, plea bad, for it must be assumed that the mortgage was recorded at length; no assignment either directly or by deposit was averred; and under the Registry Act defendant would be fully protected on payment of the mortgage and recording the discharge; and the alleged will was not said to be valid or existing. *Macauley* v. *Boyle*, 25 C. P. 239.

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12. *Release and Purchase of Portions of Mortgaged Premises*

Assignee of Equity of Redemption—*Right to Benefit of Covenant—Abatement.*]—A mortgage on five stores, expressed to be for $10,500, contained a provision that on payment of $2,500 the mortgagees would release the easterly store mortgaged, and any one or more of the other four stores on payment of $2,000 each at any time, on receiving a bonus of three months' interest on the sum so paid:—Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it. It appeared that the whole $10,500 had not been advanced:—Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately. *Clarke* v. *Freehold L. and S. Co.*, 16 O. R. 598.

——— *Right to Benefit of Covenant—General Payment.*]—A mortgage contained a covenant to release any land sold during the continuation of the mortgage upon the payment of £200 per acre. An assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion, demanded a release from an assignee of the mortgagee:—Held, that the benefit of this covenant would pass to an assignee of the equity of redemption, but that the mortgagee must receive the stipulated sum per acre upon the sale of the portion to be released; and no general payment on the mortgage would be sufficient. *Webber* v. *O'Neil*, 10 Gr. 440.

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

Effect of Provision—*Purchaser of Part—Right to Pay off Whole Mortgage.*]—Where a mortgage provided that in cases of sale the mortgagee, on receipt or tender of a certain proportion of the purchase money, should release the part sold from the mortgage:—Held, that the first person who thereafter purchased and paid to the mortgagor his purchase money, but obtained no release from the mortgagee, was not entitled, as he would have been in the absence of this provision, to pay off the whole mortgage, and to demand payment of the whole from a subsequent purchaser redeeming him; but that each purchaser (including the first) was entitled to redeem his own part on payment of the stipulated proportion of money. *Davis* v. *White*, 16 Gr. 312.

Rights of Purchaser of Part — *Indemnity against Mortgage.*]—B. owned lots D. and E., and mortgaged them. The mortgagee (J.) assigned the security, and afterwards bought up the equity of redemption. P., the plaintiff, subsequently purchased lot D., for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E. to a bonâ fide purchaser, who conveyed to the appellant:—Held, affirming the judgment in 28 Gr. 356, that P. was entitled to be indemnified out of lot E. to the full extent of the value thereof against the amount due on the mortgage. *Pierce* v. *Canavan*, 7 A. R. 187. See *S. C.*, 29 Gr. 32.

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13. *Special Covenants and Conditions.*

Maintenance of Mortgagee—*Construction—Default.*]—Grant of freehold property to the plaintiff in fee, with a proviso for avoid-

ance if grantor should board, clothe, and provide all necessaries for the plaintiff for his life, or in the event of his desiring to board elsewhere, then grantor should pay him yearly £12 while he should remain away. The plaintiff boarded with the mortgagee till his death, and afterwards (for some time) with his widow and devisee, the defendant. He then left, but after a time returned and demanded to be boarded. Defendant refused to take him back, saying that he should get his £12 and no more. The plaintiff then claimed a forfeiture, and brought ejectment:—Held, that the mortgage operated as a conveyance in fee with a proviso for the cesser of the estate granted on the performance by the grantor of an alternative condition, with a right of re-entry in the grantee as owner on non-performance, and a right of possession until default as quasi-tenant for the life of the grantee. And that the plaintiff having left was not entitled to come back when he demanded to be received, but became entitled to the money payment, and therefore there was no default. *Maloch* v. *McEwan*, 9 C. P. 467.

Notice — *Bill for Foreclosure.*]—A mortgagee, with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises, without three months' notice to the mortgagor, demanding payment:—Held, that such notice was unnecessary before filing a bill for foreclosure. *Lamb* v. *McCormack*, 6 Gr. 240.

Payment—*Acceleration—Further Incumbrance—Assignment in Insolvency.*]—A mortgage, payable in ten years, contained a proviso that if the mortgagor mortgaged or otherwise incumbered the premises, or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable:—Held, that an assignment in insolvency, though voluntary, was not such an incumbering of the estate as entitled the mortgagee to call for the mortgage money. *McKay* v. *McFarlane*, 19 Gr. 345.

Payment of Bills of Exchange—*Default—Action—Notice.*] — Defendant, owing the plaintiffs a large sum on bills of exchange, some overdue, some maturing, gave them a mortgage on land, reciting the debt on the bills and the plaintiffs' agreement to accept further security by way of mortgage, and containing a proviso that it should be void on the payment of the bills, and a further proviso that on default of payment for twelve months the plaintiffs might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant:—Held, that the proviso as to default and notice applied only to the remedy against the lands. Defendant in his plea, after setting out the mortgage and proviso, and averring that the plaintiff had not given the six months' notice, concluded, "and so the defendant had not made default before the commencement of this suit:"—Held, that as the notice was unnecessary the plea was not proved. *Gore Bank* v. *Eaton*, 27 U. C. R. 332.

Purchase on Default — *Specified Sum.*]—On an advance of money on the security of real estate, the lender cannot bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated. *Fuller* v. *Keenan*, 12 Gr. 388.

14. *Timber.*

Covenant against Cutting — *Breach—Trover — Trespass — Injury to Reversion—Pleading.*]—The first count of the declaration alleged that one B. was the owner of certain land described, in fee simple, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of $1,350 and interest, by instalments, as specified; that it was provided in the mortgage that B. should not, without the plaintiffs' written consent, cut down or remove any of the standing timber until the first four instalments of principal, and interest up to a certain date, should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest, and the defendant afterwards, without plaintiffs' leave, and against their will, entered on the land, and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees. It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, defendant E. assisting him, in order to sell it and leave the place depreciated; that the damage thus done was $150; and that defendants did not purchase the timber from R., as had been asserted, believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants on these answers, that they did not intend to find E. guilty:—Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrong-doers; that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and semble, that, though not in actual possession, he might, under the circumstances, maintain trespass also. *Mann* v. *English*, 38 U. C. R. 240.

Cutting after Decree — *Mortgagee's Right to Proceeds.*]—The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of redemption, was negotiating with S., the third mortgagee. During these negotiations V. cut and sold to G. a large quantity of the timber on the land, whereupon S. filed a bill praying payment by G. of the price of the timber which had not yet been paid over:—Held, that the first mortgagee was entitled to it. *Scott* v. *Vosburg*, 8 P. R. 336.

Remedy of Mortgagee—*Injunction—Account.*]—The remedy of a mortgagee against a mortgagor in possession or any one claiming under him who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient, is not limited to a mere prevention of the mischief by injunction. And where a second mortgagee in possession had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof:—Held, that the second mortgagee was bound to account for the value of the timber cut and removed by him prior to the action. *McLeod* v. *Avey*, 16 O. R. 365.

15. *Widow of Mortgagor, Rights of.*

Devise in Lieu of Dower—*Exoneration from Mortgage.*]—The testator devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower: the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses:—Held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her freed from the debts of the testator. *Dungey* v. *Dungey*, 24 Gr. 455.

Dower—*Gross Proceeds of Sale—Surplus—Creditors.*]—Where a woman joins with her husband in executing a mortgage to secure money borrowed by the husband, no portion of which is received by her to her own use, and after the husband's death the land is sold at the instance of creditors, the widow is entitled even as against them to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage. Semble, in the event of no surplus, the widow could only claim as any other creditor of her husband. Sheppard v. Sheppard, 14 Gr. 174, approved and followed. *In re Robertson*, 24 Gr. 442.

Payment of Mortgage out of Assets—*Creditors.*]—Where a wife joins in a mortgage, and on the death of the husband there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Gr. 113; *White* v. *Bastedo*, 15 Gr. 546.

Statute—*Amendment of Law of Dower—42 Vict. c. 22 (O.)—Application to Prior Mortgages.*]—See *Martindale* v. *Clarkson*, 6 A. R. 1.

See DOWER, VI. 1.

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16. *Other Rights and Liabilities.*

Devise to Mortgagee—*Legacies—Priorities.*]—A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to other persons. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt:—Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised. *Ricker* v. *Ricker*, 14 Gr. 264.

Expropriation of Land—*Compensation Awarded to Mortgagee—Account—Redemption.*]—A mortgagee of land, part of which was taken by a railway company, was offered £100 as compensation for the land so taken, which he refused, and the matter having been referred to arbitration £30 only was awarded. On a bill filed to redeem:—Held, that, under the circumstances, he was chargeable only with the sum awarded. *Gunn* v. *McDonald*, 11 Gr. 140.

——— *Right of Mortgagee to Compensation Money.*]—Land mortgaged by the owner was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:—Held, that the mortgagee had the prior right; that his mortgage being registered, the corporation had notice of it; and that he was entitled to recover the amount from the corporation with costs. *Dunlop* v. *Township of York*, 16 Gr. 216.

Lease to Mortgagor—*Overholding Tenant.*]—A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises will not be permitted at the expiration of the term to proceed against the mortgagor as an overholding tenant under C. S. U. C. c. 27, s. 63. *In re Reeve*, 4 P. R. 27.

Payment by Mortgagee of Prior Execution—*Lien therefor against Subsequent Executions.*]—See *Trust and Loan Co.* v. *Cuthbert*, 14 Gr. 410.

Postponing Lease to Mortgage.]—See *Anderson* v. *Stevenson*, 15 O. R. 563.

Purchase by Mortgagee at Sale of Mortgaged Premises.]—P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated at worth $6,000, subject to incumbrances amounting to $3,500, and interest. One of the mortgages was in favour of defendant M., who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages P. executed a deed of trust of the whole property in order to defeat a claim of title set up to ten acres by one S. Default having been made in payment of M.'s mortgage, he instituted proceedings at law and recovered judgment, on which he sued out execution, and under it the sheriff (after the defendant M. had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and M. bid for and became the purchaser of all at sums amounting in the whole to $20. The cestui que trust thereupon filed a bill to redeem, alleging that the sale to M. had been at a gross undervalue, and praying to have the same set aside; the court, however, refused the relief asked with costs, being of the opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a sheriff's sale. *Parr* v. *Montgomery*, 27 Gr. 521.

Sequestration—*Mortgagor's Right to Indemnity — Mortgagee and Purchaser of Equity.*]—A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where, therefore, a mortgagee filed his bill against the assignee of the equity of redemption to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached. *Irving* v. *Boyd*, 15 Gr. 157.

Trustees—*Mortgage by—Retiring Trustee—Liability of—Agreement with New Trustees—Novation—Discharge of Surety.*]—See *Canada Permanent L. and S. Co.* v. *Ball*, 30 O. R. 557.

Unpatented Lands.]—R. S. O. 1877 c. 25, s. 26, declares that any mortgage or lien created by the nominee of the Crown on lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had before the execution of such instrument, been issued in favour of the grantor:—Held, that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves that they would have had, had the freehold been actually vested in the mortgagor. *Watson* v. *Lindsay*, 27 Gr. 253, 6 A. R. 609.

XIII. SALE UNDER DECREE.

1. *Generally—When Ordered.*

(a) *Immediate Sale.*

Consent of Mortgagor—*Incumbrancers.*]—In a suit to enforce payment of a mortgage security, if the mortgagor consents to a decree for an immediate sale, it is not necessary that subsequent incumbrancers should give their consent thereto; their right only being to be paid out of the surplus after satisfaction of the plaintiff's claim. *Township of Hamilton* v. *Stevenson*, 25 Gr. 198.

Ejectment—*Deposit in Court—Infants.*]—In an action of ejectment by mortgagees, on the application of the infant defendants an order for immediate possession and sale of the mortgaged premises was made, with a reference to the master to take the usual accounts; but $80 was ordered to be paid into court to meet the expenses of sale. *Western Canada L. and S. Co.* v. *Dunn*, 9 P. R. 490, 587.

Order for—*Forum.*]—An order for an immediate sale will not be made in chambers, where the master, pursuant to a decree made in court, has fixed a day for payment, and it has not arrived. The motion must be made to the court. *Buell* v. *Fisher*, 6 P. R. 51.

Order for Refused.]—A sale will not be ordered until the mortgagor has had the usual time to redeem. *Trust and Loan Co.* v. *Reynolds*, 2 Ch. Ch. 41.

Special Grounds.]—Primâ facie, a mortgagor is entitled to six months to pay. To induce the court to direct an immediate sale, or a sale at an earlier day, some special ground must be shewn. *Rigney* v. *Fuller*, 4 Gr. 198.

——— *Infants.*]—Although by the general rule and course of proceedings in mortgage cases the mortgagor is entitled to six months to redeem before a sale is ordered, the court will, under special circumstances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor. *Swift* v. *Minter*, 27 Gr. 217.

(b) *Other Cases.*

Consent—*Necessity for.*]—Quære, whether a mortgagee praying a sale can have it when the subsequent incumbrancers or the mortgagor do not consent. *Bethune* v. *Caulcutt*, 1 Gr. 81.

Death of Owner of Equity—*Heirs Unknown—Error or Fraud—Conditions of Sale.*]—Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the court has jurisdiction, in a suit by the first mortgagee against a subsequent mortgagee and the attorney-general, to direct a sale of the property; and the proceedings cannot afterwards be set aside by the heirs except for error or fraud. In such a case the conditions of sale must state these circumstances. *Smith* v. *Good*, 14 Gr. 444.

Foreign Lands — *Jurisdiction.*] — See *Strange* v. *Radford*, 15 O. R. 145.

Subsequent Incumbrancer — *Equitable Mortgagee.*]—See *Kerr* v. *Bebee*, 12 Gr. 204.

See, also, cases under IV. 4 (b).

2. *Costs.*

Charge on Estate.]—The costs of proceedings to obtain a sale of mortgaged premises are such a charge upon the estate as will entitle the mortgagee to proceed to a sale of the property in the event of non-payment. *Thompson* v. *Holman*, 28 Gr. 35.

Subsequent Incumbrancer — *Deposit—Insufficiency—Abortive Sale—Payment of Deficiency—Increase of Deposit.*]—Where a subsequent incumbrancer paid $80 into court and obtained a sale under G. O. 456, which proved abortive, and the costs were taxed at $165:—Held, that he could not be compelled to pay the difference between the deposited and the taxed costs; and that the plaintiff should have objected to the deposit as being insufficient before the sale took place. *London and Canadian L. and A. Co.* v. *Pulford*, 7 P. R. 432.

Where a subsequent incumbrancer has obtained a sale under G. O. 456, an application to increase the deposit must be made before the order for sale is acted upon. *London and Canadian L. and A. Co.* v. *Morrison*, 7 P. R. 450.

Where a defendant by bill in a foreclosure suit demanded a sale and paid $80 into court as a deposit:—Held, that, although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by schedule S. indorsed on the office copy of the bill under G. O. Chy. 436. *Cruso* v. *Close*, 8 P. R. 33.

——— *Proceeds of Sale — Deficiency.*]—A bill for sale was filed by a puisne incumbrancer, and prior incumbrancers and mortgagees were made parties in the master's office, and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient to pay the first incumbrancer. An application by plaintiff to have his costs of suit and of sale paid out of such proceeds, in preference to the first incumbrancer, was refused with costs. *Grange* v. *Barber*, 2 Ch. Ch. 189.

See Jackson v. *Hammond*, 8 P. R. 157; *Gardner* v. *Burgess*, 13 P. R. 250.

3. *Decree.*

Changing from Sale to Foreclosure—*Rehearing — Notice.*] — Where a decree is

sought to be changed from a sale to a foreclosure, the cause must be set down to be reheard, and notice served on defendant, although the bill has been taken pro confesso. *McClelan* v. *Jacobs*, 9 Gr. 50.

Direction—*Approbation of Master—Omission—Infants.*]—Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested. *Ricker* v. *Ricker*, 27 Gr. 576.

——— *Immediate Payment and Possession.*]— See *Imperial L. and I. Co.* v. *Boulton*, 22 Gr. 121, *ante* VIII. 3.

Sale in Parcels.]—The owner of lots A. and B. sold A., but the conveyance was not registered; he afterwards mortgaged A. and B., and the mortgagee registered the mortgage without notice of the prior deed. The mortgagor subsequently sold B. in portions by three successive sales:—Held, in a suit by the assignees of the mortgage for a sale, that the decree should be for the sale first of B., and that if a sale of part of B. produced enough, the portion last parted with by the mortgagor should be first sold. *Barker* v. *Eccles*, 17 Gr. 277, 18 Gr. 440.

4. *Final Order for Sale.*

Default of Payment — *Attendance at Time Appointed — Incumbrances.*] — On moving for an order absolute to sell for default of payment of the sum found due by the master, it need not be shewn that any incumbrancer besides the plaintiff attended at the time appointed for payment of the several incumbrancers. *Irvine* v. *Whitehead*, 1 Ch. Ch. 10.

——— *Bank Certificate — Date of.*] — Mortgage money had been ordered to be paid on the 19th December. Default being made, the usual bank certificate was obtained on the 20th December, and on the 10th February following an application was made for a final order for sale:—Held, that this bank certificate was too old for the court to act upon. *Hurd* v. *Seymour*, 1 Ch. Ch. 332.

——— *Proof of Affidavit—Notice.*]—In a suit at the instance of mortgagees resident in Scotland against defendants, formerly in Canada, but now in England or elsewhere, it is not sufficient on a motion for a final order for sale for the plaintiff's agent to negative payment. The plaintiff also must do so. Quære, would not service of notice on defendants in England be better. *McKechnie* v. *McKechnie*, 1 Ch. Ch. 42.

Infants—*Benefit of Master's Report.*]—It must appear clearly that the master reports a sale to be beneficial for infants before a final order for sale will be made. *Edwards* v. *Burling*, 2 Ch. Ch. 48, 2 C. L. J. 302.

Possession—*Rents and Profits—Affidavit Denying.*]—In applying for a final order for sale the usual affidavit of the plaintiff must negative possession and the receipt of rents and profits. *Burford* v. *Lymburner*, 1 Ch. Ch. 275.

It is not sufficient for the plaintiff to swear merely that he has not been in possession or in receipt of rents and profits; he must also negative said possession and receipt by any one on his behalf. *Ford* v. *Jones*, 1 Ch. Ch. 291.

5. *Parties.*

Incumbrancers—*Master's Office.*]—To a bill by an incumbrancer for the sale of the property, all other incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the master's office, and the proceeds of the sale will pay off all incumbrances according to their priorities. *White* v. *Beasley*, 2 Gr. 660.

Lien-holders — *Defendants by Bill — Costs.*]—A mortgagee filed a bill for sale making certain lien-holders under the Mechanics' Lien Act parties defendant, therein alleging that the work by virtue of which their liens arose was commenced after the registration of his mortgage:—Held, that the lien-holders should have been made parties in the master's office after decree by notice, and the plaintiff's costs of making them defendants by bill were disallowed on revision of taxation. *Jackson* v. *Hammond*, 8 P. R. 157.

Representative of Deceased Mortgagor.]—To a bill by a mortgagee for a sale after the mortgagor's death, the personal representative of the mortgagor is a necessary party; but not to a bill for foreclosure. *White* v. *Haight*, 11 Gr. 420.

6. *Other Cases.*

Conveyance to Purchaser — *Parties — Wife of Mortgagor.*]—If the wife of the mortgagor join in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser. *Moore* v. *Shinners*, 1 Ch. Ch. 59.

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

Deficiency after Sale—*Liability for.*]—Where a suit is brought to enforce a sale against the mortgagor and his assignee, the order for payment of any balance due after such sale, must be against the mortgagor, and not the assignee. *Turnbull* v. *Symmonds*, 6 Gr. 615.

Deposit to Procure Sale — *Application of.*]—In a foreclosure suit the official assignee of an insolvent defendant paid $150 into court to procure a sale. The proceeds derived from the sale were much more than sufficient to pay the plaintiff's claim in full, but were insufficient to pay the subsequent incumbrancers:—Held, that the deposit should be applied in reduction of the second mortgagee's claim. *Gzowski* v. *Beaty*, 8 P. R. 146. (See, also, *ante* 2).

Insolvency of Mortgagor—*Staying Sale — Irregularity—Assignee — Parties.*] — The mortgagor, defendant in a suit for sale, having become insolvent after decree, but before the day appointed for redemption, the plaintiff, without reviving the suit, took out a final order for sale, and the proceedings for having the sale were completed. On the motion of the assignee in insolvency to make him a party, and to set aside the proceedings for sale as irregular, and to stay the sale, an order was made adding this assignee as a party, pursuant to the powers of amendment conferred by s. 50 of the Administration of Justice Act, 1873, but without staying the sale, as it did not appear that any injury would result from its being allowed to proceed. Observations on the policy of the court as to staying sales under decrees. *Hoskins* v. *Johnston*, 6 P. R. 257.

Judgment Creditors—*Suit by—Debtor—Period of Redemption.*]—In suits by judgment creditors for the sale of the debtor's property, the debtor is entitled, like a mortgagor, to six months to redeem before the sale takes place. The rule prescribed by the statute 43 Geo. III. c. 1 is not applicable to the practice of the court of chancery. *White* v. *Beasley*, 2 Gr. 660.

Partition—*Mortgagee—Consent—Interest—Notice.*]—Where a mortgagee comes in under a decree for partition or sale, and proves his claim and consents to a sale, he is not entitled to six months' interest, or six months' notice. *Re Houston, Houston* v. *Houston*, 2 O. R. 84.

Plaintiff Purchasing — *Vesting Order Refused.*]—Where the plaintiff, who was the mortgagee in fee of lands sold under the decree, had become the purchaser thereof, an order vesting the lands in the plaintiff as such purchaser, although acquiesced in by the defendants, was refused. *Bowen* v. *Fox*, 1 Ch. Ch. 329.

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

Sale in Parcels—*Settling Advertisement—Confirmation of Sale—Objection—Excessive Sale—Innocent Purchaser.*]—Under a decree for the sale of land or a competent part thereof, the mortgagor must see to the parcelling out of the land directed to be sold, and if he consider that too much is offered he should object at the time of settling the advertisement, which should state that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken. The confirmation of a sale may be opposed before the master, and the sale disallowed on grounds which would afford material for a motion to set it aside. Where the ground is that an unnecessary number of lots have been sold, the purchaser should be notified. Semble, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale. *Beaty* v. *Radenhurst*, 3 Ch. Ch. 344.

Sale Obtained by Defendant — *Abortive Sale—Petition.*]—Where a sale has been asked for by defendant and granted, and has proved abortive, the proper course is to file a petition and have the decree carried out. *Goodhill* v. *Burrowes*, 6 L. J. 189.

Subsequent Incumbrancer—*Bill Filed by—Purchaser at Sale—Payment into Court — Claim of Prior Incumbrancer.*] — See *Fleming* v. *McDougall*, 8 P. R. 200.

XIV. Sale under Power.

1. *Costs.*

Taxation—*Appeal.*]—No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R. S. O. 1897 c. 121, s. 30. *Re Vanluven and Walker*, 19 P. R. 216.

——— *Right to — Subsequent Incumbrancer.*]—Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power of sale, such costs to be taxed as between solicitor and client. *Re Crerar and Muir*, 8 P. R. 56.

First mortgagees sold under a power in their mortgage, and paid their solicitors' costs of sale. A subsequent incumbrancer obtained from the referee, on motion, an order for the taxation of the mortgagees' costs. This order was reversed on appeal, on the ground that the mortgagees could not tax the bill, and the mortgagor stood in their place. An objection that the order should have been obtained on petition, not notice, was disregarded. *Re McDonald, McDonald, and Marsh*, 8 P. R. 88.

First mortgagees sold under power of sale, and paid their attorneys' costs. A second mortgagee was held not to be entitled to the right of taxing these costs. Re McDonald, McDonald, and Marsh, 8 P. R. 88, approved. *Re Cronyn, Kew, and Betts*, 8 P. R. 372.

See O'Donohoe v. *Whitty*, 2 O. R. 424, *post* 3; *Re Kingsland*, 8 P. R. 77, *post* 2; *Richmond* v. *Evans*, 8 Gr. 508, *post* 4 (a); *Beatty* v. *O'Connor*, 5 O. R. 731, *post* 5.

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2. *Disposition of Surplus.*

Execution Creditors—*Payment of Lien Notes—Liability to Account.*]—A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time

the notes had become payable, the amount of them would have been recoverable:—Held, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the execution creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest. *Glover* v. *Southern Loan and Savings Co.*, 31 O. R. 552.

Owner of Equity of Redemption—*Payment to—Claims of Others.*]—Where a mortgagee, who had sold under the power in the mortgage, paid over the surplus on the order of I. J., the apparent owner of the equity of redemption:—Held, that, even if the deed under which I. J. claimed was voidable, nevertheless the mortgagee was entitled to act on her order, especially as he had served a notice of sale on those who now impeached his conduct, while they had done nothing to assert their claim until after the surplus was so paid over, and as also a suit which had been theretofore commenced to set aside the deed from I. J. as void had been abandoned. *Harper* v. *Culbert*, 5 O. R. 152.

Payment into Court—*Costs.*]—Where mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed the surplus, but refused to give such proof as the mortgagees required of his title thereto:—Held, that, as the mortgagees had acted reasonably in requiring proper proof, and, failing to get it, had paid the surplus into court, they were entitled to their costs of so doing, and to their costs of appearing on S.'s application to have the money paid out to him. *Re Kingsland*, 8 P. R. 77.

Subsequent Incumbrancer—*Claim of — Money Demand.*] — Quære, whether the claim of a second mortgagee for the surplus proceed of the sale after satisfaction of the prior mortgage is a purely money demand. *Green* v. *Hamilton Provident Loan Co.*, 31 C. P. 574.

——— *Rival Claimants — Dower — Payment into Court.*]—Certain lands were subject to a first mortgage, a charge registered by an engine company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage. The engine company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff, the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. Held, also, however, that the plaintiff was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dowress; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the engine company. In the absence of arrangement, the value of this interest must be ascertained and retained in court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and the engine company if it did not attach. *Discher* v. *Canada Permanent Loan and Savings Co.*, 18 O. R. 273.

Trust—*Account—Limitation of Actions.*]—When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale upon trust to pay costs and charges and the principal and interest of the debt and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale, and the mortgagor is entitled to bring an action against him for an account notwithstanding the expiration of six years from the time of sale. Section 32 of the Trustee Act, R. S. O. 1897 c. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee. *Biggs* v. *Freehold L. and S. Co.*, 26 A. R. 232.

Widow of Mortgagor—*Bar of Dower in Mortgage—Payment into Court.*]—Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his lifetime conveyed away his equity of redemption, and the mortgagees afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into court under R. S. O. 1887 c. 133, s. 6:—Held, that they should be allowed to do so, in view of the conflict of opinion and decision as to ss. 5 and 8 of R. S. O. 1887 c. 133, an Act respecting dower. There is a sharp distinction made in those sections between the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by s. 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches at the time of the husband's death, and not before, and non constat that the widow had no claim to the surplus moneys in this case. Smart v. Sorenson, 9 O. R. 640, considered. *Re Croskery*, 16 O. R. 207.

See, also, DOWER, VI. 1.

See Boulton v. *Rowland*, 4 O. R. 720; *Maclennan* v. *Gray*, 16 A. R. 224; *Gray* v. *Coughlin*, 18 S. C. R. 553; *Western Canada L. and S. Co.* v. *Court*, 25 Gr. 151; *Ford* v. *Allen*, 15 Gr. 565.

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3. *Notice of Sale.*

Concurrent Proceedings—*Statute Forbidding—Abandonment of Notice—Costs—Action on Covenant — Summary Judgment.*]—After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R.

S. O. 1887 c. 102, s. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof:—Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of R. S. O. 1887 c. 102, s. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice. *Lyon* v. *Ryerson*, 17 P. R. 516.

——— *Statute Forbidding—Demand—Advertising.*]—An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in s. 30 of R. S. O. 1887 c. 102. Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stated that, unless payment were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing, until after the expiry of the month, an advertisement of the sale of the mortgaged premises. *Smith* v. *Brown*, 20 O. R. 165.

——— *Statute Forbidding—Unnecessary Notice of Sale.*]—A power of sale in a mortgage authorized a sale without any notice. Default having been made in payment of the mortgage money, notice of sale was given exercisable forthwith. Shortly afterwards an action was brought by the mortgagees for the possession of the mortgaged premises without the leave of a Judge, as required by s. 30 of R. S. O. 1887 c. 102, having been first obtained:—Held, that the Act did not apply, there being no proviso for notice in the mortgage. *Canada Permanent Building Society* v. *Tecter*, 19 O. R. 156.

Infant Heir—*Administratrix of Deceased Mortgagor—Form of Notice—Sufficiency.*]—A power of sale in a mortgage required notice upon default to be given to the mortgagor, "his heirs, executors, or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power:—Held, that a notice which was served upon the widow, who was also the administratrix of the deceased mortgagor, and addressed to her as such widow, was insufficient, because not served also upon the heir-at-law of the mortgagor, although only an infant about three years of age, and that the sale under the power was therefore void. The notice stated only that unless payment was made proceedings would be instituted to obtain possession:—Held, that on this ground the notice was insufficient to support a sale. *Bartlett* v. *Jull*, 28 Gr. 140.

Person Interested in Land—*Necessity for Notice to.*]—Held, that there being an existing interest in the land vested in or claimable by the plaintiff, of which the mortgagee had express notice, the plaintiff was entitled to notice of the sale, and, upon the evidence, that no such notice of sale was given as he was entitled to under the power. *Stewart* v. *Rowsom*, 22 O. R. 533.

Proviso as to Notice—*Concurrent Default.*]—Where a power of sale in a mortgage provides that after default of payment for a month, and a month's notice of sale, the mortgaged premises may be sold, the month's default and notice of sale cannot run concurrently. *Gibbons* v. *McDougall*, 26 Gr. 214.

One of the stipulations of a mortgage was, that "interest should be payable half-yearly on . . . provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the said lands without notice:" "And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors:"—Held, that the mortgagees could sell at any time, without notice, after default for three months, and that the purchaser would take a good title; and, in any event, a notice served at any time after default was sufficient, and the mortgagees were not bound to wait until default had been made for three months to give such notice: in other words, that the month's notice and the three months' default might be concurrent. *Grant* v. *Canada Life Assurance Co.*, 29 Gr. 256.

——— *Short Forms Act—Execution Creditors—Assigns.*]—In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act, execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served. *Re Abbott and Metcalf*, 20 O. R. 299.

Proviso for Sale on Notice—*Covenant for Possession on Default—Short Forms Act—Lease—Timber.*]—There is nothing in the covenant (No. 7) in the Act respecting Short Forms of Mortgages, R. S. O. 1887 c. 107, that on default the mortgagee shall have quiet possession of the lands, repugnant to the proviso in the same Act (No. 14), that the mortgagee, on default of payment, may, on giving notice, enter on and lease or sell the lands; and a mortgagee, when his mortgage is in default, may, under the covenant, without giving notice, make any lease which will not interfere with the mortgagor's right to redeem. The action intended by the proviso is not the mere taking possession for the purpose of keeping down the interest, but the entering on the lands to lease or sell in such wise that the right of redemption shall be postponed or destroyed. When the security in arrear is scanty, it is competent for the mortgagee to make the best provision he can for his own safety, even to the cutting down of trees, which power he can confer upon others under him, subject to an account to the owner of the equity of redemption at the proper time. Millett v. Davey, 31 Beav. 470, applied. *Brethour* v. *Brooke*, 23 O. R. 658. Affirmed, 21 A. R. 144.

Proviso for Sale on One Month's Notice—*Short Forms Act.*]—G. was assignee of a mortgage made pursuant to the Act respecting Short Forms of Mortgages, which contained a power of sale in the words "provided that the said mortgagee on default of payment for one month may on giving notice in writing enter on and lease or sell the said lands." In an application under the Vendors and Purchasers Act, R. S. O. 1877 c. 100:—Held, that the substitution of "one month" for

"— months" was not a material variation in the form, and that G. could make a good title. *Re Green and Artkin*, 14 O. R. 697.

Proviso for Sale without Notice—*Short Forms Act.*]—A mortgage deed, purporting to be made pursuant to the Short Forms Act, contained the following: "Provided that the said mortgagee on default of payment for two months may, without giving any notice, enter on and lease or sell the said lands." The mortgage was assigned to G. and K., who assumed to sell under the above power:—Held, that they could not confer a good title upon the purchaser, for that in construing the above power resort could not be had to the long form in the Act, inasmuch as notice was dispensed with, which was not a mere exception from nor qualification of the short form given in the Act, but an abolition of one of its most important terms; and the power thus being left to its own force, no one but the persona designata, the original mortgagee, could exercise it. A transfer of the estate does not necessarily involve the transfer of trusts or powers as inseparable incidents of the estate. *Re Gilchrist and Island*, 11 O. R. 537.

——— *Short Forms Act—Entry—Notice to Incumbrancers.*]—The vendors were selling lands under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default the mortgagees entered, and after having done so made the contract for sale, and served notice of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others:—Held, that if the Act were applicable, the power of sale was properly exercised; if the Act were not applicable, then, taking the words in their strictest sense, the vendors had done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all. *Re British Canadian L. and I. Co. and Ray*, 16 O. R. 15.

——— *Short Forms Act—Entry.*] — The power of sale contained in a mortgage, purporting to be under the Short Forms Act, was: "Provided that the mortgagee on default for one day may, without any notice, enter on and lease or sell said lands:"—Held, at the trial, that this case was distinguishable from Re Gilchrist and Island, 11 O. R. 537, as the sale there was by an assignee of the mortgagee, and not as here by the mortgagee himself; and that under the power entry on the land was not necessary prior to sale. An appeal to a divisional court was dismissed by reason of an equal division of opinion. *Clark* v. *Harvey*, 16 O. R. 159.

——— *Short Forms Act—Exercise by Assignee.*]—A mortgage, made in alleged pursuance of the Short Forms Act, contained the following provisions as to sale: "Provided that the said mortgagees on default of payment for one month may, on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied and rescinded. And also that the said mortgagees, their heirs, executors, administrators, and assigns, may buy in and re-sell without being responsible for any loss or deficiency on re-sale:"—Held, that the power of sale could be validly exercised by the assigns of the mortgagees. Re Gilchrist and Island, 11 O. R. 537, and Clark v. Harvey, 16 O. R. 159, considered. *Barry* v. *Anderson*, 18 A. R. 247.

Service — *Sufficiency — Leaving at Last Place of Abode—Solicitor—Costs.*] — Where F., a solicitor, on behalf of his client, served a notice of sale under a mortgage made pursuant to the Act respecting short forms, R. S. O. 1877 c. 104, at what he believed, after diligent inquiry, was the last place of residence of the mortgagor in this Province, and did so on the instructions of his client, who was fully advised as to the said inquiries and their result, and bonâ fide deeming such service sufficient:—Held, that F. was entitled, as against his client, to tax the costs of the proceedings under the power of sale, although it appeared that the mortgagor really was at the time of such service within this Province. R. S. O. 1877 c. 104 permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But, even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who bonâ fide acted on that view of the statute should not lose his costs of so effecting service. *O'Donohoe* v. *Whitey*, 2 O. R. 424.

Surety—*Necessity for Notice to.*]—Where mortgagees sold the mortgaged premises without notice to a surety for part of the debt:—Held, that they were liable as between themselves and the surety for the full value of the property. *Martin* v. *Hall*, 25 Gr. 471.

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4. *Setting aside Sale.*

(a) *Sale at Undervalue.*

Negligence—*Sale of Two Lots in One Parcel.*]—A mortgagee who, under a power of sale, without previous inquiry of any kind, put up for sale by auction, and sold in one parcel a farm, and two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately. Judgment in 27 O. R. 548 affirmed. *Aldrich* v. *Canada Permanent L. and S. Co.*, 24 A. R. 193.

Purchaser for Value without Notice—*Account of Proceeds.*]—L. F. D., being the owner of certain valuable property, mortgaged it for $700, became of unsound mind, and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for $900 to E. R., sister of M. A. D. Two years afterwards E. R. sold the property to M. E. B. for $5,000, and a mortgage for $4,000 unpaid purchase money was taken to M. A. D. In an action by L. F. D., by L. D. his next friend, to set aside the sale or for an account:—

Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that, as M. E. B. was a purchaser for value without notice, the sale must stand. An account of the proceeds was ordered against M. A. D. *Dufresne* v. *Dufresne*, 10 O. R. 773.

Sacrifice of Property.]—It is the settled rule of equity, that a mortgagee, in exercising a power of sale, must take reasonable means of preventing a sacrifice of the property. Where he took no means for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside. *Latch* v. *Furlong*, 12 Gr. 393.

——— *Sale to Agent of Mortgagee—Pleading.*]—Where the bill alleged facts which shewed that the lands had been sold by the mortgagee under his power of sale for less than one-fifth of the value; and alleged that the mortgagee, "intending to acquire title himself to the said land . . caused the said lands to be sold for the nominal sum of $409 to one G., who paid no consideration therefor, and on the same day conveyed the same to the defendant Ann Watt, the wife of the mortgagee:" that "Ann Watt had paid no consideration for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises:"—Held, that this sufficiently alleged the mortgagee's intention to become himself the purchaser. *Spain* v. *Watt*, 16 Gr. 260.

Sale without Public Notice—*Costs.*]—A mortgagee is not at liberty to proceed under his power of sale without any reference to the interests of the mortgagor. He is in fact a trustee for the mortgagor, subject to his own claim upon the property. The assignee of a mortgage, with power to sell or lease in default, gave notice to the mortgagor and the mortgagee of his intention to sell, but gave no public notice of the intended sale, and, notwithstanding the protest of the mortgagee, who had covenanted to make good any deficiency in case of a sale being enforced, proceeded with the sale, and sold, for little more than half of the balance due, to a person cognizant of the facts, and then proceeded against the mortgagee for the deficiency. The court set aside the sale, but refused the plaintiff his costs, he having made unfounded charges of fraud and collusion against defendants. *Richmond* v. *Evans*, 8 Gr. 508.

See Parr v. *Montgomery*, 27 Gr. 521, *ante* XII. 16; *Campion* v. *Brackenridge*, 28 Gr. 201, *ante* (AUCTION AND AUCTIONEER); *Prentice* v. *Consolidated Bank*, 13 A. R. 69, *ante* (BANKS AND BANKING, III. 1.)

(b) *Other Cases.*

Burden of Proof.]—In a proceeding to impeach a conveyance executed in pursuance of a sale, under power of sale, the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the deed. *Bartlett* v. *Jull*, 28 Gr. 140.

Irregular Sale—*Terms of Setting aside—Improvements.*]—A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:—Held, that, as a condition of relief against him, he should be allowed for all improvements made under the belief that he was absolute owner, so far as they enhanced the value of the property, but no further, and not only such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Carroll* v. *Robertson*, 15 Gr. 173.

Judgment Creditors of Mortgagee—*Right to Impeach Sale.*]—Where a mortgagee against whom judgments are registered exercises a power of sale, his judgment creditors have such an interest in the due exercise of the power that the court will grant them relief against the mortgagee exercising it to their disadvantage. *Commercial Bank* v. *Watson*, 5 L. J. 163.

Mortgagee Trustee for Mortgagor—*Redemption.*]—A purchase by a second from a prior mortgagee, under a power of sale in the first mortgage, was sought to be set aside, on the ground mainly that the mortgagee was a trustee for the mortgagor; but the court upheld the transaction, and, the purchaser submitting to be redeemed in respect of both mortgages, directed the cause to stand over for the purpose of making the mortgagor a party to the suit. *Watkins* v. *McKeller*, 7 Gr. 584.

Sale to Agent of Mortgagee—*Impeaching—Estoppel.*]—On a sale under a power of sale the clerk of the mortgagee's attorney purchased, but paid nothing; the mortgagee conveyed to him, and he immediately reconveyed to the mortgagee:—Held, that the sale was invalid, and the property still redeemable, although the mortgagor immediately after the sale accepted a lease of the property. *Ellis* v. *Dellabough*, 15 Gr. 583.

——— *Subsequent Foreclosure—Mistake in Bidding—Redemption.*]—A building society advertised for sale the mortgaged property under their power. At the auction it was stated by the auctioneer that the price to be paid for the premises was to be over and above the amount of certain other mortgage debts against a portion of the same estate. One of the directors, who was also solicitor to the society, bid off the property, though it afterwards appeared that he acted only as agent for a third party. After the sale the purchaser bought up the interest of the other mortgagees, who had already commenced proceedings to foreclose, carried on the foreclosure suit, and obtained a final decree of foreclosure, no notice being taken of the fact of the money having been paid to the mortgagees. Before this order, however, the mortgagor, claiming the surplus of the purchase money over and above the amount of the mortgage under which the property was sold, filed a bill to redeem, when the agent of the purchaser swore that he had not intended to bid the sum he did in addition to the amount of the mortgage paid off. The court set aside the sale, and gave the mortgagor leave to redeem. *Montgomery* v. *Ford*, 5 Gr. 210.

Sale to Solicitor of Mortgagee—*Right of Mortgagor to Impeach.*]—Where the sale is not properly conducted through the fault

of the solicitor, the mortgagor, or any other party interested, as well as the mortgagee, has a right to complain thereof. On such a sale the solicitor of the mortgagee cannot purchase, though the proceedings for the sale were not taken in his name, and it was not shewn that any loss had occurred by reason of his being the purchaser. *Howard* v. *Harding*, 18 Gr. 181.

See Ingalls v. *McLaurin*, 11 O. R. 380, *ante* X. 1; *Locking* v. *Halsted*, 16 O. R. 32; *Chatfield* v. *Cunningham*, 23 O. R. 658, *ante* IV. 6 (c); *Brown* v. *Fisher*, 9 Gr. 423; *Independent Order of Foresters* v. *Pegg*, 19 P. R. 254, *post* 5.

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5. *Other Cases.*

Damages for Wrongful Proceedings.]—See *Edmonds* v. *Hamilton Provident and Loan Socy.*, 19 O. R. 677, 18 A. R. 347.

Defective Foreclosure—*Subsequent Sale—Validity as Exercise of Power.*]—K. gave a mortgage of leasehold premises to the defendants, with a covenant authorizing them to sell the premises on default, with or without notice to mortgagor, and either at public or private sale. The mortgage conveyed the unexpired portion of the current term, and "every renewed term." K., shortly after giving the mortgage, conveyed the equity of redemption in the mortgaged premises to one O'S. for a nominal consideration, and in trust to carry out certain negotiations for K., who then left the country and was absent for several years. During his absence the lease of the ground mortgaged to the defendants expired, and was renewed in the name of O'S. Default having been made in the payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, the mortgagees having knowledge of his want of interest in the premises. Prior to such suit, O'S., fearing that such proceedings would be taken against him, had executed a deed of reconveyance of the equity of redemption to K., but such deed was never delivered. O'S. then filed an answer and a disclaimer of interest in such suit, but he was afterwards persuaded by the mortgagees to withdraw the same and consent to a decree, and a final order of foreclosure was made against him. Pursuant to this order the defendants subsequently sold the mortgaged premises to the defendant D. for a sum less than the amount due under the mortgage; the deed to D. recited the proceedings in foreclosure, and purported to be made pursuant to the final order of foreclosure:—Held, affirming the judgment of the court of appeal, 11 A. R. 626, that, even if the decree of foreclosure was improperly obtained, and consequently void, yet the sale and conveyance to D. were a sufficient execution of the power of sale in the mortgage, and passed the renewed term conveyed by the mortgage. *Kelly* v. *Imperial L. and I. Co.*, 11 S. C. R. 516.

Held, that a sale of the mortgaged premises by the mortgagee pending foreclosure was not, under the circumstances, sustainable under the power of sale contained in the mortgage. Kelly v. Imperial L. and I. Co., 11 S. C. R. 516, distinguished. *Independent Order of Foresters* v. *Pegg*, 19 P. R. 254.

Insolvency of Mortgagor—*Exercise of Power.*]—Where a mortgagor becomes bankrupt, the mortgagee is not compelled to go in under the Act, but may proceed to sell the property under a power of sale in his mortgage. *Gordon* v. *Ross*, 11 Gr. 124.

Obligation to Carry out Sale.] — A mortgagee, having exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs, cannot without sufficient reason treat the sale as a nullity, and fall back on the mortgage as if the exercise of the power was a mere matter of form. Three joint owners of property mortgaged it and then sold to the plaintiff, who covenanted to pay off the mortgage. The plaintiff sold to the defendant, taking a similar covenant. The mortgagees exercised the power of sale in their mortgage, and one of the original owners became the purchaser, at a price sufficient to pay the mortgage and costs. The purchaser, though able, not being willing to carry out the sale, the mortgagees refrained from compelling him to do so, and, under threats of legal proceedings by the mortgagor, collected the arrears and costs from the plaintiff. In an action by the plaintiff to recover from his vendee the amount thus paid:—Held, that he was not entitled to recover. *Patterson* v. *Tanner*, 22 O. R. 364.

——— *Tender of Redemption Money.*]—The defendants advertised an auction sale of mortgaged lands situate near Kincardine to take place there on the 19th January. At eleven a.m. on the 17th January the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it, and the defendants telegraphed a reply. At ten a.m. on the 19th January the defendants received at Toronto the amount named, but, in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when, knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor:—Held, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount at such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment. *Gentles* v. *Canada Permanent and Western Canada Mortgage Corporation*, 32 O. R. 428.

Payment of Purchase Money—*Default—Mortgagee not Chargeable—Petition—Opening up Decree.*] — Mortgagees, under their power of sale, sold to M. for $7,800, and gave him possession. M. paid a deposit of $600, and gave his promissory note for $600 more, which he duly paid. He also executed a mortgage for $4,000, which was duly registered, but did not pay the residue of the purchase money, $2,600. The mortgagees executed a deed, but retained it in their possession. Their solicitor also did some acts as if the sale was complete; but the court, being satisfied that the parties regarded the transaction as still in fieri:—Held, that the mortgagees were not responsible to a subsequent incumbrancer for the $2,600, or chargeable with more than they had received. The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees, through oversight, allowed the bill to be taken pro confesso, and a decree was made accordingly.

The plaintiff, desiring more extensive relief, filed a petition in the nature of a bill of review. The mortgagees, in their answer to this, set up the facts which shewed the transaction to be not completed. The court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser. *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280.

Restraining Proceedings—*Acceleration Clause—Application.*]—In an action for an injunction only, the plaintiff not seeking to redeem, it appeared that the mortgage moneys were due by reason of the acceleration clause, the interest being in arrear. The plaintiff had made a tender before bringing action, which was refused as insufficient. An interim injunction was granted upon the plaintiff bringing into court the amount of arrears:—Held, on motion to continue the injunction, that G. O. 461 did not apply to proceedings under the power of sale, no suit having been instituted by the mortgagee, and that the case did not come within Tylee v. Hinton, 42 U. C. R. 228, 3 A. R. 53. *Robertson* v. *Hetherington*, 8 C. L. T. Occ. N. 141.

——— *Appeal.*]—Pending an appeal from the court of chancery, a mortgagee was restrained from proceeding to a sale of the mortgaged premises under the power of sale. *Commercial Bank* v. *Bank of Upper Canada*, 1 Ch. Ch. 64.

Sale by Way of Exchange.]—A mortgagee with power of sale under the Short Forms Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. The words "absolutely dispose of" in the power are appropriate to an exchange. *Smith* v. *Spears*, 22 O. R. 286.

Sale of Timber only.]—A mortgagee of timbered land, whose mortgage contained the ordinary short form of power of sale authorized by R. S. O. 1887 c. 107, in the exercise of such power sold the timber without the land:—Held, that the sale as an exercise of the power was void. *Stewart* v. *Rowsom*, 22 O. R. 533.

See Brethour v. *Brooke*, 23 O. R. 658, 21 A. R. 144, *ante* 3.

Sale on Credit—*Account for as Cash—Costs.*]—After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor, and the lands were sold under the power of sale, the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitor's costs for doing so were charged. In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings:—Held, that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs; those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale: R. S. O. 1877 c. 103. *Beatty* v. *O'Connor*, 5 O. R. 731.

Sale of land on credit by agent under power of attorney not authorizing a sale on credit. See *Rodburn* v. *Swinney*, 16 S. C. R. 297.

Sale to Subsequent Incumbrancer—*Irredeemable Interest.*]—If a first mortgagee, with a power of sale, sells to a puisne incumbrancer, the purchaser requires an irredeemable interest, as against the mortgagor; and this though such subsequent incumbrancer had been paid off, and had in hand moneys of the mortgagor sufficient to pay off the first incumbrance, but not specially intrusted to him for that purpose. *Brown* v. *Woodhouse*, 14 Gr. 682.

Solicitor's Lien—*Purchase Subject to.*]—A solicitor's lien on title deeds for his professional services attaches and continues, although the property to which they relate has passed from the ownership of the client for whom the services were performed, by sale and purchase under a power of sale contained in a mortgage. The purchaser takes the interest of the mortgagor subject to the lien. *Gill* v. *Gamble*, 2 Ch. Ch. 135, 13 Gr. 169.

Title—*Legal Estate—Existence of Power.*]—In ejectment, where plaintiff claimed under a deed executed by a mortgagee under power of sale:—Held, that the estate in the mortgage having become absolute in law in the mortgagee, there was no necessity for shewing that there was a power of sale in the mortgage to convey the legal estate. *Nesbitt* v. *Rice*, 14 C. P. 409.

——— *Legal Estate—Mistake in Name of Mortgagee.*]—See *Burton* v. *Dougall*, 30 O. R. 543.

Trustees — *Exercise of Power by New Trustees.*]—R. S. O. 1877 c. 107, s. 3, provides that every new trustee shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust. Where a mortgage made in favour of two trustees of a marriage settlement, which contained a power of sale exercisable by them, but not by the assignee of the mortgage, not being in conformity with the Short Forms Act, was, together with the mortgaged lands, on the resignation of the trustees, assigned to a new trustee appointed in their place:—Held, that the new trustee stood in the place of the former trustees, and could exercise the power of sale, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust. *Re Gilmour and White*, 14 O. R. 694.

XV. Several Mortgages.

1. *Marshalling Securities.*

In 1849 G., being the owner of Whiteacre and Blackacre, contracted to sell half of the

former to B. by bond, which was never registered. In 1852 G. executed a mortgage covering both lots to C., which was immediately registered, but the christian name of the grantor's wife (who executed to bar dower) did not appear in the memorial. In 1853 G. gave a mortgage of Blackacre to P., who also immediately registered his conveyance. In 1855 G. sold the remaining half of Whiteacre to M., and in the following year B. conveyed his interest in the other half to S. In 1861 C. sold Blackacre under a power of sale in his mortgage, and the sale realized fully what was due thereon. In 1862 P. filed his bill against M. and S., in order that he might be subrogated to the rights of C. as against Whiteacre for the amount due him on his security. S. and M. had previously paid all their purchase money:—Held, that P. was not entitled to any relief against S., but that if C.'s mortgage was duly registered, P. was entitled to contribution against M. *Boucher* v. *Smith*, 9 Gr. 347.

The owner of lots A. and B. sold A., but the conveyance was not registered; he afterwards mortgaged A. and B., and the mortgagee registered the mortgage without notice of the prior deed; the mortgagor subsequently sold B. in portions by three successive sales:—Held, in a suit by the assignees of the mortgage for a sale, that the decree should be for the sale first of B.; and that if a sale of part of B. produced enough the portion last parted with by the mortgagor should be first sold. *Barker* v. *Eccles*, 17 Gr. 277.

A., being the registered owner of Whiteacre and Blackacre and other lands, mortgaged all to plaintiff. He then sold Whiteacre to B., and afterwards Blackacre to K., covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after their execution:—Held, that B.'s right, as between him and K., was to throw the whole mortgage and not merely a ratable part on Blackacre. *Jones* v. *Beck*, 18 Gr. 671.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, (1) that the plaintiffs were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased, to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Clark* v. *Bogart*, 27 Gr. 450.

See Rutherford v. *Rutherford*, 17 P. R. 228, *post* 4.

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2. *Priorities.*

Application of Advance in Reduction of First Mortgage — *Rights of Lender against Second Mortgagee.*]—There were two mortgages registered against property, the first mortgagees were pressing the mortgagor for payment, and about to sell out his chattels, and A. at the request of the mortgagor, and to stop such sale, advanced $1,000 to them, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first incumbrancers:—Held, that A., though he thus reduced the first mortgage by $1,000, and so bettered the position of the second mortgagee by that amount, could not claim priority for his advance over the second mortgagee. *Imperial L. and I. Co.* v. *O'Sullivan*, 8 P. R. 162.

Application of Loan in Payment of Purchase Money—*Right of Lender to Lien —Subrogation—Prior Mortgagees.*] — C., being the equitable owner of the land, contracted by writing (registered) to sell to the defendant on 13th February, 1877. Part of the purchase money was paid down. C. obtained an order on 17th April, 1878, vesting the land in him. There were two mortgages on the register prior to one in favour of a loan company. On the 17th May the defendant gave an order on the loan company to pay the proceeds of a loan to their local agent, who was informed by one J., a solicitor who had control of the two prior mortgages, that they were paid off and he would get them discharged. Thereupon the agent paid C. the balance of his unpaid purchase money, and C. on the 25th May, 1878, conveyed to the defendant. The loan company's mortgage was dated 15th May, and registered the 25th May:—Held, that the loan company could not stand in C.'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgages, following Imperial L. and I. Co. v. O'Sullivan, 8 P. R. 162. The loan company's mortgage contained this clause "that in the event of the money hereby advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off:"—Held, that this provision could not affect prior mortgagees who were no parties to it; and quære, whether it would apply to the discharge of unpaid purchase money, which does not constitute a charge or incumbrance in the proper meaning of those terms. *Watson* v. *Dowser*, 28 Gr. 478.

Building Loan—*Further Advances—Subsequent Mortgage—Registry Laws—Notice.*] —After purchasing land under an agreement which provided that $2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding $12,000, the purchaser executed a building mortgage to a loan company for $11,500, which was at once registered, but only part of that sum was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for $2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—Held, that the plaintiff was not entitled to the priority claimed by her. Decision in 24 O. R. 426 reversed. *Pierce* v. *Canada Permanent L. and S. Co.*, 25 O. R. 671. Affirmed by the court of appeal, 23 A. R. 516. See R. S. O. 1897 c. 136, s. 99.

Execution of Mortgage—*Delivery—Registration.*]—Where a person executed a mortgage and had it registered, but did not for some time give it to the mortgagee, and it was afterwards sold to a third person, who was not aware of the facts, it was held entitled to priority over another mortgage previously executed, but not registered till after the other security had been registered, though before it had been delivered to the mortgagee. *Muir* v. *Dunnet*, 11 Gr. 85.

Omission of Part of Land from First and Second Mortgages—*Separate Suits to Rectify—Decree.*]—Two mortgages were successively taken by distinct creditors, which omitted, by mistake, a piece of ground which the mortgagor held under a contract of purchase only. The second mortgage was afterwards assigned for value, without notice of the first mortgage. The mortgagor died insolvent. One of the heirs, out of his own money, paid the balance of purchase money due on the omitted lot, and obtained from the vendor's heirs a conveyance of that lot to himself. Afterwards the mortgagees respectively discovered the mistake in their mortgages, and each filed a bill to have his mortgage rectified, taking no notice of the other mortgage, and not making the holder of it a defendant. The second mortgagee obtained his decree first, and thereby the estate was vested in him; and the defendant (the heir of the mortgagor) was ordered to pay the costs and to receive credit for what he had paid for his conveyance; the holders of the first mortgage then filed a bill against the plaintiff in the other suit, claiming a prior equity in respect of the omitted parcel:—Held, on rehearing, reversing the decision in 18 Gr. 382, that the defendant (the holder of the second mortgage) could not avail himself of the legal estate in such a case; and that the plaintiff was entitled to the relief prayed. *Merchants Bank of Canada* v. *Morrison*, 19 Gr. 1.

Payment of First Mortgage—*Subrogation — Estoppel — Second Mortgagee.*] — The plaintiff paid off a first mortgage on certain lands, and procured its discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact of the existence of a second mortgage. Shortly afterwards on ascertaining this fact he notified the defendant, the holder, that he would pay it off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee:—Held, that the plaintiff by his acts and conduct had precluded himself from asserting such rights. Brown v. McLean, 18 O. R. 533, and Abell v. Morrison, 19 O. R. 669, distinguished. *McLeod* v. *Wadland*, 25 O. R. 118.

Payments by Stranger—*Assignment.*]—A testator devised the north half of his farm to one son and the east half of the south half to another son, the latter half being subject to mortgage. The devisee of the north half made several payments to the mortgagees, without any demand from them, reducing the mortgage debt to about $100. The devisee of the east half of the south half gave a mortgage on his land, this mortgagee, before advancing the money, communicating with the former mortgagees and obtaining from them a statement shewing the balance due to be about $100, and then registering the mortgage. Subsequently the owner of the north half paid this balance and took an assignment expressed to be in consideration of $1, and in these proceedings he claimed that he was entitled to hold the assignment for the full amount paid by him:—Held, per Hagarty, C.J.O., and Osler, J.A., that there was nothing to shew that the payments, other than the last, were made on the faith of getting the assignment, and that even if they had been so made, the right to an assignment was an equitable one and could not prevail against the duly registered second mortgage. Per Burton, J.A., that, on the evidence, it was not shewn that the payments had been made with the intention of taking an assignment. Per Maclennan, J.A., that the payments by the devisee of the north half were properly made, in view of the possible resort to the north half in case of deficiency in value of the south half, but that the equitable right could not prevail against the duly registered second mortgage. In the result the judgment in 23 O. R. 351 was affirmed. *McMillan* v. *McMillan*, 21 A. R. 343.

Priority of Registration — *Balance of Purchase Money—Estoppel.*]—See *McMillan* v. *Munro*, 25 A. R. 288.

Purchase of Equity by First Mortgagee—*Rights of Second Mortgagee—Intention to Merge.*]—There were two mortgages on certain land. O., having notice of the second, bought the first mortgage, and, at or about the same time, the equity of redemption, and gave to his vendor a new mortgage for the sum O. was to pay therefor. O. conveyed portions of the land to his sons, in terms subject to the mortgage which he had so given; and he afterwards paid that mortgage off:—Held, that these facts were not sufficient evidence of an intention to merge under 22 Vict. c. 87, and that the second mortgage had not acquired priority over the mortgage purchased by O. *Barker* v. *Eccles*, 18 Gr. 440; *S. C.*, in the court below, 17 Gr. 631.

Purchase of Mortgage by Prior Mortgagee—*Equity—Right of Subsequent Mortgagee.*]—The plaintiff was the holder of two mortgages, and in June, 1870, obtained a decree of foreclosure, whereby he was declared entitled to priority over one F., who was the holder of a fourth mortgage thereon, and after the decree the plaintiff bought up the third mortgage, which was prior to that held by F.; and he had also, before the date of the decree, procured from the mortgagor a release of the equity of redemption:—Held, following Barker v. Eccles, 18 Gr. 440, 523, and Hart v. McQuesten, 22 Gr. 133, that the master had correctly found the plaintiff entitled to priority over F. in respect of all the three mortgages. *Forrester* v. *Campbell*, 26 Gr. 212.

Approved in *Peterkin* v. *McFarlane*, 9 A. R. 429.

Subsequent Advance by First Mortgagee—*Second Mortgage—Notice—Registration.*]—The mortgagor, having after the mortgage become indebted to the mortgagee in a further sum, conveyed the lands to him in fee, and some days afterwards the grantee gave the mortgagor a bond to reconvey upon payment of the whole debt:—Held, that the grantee was entitled to hold the premises as a security for the whole of his debt, as against a mesne incumbrance which had been created thereon between the time of his obtaining the mortgage

and the conveyance to him in fee, but of which he had not been notified before the execution of the conveyance under which he claimed. Held, also, that registration is not notice in this country. *Street* v. *Commercial Bank*, 1 Gr. 169.

Subsequent Mortgagees—*Subrogation to Rights of Prior Mortgagees—Mesne Charge.*]—The original owner of land created a mortgage thereon in favour of one M., and died without redeeming, and the equity of redemption in the premises descended to C. F., his heir-at-law, who with her husband P. F. joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, subject to which and the mortgage in favour of M. the premises were limited to P. F. in fee, who subsequently in September, 1875, out of W. F.'s moneys, paid the amount due on M.'s mortgage, but which was not actually discharged. In December following, P. F. sold to W. F., conveyed to him the equity of redemption, and procured M. to assign his mortgage and convey to him the legal estate. In March, 1877, W. F. mortgaged the land to a loan company, but did not assign the M. mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate:—Held, that the loan company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by M.'s mortgage. *Fraser* v. *Gunn*, 29 Gr. 13.

See Goldie v. *Bank of Hamilton*, 31 O. R. 142, 27 A. R. 619.

Substitution of Third for First Mortgagee—*Assignee of Second Mortgage—Notice—Consent—Postponement—Indemnity.*]—In October, 1863, the owner of real estate created a mortgage thereon in favour of J. M. to secure $20,000, which was duly registered on the day of its execution, and was in 1875 assigned to a bank to secure a liability of the mortgagee, there having been a prior mortgage on the same estate, created in 1861, securing $4,000. In 1866 another mortgage was created in favour of the plaintiff for $4,000, which was intended to be substituted for the prior mortgage for that amount, and the money obtained thereon was applied towards the payment thereof. J. M. giving a written consent that the latter mortgage should have priority to his own, notwithstanding its prior registration, such consent, however, not being registered. The mortgaged estate proved insufficient to pay the mortgage assigned to the bank, who had taken the assignment thereof in good faith and without notice of J. M.'s consent to be postponed to the plaintiff:—Held, that these circumstances did not create an equity in favour of the plaintiff to call upon J. M. to make good the loss by reason of J. M.'s neglect to notify the bank of his priority. Slim v. Croucher, 2 Giff. 37, distinguished. *Campbell* v. *McDougall*, 26 Gr. 280.

The court of appeal affirmed the decree as to all the defendants, except as to J. M., who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. J. M. thereupon appealed to the supreme court of Canada:—Held, affirming the judgment in 5 A. R. 503, reversing that in 26 Gr. 280, that, as appellant could not justify the breach of his agreement in favour of C., he was bound both at law and in equity to indemnify C. for any loss he sustained by reason of such breach. *McDougall* v. *Campbell*, 6 S. C. R. 502.

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3. *Tacking and Consolidation.*

(a) *Before the Registry Act, 1865.*

Where there were three mortgages on the same property, and the third was taken without notice of the second, and was afterwards transferred to another person, who thereupon obtained a conveyance to himself of the first mortgage:—Held, that he could not tack his third mortgage to the first; and the court refused a reference to inquire whether the assignee had notice of the second when he took the conveyance of the third mortgage. *McMurray* v. *Burnham*, 2 Gr. 289.

A mortgagor conveyed his equity of redemption to a third party, and afterwards contracted to release to the mortgagee, and the latter, having no notice of the proper conveyance, paid the mortgagor some part of the consideration that he had contracted to give for the release:—Held, that he was entitled to tack what he had so paid to his mortgage debt. *Gordon* v. *Lothian*, 2 Gr. 293.

R. mortgaged lot 16 to E. to secure £2,047. R. afterwards mortgaged lot 17 to C. to secure £100. R.'s equity of redemption in lot 17 was attached by fi. fa. lands in 1851, but before sale of it E. purchased and received an assignment of C.'s mortgage; after this the sheriff sold R.'s equity of redemption in lot 17 to L. On a bill filed by the representatives of E. to foreclose both mortgages:—Held, that they were entitled to tack and be redeemed, if at all, as to both. *Hyman* v. *Roots*, 10 Gr. 340.

Where the owner of property mortgaged it to W., and then assigned an undivided half to J., subject to the mortgage, and afterwards mortgaged the remaining half to B., who afterwards obtained an assignment of the first mortgage:—Held, that the representatives of J. were not bound to redeem both mortgages, but only the mortgage to W. *Buckler* v. *Bowman*, 12 Gr. 357.

(b) *Application and Effect of Registry Act, 1865.*

Section 66 of the Registry Act, 1865—which enacts that "no equitable lien, charge, or interest affecting land shall be deemed valid in any court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act,"—is not retrospective. *McDonald* v. *McDonald*, 14 Gr. 133.

A mortgagor's devisee held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the Registry Act forbids. *McLaren* v. *Fraser*, 17 Gr. 533.

The rule of equity which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts, and insist on being redeemed in respect

of all before releasing any one of his securities, is not "tacking," and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof. *Dominion S. and I. Society* v. *Kittridge*, 23 Gr. 631.

The right of consolidating separate mortgage debts on separate properties, is an equitable one, and under s. 68 of the Registry Act, 31 Vict. c. 20, will not be allowed in favour of the holder of the mortgages against a puisne incumbrancer of one of the mortgaged properties without notice, although such right would be enforced as against the mortgagor himself. *Brower* v. *Canadian Permanent Building Association*, 24 Gr. 509.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of that Act, assigned the equity of redemption to M. by a registered instrument:—Held, on M.'s suing for redemption, that the registered conveyance to M. prevailed, under s. 66 of the Act, over C.'s equitable right to consolidate the two mortgages. *Miller* v. *Brown*, 3 O. R. 210.

(c) *Cases since the Act.*

Assignee of Equity in Part of Land—*Rights against.*]—Two mortgages of a lot of land were made at different periods for different sums by the owner thereof, who afterwards conveyed the equity of redemption in thirty-six feet of the lot to one of the defendants, with a covenant against incumbrances, which was partly carried out by the discharge from the second mortgage of the land conveyed. Subsequently the mortgagor conveyed the equity of redemption in the remainder of the lot to another of the defendants. The plaintiff was the assignee of both mortgages, but acquired the second after the discharge therefrom of the thirty-six feet, and now sought payment of the amount due on both mortgages, or foreclosure:—Held, that she was not entitled to consolidate her securities against the owner of the thirty-six feet, who however had the right as against the owner of the residue of the land to cast the whole burden of the incumbrances on it, but had no such right against the plaintiff; that the whole of the land, if not redeemed, should be sold charged with the first mortgage, which should be apportioned between the two parcels according to their respective values. On the owner of the thirty-six feet paying the amount of the first mortgage, the remainder of the land only should be sold and the proceeds divided amongst the parties interested, including the plaintiff as second mortgagee. *Fraser* v. *Nagle*, 16 O. R. 241.

Debt Due before Mortgage.]—A municipal treasurer gave to the municipality a mortgage to secure the moneys coming to his hands. On taking an account in a suit to redeem:—Held, that the municipality could not tack a simple contract debt due to them by the plaintiff before the execution of the mortgage. *Ferguson* v. *Frontenac*, 21 Gr. 188.

Derivative Mortgage — *Redemption.*]—The plaintiff, as mortgagee of land of which the defendant was the owner of the equity of redemption, was also derivative mortgagee from the latter of other lands:—Held, that the plaintiff was entitled to consolidate his claims in an action of foreclosure. Held, also, that the plaintiff might foreclose the original mortgage without making the original mortgagor a party. *Silverthorn* v. *Glazebrook*, 30 O. R. 408.

Foreclosure Suit—*Notice—Sale—Hidden Equities—Holder for Value.*]—The rule that a mortgagee shall not be redeemed in respect of one mortgage, without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem. In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage, which was registered after it but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee:—Held, (1) that the defendant, the mortgagee, had not the right as against the plaintiff to consolidate his mortgages and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff was a holder of his mortgage for value. *Johnston* v. *Reid*, 29 Gr. 293.

One Mortgage not in Default.]—The plaintiffs, who were the mortgagees under three mortgages from the same mortgagors, on different lands, were held entitled only to consolidate in respect of the mortgages in default when action was brought to enforce them, and as the amount due on one of the mortgages had been then paid, and there was then no default as to it, consolidation was refused. *Scottish American Investment Co.* v. *Tennant*, 19 O. R. 263.

Right to Assignment.]—Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of their number:—Held, that the subpurchaser, on being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof, without also paying the second mortgage. *Thompson* v. *Warwick*, 21 A. R. 637.

——— *Costs.*]—The plaintiffs, being mortgagees in possession of certain lands, afterwards acquired by transfer a second mortgage on the same property, and sued the covenantors in the first mortgage, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage subject to equities of redemption existing in other parties:—Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first and require payment of both. Kinnaird v. Trollope, 39 Ch. D. 636, followed. The defendants before action tendered, with the amount due on the first mortgage, an assignment thereof, which the plaintiffs, being mortgagees in possession, were not

bound and declined to give, under R. S. O. 1887 c. 102, s. 2, and subsequently, but without tender, the defendant offered to take a reconveyance:—Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of the costs of the action. Decision of the trial Judge varied upon the question of costs. *Stark* v. *Reid*, 26 O. R. 257.

——— *Covenant.*]—The owner of property mortgaged it to the plaintiff, and then sold subject to the mortgage, taking from the purchaser a second mortgage as part of his purchase money, which he assigned to the plaintiff. The purchaser then sold to one of the defendants, who, to obtain an extension of time on the first mortgage, entered into a covenant with the plaintiff to pay it, and afterwards sold the property. In a foreclosure action the plaintiff claimed an order for the payment of the first mortgage by the covenantor under his covenant, and the latter refused to pay the amount due on it unless the plaintiff would assign the mortgage to him:—Held, that the plaintiff was not bound to assign to the covenantor unless he paid off both mortgages. *Muttlebury* v. *Taylor*, 22 O. R. 312.

——— *Payment.*]—Where a mortgagor of land conveyed his equity of redemption to several grantees, one of whom agreed to pay off the mortgage, and some of whom also executed further mortgages upon the land, and the first mortgagee proceeding to foreclose and to sue the mortgagor upon his covenant, the latter requested him to assign his mortgage to a third party who had advanced the money and paid off the mortgage:—Held, that the first mortgagee was bound under R. S. O. 1887 c. 102, s. 2, to execute the assignment as asked, notwithstanding the subsequent incumbrances. Teevan v. Smith, 20 Ch. D. 724, distinguished. Kinnaird v. Trollope, 39 Ch. D. 636, followed. Semble, that, even if the redemption money had been that of the mortgagor himself, it would have made no difference. *Queen's College* v. *Claxton*, 25 O. R. 282.

Where the plaintiff, the mortgagor of certain lands, sold the same for a sum in excess of the amount of his mortgage, the purchaser raising such excess by a mortgage to the defendant, the original mortgagee, the plaintiff was held entitled to an assignment of the mortgage made by him on his paying the defendant merely the amount due thereon. *Wheeler* v. *Brooke*, 26 O. R. 96.

See Smith v. *Smith*, 18 O. R. 205; *Re Union Assurance Co.*, 23 O. R. 627; *Rogers* v. *Wilson*, 12 P. R. 322 (*ante* I. 4).

Waiver of Right—*Proof of Claim—New Mortgage.*]—A subsequent mortgagee, who also held a mortgage on other property of the mortgagor, proved his claim on the property in question, and after the solicitor of the mortgagor had taken a mortgage on it for costs incurred, and the report had been made, applied to consolidate his mortgages:—Held, that the mortgagee had not waived the right to consolidate, and that the solicitor's claim must be postponed. *Ross* v. *Stevenson*, 7 P. R. 126.

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4. *Other Cases.*

Absolute Covenants for Title in Second Mortgage—*Notice of First Mortgage.*]—Where a second mortgage, not noticing the first, contains absolute covenants for title, but there is no allegation in the pleadings, and no other evidence than the mortgage thus affords, that the mortgagor did not inform such second mortgagee of the first mortgage before the execution of the second, the court will not assume such to be the case, so as to vest the equity of redemption in such second mortgagee, under 4 & 5 W. & M. c. 16 s. 3. *Meyers* v. *Harrison*, 1 Gr. 449.

Charge on Land—*Subsequent Incumbrancers—Amount of Charge.*]—Legacy to plaintiff of a sum equal to one-fifth of their value charged upon two parcels of land, A. and B. Devise of both parcels subject to the legacy. The extent of the devisee's interest under the will in parcel A. uncertain. Agreement between the devisee and plaintiff fixing value of legacy at $400, not registered. The devisee mortgaged both parcels separately to different mortgagees, who registered. Plaintiff proceeded against the devisee alone for the sale of parcel B. only for payment of the legacy as fixed by agreement, and obtained judgment by default with reference as to incumbrances. Upon motion by the incumbrancers upon parcel B., who were added as parties in the master's office, to set aside or vary the judgment:—Held, that there was no necessity, and no right on the part of the added parties, to alter or vary the judgment to enable them to question and reduce the amount of the charge fixed thereby as between the plaintiff and the defendant; and that as between them and the plaintiff the value of the charge was open in the master's office, in the absence of notice. 2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in parcel A. were subject to the charge. If they chose they could redeem the plaintiff, and, standing in her place, at their own expense have recourse to the west half. *Rutherford* v. *Rutherford*, 17 P. R. 228.

First Mortgagee—*Rents and Profits—Receiver—Benefit of Puisne Mortgagee.*]—It would seem that a first mortgagee has not, as such, a right to the rents and profits. Where, therefore, a puisne incumbrancer filed a bill and obtained the appointment of a receiver, who had since his appointment collected the rents and profits of the property, and paid the same into court, and a prior incumbrancer, who was not a party to the first suit, filed a bill upon his mortgage, and moved in that cause for an order to apply the rents, so paid in by the receiver, to payment of his claim, the court, under the circumstances, refused the application with costs, but gave the plaintiff liberty to renew the same, in such manner and in such suit as he should be advised. *Bank of British North America* v. *Heaton*, 1 Ch. Ch. 175.

Proviso for Possession in Default—*Second Mortgage — Ejectment — Estoppel — Remedy.*]—Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in

six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff, and on ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default:—Held, that the plaintiff was not estopped; for (1) the second mortgage might take effect by passing an interest; (2) if the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but (3) semble, that the redemise in a mortgage cannot operate, by estoppel or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. Quære, whether, although the proviso could form no defence to this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract not to disturb his possession. *James* v. *McGibney*, 24 U. C. R. 155.

Sale under Second Mortgage — *Purchase by First Mortgagee—Covenant in First Mortgage—Injunction.*]—A sale of the equity of redemption had been effected under a power of sale contained in a second mortgage; and, pending a suit in the court of chancery to set aside such sale, the first mortgagee, who was one of the purchasers, was proceeding at law to recover against the mortgagor upon the covenant contained in his mortgage deed; whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill, insisted upon the validity of the sale. From what had taken place in relation to the premises it was doubtful whether the mortgage debt was not extinguished, in equity, as between the mortgagor and mortgagee, and the original cause being almost ripe for hearing, an injunction was granted to restrain the action at law until the hearing took place. *Rees* v. *Beckett*, 2 Gr. 650.

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

——— *Foreclosure by First Mortgagee.*]—L. created a second mortgage after a bill had been filed to foreclose a prior incumbrance on the same land:—Held, that the mortgagee in the mortgage took subject to the lis pendens, even though service of the bill had then not been effected; and a bill filed by him to redeem the prior incumbrancer, after a final foreclosure in such suit, was dismissed with costs. *Robson* v. *Argue*, 25 Gr. 407.

——— *Impeaching Prior Registered Mortgage—Fraud—Judgment Creditor.*]—A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor who has accepted a mortgage does not lose his rights as a judgment creditor. *Warren* v. *Taylor, Ross* v. *Taylor*, 9 Gr. 59.

——— *Purchase by Mortgagor at Sale under First Mortgage.*]—V., having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mortgage, which he assigned to the plaintiff. G. subsequently sold the whole of the lands under a power of sale in his mortgage, and B. became the purchaser:—Held, that B.'s purchase under the power of sale in the first mortgage did not cut out, but enured to the benefit of, V., the second mortgagee. *Box* v. *Bridgman*, 6 P. R. 234.

Solicitor's Lien—*Title Deeds—Purchaser under Second Mortgage.*]—A solicitor, having a lien on title deeds as against his client for costs generally, was employed by A. to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favour of another person. On default in such second mortgage, the mortgagee sold under a power of sale in the mortgage:—Held, that the lien on the deeds in his possession, as against the mortgagor, continued as against the purchaser. *Gill* v. *Gamble*, 13 Gr. 169. See *S. C.*, 2 Ch. Ch. 135.

XVI. Miscellaneous Cases.

Attachment of Mortgage Debt—*Suit by Creditors of Mortgagee.*]—See *Menzies* v. *Ogilvie*, 27 Gr. 456.

Attachment of Rents—*Creditors of Mortgagor—Rights of Mortgagee.*]—See *Massie* v. *Toronto Printing Co.*, 12 P. R. 12; *Parker* v. *McIlwain*, 17 P. R. 84.

Bank—*Advances by, on Mortgage—Banking Act—Declaratory Judgment—Parties—Mortgagee.*]—The plaintiff, a creditor of the insolvent, asked for a declaration that advances made by a bank upon a mortgage by the insolvent to a third person, and by him assigned to the bank, were contrary to the Bank Act, and that the property was free from the mortgage:—Held, that no such declaration should be made in the absence of the mortgagee, who was liable to the bank as indorser of a promissory note of the insolvent, collateral to the mortgage. *Conn* v. *Smith*, 28 O. R. 629.

Company—*Winding-up — Foreclosure — Security for Indorsement—Banks.*]—On a petition by a mortgagee in proceedings for the winding-up of a company, under R. S. C. 1886 c. 129, asking for the conveyance to him by the liquidator of the company's equity of redemption, the court has jurisdiction to make the usual order for foreclosure or sale. It is a matter of discretion with the court whether an action will be directed or summary proceedings sanctioned. A mortgage upon land, given to secure indorsement upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor, becomes operative only upon the indorsements being made; and an assignment of such mortgage to a

bank, before the making of the indorsements, is not a violation of s. 45 of the Bank Act, R. S. C. 1886 c. 120. *Re Essex Land and Timber Co., Trout's Case.* 21 O. R. 367.

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

Covenant for Possession on Default—*Proviso for Sale on Notice—Short Forms Act—Lease—Timber.*]—See *Brethour* v. *Brooke*, 23 O. R. 658, 21 A. R. 144, *ante* XIV. 3.

Creditors—*Mortgagees—Voluntary Settlement.*]—Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within 13 Eliz. c. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged transfer was of less value than the amount of the loan. Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld; although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie* v. *Young*, 26 O. R. 194.

Detinue for Mortgage Deed—*Title—Heir of Mortgagor.*]—The plaintiffs, having obtained letters of administration, brought detinue for an indenture of mortgage in fee, made to the intestate, and after his death in the possession of defendant:—Held, that the title to the mortgage followed the legal estate, and that it therefore belonged to the mortgagee's heir. *Riordon* v. *Brown*, 1 C. P. 199.

Devisee—*Devolution of Estates Act.*]—The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives. And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith:—Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for this purpose. *Re McMillan, McMillan* v. *McMillan*, 24 O. R. 181.

——— *Estate Tail—Conversion into Fee—Execution and Registration of Mortgages.*]—See *Culbertson* v. *McCullough*, 27 A. R. 459.

——— *Subsequent Mortgage—Exoneration.*]—Where a testator devised property, and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies:—Held, that the devisee of the mortgaged property was entitled as against the legacies to have the property exonerated from the mortgage at the expense of the personal estate. *Lapp* v. *Lapp*, 16 Gr. 159.

Devisee in Trust—*Power to Mortgage—Payment of Debts—Trustee Act.*]—See *Mercer* v. *Neff*, 29 O. R. 680.

Devisee or Heir—*Mortgage—Exoneration—Payment out of Personalty—29 Vict. c. 28, s. 33.*]—See *Slater* v. *Slater*, 3 Ch. Ch. 1.

Disseisin—*Mortgagor in Possession.*]—Neither the mortgagee, nor his assignee, can be disseised by the mortgagor continuing in possession. *Doe d. Carey* v. *Cumberland*, 7 U. C. R. 494.

Dower in Mortgaged Lands.]—See DOWER, VI. 1.

Executor—*Right to Mortgage for Debts—Trustee Act—Mortgagee—Injury.*]—See *Mercer* v. *Neff*, 29 O. R. 680.

Executor of Mortgagee—*Conveyance of Legal Estate.*]—The executor of a mortgagee had not, under C. S. U. C. c. 87, s. 5, any power to convey the legal estate to a person purchasing the mortgage. *Robinson* v. *Byers*, 9 Gr. 572. See *Hunter* v. *Farr*, 23 U. C. R. 324.

Fiduciary Relations — *Mortgagor and Mortgagee.*]—See *Thompson* v. *Holman*, 28 Gr. 35; *Kilbourn* v. *Arnold*, 6 A. R. 158.

Forfeiture of Extended Terms of Payment—*Relief against.*]—See *Graham* v. *Ross*, 6 O. R. 154.

Highway—*Closing of—Adjoining Lands—Rights of Mortgagee.*]—A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purpose of s.-s. 9 of s. 550 of the Consolidated Municipal Act, 1892, and as such is entitled to pre-emption thereunder, subject to the right of the mortgagor to redeem it along with the mortgage, or to have it sold to the mortgagor subject to the mortgage, if the mortgagor so prefer. *Broun* v. *Bushey*, 25 O. R. 612.

Hypotheque—*Action for Declaration of—Judgment—Service — Absent Defendant — Irregularity—Waiver—Surrender of Property—Default—Personal Liability.*]—See *Dubuc* v. *Kidston*, 16 S. C. R. 357.

——— *Delegation of Payment—Personal Liability—Release from as to Part of Premises.*]—See *Reeves* v. *Perrault*, 10 S. C. R. 616.

——— *Devise Subject to Liability of Universal Legatee.*]—See *Harrington* v. *Corse*, 9 S. C. R. 412.

Improvements under Mistake of Title—*Mortgage by Person Making—Enforcement against True Owner—"Assign*

—*Lien—Rents and Profits—Set-off—Interest—Occupation Rent.*]—See *McKibbon* v. *Williams*, 24 A. R. 122.

Indian Lands—*Patent—Notice — Registration—Priorities.*] — A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage:—Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Reed* v. *Wilson*, 23 O. R. 552.

Infant Married Woman—*Mortgage by —Misrepresentation as to Age.*]—To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation. Section 6 of R. S. O. 1887 c. 134 does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment. *Confederation Life Association* v. *Kinnear*, 23 A. R. 497.

Infants — *Investment by Court—Mortgages.*] — Since the establishment of a government Dominion stock, the investment of infants' money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Kingsmill* v. *Miller*, 15 Gr. 171.

Insolvency of Mortgagor—*Purchaser of Mortgage—Notice—Inquiry.*]—In case of a purchase of a mortgage security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of his insolvency, should before completing his purchase satisfy himself by proper inquiries that the mortgage was bonâ fide and good against creditors. *Totten* v. *Douglas*, 18 Gr. 341, 16 Gr. 243.

Insolvent Act—"*Contract*"—*Mortgage.*] —*See Smith* v. *Harrington*, 29 Gr. 502.

Joint Purchase of Land—*Unequal Payment of Purchase Money—Lien on Half Interest — Mortgagees—Set-off—Res Judicata.*] —A purchase of lands had been made by plaintiffs and one C. jointly, each to pay one-half the purchase money. The plaintiffs paid more than their share, and had a lien on C.'s interest for the excess; they also had lumber dealings together, the accounts of which were unsettled, and the balance thereon was claimed by each to be in his favour. In accounts of these lumber dealings the plaintiffs had charged C. with his share of the purchase money. They afterwards filed a bill claiming that the land account and the lumber account were unconnected; that they should be paid their advances for C. on the land, and that in default his mortgagees and assignee should be foreclosed:—Held, that, as against the lien of the plaintiffs on the land, these mortgagees were entitled to set off the amount, if any, due by the plaintiffs on the lumber dealings. The plaintiffs put in evidence that C. had, on a former occasion, filed a bill against them seeking an account of the lumber dealings, and charging that the land agreement had been cancelled; that it was after answer and before decree in that suit that C. had mortgaged his interest to M. and W. (who were not made parties to the suit, and had not any notice of it); and that the cause having been set down for examination of witnesses, and the plaintiff therein not appearing, the bill was dismissed with costs. The present plaintiffs, however, did not in their bill set up these proceedings. The court declined to hold the defendants the mortgagees concluded by them as res judicata. *Cook* v. *Mason*, 24 Gr. 112.

Mistake — *Mortgage of Wrong Land—Subsequent Sale — Account of Proceeds.*] — Where a wrong lot was mortgaged through error, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had the title, the court ordered him to account for the proceeds of the sale not exceeding the mortgage money secured, with the interest and costs. *Lundy* v. *McKamis*, 11 Gr. 578.

Mistake in Name of Mortgagee—*Void Conveyance — Legal Title.*] — In a mortgage which was intended to be taken in the name of the mortgagee, she, by mistake, was described by a name which was not her real name, and which was one she had never assumed or been known by:—Held, that the legal estate did not pass to her by the mortgage, whatever its operation in equity; and that she could not make a good legal title to a purchaser under the power of sale contained in the mortgage. *Burton* v. *Dougall*, 30 O. R. 543.

Mortgagee — *Fraud — Scheme to Defeat Creditors — Non-registration of Mortgage—Subsequent Purchasers—Notice.*]—In a bill filed by the administrators with the will annexed and creditors of B., it was alleged that on a sale of land by B. to K. the latter executed a mortgage to secure the purchase money, but that by the fraud and design of B. such mortgage was withheld from registration, and that the lands were subsequently sold by K. to two purchasers who—before the conveyances to them were executed, or, at all events, before the payment of their purchase money — had notice and were well aware that K. had not paid his purchase money and had given his mortgage therefor, and that they, fraudulently intending to cut out such mortgage, had caused the conveyances to themselves to be registered. The bill further alleged that neither of these purchasers had yet paid his purchase money, and prayed that the mortgage to B. should be fastened on the land as a charge prior to their conveyances, and, failing that relief, that the amounts payable by them respectively to K. in respect of their purchase money might be ordered to be paid to the plaintiffs on account of the mortgage money due under the mortgage from K. The purchasers demurred generally to such bill for want of equity:—Held, overruling the demurrer, that the plaintiffs were not bound to wait till the purchase money payable by the purchasers was overdue before taking proceedings; and that in case of notice before the execution of these conveyances the mortgage would take

precedence thereof; or, if only before payment, the purchase money payable by the purchasers could be claimed by the plaintiffs. *Ferguson* v. *Kilty*, 10 Gr. 102.

——— *Right against Estate of Deceased Mortgagor — Creditor — Judgment — Fi. Fa. Lands.*]—A mortgagee, after the death of the mortgagor, has a right in an administration suit to prove upon the general estate for his whole claim, and to hold his security for what the general estate cannot pay; and the fact that a simple contract creditor has obtained judgment against the personal representative, and an execution against lands, will not affect such right. *In re Stewart, Stewart* v. *Stewart*, 10 Gr. 169.

——— *Right to Title Deeds — Solicitor's Lien.*] — A mortgagor, after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee. On a motion for that purpose, an order was made for their delivery. *Stennett* v. *Aruyn*, 2 Ch. Ch. 218.

——— *Suit against Assignee for Creditors of Mortgagor — Trust Deed — Exclusion of Preferences — — Specialty Debt — —Præcipe Decree—Costs.*]—A mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of creditors under a trust deed excluding all preference and priority, praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee, with the view of charging him with all payments made by him to simple contract creditors before satisfying the specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency. The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the right of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than as of a præcipe decree:—Held, as the trust deed excluded all preference and priority as to the payment of the debts, the rules applicable to the administration of the estates of intestates did not apply, and that the mortgagee, for anything beyond what his mortgage would realize, could claim only the same as other creditors. And as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe, he was declared entitled only to the costs of such a decree, and was ordered to pay to the trustee his costs of defending the trust estate. *Gore Bank* v. *Sutherland*, 1 C. L. J. 159.

Mortgagees — *Joint Tenancy.*] — Mortgagees are not trustees under 4 Wm. IV. c. 1, s. 48, so as to take jointly when the deed is silent as to the tenancy created. *Doe d. Shuter* v. *Carter*, H. T. 2 Vict.

Municipal Corporation — *Bonus to Manufacturer — Mortgage to Secure Performance of Conditions.*] — See *Village of Brussels* v. *Ronald*, 4 O. R. 1, 11 A. R. 605.

Payment of Mortgage by Moneys Fraudulently Obtained.] — See *Jack* v. *Jack*, 12 A. R. 476.

Prior Mortgage Set aside by Execution Creditor—*Rights as against Subsequent Bond Fide Mortgagee.*] — See *Coursolles* v. *Fookes*, 16 O. R. 691.

Priorities — *Valuable Consideration — Security for Debts.*]—A mortgage to creditors, to secure their debts, is a sufficient valuable consideration to give a prior registered conveyance precedence over a conveyance previously executed, but registered subsequently. *Fraser* v. *Sutherland*, 2 Gr. 442.

Priorities with Reference to Mechanics' Liens.]—See LIEN, V. 5 (a).

Restraint upon Alienation—*Mortgage by Devisee.*]—See *Smith* v. *Faught*, 45 U. C. R. 484.

Sale—*Distribution of Surplus — Assignment for Benefit of Creditors—Priority over Executions.*]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. 1887 c. 124, before certain prior execution creditors had established their claims in the master's office to the balance of purchase money, after satisfying the amount of the mortgage:—Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

Sale of Equity of Redemption under Execution.]—Plaintiff claimed a debt of $200 from the defendant. Defendant did not appear to the writ. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plaintiff, the other outstanding in other hands. On application of plaintiff for judgment for $200 and interest, and for a decree for sale of the equity of redemption:—Held, on the authority of Kerr v. Styles, 26 Gr. 309, that the plaintiff could have judgment as asked, notwithstanding that in this case there were no fi. fas in the sheriff's hands. *Johnson* v. *Bennett*, 9 P. R. 337.

See, also, *Parr* v. *Montgomery*, 27 Gr. 521; *Rumohr* v. *Marx*, 3 O. R. 167.

Sale of Mortgaged Lands for Taxes—*Purchase by Mortgagor's Wife — Fraudulent Scheme—Notice.*]—See *Lawlor* v. *Day*, 29 S. C. R. 441.

Settlement—*Land Subject to—Exoneration.*] — Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death: — Held, that the mortgage should be paid out of the settlor's general estate. *Lewis* v. *Moore*, 24 A. R. 393.

Short Forms Act — *Numbers in Schedule.*]—The provisions and covenants in a mortgage under the Act are not to be deprived of the meaning given to them by the Act, because they are not numbered as in the schedule to it. *Northey* v. *Trumenhiser*, 30 U. C. R. 426.

Specific Bequest of Mortgage to Mortgagor— *Right of Executors to Insist on Payment of Other Claims against Mortgagor.*]—See *Archer* v. *Severn*, 12 O. R. 615, 14 A. R. 723.

Substitution — *Mortgage by Institute — Judicial Authorization — Default—Judgment — Sale under Execution—Title—Parties.*]—See *Vadeboncœur* v. *City of Montreal*, 29 S. C. R. 9.

Tenants of Mortgagor—*Notice to Pay Rent to Mortgagee — Attornment — Assignment of Rent.*]—See *Parker* v. *McIlwain*, 17 P. R. 84.

Timber on Mortgaged Lands.] — See *Stewart* v. *Rowsom*, 22 O. R. 533; *Brethour* v. *Brooke*, 23 O. R. 658, 21 A. R. 144.

Tolls — *Mortgage of — Harbour Company —Foreclosure.*]—A harbour and road joint stock company by its charter, 16 Vict. c. 141, had power to levy tolls on goods landed or shipped within certain prescribed limits; and the harbour, roads, wharves, and all the real estate, were to be vested in the company and their successors for ever. The company, finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their charter, and the mortgagee foreclosed the security, entered into possession, and leased to the plaintiff, who sued defendant, owner of the wharf within the statutable limits of the harbour, for toll on goods shipped or landed on defendant's wharf:—Held, that the plaintiff could sue only in the corporate name, and a nonsuit was therefore directed. *Whiteside* v. *Bellchamber*, 22 C. P. 241.

Trespass to Mortgaged Lands—*Possession—Mortgagor and Mortgagee—Transfer of Interest.*]—Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity. Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title. *Brookfield* v. *Brown*, 22 S. C. R. 398.

Trustee—*Conveyance to—Charge — Benefit of Mortgagee.*]—A trustee of lands authorized to sell, and, amongst other things, to retain and pay sums due and owing to himself by the settlor, and to pay the balance to the settlor, mortgaged his interest to the plaintiff, giving covenants for title and further assurance; and then by arrangement with the settlor the trustee was to be entitled to pay himself and his partners for goods and advances made after the mortgage; and afterwards becoming entitled to the whole partnership estate:—Held, that the further charge enured to the benefit of the mortgagee. *Edinburgh Life Association* v. *Allen*, 23 Gr. 230.

Undertaking to Give Mortgage — *Fulfilling Conditions of — Third Mortgage.*] —" Sir,—Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging. I am willing to become responsible to you that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it I will be responsible for the payment of your debt in twelve months:"—Held, that offering a mortgage subject to two prior mortgages, which were given moreover after the guarantee, was not such a valid mortgage as the guarantee imported. *Jenkins* v. *Ruttan*, 8 U. C. R. 625.

Vacant Lands — *Mortgagee — Entry.*]— Where a right to entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands; the mortgage being in default, and no presumption of payment arising. An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages, as he would have been in respect of the land. *Delancy* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

"Valuable Security"—*False Pretences —Execution of Mortgage.*] — The term "valuable security," used in C. S. C. c. 92, s. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the Act. *Regina* v. *Brady*, 26 U. C. R. 13.

Welch Mortgage.]—A party in possession of land under an agreement in the nature of a Welch mortgage having refused to give any statement of rents received or information as to the amount due on the agreement, a bill was filed by the mortgagor for an account. Although on taking the account a balance was found still due to defendant, the court ordered him to pay the costs. *Morrison* v. *Nevins*, 5 Gr. 577.

See COLLATERAL SECURITY — COMPANY, VII. 5—COUNTY COURTS, III. 2—DEED, VII. 5 — DISTRESS, II. — FIXTURES, III. — INDEMNITY — INFANT, V. 2, VI. 4 — INSURANCE, III.—INTEREST, II.—LIEN, V. 5 —LIMITATION OF ACTIONS, II. 19—PARTIES, II. 10 — RECEIVER, I. 2 (b) — SHIP, X.— WILL, IV. 10.

MORTMAIN.

Bond—*Evasion of Statute.*] — Declaration on a bond made by testator for payment of $2,000 to plaintiff, as treasurer of the board of trustees of the New York Baptist Union, or his successor in office, for ministerial education. Plea, that the bond was made without consideration; and that, so far as defendants, as executors, might be called on to pay the same out of the realty, the bond was void and

contrary to the Statute of Mortmain, and was of the nature of a bequest for charitable purposes, and was not a deed executed before two credible witnesses, &c.; and that, as such executors, they ought not to pay the same out of realty; and that they had fully administered all the remainder of the personalty which had come to their hands as executors: —Held, on demurrer, plea bad; for it did not disclose any device on the part of the testator to evade the Statutes of Mortmain; on the contrary, it admitted his bona fides in disposing of so much of his estate as personalty, but asked that his lands might be protected from the judgment to be recovered, which was a defence in the nature of a quia timet, and altogether unwarranted. *Paine* v. *Kilbourne*, 16 C. P. 64.

A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's land. *Anderson* v. *Paine*, 14 Gr. 110.

Charitable Uses—*9 Geo. II. c. 36 in Force in Upper Canada.*] — See *Doe d. Anderson* v. *Todd*, 2 U. C. R. 82; *Hallock* v. *Wilson*, 7 C. P. 28; *Mercer* v. *Hewston*, 9 C. P. 349; *Hambly* v. *Fuller*, 22 C. P. 141; *Corporation of Whitby* v. *Liscombe*, 22 Gr. 203, 23 Gr. 1.

Municipal Corporations — *Foreclosure.*]—After the passing of 27 Vict. c. 17, a municipal corporation invested on mortgage part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the security:—Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the Statutes of Mortmain. *Municipality of Oxford* v. *Bailey*, 12 Gr. 276.

——— *Within Statute of Mortmain.*]—See *Brown* v. *McNab*, 20 Gr. 179.

Registration.] — Under the Provincial statute 9 Geo. IV. c. 2, s. 3, a deed conveying land to trustees for the use of a religious society is invalid for want of registration. *Doe d. Bowman* v. *Cameron*, 4 U. C. R. 155.

Registration held sufficient to make a deed valid under the Statutes of Mortmain, without enrolment in chancery. *Hallock* v. *Wilson*, 7 C. P. 28; *Hambly* v. *Fuller*, 22 C. P. 141.

Quære, whether registration is necessary. *Mercer* v. *Hewston*, 9 C. P. 349.

Trust Deed—*Void in Part.*] — A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trust in respect thereof, as follows:—To lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor to pay the same, or in the discretion of the trustees a portion thereof, to M. during his life; and the trustees sold a portion of the estate, and after the death of the settlor a bill was filed impeaching the settlement as void under the Statute of Mortmain, which it admittedly was as respected the trusts declared of the corpus of the estate:—Held, that the trusts declared in favour of the settlor and M. were sufficient, however, to support the sale which had been effected, and the bill, as against the trustees, the purchaser from them, and M., was dismissed with costs. *Mclsaac* v. *Heneberry*, 20 Gr. 348.

See CHURCH—CONSTITUTIONAL LAW, I., II. 17—WILL, III. 3.

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I. ACTIONS AND PROCEEDINGS AGAINST.

(*See*, also, Sub-Titles IX., X., XII.)

1. *Notice of Action.*

Necessity for.]—Municipal corporations are not within C. S. U. C. c. 126, and are, therefore, not entitled to notice of action. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 169.

A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. 1887 c. 73. Hodgins v. Counties of Huron and Bruce, 3 E. & A. 169, followed. Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

——— *Municipal Councillors — Pathmaster.*]—Two of the defendants, members of a township council, were appointed by resolution of the council a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them, and did the work. The plaintiff met with an accident on the highway near the culvert, owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries:—Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R. S. O. 1887 c. 73. Held, also, that the statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it, when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and therefore not to actions for negligence in the doing of the act. Held, lastly, that one of the defendants, who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster, because he was not employed as such in doing this work, but as a day labourer. *McDonald* v. *Dickenson*, 25 O. R. 45. Affirmed, 21 A. R. 485.

——— *Sufficiency of — Pleading — "Immunities."*]—See *City of St. John* v. *Christie*, 21 S. C. R. 1.

Water—*Breach of Contract as to Supply of—Inapplicability of Statutory Defences.*]—Action against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevator according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevator:—Held, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, &c., under statutes giving the same protection as that given to justices of the peace in the execution of their duties, were inapplicable. *Scottish Ontario and Manitoba Land Co.* v. *City of Toronto*, 24 A. R. 208.

See Huron District Council v. *London District Council*, 4 U. C. R. 302, *post* 2.

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2. *Other Cases.*

Accidents before Organization of Municipality — *Liability for.*] — See *Simpson* v. *Village of Huntsville*, 13 O. R. 101.

Commissioners of Town Trust—*Action against—Parties—Former Member.*]—See *Standly* v. *Perry*, 23 Gr. 507.

Distress for Taxes—*Authority to Distrain.*]—Section 126 of the Assessment Act, 32 Vict. c. 36 (O), directs that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *County of Frontenac*, 30 U. C. R. 275.

——— *Lease by Corporation—Covenant to Pay Taxes.*]—See *Scragg* v. *City of London*, 26 U. C. R. 263.

District Council—*Account Stated—Notice—Request—Funds.*]—A district council cannot be sued upon the common money count on account stated, unless at least the subject matter of the account be averred, and it is seen to be such as can by law create a debt from defendants to plaintiffs to be satisfied out of the funds of the district. Semble, that it was not necessary before action to give a notice to the treasurer of the London District of the claims of the plaintiffs against the district. Semble, also, that it was necessary, in order to a right of action, to aver a request from the plaintiffs to the defendants to pay over the money due. Semble, also, that in suing for a debt due by the district under s. 43 of 4 & 5 Vict. c. 10, it should be averred that defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference. *Huron District Council* v. *London District Council*, 4 U. C. R. 302.

——— *Repair of Court House.*]—Action against district council under 10 & 11 Vict. c. 6, for injury resulting in death in walking up the court house steps:—Held, not maintainable. The council have not the duty of keeping the court house in repair, but the district surveyor, on whose report they have to pass a by-law. Quære, would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted. *Hawkeshaw* v. *District Council of Dalhousie*, 7 U. C. R. 590.

False Imprisonment—*Action for—Void Assessment.*]—See *McNorley* v. *Mayor, &c., of City of St. John*, 6 S. C. R. 531.

Justice of the Peace—*Jurisdiction—Indictment.*]—A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Re Chapman and City of London, Re Chapman and Water Commissioners of City of London*, 19 O. R. 33.

Libel—*Liability for.*]—See *McLay* v. *County of Bruce*, 14 O. R. 398.

Liquor License—*Refusal to Confirm Certificate — Discretion — Damages — Malice—Quebec Law.*]—See *Beach* v. *Township of Stanstead*, 29 S. C. R. 736.

Market Fees—*Lease of—Disturbance of Collection — Obstruction of Highway — By-law.*]—Defendants leased to plaintiff the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. Twenty years previously they had passed a by-law giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to M., who obstructed a portion of the same with building materials. The plaintiff thereupon sued defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market:—Held, that such action was not maintainable; that the by-law was one which the defendants had authority, with a view to public improvement and convenience, to pass, and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without defendants' license, have occupied a reasonable portion of the highway, the by-law apparently merely restricting, without expressly conferring, the right of occupation; that the market being fixed on a public highway, which was primâ facie for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway; and that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed. *Reynolds* v. *City of Toronto*, 15 C. P. 276.

Municipal Councillors—*Action against, by Ratepayers—Loss to Municipality, by Conduct of—Equitable Action — Jury Notice —Parties.*]—Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the court of chancery, and a jury notice was therefore improper. Semble, that the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow* v. *Connor*, 11 P. R. 423.

Officer of Corporation—*Salary — Mandamus.*]—An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council:—Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance. *Re Whitaker and Mason*, 18 O. R. 63.

——— *Unlawful Act—Indemnity.*]—Held, that the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not

entitle him to look to them for indemnity against the consequences of unlawful acts, as for instance, in this case, of a wrongful distress; and that the plaintiff could not be allowed to impeach the judgment of a competent court by which he was held to be a wrongdoer. *Irwin* v. *Corporation of Mariposa*, 22 C. P. 367.

Pauper—*Relief of.*]—C., a servant living in the township of London, was travelling to Komoka with a load of trees, and was injured on the way by the waggon upsetting. He was taken to a tavern, in the township of Lobo, where his leg was amputated, and he remained several months at the tavernkeeper's expense, destitute and helpless:—Held, that the court had no power to compel the township corporation to provide for his relief. *In re McDougall and Township of Lobo*, 21 U. C. R. 80.

Promissory Note—*Accommodation—Promise to Pay—Equitable Relief.*]—Where a corporation, having a debt to pay which it was to their advantage to discharge immediately, being a balance due upon their subscription to a railway, raised money upon an accommodation note of an individual, under sanction of a resolution, and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in chancery against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note would be entitled to stand in the place of the corporation creditor. *Burnham* v. *Peterborough*, 8 Gr. 366.

Removal of Snow—*Building Occupied by Corporation.*]—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. Defendants, owning land in the city, leased it to H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower storey was occupied by one S. as lessee of H., and the upper storey and garret by defendants. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate removal of snow. The plaintiff having being injured while passing along the street by snow falling from the roof:—Held, that defendants were not liable. *Lazarus* v. *City of Toronto*, 19 U. C. R. 9.

School Teacher—*Salary.*]—A teacher cannot maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees. *Smith* v. *Village of Collingwood*, 19 U. C. R. 259; *Munson* v. *Municipality of Collingwood*, 9 C. P. 497.

Time for Bringing Action.]—A party aggrieved by an act of a municipal council is not bound to commence his action within six months from the committing of the act complained of. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 109.

Trespass to Land—*City Commissioner—Authority of—By-law—Damages—Alteration of Streets.*]—Under the orders of the city commissioner of the city of Toronto, large quantities of rubbish and offal, offensive and injurious to health, were during the summer deposited in a lane adjoining the plaintiff's cottages, by which the lane was raised three or four feet, coming up to the windows, and the filth ran over it into the basement; the well attached to the houses was rendered unfit for use, so that the plaintiff was compelled to dig a new one, and he had also to raise one of the houses, and remove the kitchen, to suit the level of the lane; the tenants refused to remain, and he was obliged to lower the rent; —Held, that the defendants were liable for the acts of the commissioner, without any by-law being shewn; but that the expense of raising the house and removing the kitchen could not be recovered. When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. Remarks as to the form of the second count in this case. The power given by s. 425, s.-s. 1, of the Municipal Act of 1873, to improve, repair, widen, and alter streets, includes the power, when necessary for these purposes, to level, raise, or lower the streets. *Lewis* v. *City of Toronto*, 39 U. C. R. 343.

——— *Pathmaster — Authority of — By-law.*]—In trespass against a municipal corporation for the act of their pathmaster, in causing statute labour to be performed on certain land of the plaintiff, alleged by defendants to be an original allowance for road, it appeared that the pathmaster acted under an order written by the clerk, by the direction of the council while in session:—Held, sufficient to render the corporation liable, and that a by-law was not necessary. *Neville* v. *Corporation of Ross*, 22 C. P. 487.

Writ of Prohibition to Municipal Corporation.]—See *Coté* v. *Morgan*, 7 S. C. R. 1.

II. Actions by.

1. *Against Members of Council.*

The plaintiffs, the municipal council of East Nissouri for 1858, sued defendants, who were councillors during 1856, alleging in substance that in that year a commission was issued under 12 Vict. c. 81, to inquire into the financial affairs of the township, and that defendants wickedly and maliciously conspired and contrived together to obstruct and delay and to increase the costs of such inquiry to the plaintiffs, and for that purpose refused to attend and give evidence and produce documents as required, and procured the clerk to absent himself, and had the documents concealed, whereby the injury was delayed, and the expenses thereof to the plaintiffs was increased by £300 beyond what it would otherwise have been:—Held, that the action was maintainable, and the declaration sufficient. *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 556.

In an action for money had and received by the municipality of a township for 1857, against the defendant, who had been reeve in 1856, it appeared that at a meeting of the council in that year, defendant being in the chair, it was resolved: 1. That the treasurer should pay defendant the sum of £129 "for moneys advanced, attending commission, salary as councillor for 1856, for defending

chancery suit, &c." 2. That the defendant should be authorized to sign an order on the treasurer to pay certain witnessess called by the council their expenses attending the commission, and paying other township officers, &c., not already paid by orders on the treasury. 3. That the reeve should give an order on the treasurer for £10 10s. in favour of N. for services as township clerk. It was proved that the treasurer paid the £129 to defendant; that the commission mentioned was held under 12 Vict. c. 81, s. 181, to examine into the financial affairs of the township; and that the suit referred to had been brought by one C. respecting the affairs of the township; but the clerk swore that no documents had come into his possession shewing for what the moneys paid to defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorize any of these payments:—Held, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence. With regard to the different items mentioned in the resolutions:—Held, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal. As to the charge for "attending commission," that it was primâ facie illegal, and defendant should have shewn his right to it That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. As to the money paid for defending the suit, that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend. As to the second resolution, that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers. As to the third resolution, that as there was no evidence of illegality in the payment nothing could be recovered. *S. C.*, 16 U. C. R. 576.

In an action against three members of a municipal corporation, one being the reeve, for combining to delay and obstruct the proceedings of commissioners appointed to inquire into the affairs of the township, under 12 Vict. c. 81, s. 181:—Held, that one defendant, who had suffered judgment by default, could not be called as a witness on behalf of the others. 2. That the jury were properly told that it was the duty of defendants, and more especially of the reeve, to direct the clerk to produce before the commissioners his books, and to facilitate the inquiry. 3. There being evidence to go to the jury to shew that the clerk had absented himself and kept back the books, &c., in collusion with defendants, and that in consequence the costs of the commission, which otherwise would not have exceeded £75 or £100, were increased to £328, that £250 damages was not excessive. *S. C.*, 18 U. C. R. 31.

The reeve of a township received certain license fees, which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash and a note for the balance. The treasurer denied having received the note or cash, and at his instance the municipality, by resolution, allowed an action to be brought for it in their name against the reeve. They afterwards rescinded this resolution, but the action went on; and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his accounts for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer:—Held, that the action could not be maintained by the municipality; and that, if it could, the treasurer would not have been admissible as a witness. *Township of King* v. *Hughes*, 17 U. C. R. 253.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges; that he falsely and fraudulently represented to them that he had caused work to be done, and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and the plaintiffs thus lost the money. Common counts were added. It appeared that the corporation by one resolution directed that $300 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another that $100 should be placed to the credit of each councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, though contracted for, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended. The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action:—Held, that, though giving orders false in fact might raise a primâ facie case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs. Held, also, that there could be no recovery on the common counts, for defendant had received no money. Quære, whether this action would lie by the corporation against one of its members, or whether the proper remedy was not in equity, against defendant as a trustee. Quære, also, whether it could be said that the money was obtained by means of the untrue orders, for defendant, having the control of the money by the resolutions, might legally make payments in advance, and the orders would equally have been paid if they had shewn that the work was only in progress or contracted for. *Township of Chatham* v. *Houston*, 27 U. C. R. 550.

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2. *Other Cases.*

Account.]—A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

District Council — *Action for Debt.*]— Under the Municipal Councils Act, 4 & 5 Vict. c. 10, a municipal council can in their corporate name enforce payment of debts due to the district where neither the magistrates nor their treasurer could have sued formerly, but they cannot vary the rights of the parties, nor alter any contract. *Ottawa District Council* v. *Low*, 6 O. S. 546.

——— *Balance of Revenue.*]—One district council may sue another for a cause of action connected with their public duties; e. g., for the balance of district revenue which one district holds for another. *Huron District Council* v. *London District Council*, 4 U. C. R. 302.

——— *Moneys due to—Township Council—Rights of.*]—Under 12 Vict. c. 81, ss. 175, 176, the township councils, and not the county councils, are entitled to receive moneys due to the old district councils where the debt is due to the locality, as for making roads in a township, &c. *Counties of Northumberland and Durham* v. *Bull*, 8 U. C. R. 375.

Injunction—*Injury to Property—Parties—Attorney-General.*]—To a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality, the attorney-general is not a necessary party. *Town of Guelph* v. *Canada Co.*, 4 Gr. 632.

Mortgage—*Foreclosure — Mortmain.*] — After the passing of 27 Vict. c. 17, a municipal corporation invested on mortgage part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the securities:—Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the Statutes of Mortmain. *Municipality of Oxford* v. *Bailey*, 12 Gr. 276.

——— *Mistake—Rectification.*] — Where a mortgage on land was executed to a municipal corporation to secure a debt due to the corporation by its treasurer, and by the mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage:—Held, that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled. *Brown* v. *McNab*, 20 Gr. 179.

——— *Sale—Possession by Purchaser—Improvements — Ejectment.*] — Where the owner of property had executed a mortgage and release thereof to a municipal corporation, and the corporation afterwards sold the property with the knowledge of such owner and without objection by him until, as was alleged, though contradicted, the purchaser had had seven years' quiet possession, during which time he had improved the property, the case was held a proper one for granting an injunction to the hearing restraining an action of ejectment against the purchaser. *Brown* v. *McNab*, 20 Gr. 179.

Negligence in Making Improper Survey.]—See *Township of Stafford* v. *Bell*, 6 A. R. 273.

Railway Company—*Compelling to Repair Highway—Frame of Suit.*] — See *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4.

See Todd v. *Perry*, 20 U. C. R. 649.

III. Animals Running at Large.

(*See* also Distress.)

1. *By-laws and Regulations.*

Destroying Dogs — *Liability of Municipality—Statute.*] — Defendants held responsible for the act of a policeman who shot a dog under the authority of a by-law for the destruction of dogs roaming at large, not having on a specified tag or plate. The purchase of the plate does not protect the dog unless it is worn. A dog following its owner cannot be said to be wandering about at will or to be roaming or running at large. Discussion as to the object of the legislature in reference to the provisions of the Municipal Act, 1883, s. 49, s.-ss. 12, 13. *Spence* v. *City of St. Catharines*, 23 C. L. J. 167.

Impounding and Selling — *Damages—Fine.*]—Under 4 Wm. IV. c. 26, incorporating the town of Port Hope, the corporation had power to enforce regulations preventing cattle, swine, and other animals from running at large by impounding and selling them, as well to liquidate damage occasioned by their so doing, as a fine imposed. *Smith* v. *Riordan*, 5 O. S. 647.

Naming Animals — *Implication as to Others.*]—Semble, that a by-law enacting that certain animals shall not run at large does not impliedly allow other animals not named to do so, contrary to the common law. *Jack* v. *Ontario, Simcoe, and Huron R. W. Co.*, 14 U. C. R. 328.

——— *Implication as to Others—Fences.*] —A municipal council, by by-law passed pursuant to the Municipal Act, enacted that certain descriptions of animals (naming them), and all four-footed animals known to be breachy, should not be allowed to run at large in the township: and provided for fixing the height of fences. The plaintiff's cattle strayed from the highway in the lands of one of the defendants, whose fences were not of the height required by the by-law. He distrained them and they were impounded, defendant being the pound-keeper. In an action of replevin:—Held, that, as the by-law did not affirmatively authorize these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, the plaintiff was liable at common law, and under R. S. O. 1877 c. 195, for the damage done, irrespective of any question as to the height of the defendant's fences. *Crowe* v. *Steeper*, 46 U. C. R. 87.

Reasonableness—*Prohibition at all Seasons—Penalty—Fine—Costs—Indian Lands—Discretion.*] — By-law No. 84, passed by a township on 29th May, 1882, prohibited certain animals therein named from running at large; and provided that, except between the 10th May and the 1st December in any year, it should not be lawful for the owners of any other animals not theretofore mentioned or indicated, to allow or permit the same to run at

large. A fine or penalty not exceeding $5 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound-keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties (not adding the words "and costs") was directed to be under s. 421 et seq. of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs, including costs of committal, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in italics:—Held, that the by-law was not oppressive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed, Municipal Act, 1883, s. 492, s.-s. 2. It was objected that the provisions in by-law 84 as to levying fines were ultra vires, because s. 492, s.-s. 2, of the Municipal Act provided a mode of recovery, i. e., by sale of the animals impounded, and hence that s. 421 et seq. did not apply:—Held, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law. Quære, as to the effect of the omission of the words "and costs" in the clause of the by-law providing for the penalty; but as this was not taken in the rule it was not considered. It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the Judge refused to quash on this ground: (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain; (3) it could only be quashed as to Indians and Indian lands; (4) the applicant was not prejudiced, and this was not a substantial objection; and (5) the Indians, who were alone affected, were not complaining. *Re Milloy and Township of Onondaga*, 6 O. R. 573.

"Running at Large"—*Meaning of.*]—Sheep grazing on private unenclosed property in charge of a boy:—Held, not to be "running at large," in contravention of a by-law. *Ibbottson* v. *Henry*, 8 O. R. 625.

Shooting of Dogs.]—The corporation of the city of Toronto had power under 4 Wm. IV. c. 23, s. 21, to make by-laws by which dogs found running at large within the limits and liberties of the city, after proclamation of such by-laws, might be shot. *McKenzie* v. *Campbell*, 1 U. C. R. 241.

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2. *Pound-keepers.*

Damage to Pound-keeper's own Close.]—A pound-keeper could not, under 3 Vict. c. 21, detain and sell an animal seized by him for damage done to his own close, but only such as should "be brought to him" by some other person. *Brown* v. *Williams*, 6 O. S. 656.

Extent of Liability — *Illegal Acts.*]—A pound-keeper is a public officer discharging a public duty, and is not liable for detaining a distress, unless he has done some act beyond his duty, whereby the owner of the things impounded suffered some particular damage not recoverable against the distrainor or party impounding; or when, by going out of the line of his duty, he makes himself a party to some illegal act of the distrainors. *Wardell* v. *Chisholm*, 9 C. P. 125.

Notice of Action — *Person Acting as Pound-keeper—Good Faith — Reasonable Belief.*]—Defendant was in charge of the pound of a city as pound-keeper, having so acted for seven or eight years. He had been appointed by the city commissioner at a yearly salary, which had been paid until a short time before the act sued for (the impounding of plaintiff's pigs), when some question was raised as to the legality of his appointment. It appeared that after the seizure he had offered to release the pigs on payment of the pound charges only; and, according to one witness, he had said he was not pound-keeper. He had not been appointed by by-law, nor given the requisite bond. The Judge of the county court found that defendant was acting as pound-keeper in good faith, and believed, on reasonable grounds, that he was such pound-keeper:—Held, that the finding was fully justified, and that defendant was clearly entitled to notice of action. *Denison* v. *Cunningham*, 35 U. C. R. 383.

See also *Davis* v. *Williams*, 13 C. P. 365.

Pleading — *Justification—Particularity.*]—In a plea of justification by a pound-keeper for taking a pig, where the justification was that the pig, contrary to the township regulations, broke through a lawful fence, it was held necessary to allege that the fence was within that township, and to shew the close in which the pig was trespassing at the time of seizure. *Carey* v. *Tate*, 6 O. S. 147.

In trespass against a pound-keeper for seizing and selling plaintiff's horse, the defendant, in justifying the act, because the plaintiff had not paid him the damages awarded according to the statute, must shew that he was in a position to claim such damages, and set out in his plea the existence of all those facts from which his right arises. *Brown* v. *Williams*, 6 O. S. 656.

In trespass against two for selling cattle, one defendant justified as pound-keeper, and because the cattle being in the close of A. wrongfully, &c., A. took the said cattle trespassing and delivered them to defendant as a pound-keeper within his jurisdiction, and defendant impounded and afterwards sold them according to law; and the other defendant justified as having bought the cattle at the sale as the highest bidder. The plaintiff demurred generally to both pleas:—Held, that the plea by the pound-keeper was bad, as it did not shew that he received the cattle from a person within his division, or that the close was so situated; and the plea of the purchaser good, as he could not be liable to the plaintiff in trespass. *Clarke* v. *Durham*, E. T. 3 Vict.

In replevin for a mare defendant justified under a by-law of the township, enacting that the pound-keeper should impound any horse for unlawfully running at large, &c., delivered to him for that purpose by any person resident within the township; and that the person distraining should deliver to him at the same time duplicate written statements of his demand

against the owner, and, if required by the pound-keeper, a written agreement with a surety to pay all costs in case the distress should prove illegal, &c. The plea alleged that the mare being taken while at large and doing damage to the township "was duly impounded by a lawfully authorized pound-keeper of said township," &c., and thereupon all proceedings were lawfully had, all steps taken, notices given, and times elapsed necessary to enable the pound-keeper to sell said mare, &c.:—Held, on demurrer, plea bad, for not alleging that the mare was delivered to the pound-keeper by a resident of the township; and that this allegation was not supplied by the general averment that all proceedings were had, &c., which applied only to what took place after the impounding. Held, also, that the other requisites of the by-law, as to the statement of demand, the written agreement, and notices of sale, &c., were covered by the general allegation. *Rourke* v. *Mosey*, 36 U. C. R. 546.

Selling after Security Given—*Excess of Jurisdiction.*]—The plaintiff sued defendant, a pound-keeper, for selling the plaintiff's horses impounded, after the plaintiff had given him satisfactory security as required by the statute (Municipal Act of 1866, s. 355), and demanded the horses. A count in trover was added; and the plaintiff had a verdict on both. On motion for a nonsuit, because the first count did not allege that the act complained of was done maliciously:—Held, that the verdict was right on both counts, for the special count shewed a case in excess of jurisdiction, and therefore within s. 1, not s. 2, C. S. U. C. c. 126. The proper mode of taking the objection would have been by demurrer, or in arrest of judgment. *Sargeant* v. *Allen*, 29 U. C. R. 384.

Wrongful Detention—*Replevin—Pleading.*]—Section 18, C. S. U. C. c. 29, applies only to cases of a wrongful taking and detention within the latter part of s. 1 of that Act. The second count of the declaration, set out in the report, was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but, even if intended to be a count in replevin under the provisions of the latter part of s. 1, it was improper, the fact being that the action was against a pound-keeper for detaining certain horses, distrained damage feasant, and therefore a case "in which by the law of England replevin might be made," and in either case the count must be struck out. *Barber* v. *Armstrong*, 5 P. R. 153.

IV. Arbitration and Award.

1. *Compensation to Landowners.*

Expropriation—*Date of By-law.*]—When a municipal corporation expropriates land, the date of the passing of the by-law defining the lands and the nature of the rights required is the date in relation to which the compensation should be assessed. *In re Prittie and Toronto*, 19 A. R. 503.

——— *View—Evidence—Value—Improvements—Interest.*]—A municipal corporation expropriated land for a road, under a by-law which described the land, and provided "that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive," pursuant to which the corporation took possession. Upon appeal from an award by which the landowners were allowed $5,505 as compensation for the land taken, and $10,695 for other lands injuriously affected, and interest on both sums from the date of the by-law:—Held, that where an arbitrator has viewed the premises, but has not proceeded upon his view, the court should not give any greater effect to his findings than if he had not taken a view. 2. As to the weight of evidence: there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions. 3. That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of improving it, as a means of arriving at its actual value. Ripley v. Great Northern R. W. Co., L. R. 10 Ch. 435, Widder v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 425, and Boom Co. v. Patterson, 98 U. S. R. 403, followed. 4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken. James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1, specially referred to. 5. That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable on the whole sum from that date. Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and In re Shaw and Corporation of Birmingham, 27 Ch. D. 614, followed. 6. That the arbitrator had jurisdiction to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

Lands Injuriously Affected—*Interest.*]—Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. Judgment in 29 O. R. 685 reversed. *In re Leak and City of Toronto*, 26 A. R. 351, 30 S. C. R. 321.

——— *Joint Work by City and County.*]—Where a bridge over a river, which formed the boundary line between a city and a township, within a county, was erected by the councils of the city and county jointly, and in raising the approaches on the township side certain lands were injuriously affected, for which the owner claimed compensation from both municipalities:—Held, that, having regard to ss. 530, 532, and 535 of the Municipal Act, 55 Vict. c. 42, the county only could be compelled to arbitrate in respect of such compensation. Pratt v. City of Stratford, 16 A. R. 5, followed. Held, also, that s. 391 did not apply to permit an arbitration between the landowner and the city and county together, nor was such an arbitration otherwise provided for by law. Prohibition against proceeding with such an arbitration. Decision in 25 O. R. 607 reversed. *Re Cummings and County of Carleton*, 26 O. R.1.

——— *Railway.*]—A railway company obtained permission from a municipal corporation to run their line along a certain street, agreeing not to raise the grade to more than a certain height. They built the line and raised the grade of the street to more than the specified height, the corporation not consenting, but not taking any steps to prevent the violation of the agreement:—Held, that as against the plaintiffs, who were owners of property injuriously affected by the unauthorized raising of the grade, the railway company were liable in an action for damages; but that as against the corporation the plaintiffs were restricted to the remedy by arbitration, and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the railway company under s. 531 (4) of R. S. O. 1887, c. 184. *Baskerville* v. *City of Ottawa*, 20 A. R. 108.

——— *Raising and Lowering Highway—Evidence — Damages — Enforcement of Award.*]—Upon a reference under the Municipal Act, R. S. O. 1877 c. 174, to determine the compensation to which the applicant was entitled for raising and lowering a street in a town in front of his land:—Held, that he award should not be set aside for not dealing with the question of compensation for injuries sustained by the lowering as well as raising the street, the evidence being hardly directed to this at all, and no appreciable damage clearly shewn; and, if necessary, the court would, under s. 383, amend the award in this respect. 2. That it is competent for arbitrators in such a case to find that no damage has been sustained, and they are not bound to award some or merely nominal damages. 3. The distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily. 4. When the evidence is conflicting as to whether damage or benefit has resulted to the party affected, the court will not interfere with an award, merely because it may think the weight of evidence to be against the view taken by the arbitrator. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

——— *Raising and Lowering Highway—Retaining Wall—Access.*] — An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipal corporation to maintain a retaining wall. The arbitrator has power to include in his award compensation to the landowner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access. *Re Burnett and Town of Durham*, 31 O. R. 262.

See Harding v. *Township of Cardiff*, 2 O. R. 329; *In re Town of Ingersoll and Carroll*, 1 O. R. 488; *In re Laplante and Town of Peterborough*, 5 O. R. 634.

See post, 2: see also *post*, XII., XIII., XVI.

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2. *Costs of Arbitrations.*

Powers of Arbitrators—*Discretion—Event.*]—The power given by the Municipal Act, R. S. O. 1897 c. 223, s. 460, to arbitrators under that Act "to award the payment by any of the parties to the other of the costs of the arbitration, or of any portion thereof," should receive the same construction as con. rule 1130; the discretion, given is a legal discretion, and subject to the rule that where the claimant has been guilty of no misconduct, omission, or neglect such as to induce the court to deprive him of his costs, the unsuccessful party should bear the whole costs of the litigation. *In re Pattullo and Town of Orangeville*, 31 O. R. 192.

——— *Scale of Costs—Quantum—Taxation.*]—Section 399 of the Municipal Act, R. S. O. 1887 c. 184, provides with regard to arbitrations under the Act, that the arbitrators shall have power to award the payment by any of the parties to the other of the costs of the arbitration, and may either direct the payment of a fixed sum or that the costs shall be taxed on either the scale of the high court, or of the county courts, in which case the costs shall be taxed by the officer of the proper court. Arbitrators directed that costs of certain landowners of arbitration proceedings to ascertain the compensation to be paid by a municipality for land expropriated should be taxed on the scale of the high court "as between solicitor and client:"—Held, that the judicial discretion of the arbitrators was exercised and expended when costs were adjudged according to a certain scale; and that the arbitrators had no power to give costs "between solicitor and client;" and, as the error appeared on the face of the award, the municipality was not driven to appeal therefrom, but was entitled to claim the benefit of the excess of jurisdiction upon the taxation of the costs. The ruling of the taxing officer that the costs should be taxed as between party and party was affirmed. *Re Beaty and City of Toronto*, 13 P. R. 316.

——— *Taxation.*]—By 35 Vict. c. 79 (1) the waterworks commissioners of the city of Toronto were authorized to expropriate lands for the purpose of waterworks, and in case of disagreement to have the value ascertained by arbitration; and by 41 Vict. c. 41, all the powers of the commissioners were vested in the city corporation. The city corporation, desiring to expropriate certain land for waterworks purposes, passed a by-law reciting the above enactments and authorizing the expropriation, and afterwards served a notice offering to pay the landowner $25,000, and, in the event of his not accepting, requiring him "pursuant to s. 393 of the Municipal Act" to appoint an arbitrator. The arbitrators appointed took the oath prescribed by the Municipal Act, which was different in substance from that prescribed by 35 Vict. c. 79:—Held, that s. 483 of the Municipal Act, R. S. O. 1887 c. 184, had the effect of superseding the procedure for arbitration provided by 35 Vict. c. 79, and of substituting therefor the procedure for arbitration provided by the Municipal Act; and that the city corporation, having adopted and taken advantage of the procedure provided by the Municipal Act, could not escape the consequences; and therefore the arbitrators had power under s. 399 of the Municipal Act to award costs to the landowner, there being no power to do so under 35 Vict. c. 79:—Held, also, that the arbitrators having awarded costs, and their award not having been moved against, it was

the duty of the taxing officer to tax the costs. *Re Smith and City of Toronto*, 13 P. R. 479.

See In re Counties of Northumberland and Durham and Town of Cobourg, 20 U. C. R. 283, *post* 3; *In re Christie and Toronto Junction*, 22 A. R. 21, 25 S. C. R. 551, *post* 5.

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3. *Inter-Municipal Arbitrations.*

Adjustments Between City and County—*Retrospective Award—Time—Ratable Division of Expenses.*]—Arbitrators were appointed by agreement, dated 28th December, 1855 to settle certain differences recited as pending between the city of London and the county of Middlesex, respecting the compensation to be paid by the city to the county for the use of the county court house and gaol, and certain financial affairs then pending between them. On the same day they awarded that the stock held by the county in certain railways mentioned should be divided, in the proportion of one-fifth to the city, the remaining four-fifths to the county. 2. That the city should pay the county £2,675 on account of the county roads, and should keep such roads in repair within the city limits. 3. That the city should pay the county £1,966 in full for their portion of the county debt. 4. That in future each of the municipalities should pay the expense of all prisoners committted to the county gaol by each of them respectively, and the portion of such expense incurred by the city should be paid over by them in January of each year. 5. That in future the city should pay the county one-third of all incidental expenses connected with the county court-house and gaol, including repairs and insurance, together with one-third of all expenses connected with the administration of justice not paid by government, such payment to be made in the month of January in each year. 6. That the city should pay the county the sums mentioned in the 1st, 2nd, and 3rd clauses, with interest, in twelve months from the 1st January, 1856, except that the city council should pay their share of the railway stock at the time the county debentures given therefor should become payable. 7. That the award should take effect on the 1st January, 1855, and remain in force until the 1st January 1860:—Held, that the giving to the award a retrospective effect to the 1st January, 1855, being the time when London was declared a city, was not objectionable, but proper; that the arbitrators had authority to give time for payment, as in the 6th clause; that the limiting the continuance of the award to the 1st January, 1860, was inconsistent with 12 Vict. c. 81, s. 200, and rendered the award bad as to the 4th and 5th clauses, respecting the court-house and gaol; that the 4th clause of the award was also bad, because the Act directs that the arbitrators shall settle a sum to be paid, and does not authorize a ratable division of the expenses; that the 4th and 5th clauses might be separated from the rest, and the award set aside as to them only. *In re County of Middlesex and City of London*, 14 U. C. R. 334.

——— *Discretion of Arbitrators—Population—Maintenance of Prisoners.*]—In proceedings upon arbitration between a city and county under ss. 22, 445, 446, and 447 of the Municipal Act, 1877, the questions submitted are largely in the discretion of the arbitrators, no principle or rule being laid down by the statute. Where, therefore, arbitrators, in forming estimates of the proportion of expenditure to be borne by the city and county under these sections, took population as a basis instead of the assessment rolls:—Held, that this was no ground for interference. The court refused also to interfere with the compensation awarded for care and maintenance of prisoners. The arbitrators having awarded as to the macadamized road lying in the county and city, a matter not submitted to them, the clause was struck out of the award with costs, which were fixed at $10. *In re City of St. Catharines and County of Lincoln*, 46 U. C. R. 425.

Adjustments between Township and County—*Debt for Road—Liability of Township—Right of Action—Award under 14 & 15 Vict. c. 5, s. 7—Effect of upon Provisions of s. 8.*]—See *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 71.

——— *Maintenance of Bridges—Repeal of Statute—"Arbitration Pending."*] — Section 14 of the Municipal Amendment Act, 1894, 57 Vict. c. 50 (O.), must be read with s. 8, s.-ss. 43 and 48, of the Interpretation Act, R. S. O. 1887 c. 1, and so read, rights of action accrued at the passing of the former Act are not affected thereby. On the 29th April, 1893, a township corporation obtained an award against a county corporation under s. 533a of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges expended by them, and while an appeal against the award was before the court of appeal, 57 Vict. c. 50 (O.), repealing s. 533a, was passed:—Held, that there was no "arbitration pending" by reason of the appeal at the time of the passing of the repealing Act. The plaintiffs were held entitled, notwithstanding the repeal of s. 533a, to recover the proportionate amount paid or agreed to be paid by them, from the commencement of 1893 to the date of the passing of the repealing Act. Judgment in 26 O. R. 689 varied. *Township of Morris* v. *County of Huron*, 27 O. R. 341.

Separation of Town from County—*Existing Debt of County—Roads—Evidence—Knowledge of Arbitrators—Books of Treasurer—Costs.*]—Upon motion to set aside an award made under C. S. U. C. c. 54, s. 26, on the withdrawal of a town from a county:—Held, that it was not necessary that such award should direct the town to pay any portion of the existing debt of the county, and that the arbitrators, finding that the whole debt had been incurred for making roads which had been of no benefit to the town, were justified in awarding that the town should pay nothing on account of such debt, and that the county should refund what the town had paid towards the construction of such roads. The arbitrators did not take or file any oral or documentary evidence (under s. 358, s.-s. 13), but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the warden at the last meeting of the arbitrators, and their correctness was not disputed:—Held, sufficient. Held, also, that the arbitrators had no power

to award as to costs, and that part of the award was set aside. *In re United Counties of Northumberland and Durham and Town of Cobourg*, 20 U. C. R. 283.

Separation of Village from Township—*Equalization of Assessment—Equitable Settlement.*]—Two municipalities on separation having failed to agree as to the disposition of certain property and liabilities between them, an arbitration was had pursuant to the Municipal Act of 1873, s. 25, s.-s. 5. The arbitrators decided that the principal expressed in s.-s. 4 of s. 25, that the amount to be paid by one corporation to the other should be "such sum of money as may be just," had reference only to a fair equalization of the assessment of the municipalities, and that no other consideration should be regarded:—Held, that, although by the general law this award could not be impeached, as there was nothing wrong either of fact or of law on the face of the award, the court must, nevertheless, when its interference is invoked under s. 295, enter into the merits of the matters submitted. 2. That the arbitrators should have taken into consideration such other circumstances as they might have thought just, so as to arrive at an equitable settlement between the municipalities. The award was therefore remitted to the arbitrators to award what they might find to be, under all the circumstances, just between the parties, upon a liberal and comprehensive interpretation of the statute. *In re Township of Howick and Village of Wroxeter*, 12 C. L. J. 64.

Separation of United Townships—*Municipal Loan Fund—Appropriation—Distribution—Assets—Liabilities.*] — Held, that the arbitrators on the separation of the united townships, under R. S. O. 1877 c. 174, s. 28, should not take into consideration moneys received by the union, under 36 Vict. c. 47 (O.), from the government on account of the municipal loan fund, and appropriated by the union to the purposes authorized by that Act; but that they might apportion any part of it remaining unappropriated, and in doing so need not be governed by the population of the several townships according to the census of 1871, as provided for the purpose of the distribution by the government under that Act. The duty of such arbitrators is to ascertain the assets of the union, real and personal; dispose of the personal property as may be just; make proper allowance for the real estate to the township deprived of it by the separation, and for the personal property assigned to either municipality in excess of its share; and ascertain and apportion the liabilities. They should consider the value of the real property of the union in each township as an asset, and what allowance, if any, should be made by the township retaining it under the statute to the separating township. *In re Albemarle and Eastnor*, 45 U. C. R. 133.

See also *S. C.*, 46 U. C. R. 183, *post* 5.

Separation of Part of Township—*Drainage Assessment.*]—Held, that in the case of the separation of part of a township and its erection into an incorporated village, the liability to assessment in respect of government drainage, which had been done under the Ontario Drainage Act on the application of the township, but for which the assessment had not been completed, was not a matter to be arbitrated upon between the two corporations under the Municipal Act, as being a debt of the township to which the village ought to contribute, each corporation being bound by the Ontario Drainage Act to raise the amount assessed in respect of such drainage upon the land locally situated within it. *In re Village of Point Edward and Township of Sarnia*, 44 U. C. R. 461.

——— *Drainage Assessment—Payment by Township.*]—A portion of the township of Sarnia was added to the town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the Province for certain drainage works under the provisions of R. S. O. 1877 c. 33, in respect of roads benefited by the drains. The arbitrators, in settling the matters in dispute between the two corporations, refused to consider the indebtedness, and made their award without adjudicating thereon:—Held, that the award was invalid, for the liability in respect of the roads was an ordinary debt payable out of the general funds of the township, to which the town should contribute. The award directed the township to pay a certain sum to the town:—Held, bad; for the Municipal Act, R. S. O. 1877 c. 174, s. 53, only provides for the payment by the town to the township. In re Village of Point Edward and Township of Sarnia, 44 U. C. R. 461, distinguished. *Re Township of Sarnia and Town of Sarnia*, 1 O. R. 411.

See post XXIV. 2, XXVI.

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4. *Submission.*

Power to Submit.] — Corporations, sole or aggregate, if not disabled, may submit disputes relating to corporate property to arbitration, and their successors will be bound thereby. *In re Township of Eldon and Ferguson*, 6 L. J. 207.

Rule of Court—*Ex Parte Application.*]—In the case of an arbitration under the Municipal Act, R. S. O. 1887 c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of court under s. 13 of R. S. O. 1877 c. 53. R. S. O. 1887 c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the high court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court:—Held, upon the language of this section, that the submission should be made a rule of court before the award is moved upon. Held, also, that any party to the submission has primâ facie a right to have it made a rule of court; and according to the practice existing when the consolidated rules came into force, no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by con. rule 526 there is no necessity for serving notice of motion, and an order can be made ex parte. Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can inquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an ex parte application

for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargement of the time for making the award. *Re City of Toronto Leader Lane Arbitration*, 13 P. R. 166.

Resolution of Council—*Whether Binding.*]—Quære, whether a resolution passed by the council, that arbitrators chosen under 16 Vict. c. 181, to determine what should be paid to the plaintiff, for opening a road across his property, should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled, was binding upon the council as a reference. *Hodgson* v. *Township of Whitby*, 17 U. C. R. 230.

——— *Necessity for seal.*]—Quære, can the reeve of the township affix the seal of the township to a submission to arbitration as to property of the township, without being specially authorized by a resolution of the council to do so. *In re Township of Eldon and Ferguson*, 6 L. J. 207.

Seal—*Necessity for—Objection—Validity.*]—The appointment of the arbitrator by the corporation was not under seal, but the court declined to set aside the award on that ground, as the objection, if valid, could be taken in any proceeding to enforce the award. In re Township of Eldon and Ferguson, 6 L. J. 207, followed. *Re Harvey and Parkdale*, 16 O. R. 372.

5. *Validity of Award—Appeals and Motions.*

Appeal—*Increase of Award—Expense.*]—Held, per Hagarty, C.J.O., and Maclennan, J.A., that in an arbitration within ss. 401 and 404 of the Consolidated Municipal Act, 55 Vict. c. 42 (O.), a Judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded. Per Burton and Osler, JJ.A., that the Judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs. In the result the judgment in 24 O. R. 443 was affirmed. Remarks as to the great expense of land arbitrations under the Municipal Act. *In re Christie and Toronto Junction*, 22 A. R. 21. Affirmed by the supreme court of Canada, 25 S. C. R. 551.

——— *Time—Filing—Notice.*]—An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation is an award which does not require adoption by the council, but is subject to an appeal to the high court, as provided by R. S. O. 1897 c. 223, s. 465; and the practice as to the appeal is governed by R. S. O. 1897 c. 62, ss. 31, 34, 47. Where it is not shewn that such an award has been filed or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail. *Re McLellan and Township of Chinguacousy*, 18 P. R. 246.

Disqualification of Arbitrator—*Ratepayer.*]—By s. 378 of R. S. O. 1877 c. 174, no member, officer, or person in the employment of a corporation interested in any arbitration, nor any person so interested, shall act as an arbitrator under the Act:—Semble, that a ratepayer was disqualified, and that the objection would not be waived by mere acquiescence. See R. S. O. 1887 c. 184, s. 396 (2). *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.

Motion to Set aside Award—*Forum.*]—The award having been directed to be made within a year by an order of the chancery division, where the parties were litigating concerning it:—Held, that the motion to set it aside or refer back on the above grounds, or on the merits, should have been made in that division, and should be transferred. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.

——— *Necessary Material.*]—Held, that on an application to set aside an award under the Municipal Act, the by-law of the municipalities appointing the arbitrators, or copies thereof, and the appointment of the third arbitrator should have been filed. *In re Village of Point Edward and Township of Sarnia*, 44 U. C. R. 461.

——— *Reasons for Award—Evidence—Reference back—Fresh Tribunal.*]—From reading the award made in this matter, and the evidence and documents filed, it was impossible for the court to ascertain the reasons for the award, and so impossible to consider the matter upon the merits, as required by s. 385; and the evidence and documents which were filed appeared not to support the award, which was therefore set aside. The arbitrators having made two previous awards, which had both been referred back to them, and great expense incurred, the court refused to refer the matter back to them, but ordered that it be remitted to the Judge of the county court, unless counsel could agree upon such facts as would enable the court to deal with the matters in dispute. *In re Albemarle and Eastnor*, 46 U. C. R. 183.

——— *Time.*]—Section 4 of 52 Vict. c. 13 (O.), which requires motions to set aside awards of a specified kind to be made within fourteen days from the filing thereof, and s. 6 of the same Act which allows motions to set aside awards of another kind to be made within three months from the making and publication thereof, do not apply to arbitrations under the Municipal Act, and a motion made on the 10th February, 1891, to set aside an award made in an arbitration under the Municipal Act on the 31st December, 1890, and filed on the 19th January, 1891, was held to be in time. The scope and meaning of the several sections of the Act considered. *In re Prittie and Toronto*, 19 A. R. 503.

——— *Time — Publication.*] — The six weeks allowed by s. 465 of the Municipal Act, R. S. O. 1897 c. 223, for an application to set aside an award, run from the publication to the parties of the award. *Re Burnett and Town of Durham*, 31 O. R. 262.

Omission to File Evidence or Statement.]—The omission of the written statement required by s. 383 of R. S. O. 1877 c. 174 to be put in by arbitrators is not necessarily a ground for setting aside their award, and it may be afterwards supplied. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

The provisions of s. 383 of the Municipal Act, 1877, requiring arbitrators to take and

file for the information of the court full notes of the evidence, or a statement that they proceeded upon skill or knowledge possessed by themselves, or upon a view, in making their award, are imperative, and the omission to comply with them is fatal to the award. *In re Albemarle and Eastnor*, 46 U. C. R. 183.

By s. 383 the arbitrators are to file with the clerk of the council the notes of the evidence taken. There being two councils interested in the arbitration, the arbitrators did not know with which clerk to file the evidence, and did not file it:—Held, that the award was not thereby invalidated. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.

Held, that, under the circumstances of this matter, the omission to file the evidence taken by the arbitrators, was not irremediable. In re Township of Muskoka and Village of Gravenhurst, 6 O. R. 352, approved. *Re Harvey and Parkdale*, 16 O. R. 372.

Omission to Take Oath — *Arbitrator.*]—The failure of the arbitrator to take the oath required by s. 458 of R. S. O. 1897 c. 223 is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award. *Re Burnett and Town of Durham*, 31 O. R. 262.

Time for Making Award.]—The court has power to enlarge the time for making an award, although the same has not been made "within the month after the appointment of the third arbitrator," as required by s. 377 of R. S. O. 1887 c. 174. The general enactments relating to arbitration apply to awards under the Municipal Act. In extending the time in this case the matters referred were remitted to such persons as the court should appoint under the Municipal Act, s. 385. *In re City of Toronto and Scott*, 8 P. R. 318.

Quære, whether an award made by arbitrators pursuant to the Municipal Act, R. S. O. 1877 c. 174, is invalid though made more than a month after the appointment of the third arbitrator, notwithstanding s. 377 of the Act. *In re Township of Muskoka and Village of Gravenhurst*, 6 O. R. 352.

Semble, that the combined effect of ss. 377 and 380 of the Municipal Act, 1877, is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month. The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their portion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by s. 337 of the Municipal Act, had elapsed without any award having been made:—Held, that an award made after the expiry of the month was valid. *Township of Thurlow* v. *Township of Sidney*, 29 Gr. 497.

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6. *Other Cases.*

Maintenance of Bridges — *Statute — Repeal.*]—The saving provisions of s. 14 of the Municipal Amendment Act, 1894, 57 Vict. c. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R. S. O. 1887 c. 1, s. 8, s.-s. 43. A township corporation which had obtained an award against a county corporation under s. 533a of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges, were, notwithstanding the repeal of s. 533a by s. 14 of 57 Vict. c. 50 (O.), held entitled to recover the amount expended on the same up to the date of the passing of the latter Act. *Township of Morris* v. *County of Huron*, 26 O. R. 689. Varied by a divisional court, 27 O. R. 341.

Treasurer's Accounts—*Audit — Parties to Award.*]—Arbitrators appointed by a municipal corporation may examine the accounts of the corporation, though previously audited as the municipal law directs. Under the special circumstances of this case, it was held that the arbitrators might well make their award against the father of the township treasurer, who was really but not nominally treasurer, and who was a party to the submission as to the state of the township treasurer's accounts. *In re Township of Eldon and Ferguson*, 6 L. J. 207.

Withdrawal from Arbitration.] — Sub-section 6 of s. 1 of 49 Vict. c. 66 (O.), the Don Improvement Act, makes applicable to an arbitration under that Act all the provisions of the Consolidated Municipal Act of 1883 as to arbitrations, including s. 404, which enables the council to refuse to ratify the award, and not merely the provisions for determining the amount of compensation. *In re McColl and City of Toronto*, 21 A. R. 256.

V. AUDIT.

Of County Attorney's Account.]—See *In re Fenton and Board of Audit of County of York*, 31 C. P. 31; *In re Stanton and Board of Audit of County of Elgin*, 3 O. R. 86.

Of School Board Accounts.] — See *Board of Education of Town of Paris* v. *Citizens' Insurance and Investment Co.*, 30 C. P. 132.

Of Sheriff's Accounts.]—To an action for the recovery of fees for services connected with the administration of justice within defendants' county, claimed to have been rendered to the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby the plaintiff became entitled to receive payment of the same, the defendants pleaded, on equitable grounds, that the right to such fees had been disputed and submitted to the court of Queen's bench, by a special case, and that the alleged audit was made under a misconception of the judgment, which the auditors erroneously understood to decide that the plaintiff was entitled to such fees, whereas the decision was to the contrary:—Held, affirming the judgment in 29 C. P. 488, plea good, for that the facts stated therein would constitute a good defence to the action, because it appeared that the fees had not been duly audited, and this was a pre-requisite to the plaintiff's right to recover. *Reynolds* v. *County of Ontario*, 30 C. P. 14.

Of Temperance Act Accounts.]—The Act 39 Vict. c. 26 (O.), in relation to the Temperance Act of 1864, is not unconstitutional, and the Provincial Legislature has power to appoint commissioners for the purpose mentioned in the Act, and under 41 Vict. c. 14 (O.), to provide for the charges attending the execution of their duties even when previously incurred; and the provisions of the Act apply to a municipality in which the Temperance Act is in force. The audit of accounts against the municipalities is not final and binding on the municipalities, it being open to them to shew that charges have been allowed in such accounts for which they are not liable, although it would not be necessary or proper to require evidence of matters in detail where an audit had been had. The auditing of such accounts need not appear to have been done by the Provincial treasurer personally; it is sufficient if they have been so audited by a subordinate officer in the department, whose duty it is to attend to such matters. *Prince Edward License Commissioners* v. *County of Prince Edward*, 26 Gr. 452.

Of Treasurer's Accounts.]—See *In re Township of Eldon and Ferguson*, 6 L. J. 207, *ante*, IV. 6.

VI. Bonuses, Exemptions, and Privileges.

Bonus—*Factory—Loan of Money—Gift—Debentures.*]—Held, that a municipality, under 36 Vict. c. 48, s. 372, s.-s. 5 (O.), has power to lend money for the encouragement of a manufacturing establishment, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on debentures issued for the purpose of raising money to be so lent. The rate of interest on the debentures was seven per cent.:—Held, that s. 217 of 29 & 30 Vict. c. 51 has not been repealed, though marked effete in the schedule prefixed to, and not re-enacted in, 36 Vict. c. 48 (O.), and that the above rate was therefore lawful. Quære, whether the power to give would not include power to lend. If there had been no power to lend, and the mortgage taken by the municipality to secure repayment of the money lent was invalid, quære, whether this would afford any defence to the debentures. Quære, whether, the municipality having received the consideration stipulated for, the debenture holders might not have some remedy against the municipality, though not by direct suit on the debentures. *Scottish American Investment Co.* v. *Village of Elora*, 6 A. R. 628.

——— *Factory — Conditions — Breach — Mortgage—Damages.*]—The plaintiffs under a by-law granted the defendant a bonus of $20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for $10,000, and a bond for $10,000, to be conditioned: (1) for the carrying on of such manufactures for twenty years; (2) during that period to keep $30,000 invested in the factory; and (3) to insure the buildings and plant in plaintiffs' favour for $10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the $30,000 as stipulated for. He also made a further mortgage on the premises to the plaintiffs for $3,000 not mentioned in the by-law. The factory was one in which eighteen or twenty-five men might have been employed, and which could have turned out one hundred mowers in a year. In the course of two years only twenty mowers were constructed, and the number of persons employed dwindled down from eighteen or twenty to two or three:—Held, affirming the judgment in 4 O. R. 1, that the performance contemplated by the parties, of the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance. Held, also, that the $10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default to an extent not greater than $10,000, and not as a charge for that specific sum. Held, also, that as the $3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the master in assessing plaintiffs' damages. *Village of Brussels* v. *Ronald*, 11 A. R. 605.

——— *Factory—Conditions — Breach.*]—By a by-law passed by the city of Three Rivers on the 3rd March, 1886, granting a bonus of $20,000 to a firm for establishing a saw-mill and a box factory within the city limits, and a mortgage for a like amount of $20,000 granted by the firm to the corporation on the 26th November, 1886, it was provided that the entire establishment of a value equivalent to not less than $75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 people at least should be kept employed during the space of five months of each of the four years. The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, with interruptions, until October, 1889, and at least 600 men were employed in both establishments during that time. On a contestation by subsequent hypothecary claimants of an opposition âfin de conserver, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property:—Held, that, even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season; and therefore there had been a breach of the conditions. *City of Three Rivers* v. *Banque du Peuple*, 22 S. C. R. 352.

——— *Factory — Conditions — Breach — Damages.*]—The plaintiffs agreed to give to the defendants a bonus of $1,000 in five equal consecutive annual instalments of $200 each, in consideration of their establishing a factory and working it for ten years. The defendants covenanted to carry on the factory, and to employ therein continuously not less than twenty persons during the term. The agreement provided that the annual payments were to cease if the defendants ceased to carry on business within five years, but there was nothing in the agreement as to return of any part of the bonus in case of cesser after that time. The defendants were paid the full amount of the bonus, carried on business for six years, and then closed their factory. The plaintiffs were unable to prove

any specific substantial damage:—Held, that the damages could not be assessed on the principle of apportioning the bonus with reference to the term and the period for which the business had been carried on. Held, also, that the plaintiffs were entitled to nominal damages at least, and, under the circumstances, the defendants having deliberately broken their covenant, to the costs of the action. *Village of Brighton* v. *Auston*, 19 A. R. 305.

——— *Evasion of Act.*]—A municipal corporation cannot grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge. Therefore, a by-law, valid on its face, purporting to authorize the purchase of a water privilege for electric lighting purposes, but shewn to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed. Scott v. Corporation of Tilsonburg, 13 A. R. 233, applied. *In re Campbell and Village of Lanark*, 20 A. R. 372.

——— *Farmers—Assistance to Sow Land.*] See *Campbell* v. *Corporation of Elma*, 13 C. P. 296.

——— *Railway.*]—See RAILWAY, I. 2.

——— *Street Railway—Petition—Voting on By-law.*]—Although under 54 Vict. c. 42, s. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it. *Adamson* v. *Township of Etobicoke*, 22 O. R. 341.

Exemption from Taxation—*By-law—New Manufacture—Preference.*]—Section 44 of 31 Vict. c. 30 (O.) empowers municipal corporations to exempt from taxation for not more than five years manufacturers of woollen, cotton, glass, paper, and such like commodities. Under this a by-law was passed, enacting that every person or firm thereafter commencing any new manufacture of the nature contemplated by the section, who should employ therein more than $1,000, and pay to operatives more than $30 weekly, should be exempt for five years as to such property. It was provided that the property should nevertheless be assessed, but entered in a separate page of the assessment roll, and that the clerk was to post up a list of such property, and the court of revision should hear and determine complaints against such exemptions, and if they were sustained should place the property on the roll in the ordinary column. The persons claiming exemption were also required to file yearly a statement, verified under oath, shewing the capital employed and the sum paid for wages:—Held, that the by-law was bad, for exempting new manufactures only in preference to those of the same kind already established, and for exempting only those persons doing a specified amount of business. Semble, however, that all manufacturers of the same trade might be exempted, so as to give them an advantage over other trades. Held, also, that the by-law would not have been bad for exempting manufactures instead of manufacturers, nor for requiring the oath, nor on account of the provisions as to the assessment of the property and the reference to the court of revision. Quære, whether it would have been objectionable to empower the mayor or the clerk to decide upon applications for exemption. *Re Pirie and Town of Dundas*, 29 U. C. R. 401.

——— *By-law—Ultra Vires—Discrimination—Repeal.*]—C. applied to the corporation of a town for a lease of a lot, alleging that he and others proposed to erect thereon buildings for the purpose of carrying on the business of a flour and grist mill and a general grain business; they petitioned also for exemption from taxation upon the mill for ten years. Under a by-law passed the 4th March, 1885, a lease to the applicants was executed by the corporation of the lot in question for twenty-one years, reserving a nominal rent, and containing covenants on the part of the lessees in reference to the nature of the buildings to be erected, and to pay taxes, and other provisions. Another by-law was subsequently passed exempting the "manufacturing establishment of C. and others (naming them), established for the purpose of carrying on the milling and grain merchant business, including the lands leased, &c., and the mill and all buildings and property to be erected and placed upon the said land for the purpose of the said business," subject to the performance by the lessees of the stipulations in the lease as to maintaining and working the mill. Upon the faith of this by-law and lease, the lessees purchased material, and entered into contracts for the purpose of erecting the mill, and proceeded to erect it, and contracted for the purchase of machinery, the whole involving an outlay, as was alleged, of $17,000. Upon the 20th July following, the council by by-law repealed the by-law exempting from taxation. There were other taxpayers of the same town engaged in the same business, and having large amounts of capital invested therein, whose interests were injuriously affected by the repealed by-law:—Held, (1) that, inasmuch as the applicants were treated in the lease and by-law as carrying on two distinct kinds of business, viz., the manufacturing or milling business, and the general grain merchant business, the first only of which the council had power to exempt from taxation, the by-law exempting from taxation was bad; (2) that the by-law was also bad in exempting all the land leased, and not the mill only, from taxation, as other buildings, suitable alone for the grain business, might be erected thereon; (3) the fact that other large milling establishments within the same municipality were discriminated against also made the by-law illegal and bad; (4) the repealed by-law being therefore illegal, the council had a right to repeal, or to go through the form of repealing it, in order to prevent trouble and expense. *Re People's Milling Co. and Town of Meaford*, 10 O. R. 405.

——— *By-law — Ultra Vires — Limited Assessment — Public Policy.*] — The Municipal Act of 1883, s. 368, as amended by 47 Vict. c. 32, s. 8 (O.), authorizes a municipal council to exempt "any manufacturing establishment, in whole or in part, from taxation for any period not longer than ten years." A by-law of the town of P. recited that a company had acquired several water privileges on the river O., and intended developing same by erecting thereon factories

of different descriptions; and it was advisable in the interests of the town that the privileges, immunities, and exemptions thereinafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to $50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years at $50,000; and the assessors from time to time were required to assess the same at said sum, notwithstanding the erection of any buildings thereon:—Held, not a by-law within the said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment. *In re Denne and Town of Peterborough*, 10 O. R. 767.

——— *By-law — Evasion of Act.*]—A by-law valid on its face was passed by a municipal corporation with the prescribed formalities under 47 Vict. c. 32, s. 8 (O.), for exempting the manufacturing establishments of one T. for the period of ten years. At the time of its passing some negotiations had taken place between a railway company and the authorities of the corporation for the construction of a spur or switch from their railway into the town. It was proposed on the part of the company that the town should furnish the right of way and contribute $1,800 towards the construction, involving, as it was stated, an expenditure of over $6,000. The council being unwilling to submit a by-law to the people, T., the largest ratepayer in the town, suggested that if his manufacturing establishment were exempted from taxation for ten years, the taxes thereon amounting to about $280 a year, he would himself furnish the right of way and construct the switch. The by-law was accordingly passed upon this understanding, and T. proceeded with and completed the work:—Held, affirming the judgment in 10 O. R. 119, that the by-law was an evasion of the statute and therefore illegal and void. *Scott* v. *Corporation of Tilsonburg*, 13 A. R. 233.

——— *By-law—Cessation of Business.*]—R. S. O. 1887 c. 184, s. 366, which gives municipal councils power to exempt manufacturing establishments from taxation, does not authorize such exemption when such establishments cease under liquidation to carry on business, and any exempting by-law will, in such event, cease to be operative. *Polson* v. *Town of Owen Sound*, 31 O. R. 6.

———*By-law—School Taxes—Debentures—Validating Statute.*]—By-law No. 148 of the city of Winnipeg, passed in 1881, exempted for ever the C. P. R. Co. from "all municipal taxes, rates and levies, and assessments of every nature and kind:"—Held, reversing the judgment in 12 Man. L. R. 581, that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. c. 64, it was provided that by-law 148, authorizing the issue of debentures granting by way of bonus to the C. P. R. Co. the sum of $200,000, in consideration of certain undertakings on the part of the said company, and by-law 195, amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding, and valid. . . . Held, that, notwithstanding that the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law, including the exemption from taxation, was validated. *Canadian Pacific R. W. Co.* v. *City of Winnipeg*, 30 S. C. R. 558.

——— *By-law — Factory—Repeal—Good Faith—Acquiescence.*]—A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under s. 366 of the Municipal Act, R. S. O. 1887 c. 184, by which the property was exempted from all taxation, &c., for a period of ten years from the date at which the by-law came into effect. The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The court, being of opinion, on the facts as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and, in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council. In this application a ground relied on by the council was that the applicant had erected more than two dwelling houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them:—Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law. Semble, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business. Semble, also, the period of exemption was within the statute. *Alexander* v. *Village of Huntsville*, 24 O. R. 665.

——— *Railway Company — Absorption of Exempted Lands into City.*]—See *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

Privilege — *Gas Company — Exclusive Right — Statute.*] — See *Compagnie pour L'Eclairage au Gaz de St. Hyacinthe* v. *Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 S. C. R. 168.

——— *Street Railway — Monopoly.*] — Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as should be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their rails:—Held, that a subsequent clause in the deed of grant giving to the company the refusal, on terms, of other streets in the city for railway purposes, was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city. Quære, whether if a monopoly had been conceded, it was ultra vires of the municipal council. *Winnipeg Street R.*

W. Co. v. *Winnipeg Electric Street R. W. Co.*, [1894] A. C. 615.

——— *Telephone Company—Monopoly.*]—A by-law passed by the city council ratified an agreement between the city and a telephone company, providing that no other person, firm, or company should, for five years, have any license or permission to use any of the public streets, &c., of the city for the purpose of carrying on any telephone business:—Held, that this by-law was in contravention of s. 286 of the Municipal Act, 55 Vict. c. 42, and was ultra vires of the council. *Re Robinson and City of St. Thomas*, 23 O. R. 489.

See Re Cooke and Village of Norwich, 18 O. R. 72; *Parish of St. Cesaire* v. *McFarlane*, 14 S. C. R. 738; *Re Farlinger and Village of Morrisburg*, 16 O. R. 722; *Bogart* v. *Township of King*, 32 O. R. 135; *Township of Aldborough* v. *Schmeitz*, 32 O. R. 64.

VII. Buildings and Fire Limits.

By-laws Respecting—*Validity of.*]—By the Municipal Act of 1866, the corporations of cities may pass by-laws to prevent the erection of wooden buildings within specified parts of the city. A by-law prohibiting the erection of any building within certain limits other than of stone, brick, iron, or other material of an incombustible nature:—Held, void, as beyond the power, in prohibiting buildings of combustible materials other than wood. *Attorney-General* v. *Campbell*, 19 Gr. 299.

A city corporation passed a by-law under R. S. O. 1877 c. 174, s. 167, s.-s. 6, which defined fire limits, within which buildings were to be of incombustible material; the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half-an-inch thick, and no roof of any building already erected within the fire limits to be relaid or recovered except with one of the enumerated materials. The defendant was convicted for having laid new shingles on his wooden house without laying them in mortar. The house had been standing for many years before the by-law was passed:—Held, that the by-law was ultra vires, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto. *Regina* v. *Howard*, 4 O. R. 377.

The council of a town passed a by-law to "regulate or prevent the carrying on of manufactures or trades dangerous in causing or promoting fire," whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from $5 to $20 was imposed for each day that a violation of the law continued, with distress on default of payment, and imprisonment in default of sufficient distress. Afterwards they passed an amending by-law, providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing, the said consent, however, to be submitted for approval by the chairman of the board of works:—Held that the by-law as amended was invalid within the principles laid down in Re Kiely, 13 O. R. at p. 457, and in Re Nash and McCraken, 33 U. C. R. 181, because, by requiring the consent of the owners of the adjoining buildings to be obtained, it constituted these persons the judges of the right asked for, and divested the council of the power they should personally exercise, and by requiring the approval of the chairman of the board of works it permitted favouritism, and all persons who desired to follow the same trade were not placed on the same footing. It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the enacting body alone under R. S. O. 1887 c. 184, s. 196, s.-s. 14. The council also passed another by-law making it unlawful to erect a steam engine, &c., within the village limits without the leave of the council:—Held, that this by-law was also bad, and unauthorized by s. 496, s.-s. 14, since it applied to all cases whether there was danger in causing or promoting fire or not. *Regina* v. *Webster*, 16 O. R. 187.

Sub-section 10 of s. 496 of the Municipal Act, R. S. O. 1887 c. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal walls, and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-section 18, relating to party walls, does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. Where, therefore, a by-law was passed by the corporation of the city of H. prescribing the materials and thickness of the internal walls of every building, which, therefore, included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building erected before the passing of the by-law, and owned by him, into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law, the by-law was held bad, and a conviction made thereunder was quashed. *Regina* v. *Copp*, 17 O. R. 738.

Sub-section 10 of s. 496, Consolidated Municipal Act, 1892, which empowers the corporation of a city, town, or village to pass by-laws "for regulating the repair or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if built or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner. *Quinn* v. *Town of Orillia*, 28 O. R. 435.

See Regina v. *Hart*, 20 O. R. 611.

Right to Maintain Action for Breach of By-law.]—Where a statute provides for the performance of a particular duty, and some one of a class of persons for whose benefit and protection the duty is imposed, is injured by the failure of the person required to do so to perform it, an action, primâ facie, and if there is nothing to the contrary, is maintainable by such person; but where the particular course of conduct is imperative, and the non-performance is, in the general interest, punishable by penalty, an action will not lie. Where, therefore, under authority conferred by s. 496, s.-s. 10, of the Consolidated Municipal Act, 1892, a by-law was passed by the council of a city setting apart certain areas as fire limits where no wooden buildings could be erected, and providing that buildings erected

in contravention thereof might be pulled down and removed by the corporation at the cost of the owner, and a penalty of $50 was imposed, the erection of a wooden building within such limits does not give a right of action to the owner of contiguous property which is injuriously affected thereby. *Tompkins* v. *Brockville Rink Co.*, 31 O. R. 124.

VIII. By-laws.

1. *Generally.*

Anticipatory By-law — *Statutes.*]—A conviction for violating a by-law was quashed, the by-law having been passed on 27th March, to go into force the 3rd April following, in anticipation of an Act, 45 Vict. c. 24 (O.), passed the 10th March, to go into operation the 2nd April then next ensuing. *Regina* v. *Reed*, 11 O. R. 242.

Authority of Council — *Recital.*] — It is not necessary to recite in a by-law all that is requisite to shew the authority of the council, or the regularity of their proceedings: these will be presumed until the contrary is proved. *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. R. 492.

See, also, *Tylee* v. *County of Waterloo*, 9 U. C. R. 588.

Construction — *Compliance with Statute.*] —In construing a by-law the court will not intend that the municipality are trying to evade compliance with a statute, but will give every reasonable help of construction to bring the by-law within it. They will also look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give full effect to the whole. *In re Cameron and Municipality of East Nissouri*, 13 U. C. R. 190.

——— *Implication.*]—Semble, that a by-law enacting that certain animals shall not run at large, does not impliedly allow others not named to do so, contrary to the common law. *Jack* v. *Ontario, Simcoe, &c., R. W. Co.*, 14 U. C. R. 328.

——— *Intendment in Favour of Legality—Omission of Recitals.*]—If for all that appears a by-law may be legal, it will be upheld, and in this case, where it was not clear upon the face of the by-law or otherwise shewn that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions which would in that case have been essential, was held no objection. *Re Gibson and United Counties of Huron and Bruce*, 20 U. C. R. 111.

Conviction under — *Motion to Quash—Attacking By-law.*]—The validity of a by-law may be questioned on a motion to quash the conviction made under it. *Regina* v. *Cuthbert*, 45 U. C. R. 19.

——— *Motion to Quash — Attacking By-law — Requirements of Conviction.*]—On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned, though it has not been quashed. Section 205 applies only to actions brought for acts done under an illegal by-law. Such a conviction must shew by what municipality the by-law was passed. Quære, whether it is essential to state the title or date of the by-law. *Regina* v. *Osler*, 32 U. C. R. 324.

Delegation of Discretion.] — In this case, even if not ultra vires, the by-law would have been objectionable in requiring as a condition precedent to the granting of the license that an applicant should procure the consent of a number of persons in the neighbourhood. *Re Keily*, 13 O. R. 451.

See, also, *Regina* v. *Webster*, 16 O. R. 187, *ante* VII.

Injunction against Enforcement of.] —Although the court of chancery has power to restrain the enforcement of a by-law of doubtful validity until the applicant has had an opportunity to move in a court of common law to quash it, it has no general jurisdiction to test its legal validity. *Vandecar* v. *Corporation of East Oxford*, 3 A. R. 131.

Municipal council restrained from proceeding to enforce rights claimed under an illegal by-law, the by-law not having been quashed. *See Rose* v. *Township of West Wawanosh*, 19 O. R. 294.

Language of — *Clearance.*] — A by-law must be reasonably clear and unequivocal in its language in order to vary or alter the common law or statutable rights. *Crowe* v. *Steeper*, 46 U. C. R. 87.

Necessity for — *Exercise of Corporate Powers—Special Statute.*] — Semble, that R. S. O. 1877 c. 174, s. 277, enacting that the powers of township councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 593.

Notice to Public.] — All persons in a municipality, whether permanent residents or not, are bound to take notice of its by-laws. *Regina* v. *Osler*, 32 U. C. R. 324.

Penalty.]—A by-law omitting to provide a penalty for its violation is not necessarily bad. *In re Local Option Act*, 18 A. R. 572.

Public Policy — *By-law against.*] — By-law held bad as opposed to public policy and morality in directing the assessors from time to time to limit their assessment. *In re Dennc and Town of Peterborough*, 10 O. R. 767.

Purpose of—*Necessity for Stating on its Face.*]—*See Jones* v. *Town of Port Arthur*, 16 O. R. 474.

Quashing By-law—*Effect of on Proceedings.*]—If a by-law be not void on the face of it without being quashed, all proceedings duly had under it while it remained in force may be justified under it. *Barclay* v. *Township of Darlington*, 5 C. P. 432.

Seal — *Signing — Pleading.*]—Semble, although the statute enacts that all by-laws shall be authenticated by seal, and signed by the person presiding, yet it is not necessary to set out these facts in pleading a by-law, but it is sufficient to aver that it was duly made and passed. *Wilson* v. *Town of Port Hope*, 10 U. C. R. 405.

Variance from Statute.]—A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation, is invalid. *In re Clark and Township of Howard*, 9 O. R. 576.

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2. *Creating Debts.*

(a) *Amount of Debt.*

Modification—*Subsequent By-law—Rights of Creditors.*]—The court refused a rule nisi to quash by-laws of a township, on the ground that having passed a by-law to contract a loan they had exceeded their powers in afterwards modifying the said by-law; it appearing that such alteration could not affect the security of creditors. *In re Hill and Township of Walsingham*, 9 U. C. R. 310.

Necessity for Shewing.]—A by-law to raise a loan for the construction of an esplanade under 20 Vict. c. 80, which authorizes the city to raise a loan for such an amount, not exceeding £75,000, as *may* be necessary, &c.:—Held, bad, because while it authorized the raising of a loan to the full extent of £75,000, it did not shew that that sum was necessary, nor for what amount the contractors had engaged to do the work. *Ex parte Hayes* v. *City of Toronto*, 7 C. P. 255.

Statute—*Reference to—Authority for By-law.*]—16 Vict. c. 219 authorizes the issuing by the city of Toronto of $120,000 of debentures for esplanade purposes. A by-law having been passed on the 7th May, 1860, intituled, "To provide for the issue of additional debentures for $54,000 for esplanade purposes," upon objection taken that on its face it did not shew any authority in law for raising the sum:—Held, that, inasmuch as the by-law in its recital referred to the statute, which was a public Act, it could not be said that it shewed no authority; and a primâ facie case of an excess of authority in the amount authorized by statute not being proved, the court refused a rule to quash. *In re Grant and City of Toronto*, 12 C. P. 357.

See In re Cameron and Municipality of East Nissouri, 13 U. C. R. 190, *post* (c); *In re Hawke and Municipality of Wellesley*, 13 U. C. R. 636, *post* (c); *Re Caldwell and Town of Galt*, 30 O. R. 378, *post* (f); *Ward* v. *Town of Welland*, 31 O. R. 303, *post* (f).

(b) *Interest.*

Rate of.]—Municipal corporations cannot by by-law raise money at a rate of interest exceeding six per cent. *Re Wilson and County of Elgin*, 13 U. C. R. 218.

Sinking Fund—*Appropriation.*]—The deposit of the interest and sinking fund required for the payment of debentures of a municipal corporation in a bank at interest, is a temporary investment of such money under s. 248, s.-s. 4, of the Municipal Act of 1873; and the corporation has no power by resolution to appropriate interest arising from such investment to any other purpose than the sinking fund. *Re Barber and City of Ottawa*, 39 U. C. R. 406.

Yearly Payment — *Amount—Rate.*]—A by-law passed under the Municipal Act of 1873, s. 430, s.-s. 2, recited that $3,000 would be required to defray the expense of certain work; that it was intended to borrow that sum on debentures of $100 each, to be issued as the work progressed, and payable by instalments of $600 in each year, with interest at seven per cent.; and that $642 was required to be raised annually by special rate for paying the debt and interest—Held, that the by-law shewed clearly that the interest was to be raised annually on the $600, not on the $3,000. Held, following, but not agreeing with, Corporation of North Gwillimbury v. Moore, 15 C. P. 445, that the corporation were authorized to allow a higher rate of interest than seven per cent. *Re Nichol and Township of Alnwick*, 41 U. C. R. 577.

See Re Caldwell and Town of Galt, 30 O. R. 378, *post* (d).

(c) *Rate to be Levied.*

Additional Rate—*Subsequent By-law—Necessity for Levy.*]—Municipal corporations, under 12 Vict. c. 81, might, by a subsequent by-law, impose an additional rate to provide for any deficiency in the sum levied under a previous by-law for payment of debts incurred previous to the 1st January, 1849. Under 12 Vict. c. 81, any by-law passed for payment of a debt or creating a loan, must settle and direct to be levied a special rate for such purpose. Section 177 relates to all debts and interest lawfully incurred and becoming payable within the year. *Mellish* v. *Town of Brampton*, 2 C. P. 35.

Alteration of Rate by Subsequent By-law.]—A by-law to authorize a loan having been duly passed, another by-law was proposed, not dispensing with it, but shewing clearly that the rates imposed by the first by-law were meant to be dispensed with, and other provisions made for the payment of the principal:—Held, that the last by-law was bad, for it must be considered as a new and independent by-law, not as a mere supplement to the previous one, and it should therefore have contained the usual recitals and enactments required in by-laws for creating a debt. *In re Bryant and Municipality of Pittsburgh*, 13 U. C. R. 347.

Equality in Yearly Payments.]—See *Village of Georgetown* v. *Stimson*, 23 O. R. 33.

——— *Application of Statute — Substantial Compliance.*]—By s. 1 of the Municipal Amendment Act, 1888, 51 Vict. c. 28, that statute came into force on 1st August, 1888, except s. 16 thereof, which was not to take effect until 1st November, 1888, and by s.-s. 5 of s. 16 the latter section was not to affect any by-law theretofore adopted or passed, the vote taken, or debentures issued or to be issued in pursuance thereof. A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village, contrary to the

provisions of s.-s. 4 of s. 16 of 48 Vict. c. 28 (O.):—Held, that, although the by-law was in contravention of s.-s. 4 of s. 16, yet, having regard to the provisions of s. 1, and by the operation of s. 16, s.-s. 5, of that Act, the by-law was withdrawn from the effect of s.-s. 4. Held, also, that the object of s.-s. 1 of s. 342 of R. S. O. 1887 c. 184 is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of $25,000 by the issue of twenty debentures for $2,006.10, to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of $25,000," and for levying $2,006.10 in each year by a special rate, substantially complied with the sub-section. *Re Farlinger and Village of Morrisburg*, 16 O. R. 722.

——— *Recitals.*]—14 & 15 Vict. c. 109, s. 4, prescribing what by-laws creating debts, &c., shall recite, is only directory, and does not declare that the omission of any of the prescribed recitals shall render the by-law invalid. The rate to be levied by any municipal council for the payment of a debt or liquidation of a loan, &c., must, under the Municipal Acts, be equal in each successive year, and not fluctuating according to the arbitrary discretion of the municipality. *In re Sells and Village of St. Thomas*, 3 C. P. 286.

——— *Recitals — Ratable Property — Assessment — Debentures — Amount of Loan — Time for Repayment.*]—Where a by-law recited that the amount of the whole ratable property of the township, according to the last assessment returns, was £114,756, and that it would require the annual rate of 2½d. in the pound, as a special rate, for payment, &c.; and then enacted that a special rate of 2½d. should be levied to pay the principal and interest of the loan to be raised under the by-law, and that the proceeds of such special rate should be applied solely to the payment, &c., until the same be fully paid and satisfied:—Held, that the recital as to the amount of ratable property and the assessment returns was sufficient, and that it sufficiently appeared that the rate was to be levied in each year. In one part of the by-law the reeve was empowered to issue debentures for such sums as should be, from time to time, required for the purposes mentioned, but not to exceed in the whole £10,000; in subsequent clauses a special rate was imposed to pay "the said sum of £10,000," and the application of "the said sum of £10,000" was pointed out; and the debentures were directed to be made payable "within twenty years of the time that this by-law shall come into operation":—Held, that the amount of the loan, and the time when the debentures were to be made payable, were stated with sufficient certainty. *In re Cameron and Municipality of East Nissouri*, 13 U. C. R. 190.

——— *Sufficiency—Calculation.*]—The by-law provided for raising $22,500, and authorized the issue of debentures payable in from one to ten years, with interest half-yearly, but no greater sum than $3,200 to be payable in any one year; and it imposed a special rate of half-a-mill in the dollar, in addition to all other rates, until the debentures and interest should be paid in full. This was objected to as not shewing when or in what proportions the debt or debentures were to be payable, or how much each year:—Held, good, for the rate not being unequal or insufficient, it was a matter of calculation so to make the debentures payable that the principal and interest falling due in each year would be met. *Re Secord and County of Lincoln*, 24 U. C. R. 142.

Insufficiency.]—By-law quashed because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vict. c. 81. *In re Billings and Township of Gloucester*, 10 U. C. R. 273.

The by-law in this case for raising a loan was held clearly bad, the rate directed to be levied in the first year being insufficient. *Perry* v. *Town of Whitby*, 13 U. C. R. 564.

——— *Slight Variance.*] — The by-law shewed the whole ratable value of the property of the municipality to be $668,293, and directed a rate of three and nine-tenths mills in the dollar. It appeared that the rate directed to be levied would produce about $150 less than the total amount of the debt to be incurred, but on this ground the court would not interfere. *In re Gilchrist and Corporation of Sullivan*, 44 U. C. R. 588.

Necessity for Imposing Rate—*Application of Statute.*]—The by-laws for contracting a debt for taking stock in and constructing a road, having been passed by the district of Gore before 12 Vict. c. 81:—Held, that it was not necessary that such by-laws should impose a special rate as required by that Act. *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 82.

Necessity for Imposing — *General Taxes.*]—A by-law authorizing the reeve to issue a debenture, to be paid out of the taxes of the year following, thereby creating a debt:—Held, bad, the requirements of C. S. U. C. c. 54, s. 223, not having been complied with. *Clapp* v. *Township of Thurlow*, 10 C. P. 533.

Necessity for Statement in By-law—*Inclusion in Current Expenses.*]—A by-law for payment of a debt must contain on the face of it the rate authorized to be levied for making up the sum granted. Such by-law is illegal if it direct a gross sum to be raised for the payment of the current general expenses of the county, and the liquidation of the debt due, not stating what debt, or of what amount. Quære, whether 4 & 5 Vict. c. 10, s. 41, applies to by-laws passed under 12 Vict. c. 81, or whether the court must determine on their validity according to other statutes in force, and the common law. *Canada Co.* v. *County of Middlesex*, 10 U. C. R. 93.

School Rate—*Discrimination—Exemption of Non-residents.*]—Where the municipality of a township, intending to act under 13 & 14 Vict. c. 48, for common school purposes, declared a rate upon the resident inhabitants of a school section only:—Held, that under 13 & 14 Vict. c. 48, as well as the Upper Canada Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the taxable property within the section, whether of residents or non-residents. Held, also, that in such case the court has no discretion, but must quash the by-law with costs. Quære, whether in the present case the rate and assessment to

be levied were stated in the by-law with sufficient certainty. *In re DeLaHaye* v. *Township and Gore of Toronto*, 2 C. P. 317.

——— *Purchase of Site—Maximum Rate.*]—The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within the term "school rates," and is excluded from the two cents to which, by s. 357 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), the annual rate permitted to be levied by municipalities is limited. *Foster* v. *Village of Hintonburg*, 28 O. R. 221.

Sinking Fund — *Past Debts.*]—Remarks as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due. *County of Frontenac* v. *City of Kingston*, 30 U. C. R. 584.

See, also, *Haynes* v. *Copeland*, 18 C. P. 150.

——— *Past Debts—Maximum Rate.*]—The limit of two cents in the dollar imposed by the Municipal Act of 1866 as a maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Wilkie* v. *Village of Clinton*, 18 Gr. 557.

Specific Sums—*Necessity for Stating.*]—The by-law in this case provided that any money above the proceeds of the old town hall, required for the erection of the new one, should be levied on the ratable property of the township, but did not fix the amount or rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad. *In re Hawke and Municipality of Wellesley*, 13 U. C. R. 636.

The by-law instead of, as required by s. 340 of the Municipal Act, 1887, directing specific sums to be raised each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefor, leaving the amount of the rate to be determined in each year, directed that during the currency of the debentures a special rate of so much on the dollar, specifying it, over and above all other rates, should be levied and collected in each year:—Held, that this rendered the by-law bad. *Re Peck and Township of Ameliasburg*, 17 O. R. 54.

See Clarke v. *Town of Palmerston*, 6 O. R. 616; *Bogart* v. *Township of King*, 32 O. R. 135.

(d) *Time of Repayment.*

Where by one clause of a by-law to grant a bonus of $30,000 to a railway company, the last instalment of principal and interest due upon certain debentures to be issued under it was made payable on a day named, being ten days beyond twenty years from the day on which the by-law was to come into force, but by the preceding clause the debentures were to be payable in twenty years at furthest from that day, the court refused to quash. *In re Gilchrist and Corporation of Sullivan*, 44 U. C. R. 378.

Section 340 of the Municipal Act, R. S. O. 1887 c. 184, which authorizes municipal councils to pass by-laws for contracting debts, &c., provides, s.-s. 2, that the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years, at furthest, from the day on which such by-law takes effect. A by-law of a municipality to raise by way of loan $3,000 to aid in repairing harbour works, provided that the debentures should be made payable annually, the first payment to be made on the 15th December in the year next succeeding the year in which the "repairs will have been completed:"—Held, that, as the time for repayment was uncertain, the by-law was not in accordance with s. 340, s.-s. 2, and was therefore illegal and should be quashed. *Re Armstrong and Township of Toronto*, 17 O. R. 766.

A by-law to raise a sum of money by way of bonus to aid an industry in a village, after being voted on by the electors, was finally passed on 3rd June, 1889, was promulgated on 20th June, and registered on 14th August following. It stated on its face that it was to come into force on 2nd July, 1889, and provided that the debentures to be issued thereunder should be payable in twenty years from the date of their issue, the 1st October following:—Held, that, as the period of payment exceeded twenty years from the taking effect of the by-law, it was in contravention of s. 340, s.-s. 2, of the Municipal Act, R. S. O. 1887 c. 184, and should be quashed. *Re Cooke and Village of Norwich*, 18 O. R. 72.

Where a by-law creating a debt declared the time required by law within which the principal and interest of the debentures should be payable, but the dates of payment were left blank in the copy of the by-law as published, the court, in the exercise of its discretion, refused to quash the by-law, which was legal on its face. *Re Caldwell and Town of Galt*, 30 O. R. 378.

See In re Cameron and Municipality of East Nissouri, 13 U. C. R. 190, *ante* (c).

(e) *Time of Taking Effect.*

A by-law to contract a loan should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact; but the court refused to quash on this objection, holding that the words "may quash" were permissive, and gave them a discretion. *In re Michie and City of Toronto*, 11 C. P. 379.

The by-law did not name a day when it should take effect, and no notices were given as required by ss. 424 and 425 in case of a by-law for opening or altering a road, but the notices were under s. 231, s.-s. 2, as of a money by-law to be voted on:—Held, that both these objections were fatal. *Re Nichol and Township of Alnwick*, 41 U. C. R. 577.

It is not essential to the validity of a municipal by-law creating a debt, that a day certain for its coming into force should be stated therein when published and submitted to the ratepayers, as s. 384, s.-s. 2, of the Municipal Act, R. S. O. 1897 c. 223, provides that, if no day is named, it shall take effect on the day of the passing thereof. *Re Caldwell and Town of Galt*, 30 O. R. 378.

(f) *Other Cases.*

Amount of Ratable Property.] — It was stated in an affidavit filed in support of a motion to quash a by-law to raise a loan, that the true amount of the ratable property was not $6,434,773, as stated in the by-law, but $7,565,468. The clerk of the council, in answer, positively denied this, stating the true sum to be $6,435,475:—Held, that in the face of the clerk's affidavit the objection could not prevail, and that the difference between the sum in the by-law and that sworn to by him was unimportant. *Re Paffard and County of Lincoln*, 24 U. C. R. 16.

Charge on Land—*Proportionate Assessment—Legality of Debt—Recitals.*] — Under 4 & 5 Vict. c. 10, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied. A by-law under 4 & 5 Vict. c. 10, for raising a rate, stated that the money was required to pay off £1,500 due to a bank, and £500 due by the district to D.:—Held, sufficient, and that it was not necessary to state for what services the money was due; for the court would intend that the debts were legally contracted, and for a legal purpose. *Tylee* v. *County of Waterloo*, 9 U. C. R. 588.

County By-law—*Minor Municipalities—Apportionment—Subsequent By-law.*]—Under 12 Vict. cc. 78, 81, 13 & 14 Vict. cc. 64, 67, 14 & 15 Vict. cc. 109, 110, it is not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure; and, therefore, the same by-law which provides for raising the loan and imposing the rate need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law. *Grierson* v. *County of Ontario*, 9 U. C. R. 623.

Opening of Street—*Plan—Cost—Expropriation.*] — Where a by-law was passed to raise money to pay for the opening of a street, without any settled plan shewing the exact position of the intended street, or of the land to be taken, or of the cost of the expropriation, and without a by-law being passed providing for the expropriation of the lands, the court under the circumstances quashed the by-law with costs. *Re Caldwell and Town of Galt*, 30 O. R. 378.

Previously Existing Debt—*Omission to State.*]—The court, in the exercise of its discretion, refused to set aside a by-law to grant $35,000 to a railway company, the by-law being good on its face, and the court holding it to have been passed in good faith, merely because of the unintentional omission therefrom of the statement of an existing debt of about $2,700, the assessed value of the property in the municipality being about $1,500,000. *In re Lloyd and Corporation of Elderslie*, 44 U. C. R. 235.

——— *Local Improvement Debt—Omission to State—Directory Provision.*] — The provision in R. S. O. 1897 c. 223, s. 685 (2), that it shall be sufficient to state in any by-law for borrowing money on the credit of a municipality, that the amount of the general debt of the municipality as therein set forth is exclusive of the local improvement debts secured by special Acts, rates, or assessments, is merely directory, and the omission to observe it is not fatal to a by-law otherwise valid on its face. *Ward* v. *Town of Welland*, 31 O. R. 303.

Repeal before Payment.]—Where a by-law had been passed by a municipal corporation, creating a debt, and before the debt had been paid it was by a subsequent by-law repealed:—Held, that under 36 Vict. c. 48, s. 254, the repealing by-law was invalid, and must be quashed. *Re Smith and Township of Oakland*, 24 C. P. 295.

School Rate — *Requisites of By-law.*]—By-law passed to raise money for a school house:—Held, bad, for non-compliance with the requisites under 14 & 15 Vict. c. 109, s. 4, of all by-laws creating a debt or contracting a loan. *Re Hart and Municipality of Vespra and Sunnidale*, 16 U. C. R. 32. See, also, *Re McIntyre and Township of Elderslie*, 27 C. P. 58.

Specific Sums for Repayment.]—It is no objection to a by-law creating a debt that the enacting clause omits to settle certain specific sums for the payment of the debt and the interest, where the recital and enacting clause read together make clear what is to be done. *Re Caldwell and Town of Galt*, 30 O. R. 378.

Statutory Recitals—*Omission—Effect.*]—If, for all that appears, a by-law may be legal, it will be upheld; and in this case, where it was not clear upon the face of the by-law, or otherwise shewn, that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions, which would in that case have been essential, was held no objection. *Gibson* v. *Corporation of Huron and Bruce*, 20 U. C. R. 111.

See, also, *post* 3, 6, 9.

3. *Levying Yearly Rates.*

(*See*, also, 2.)

County By-law—*Actual Value.*]—A by-law imposing a rate for county purposes, to be levied on the actual value of taxable property in the county, is not objectionable, though in villages, &c., the taxes are directed to be levied on the annual value, for such direction is intended only to apply to rates imposed for their own purposes. *Grierson* v. *County of Ontario*, 9 U. C. R. 625.

Excessive Rate—*Injunction—Building—Sinking Fund.*]—Where for the purpose of erecting a market house a municipal council would require to levy a rate exceeding the two cents in the dollar allowed to be imposed by s. 225 of the Municipal Act of 1866:—Held, that a ratepayer was entitled to an injunction restraining the erection of the building by the council. The limit of two cents in the dollar demanded by the Municipal Act of 1866, as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Wilkie* v. *Village of Clinton*, 18 Gr. 557.

Ordinary Expenditure—*Building of Hall—Inclusion in Annual Estimate.*]—A by-law for the construction of a new town hall, passed on the 22nd May, 1867, was moved against, on the ground that it authorized expenditure for a purpose not under the head of ordinary expenditure, without having money in hand or making the necessary provision by rate or otherwise to meet the demand. It appeared, however, that the sum required was included in the annual by-law for the year, passed on the 19th August, 1867, upon an estimate previously made, also including it, which the applicant had voted to adopt; that the town hall had been completed, accepted, and paid for, and the land on which it stood conveyed to the corporation. A rule to quash the by-law was discharged with costs. *Re Gibb and Township of Moore*, 27 U. C. R. 150.

A by-law was passed on the 15th June, 1867, providing for the purchase of a site for and the erection of a town hall, but not for meeting the expenses, for which it did not appear that there were surplus moneys on hand. On the 31st August the council passed the annual by-law for ordinary expenditure, and, in addition to the sum required therefor, provided by the same by-law for raising the amount required for the site and building. The site had been conveyed to the corporation and paid for, and the hall completed, and there were funds in the treasurer's hands to pay for it:—Held, that, although the corporation might not have been strictly regular, the by-laws should not now be quashed, and the rule was discharged, but without costs. *Re Grant and Township of Puslinch*, 27 U. C. R. 154.

"Ordinary Expenditure," as Used in the Municipal Acts.]—See *Cross* v. *City of Ottawa*, 23 U. C. R. 288; *Wright* v. *County of Grey*, 12 C. P. 479; *McMaster* v. *Corporation of Newmarket*, 11 C. P. 398; *Corporation of Wentworth* v. *Corporation of Hamilton*, 34 U. C. R. 585.

School Rate—*Apportionment — Trustees — Assessment — Excessive Rate — School Meeting — List of Persons Assessed — Duty of Clerk — Second By-law.*] — A by-law passed by a township authorizing the levy of a rate to realize £100 for school purposes, having been quashed, the municipality then, without a second meeting having been called, passed another by-law (set out in the report) for the same purpose, which was also moved against on several grounds:—Held, on the several objections taken, (1) that the discretion to apportion the sum required rested as much with the council as with the school meeting or trustees. (2) That the rate was not declared on the property assessed in 1852 (the preceding financial year), but only determined by reference to the assessed value of the taxable property in that year. (3) That the rate not being complained of as excessive, its being calculated to realize more than the precise sum of £100 did not render the by-law void. (4) That the meeting was not indispensable. (5) That the duty imposed upon the clerk of the municipality to furnish a list to the secretary of the school trustees of the persons assessed in the school section, was not unreasonable, or inconsistent with the statutes. (6) That the rate was properly assessed upon the whole ratable property of the school section. (7) That the proviso of the by-law sanctioning the receipts pro tanto from those who had paid under the invalid by-law did not render the second by-law void. *In re DeLaHaye and Gore of Toronto*, 3 C. P. 23.

Specific Sum—*Purpose of Rate—Wild Lands.*]—By-laws quashed—(1) As contrary to 4 & 5 Vict. c. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone. (2) As exceeding the authority given to the district councils as s. 48 of that Act. (3) As inconsistent with the requirements of 12 Vict. c. 81, in not specifying the sum required, or the purpose to which it was to be applied. And, semble, that it is necessary under this Act, (s. 41, s.-s. 22,) as it was under 4 & 5 Vict. c. 10, that the sum to be raised should be specified in the by-law, and then a rate authorized for raising it. (4) For taxing certain townships for specified sums, without shewing for what purpose the money was required. *Tylee* v. *County of Waterloo*, 9 U. C. R. 572.

Township By-laws—*Aid of County Rate.*]—A township by-law was quashed as to so much of it as related to the raising a sum of money to defray the demands of the county council on the township, and as an equivalent to the government school grant, &c., it not appearing on its face that it was directed to meet a deficiency, nor even that there was any, if that would have authorized the by-law. Semble, however, that a township council has not power to pass a by-law imposing a rate in aid of any county rate. *Fletcher* v. *Township of Euphrasia*, *White* v. *Municipality of Collingwood*, 13 U. C. R. 129.

See Corporation of Lincoln v. *Corporation of Niagara*, 25 U. C. R. 578.

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4. *Private Interests.*

Closing up Public Way—*Benefit of Church—Agreement.*]—A by-law for closing up a square dedicated to the public and disposing of part thereof to a church, contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not take effect until the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it:—Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class. *In re Peck and Town of Galt*, 46 U. C. R. 211.

Closing up Road—*Benefit of Councillor —Agreement.*]—A road, originally a trespass road, running from Ottawa to Pembroke, through more than one county, following the course of the Ottawa river, had been used for upwards of forty years, and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D. In October, 1882, D., who was then, and had been for the three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and procured E. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public health—D. agreeing to spend $100 on the side line, on which it was voted to have the bulk of the statute labour performed—but on their discovering that it was against

the public interest, they asked D. to release them from their pledge, which he refused to do. He, however, pretended that he was not anxious for the passage of the by-law, and petitioned the council representing that his land might be injuriously affected thereby, and asked to be heard by counsel; but, as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which D. said would be defeated. E. accordingly voted for it, as also did M., and another councillor, D. being absent, and the reeve not voting, and in consequence the by-law was carried. D.'s counsel, who was also counsel for the township, attended the council meeting and spoke in favour of the by-law. It appeared that D. had guaranteed the council against all expense in the matter. It also appeared that the applicant had some buildings on his lot adjoining the road, which were used by farmers and others, the approach to which would be cut off by the closing of the road:—Held, under the circumstances, that the by-law must be quashed with costs. *Hewison* v. *Township of Pembroke*, 6 O. R. 170.

Drainage By-law—*Private Grievance.*]—A by-law was passed by the council of the township of Mersea providing for the drainage of lands in Mersea and Romney. Semble, upon the evidence, that the corporation intended by the by-law to remedy a private grievance, and upon that ground the by-law was bad. *Re Township of Romney and Township of Mersea*, 11 A. R. 712.

Opening up Lane—*Benefit of Individual—Registration of Plan—Dedication.*]—In 1856 the owner of lot 5 registered a plan shewing a subdivision of it into six lots with a lane running through the centre, which was intended for the use of the occupants of the lots adjoining it. He afterwards sold some of the lots, but they were all reconveyed to him. The lots were always fenced in as one property till 1876, when he sold all the lots and a lane to a bank, by whom a building was erected, the fences remaining as they had been until removed when the building was in progress, and being afterwards replaced by a new closed fence. In 1880, at the instance of one M., the owner of the adjoining lot 4, who had recently, at his own expense, laid out a lane across his lot, in continuation of the lane on lot 5, and conveyed it to the corporation, a by-law was passed by the council opening the lane on lot 5. It was shewn that M. was the only person interested in having the lane opened. An order was made quashing the by-law on the ground that it had not been passed in the interest of the public, but simply to subserve the interests of an individual:—Held, affirming the order, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it does not constitute a dedication of the lands thereon to the public, and the council had, therefore, exceeded their powers in passing the by-law in question. Held, also, that the by-law, being passed in the interests of a particular individual, was properly quashed. *In re Morton and City of St. Thomas*, 6 A. R. 323.

——— *Benefit of Individuals—Injunction.*]—P. owned a small piece of land at the south end of a lane or street called Johnson street, twenty-six feet wide, in the city of Toronto, leading from Adelaide street to King street, extending nearly to the line between these streets, and continued to King street by an irregular private footway. M. and T. owned the adjoining lots on King street, extending back to the centre line, and P. had refused to sell his piece of land to them. They then, with other owners, purporting to be owners of adjacent land, petitioned the city council under the local improvement clauses of the Municipal Act, reciting that they "were desirous of securing communication between King and Adelaide streets for vehicles by means of the above street, and certain lanes to the south thereof," and asking that the said street might be opened up of the full width of twenty-six feet from Adelaide street to the centre line of the block between King and Adelaide streets at the expense of the property benefited. The sub-committee of the council to whom this petition was referred, and before whom the plaintiff had appeared to oppose it, said that nothing further should be done without notifying him, but about eight months afterwards, without any further notice to him, they passed a by-law opening up the lane to the centre of the block as prayed, but making no provision for extending it to King street. It was shewn that M. and T., through whose land such extension would pass, had refused to give a right of way for vehicles, as expressed in the petition, and had agreed to pay all costs of opening the lane:—Held, that the by-law had been passed improperly, not in the public interest, but in that of M. and T.; and the corporation, on the application of P., was enjoined from proceeding under it. *Pells* v. *Boswell*, 8 O. R. 680.

Opening up Road—*Benefit of Individuals—Evidence.*]—The municipal council of the township of Sydney passed by-law No. 279, to open a road east and west across four farm lots in the first concession of the township. A travelled road was already open from Belleville westward to the east end of the road to be opened under the by-law, at which point a side road ran north and south through the township. After crossing three lots, the proposed new road would intersect another north and south side road, and, crossing this side road, it would extend westward across one more lot as a cul-de-sac. The applicant contended that this by-law was passed, not in the public interest, but to serve the private convenience of two landowners of the locality. It was, in answer, sworn by the members of the township council that they intended to complete the road as soon as possible across five more lots to the westward, till it would reach the next north and south side road through the township. This explanation was accepted by the court as answering any apparent presumption that the by-law was not passed in the public interest, as in this case none of the other circumstances were present which in other cases have led to the belief that private interests only were being considered in passing the by-law. *Re Ostrom and Township of Sydney*, 15 O. R. 43. But see *S. C.*, 15 A. R. 372.

See Ontario Natural Gas Co. v. *Smart*, 19 O. R. 591.

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5. *Quashing.*

(a) *Generally.*

Construction—*Difficulty of.*]—The court will only quash a by-law for illegality, not for

want of clearness of expression or a difficulty in construing or applying its provisions. *In re Smith and City of Toronto*, 10 C. P. 225.

Defect on Face—*Discretion.*]—The statute does not make it strictly imperative upon the court to quash defective by-laws, even where the defect appears on their face. *Hodgson* v. *County of York*, 13 U. C. R. 268; *In re Michie and City of Toronto*, 11 C. P. 379.

Discretion.]—The quashing of a by-law is not imperative, but discretionary. *Re Milloy and Township of Onondaga*, 6 O. R. 573.

Remarks as to how far the court is bound to quash by-laws, even when moved against properly and found bad. *In re Simmons and Township of Chatham*, 21 U. C. R. 75.

See In re Huson and Township of South Norwich, 19 A. R. 343, 21 S. C. R. 669; *Re Jones and City of London*, 30 O. R. 583 (*post* XVII.)

Doubtful Objection — *Convictions.*]—There being room for doubt as to the objection taken to a by-law, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash the by-law upon the objection. *In re Fennell and Town of Guelph*, 24 U. C. R. 238.

Extraneous Illegality.]—Quære, as to the power of the court to quash for objections not appearing on the face of the by-law. *Standley* v. *Municipality of Vespra and Sunnidale*, 17 U. C. R. 69.

On an application to quash a by-law incorporating a portion of township territory as a village:—Held, that the power of the court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shewn is entirely extraneous. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

——— *Council Meeting.*]—The court refused a rule nisi to quash a by-law on the ground that it was passed at a special meeting called by a member of the council, and not by the town reeve or other authorized officer. *In re Hill and Township of Walsingham*, 9 U. C. R. 310.

The court refused to quash a by-law on the ground that a quorum of the council was not present at its passing, as required by 12 Vict. c. 81, s. 168. *Sutherland* v. *Township of East Nissouri*, 10 U. C. R. 626.

——— *Discretion.*]—The court is not bound under the Act to quash a by-law, unless illegal on its face. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under its common law jurisdiction, to say whether the by-law shall stand or not. *Grierson* v. *County of Ontario*, 9 U. C. R. 623.

——— *Discretion — Non-compliance with Statute—Error in Computation.*]—Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially where it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections. Grierson v. Municipality of Ontario, 9 U. C. R. 623, approved, as to the extent to which the court is bound to give way to objections not apparent on the face of a by-law. Where the county council, in equalizing the assessments under s. 70 of the Assessment Act, C. S. U. C. c. 55, had intentionally capitalized the personal property in towns and villages at ten per cent. instead of six, contrary to the express directions in s. 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection. *Re Secord and County of Lincoln*, 24 U. C. R. 142.

——— *Inquiry on Affidavits.*]—Inquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

——— *Irregularity in Passing.*]—Semble, that it is doubtful whether the court, under 12 Vict. c. 81, s. 155, would quash a by-law for an irregularity in the manner of its passing, though they might hold it void if relied upon in support of something done under it; and that if they should quash for such an irregularity, it would rather be under the principles of the common law. *In re Hill and Township of Walsingham*, 9 U. C. R. 310.

——— *Statute—Non-compliance with.*]—The court has no authority to quash a by-law, on application, except for something illegal appearing upon the face of it, or except, perhaps, where it is shewn to have been passed under circumstances which, by the express terms of the statute, make it illegal. *Sutherland* v. *Township of East Nissouri*, 10 U. C. R. 626.

The council of a county, in passing by-laws to levy money for county purposes in 1877, apportioned the assessment of the different municipalities, not upon the basis of the value according to the rolls as finally revised and equalized for 1876, but according to the rolls of 1877:—Held, that such by-laws were illegal, being contrary to s. 74 of the Assessment Act 32 Vict. c. 36 (O.), and must be quashed. Remarks as to the propriety of quashing by-laws when clearly illegal, though the illegality may not be apparent upon their face. *In re Revell and County of Oxford*, 42 U. C. R. 337.

——— *Statute — Publication.*]—Held, that where a drainage by-law had been published without the notice of the holding of a court of revision for the purpose of hearing complaints against the assessment at some day "not earlier than twenty nor later than thirty days from the day on which the by-law was first published," as required by the Municipal Act, R. S. O. 1877 c. 174, s. 529, s.-s. 8, it was bad, and must be quashed. Non-publication of the notice required by s. 531 is not fatal to the validity of a by-law. *In re Ferguson and Township of Howick*, 44 U. C. R. 41.

——— *Statute—Want of Notice.*]—Under ss. 155 and 192 of 12 Vict. c. 81, the court has the power of quashing a by-law, not only for some illegality appearing upon the face of it,

but also where it has been made in such a manner as it is enacted by s. 192 it shall not be lawful for any municipal corporations to make it, e. g., without proper notice in the case of a by-law to change a road. *In re Lafferty and Municipal Council of Wentworth and Halton*, 8 U. C. R. 232.

Inconvenience.]—Refusal to quash by-law where inconvenience was likely to ensue. *Begg* v. *Township of Southwold*, 6 O. R. 184.

Market Regulations.]—Market regulations made by the council may be quashed, as orders or resolutions under s. 198 of the Municipal Act of 1866. *Snell* v. *Town of Belleville*, 30 U. C. R. 81.

Repealed By-law.]—The court will not quash a by-law repealed after it has been moved against. *In re Coleman*, 9 C. P. 146. See *In re Coyne and Municipal Council of Dunwich*, 9 U. C. R. 309.

The court discharged, with costs, a rule for quashing a by-law of a district council, which had been absolutely repealed before 12 Vict. c. 81. *In re McGill and County of Peterborough*, 9 U. C. R. 562.

Resolutions.]—The court had no jurisdiction under 12 Vict. c. 81, over resolutions of municipal corporations, to set them aside summarily in the same manner as by-laws. *In re Cæsar and Township of Cartwright*, 12 U. C. R. 341. But see R. S. O. 1897 c. 223, s. 378.

Spent By-law.]—Where the operation of a by-law or resolution is spent, it will not be quashed. *Re Daniels and Township of Burford*, 10 U. C. R. 478. See *Re Terry and Township of Haldimand*, 15 U. C. R. 380.

Want of Seal.]—The court refused to quash a by-law for want of a seal, as without the seal it could not be treated as a by-law. *In re Croft and Township of Brooke*, 17 U. C. R. 269; *In re Mottashed and County of Prince Edward*, 30 U. C. R. 74.

(b) *Applications to Quash.*

Affidavit—*Addition of Deponent.*] — The affidavit of the applicant stated him to be a ratepayer, and a resident householder:—Held, not necessary to give any further addition of deponent. *Baker* v. *Municipal Council of Paris*, 10 U. C. R. 621.

——— *Intituling—Jurat — Commissioner.*]—An affidavit in support of a motion to quash a by-law is sufficient, though not intituled in any court, if it appear by the jurat to have been sworn before a commissioner of the court of Queen's bench. *Fraser* v. *Counties of Stormont, Dundas, and Glengarry*, 10 U. C. R. 286; *Re Kinghorn and City of Kingston*, 26 U. C. R. 130.

But not unless this appears. *In re Hirons and Municipal Council of Amherstburg*, 11 U. C. R. 458.

——— *Interest of Applicant.*]—The applicant should state that he is a resident in the township, or has an interest in the provisions of the by-law. The commencement of an affidavit, "I, J. B., of the township of B.," is not sufficient. *Babcock* v. *Township of Bedford*, 8 C. P. 527.

Held, that, on the affidavits set out in the report of this case, it sufficiently appeared that the person applying to quash a by-law of the city of Kingston was a resident of the city. *Re Kinghorn and City of Kingston*, 26 U. C. R. 130.

Affidavits — *Supporting Rule — Time for Filing.*]—On the return of the rule to quash a by-law, counsel for the corporation desired to support it, and tendered affidavits for that purpose:—Held, that after the issue of the rule such affidavits could not be received from any party to strengthen the applicant's case. *In re Gilchrist and Corporation of Sullivan*, 44 U. C. R. 588.

Appeal — *Quebec Law.*]—See SUPREME COURT OF CANADA.

Applicant—*Estoppel.*]—Held, that the applicant in this case was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage. *In re Peck and Town of Galt*, 46 U. C. R. 211.

——— *Estoppel—Acting under By-law.*]—The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law or had any part in the taking of the census objected to:—Held, that the applicants were not estopped from moving to quash the by-law. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

——— *Estoppel — Acting under By-law—Costs.*]—The applicants for an order quashing the by-law had, before moving, appeared on a notice given by them to name an arbitrator, before a Judge, who raised the objection to the by-law upon which they afterwards moved, whereupon they gave notice of abandonment:—Held, that they were not estopped, but that they should have no costs. *Re Davis and City of Toronto*, 21 O. R. 243.

——— *Estoppel—Voting—Costs.*] — Held, that the applicant had not by voting against the by-law disentitled himself to apply to the court to quash it, or to the costs of his motion. *Re Armstrong and Township of Toronto*, 17 O. R. 766.

——— *Interest—Freeholder.*]—Where on application to quash a township by-law it was objected that the applicant was a non-resident:—Held, that as a freeholder of the township he had an interest in all its by-laws, sufficient to enable him to move. *In re DeLa Haye* v. *Township and Gore of Toronto*, 2 C. P. 317.

——— *Interest—Owner—Assessment Roll.*]—An owner of real estate which has been assessed is entitled to move against a by-law, though his name does not appear on the roll. *Re Boulton and Town of Peterborough*, 16 U. C. R. 380.

——— *Locus Standi—Objection.*]—See *In re Funston and Township of Tilbury East*, 11 O. R. 74.

——— *Substitution—Notice.*] — Held, that a municipal drainage by-law, whether for the construction of an original work or the improvement of an old one, and whether the proceedings are taken under s. 583, 585, or 586 of the Municipal Act, R. S. O. 1887 c. 184, is subject to the provisions of ss. 571 and 572 requiring notice in writing to be given within ten days by any one intending to apply to have the by-law quashed, of his intention to so apply. And where such notice was given by a solicitor and signed by him as solicitor for two named persons, stating that the application should be made on behalf of them and "others," and an application to quash was afterwards made to the court by persons other than those named:—Held, that the application was not made to the court by any person who had given the notice required by ss. 571 and 572; that another ratepayer could not take advantage of the notice by adopting it as his own; and, the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs. *Re McCormick and Township of Howard*, 18 O. R. 260.

Costs—*Applicant not Entitled to—Conduct—Delay.*]—See *Re Morrell and City of Toronto*, 22 C. P. 323.

——— *Discretion — Rule Nisi.*] — Costs were not asked for in the rule, though they were at bar:—Held, that, as costs are in the discretion of the court under the Judicature Act, this was no objection. *In re Peck and Town of Galt*, 46 U. C. R. 211.

——— *Interference of Legislature—Validity of By-law.*]—A rule nisi having been obtained to quash a by-law, the legislature by a statute declared the by-law valid, and the rule was afterwards argued on the various objections taken, in order to decide who should pay the costs of the application. The municipality were ordered to pay them, on the ground that the debt of the town was not truly stated in the by-law. Semble, that in future in such cases the rule should not be argued; and it would be well to direct in the statute that the petitioners to confirm the by-law should pay all proper costs incurred in any application to quash it. *In re Holden and Town of Belleville*, 39 U. C. R. 88.

——— *Mistake in Rule — Misleading Respondents—Set-off.*]—In the copy of the rule nisi first served to quash a by-law establishing a road, the applicant's name was by mistake written James instead of Joseph Thompson. The road also passed through the land of one James Thompson, with whom an arbitration had taken place, and the corporation supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The court, in making it absolute with costs, directed the costs incurred by the corporation in consequence of the error to be deducted. *In re Thompson and Township of Bedford*, 21 U. C. R. 545.

——— *Partly Defective By-law.*]—Where a by-law was defective only in part, and the rule asked to quash the whole, costs were refused. *Re Patterson and County of Grey*, 18 U. C. R. 189.

——— *Repeal of By-law.*] — When the council, on being served with a rule nisi, repealed the by-law complained of, they were still obliged to pay the costs of the application. *In re Coyne and Municipal Council of Dunwich*, 9 U. C. R. 309; *In re Coleman*, 9 C. P. 146.

——— *Respondents not Entitled to—Conduct—Indiscretion.*]—See *In re Workman and Town of Lindsay*, 7 O. R. 425.

——— *Statute—Retroactivity.*]—14 & 15 Vict. c. 109, s. 35, giving costs on applications to quash by-laws, has not a retrospective operation; and the court therefore refused to make defendants pay the costs of an application on which a by-law had been quashed before that Act. *Brown* v. *County of York*, 9 U. C. R. 453.

——— *Unopposed Rule.*]—The corporation not having appeared to the rule to quash a by-law, which was held valid, it was discharged without costs. *Re Kelly and City of Toronto*, 23 U. C. R. 425.

——— *Unsealed By-law — Discharge of Rule.*] — On application to quash a by-law passed on 21st December, 1869, under the Temperance Act of 1864, and submitted to the electors on 2nd February, 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870:—Held, that being no by-law it could not be quashed; but the rule to quash it was discharged without costs. *In re Mottashed and County of Prince Edward*, 30 U. C. R. 74.

Delay in Moving.] — See *Re McAlpine and Corporation of Euphemia*, 45 U. C. R. 199.

Forum.]—A Judge in practice court has no authority to quash a by-law of the corporation. *In re Sams and City of Toronto*, 9 U. C. R. 181.

The divisional court ought not to entertain applications to quash by-laws, which should be made to a single Judge. *Landry* v. *City of Ottawa*, 11 P. R. 442.

See In re Funston and Township of Tilbury East, 11 O. R. 74.

Notice of Motion or Rule Nisi—*Proceeding by.*] — See *Hewison v. Township of Pembroke*, 6 O. R. 170; *Re Peck and Township of Ameliasburg*, 12 P. R. 664; *Re Colenutt and Township of Colchester North*, 13 P. R. 253.

Notice of Motion—*Incorrectness—Misleading.*]—Applicants for an order quashing a by-law, having followed in their application the notice given by the council under s. 572 to intending applicants, should not be prejudiced because that notice was incorrect; the council must be held to their own notice. *In re Robertson and Township of North Easthope*, 15 O. R. 423.

——— *Time—Shortening.*] — There is no power under con. rule 485 to shorten the four days' notice required by R. S. O. 1887 c. 184,

s. 332, as modified by con. rule 526, to be given of a motion to quash a municipal by-law. *Re Sweetman and Township of Gosfield*, 13 P. R. 293.

——— *Validity of—Applicant.*]—See *Re McCormick and Township of Howard*, 18 O. R. 260.

Proof of By-laws—*Copy—Certificate—Signature—Seal.*]—Held, that a by-law was sufficiently authenticated for the purpose of a motion against it, by an affidavit of the relator that the copy produced was received by T. from the clerk of the council, and delivered by him to the deponent. *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. R. 492.

Where the seal of the corporation was not mentioned in the clerk's certificate, but was on the same page with the certificate, just above it, and opposite to the signatures of the reeve and clerk—the by-law was held sufficiently proved. *Baker* v. *Municipal Council of Paris*, 10 U. C. R. 621.

On the application to quash, a paper was put in purporting to be a copy of the by-law, authenticated by the seal of the corporation, and certified by the township clerk to be a true copy of a by-law passed on, &c., (corresponding in date with that moved against); also the applicant's affidavit that the annexed copy of the by-law, describing it accurately by title and date, was a true copy of the by-law received by him from the township clerk. On shewing cause against the rule, it appeared, and was objected, that the by-law was not annexed to the affidavit, and there was no appearance of any paper having been attached thereto:—Held, that the objection could not prevail. *Re Bessey and Municipal Council of Grantham*, 11 U. C. R. 156.

The court will discharge a rule moved on a copy of the by-law verified in a manner different from that pointed out by the statute, unless the reasons for such variance are satisfactorily explained. *Buchart* v. *United Townships of Brant and Carrick*, 6 C. P. 130.

On application for a mandamus two copies of by-laws put in not being proved under s. 190 of the Municipal Act, C. S. U. C. c. 54, could not be read, but the same by-laws were set out at length in affidavits filed, the deponent swearing that a by-law was passed by the town council "in words following," which was held sufficient for the purposes of this application. Section 190 provides for the proof of by-laws in general cases; s. 195 for the special case of an application to quash. *In re Sandwich School Trustees and Corporation of Sandwich*, 23 U. C. R. 639.

The certificate was under the corporate seal of the township, but there was no seal to the copy of by-law, nor anything but the certificate to shew that it had been sealed:—Held, sufficient. *In re Scott and Township of Harvey*, 26 U. C. R. 32.

The copy of the by-law filed was under the seal of the municipality and sworn to have been received from the clerk, and opposite the seal was the signature, "M. Flanagan, City Clerk," with the words "a true copy," above:—Held, sufficiently verified. *Re Kinghorn and City of Kingston*, 26 U. C. R. 130.

Held, that the by-law, upon the facts stated in this case, was sufficiently certified under the seal of the corporation. *In re Miles and Township of Richmond*, 28 U. C. R. 333.

On an application to quash a by-law closing up a road, the applicant's affidavit stated that in compliance with his request therefor he received from the township clerk what purported to be a copy of the by-law with the following certificate thereon, "Verified a true copy," which was signed by the clerk and under the corporate seal, but the by-law was not stated to have been signed by the reeve or other proper officer, or to be under the corporate seal:—Held, that this was sufficient proof of the by-law, under s. 322 of the Municipal Act, it not being essential to shew that the by-law was signed by the reeve, &c., under the corporate seal; and that if the corporation intended to rely on this objection the onus was upon them to substantiate it. *In re Vashon and Township of East Hawkesbury*, 30 C. P. 194.

See In re Scott and Township of Harvey, 26 U. C. R. 32.

Recognizance.]—A condition precedent to the entertaining of a motion to quash a municipal by-law is the entering into, allowance, and filing of a recognizance, in the manner provided by s. 332 of the Municipal Act, 55 Vict. c. 42 (O.); and a bond, even though allowed by a county court Judge, cannot be effectively substituted for a recognizance. *Re Burton and Village of Arthur*, 16 P. R. 190.

Rehearing—*Default.*]—Leave was granted, notwithstanding the lapse of two terms, to rehear a rule made absolute setting aside a by-law, on no cause being shewn. *Re Chamberlain and Counties of Stormont, Dundas, and Glengarry*, 45 U. C. R. 26.

Rule Nisi—*Intituling.*]—The rule to quash a by-law need not be intituled "The Queen v. The Council," but may be "In the matter of A. and the council." *In re Conger and Peterborough Municipal Council*, 8 U. C. R. 349.

The rule nisi was intituled "In the matter of ——— appellant, and ——— respondent:"—Held, no objection. *Re McLean and Town of St. Catharines*, 27 U. C. R. 603.

——— *Return of.*]—See *In re Sams and City of Toronto*, 9 U. C. R. 181; *Perry* v. *Town of Whitby*, 13 U. C. R. 564.

[By R. S. O. 1897 c. 223, s. 378, the court may quash after at least seven days' service of the notice of motion.]

——— *To Whom Directed—Railway Company.*]—See *Re Billings and Township of Gloucester*, 10 U. C. R. 273.

——— *To Whom Directed — Severance of United Townships.*]—A by-law was passed by the united townships of Smith and Harvey to levy a certain sum on lands in H., to defray the expenses of a resurvey of that township. The union having been dissolved:—Held, that an application to quash was properly made by a rule calling on the corporation of H., upon a certified copy obtained from the clerk of S., the senior township. *In re Scott and Township of Harvey*, 26 U. C. R. 32.

See In re Holden and Town of Belleville, 39 U. C. R. 88.

Supporting By-law — *Individual Electors.*]—Where the corporation did not support the by-law, but the warden wrote to the representative of a class of persons interested in doing so, to take such measures as they might think proper, counsel instructed by them was heard to shew cause. Semble, that any of the electors might be heard to support such a by-law if the council should fail to appear. *Re Mace and County of Frontenac*, 42 U. C. R. 70.

——— *Third Persons—Rule Nisi.*]—The corporation did not support their by-law to take stock in a railway company, and the court refused to hear counsel on behalf of the railway company, as the rule was not directed to them. *In re Billings and Township of Gloucester*, 10 U. C. R. 273.

But see *Re McKinnon and Village of Caledonia*, 33 U. C. R. 502.

Time for Moving.]—[By the Municipal Act of 1873, s. 241 (R. S. O. 1897 c. 223, s. 379), no application to quash any by-law shall be entertained unless made within one year from its passing, except in case of a by-law requiring the assent of the electors, which has not been obtained. By s. 242, where a by-law imposing a rate has been promulgated in the manner specified, the application must be made before the lapse of the next term after such promulgation. By s. 380 of the above revised statute, three months are substituted for the next term after promulgation.]

The court refused to quash a by-law altering school sections, nearly fourteen months after its passing, it being on its face legal and having been acted upon. *Hill* v. *Municipality of Tecumseh*, 6 C. P. 297. Followed in *Cotter* v. *Municipality of Darlington*, 11 C. P. 265. See, also, *Walton* v. *Township of Monaghan*, 13 C. P. 401.

By-law regarding the appointment of a harbour master. Application after two years:—Held, too late. *Bogart* v. *Town of Belleville*, 6 C. P. 425.

A spent by-law or resolution will not be quashed. *Daniels* v. *Township of Burford*, 10 U. C. R. 478; *Terry* v. *Township of Haldimand*, 15 U. C. R. 380.

An application to quash a by-law establishing a road, after two years had elapsed:—Held, too late. *Standley* v. *Municipality of Vespra and Sunnidale*, 17 U. C. R. 69.

Semble, that such application should be prompt, especially in respect of matters not apparent in the by-law; and if two terms are allowed to pass, redress might well be refused on account of laches. *Scarlett* v. *Corporation of York*, 14 C. P. 161.

A rule nisi to quash a by-law to stop up a road was refused, where the relator was aware of the intention to pass it, and allowed two years and three months to elapse before moving. *In re Drope and Township of Hamilton*, 25 U. C. R. 363.

The court refused a rule nisi to quash a by-law passed eighteen months before, for licensing and regulating houses of public entertainment, the objection being that it was not, before the final passing, approved by the electors. *In re Shirley and Town of Windsor*, 23 U. C. R. 569.

A by-law passed in February, 1875, under 37 Vict. c. 32, specifying the fees to be paid to the municipality for every certificate for a shop or tavern license, was not moved against until 14th March, 1876, and the licenses granted under it would expire on 30th April, 1876:—Held, that on the ground of delay the court would have refused to quash. *In re Richardson and Toronto Commissioners of Police*, 38 U. C. R. 621.

A resolution granting a petition for separation from a school section passed on 7th December, 1867; motion to quash it in M. T. 1868:—Held, too late. *Re Leddingham and Township of Bentinck*, 29 U. C. R. 206.

The objections urged to a by-law to divide a school section being technical:—Held, that they should have been taken promptly, without allowing a term to elapse. *Re Taylor and Township of West Williams*, 30 U. C. R. 337.

Where parties complaining of the illegality of a municipal by-law or resolution, permit a term of the courts of common law to pass without moving to quash it, the court of chancery will refuse an injunction to restrain the municipality from enforcing the by-law. *Carroll* v. *Perth*, 10 Gr. 64.

Where a bill was filed to restrain proceedings of a township council, on a resolution, which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the common law courts to pass before moving for an injunction:—Held, following Carroll v. Perth, 10 Gr. 64, that he came too late, the proper course in such a case being to move at law to quash the resolution or by-law. The Consolidated Assessment Act of Upper Canada as affecting the question considered. *Grier* v. *St. Vincent*, 12 Gr. 330.

A by-law dissolving a union of school sections was passed on the 7th April, and the application to quash was not made until December following:—Semble, that the delay, unexplained, would have been an answer to the application, which may be too late, although within the year fixed by the Act as the extreme limit. *In re McAlpine and Township of Euphemia*, 45 U. C. R. 199.

Held, that a by-law passed to open a road, and also an award thereunder, not being void on its face, nor ultra vires, and the plaintiff not having attacked it for more than a year after its passing, but having on the contrary appointed an arbitrator to assess compensation thereunder, had now become absolute and incontrovertible. Held, also, although such a by-law may not become effectual in law till registration thereof, nevertheless non-registration does not prolong the time allowed by R. S. O. 1877 c. 174, s. 323, within which it may be quashed, and such time does not count from the registration. *Harding* v. *Township of Cardiff*, 2 O. R. 329.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered. *Re Milloy and Township of Onondaga*, 6 O. R. 573.

Semble, that, although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

Held, that a by-law to raise a sum of money by way of bonus to aid an industry was not one by which a rate was imposed under s. 334, R. S. O. 1887 c. 184, requiring an application to quash within three months from promulgation, but was a by-law for contracting a debt under ss. 351 and 352, and that an application to quash within three months of its registration was in time. *Re Cooke and Village of Norwich*, 18 O. R. 72.

The meaning of s. 572 of R. S. O. 1887 c. 184 is that in case the application to quash is not made within six weeks prescribed by s. 571, the by-law shall be valid. Service of a notice of motion to quash a drainage by-law, under R. S. O. 1887 c. 184, ss. 571 and 572, and filing the affidavits in support of such motion within six weeks next ensuing the final passing of the by-law, is a sufficient making of the application, although such motion is not made returnable until after the expiry of that period. *Re Sweetman and Township of Gosfield*, 13 P. R. 283.

A summary application to quash a municipal by-law registered under s. 396 of the Municipal Act, R. S. O. 1897 c. 223, is "made" within the meaning of s. 399, when notice of the motion is served, the affidavits in support of it having been already filed; it is not necessary that the motion should be brought on for hearing within the time prescribed by the section. Re Sweetman and Township of Gosfield, 13 P. R. 283, approved. *Re Shaw and City of St. Thomas*, 18 P. R. 454.

(c) *Necessity for Quashing before Action.*

Semble, that a party is not necessarily restrained by s. 155 of 12 Vict. c. 81, from bringing an action till the by-law, under which the defendant assumed to act and justifies, has been quashed, where the by-law, if legal, would not warrant the act done. *Dennis* v. *Hughes*, 8 U. C. R. 444.

See, also, *Black* v. *White*, 18 U. C. R. 362.

Under 22 Vict. c. 99, s. 201, before an action can be maintained for anything done under a by-law, a month's notice of action must be given, and a month allowed to elapse after the quashing or repealing of such by-law. The action must also be against the corporation itself, not against any person acting under the by-law. *Carmichael* v. *Slater*, 9 C. P. 423.

Action for illegality depriving plaintiff of his tavern license. Plea, that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendants had no power to pass such a by-law:—Held, that no action could be brought for anything done under the by-law till one month after it has been quashed; and the plea therefore was good. *Smith* v. *City of Toronto*, 11 C. P. 200.

22 Vict. c. 99, s. 201, which prevents actions being brought for anything done under a by-law until it has been quashed, applies only to suits for the recovery of damages, not to replevin. *Wilson* v. *County of Middlesex*, 18 U. C. R. 348.

Where the rate on the face of the by-law does not appear to be retrospective, though retrospective in fact, replevin will not lie against the officers who enforce it; it must be quashed first, and then the remedy is against the corporation. *Haynes* v. *Copeland*, 18 C. P. 150.

See Municipality of East Nissouri v. *Horseman*, 16 U. C. R. 576; *County of Lincoln* v. *Town of Niagara*, 25 U. C. R. 578; *Challoner* v. *Township of Lobo*, 32 O. R. 247.

(d) *Other Cases.*

Acting on By-law.]—Upon a motion to quash a by-law authorizing the expropriation of an easement for the construction of a sewer, it appeared that the sewer was part of a system, but the upper end thereof, and not an outlet for any part already constructed:—Held, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed. *Re Davis and City of Toronto*, 21 O. R. 243.

Award under By-law—*Attack on—Inconsistency—Estoppel.*]—Where the plaintiff filed his bill seeking to quash a certain municipal by-law, passed to open a road, and also an award made thereunder:—Held, that there was nothing inconsistent in this, and the plaintiff was not bound to elect between attacking the by-law and attacking the award. Where, however, under such circumstances, the plaintiff, being called on by the court to elect, had elected to attack the award, and consented to a decree setting it aside, and ordering a new arbitration, which arbitration he had prosecuted until another award was made, which he had not moved against within the time allowed therefor:—Held, that he could not afterwards complain of having been forced to elect at the hearing. *Harding* v. *Township of Cardiff*, 2 O. R. 329.

Drainage — *Policy of Legislature—Interference.*]—In drainage matters the policy of the legislature is to leave the management largely in the hands of the localities, and the court should refrain from interference, unless there had been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights. *Re Stephens and Township of Moore*, 25 O. R. 600.

Irregularity—*Court not Bound to Quash.*]—14 & 15 Vict. c. 51, s. 18, directs that a copy of the by-law (to take stock in a railway company) shall be inserted at least four times in each newspaper printed within the limits of the municipality; but the court refused to quash a by-law under which a large sum had been borrowed, because it had been published three times only in one of two papers. A full copy of the by-law was not published, but at the time of passing a clause was added appointing a day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the

debentures were made payable in twenty years from their dates:—Held, that whether 14 & 15 Vict. c. 51, s. 18, s.-s. 3, or 16 Vict. c. 22, s. 2, s.-s. 4, were to govern, this was an irregularity for which the court was not bound to quash. *Boulton* v. *Town of Peterborough*, 16 U. C. R. 380.

Presumption in Favour of By-law—*Necessary Statements.*]—It does not appear necessary that a township by-law should set forth the estimates on which it is founded, and the court will intend that proper estimates have been made in the absence of evidence that they are wanting; nor that the by-law should state that the rates are calculated at so much in the pound on the actual value; and in the absence of anything to the contrary the court will intend that the council has followed the directions of the statute. *Fletcher* v. *Township of Euphrasia*, *White* v. *Municipality of Collingwood*, 13 U. C. R. 129.

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6. *Registration.*

Debt—*Debentures—Action.*]—Held, that any objections to the by-law in this case were cured by its registration under 44 Vict. c. 24, s. 28 (O.), no action or suit to set it aside having been instituted within three months, and that the statute applied although the debentures had not been issued. *Bickford* v. *Chatham*, 14 A. R. 32, 16 S. C. R. 235.

——— *Debentures—Time.*]—Section 351 of R. S. O. 1887 c. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year, to be registered within a fortnight from the final passing thereof, is merely directory. *Re Farlinger and Village of Morrisburg*, 16 O. R. 722.

——— *Payment by Instalments — Inequality.*]—A by-law, passed under formalities required by law for contracting a debt for a purpose within the jurisdiction of the council under the Municipal Act, R. S. O. 1887 c. 184, s. 340 et seq., provided for payment by instalments, but in settling the amount payable in each year the total existing debenture debt of the municipality was estimated, and, although the aggregate annual amount payable under all the by-laws was approximately equal to that payable in other years, there was a very large variance in the amount payable in the different years under the present by-law. The by-law was duly registered under s. 351, and notice published under s. 354, and no application to quash was made within three months after such registration:—Held, that the by-laws and debentures issued thereunder were valid and binding on the municipality. *Village of Georgetown* v. *Stimson*, 23 O. R. 33.

Opening Road—*Plans*—"*Instrument*"—*Notice.*]—A municipal by-law, passed in 1888, providing for the opening of a road, was received at the proper registry office and the fee for registry was paid, but the by-law was never entered or registered, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 c. 114, s. 84, s.s. 2:—Held, that the by-law was an "instrument" within the meaning of that section, and as defined by s. 2, but was not an "instrument capable of registration" within the meaning of s. 96 of R. S. O. 1897 c. 136, and the registrar was right in refusing to register it; and, never having been registered, it never become "effectual in law" for any purpose; and a subsequent by-law providing for the costs of opening the road was, therefore, invalid. The requirement of the Municipal and Registry Acts, R. S. O. 1897 c. 223, s. 633, and c. 136, s. 86, that such a by-law shall be registered before it "becomes effectual in law," is not merely for the purpose of notice under the registry laws. *Re Henderson and City of Toronto*, 29 O. R. 669.

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7. *Repealing.*

Acting on By-law—*Railway Company—Change of Position.*]—A township corporation having power, by 33 Vict. c. 33, s. 18, (O.), "An Act to incorporate the Canada Air Line Railway Company," to exempt the property of the company from taxation, passed a by-law providing that all the real property of the company in the township should be rated at $12 per acre (the then average rate) for fifty years. This by-law was subsequently repealed, but it did not appear that upon the faith of it the applicants had in fact altered their position, or done anything which they otherwise would not have done, and the railway was being constructed through the township before it was passed:—Held, on an application to quash the repealing by-law, that the court under the circumstances could not interfere. *In re Great Western R. W. Co. and Township of North Cayuga*, 23 C. P. 28.

——— *Subsequent Revival.*]—A district council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived:—Held, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first. *Canada Co.* v. *County of Oxford*, 9 U. C. R. 567.

Separation of Municipalities—*Effect of Repeal—Submission to Electors.*]—Held, that the municipal council of a village, incorporated in, and separated from, a township, in which before and at the time of said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, by a by-law not submitted for the approval of the electors of the village corporation, repeal the prohibiting by-law so far as it affected the village municipality, but that the by-law must be passed upon by the electors under 32 Vict. c. 32, s. 10 (O.) *In re Cunningham and Village of Almonte*, 21 C. P. 459.

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8. *Seal.*

Municipality estopped from denying the validity of a by-law, which through inadvertence was not sealed or signed, for purchasing a road, which they dealt with as their own property, and subsequently passed a by-law divesting themselves of the road. *Regina* v. *County of Perth*, 6 O. R. 195.

No seal in this case was affixed to the by-law, but an impression of the seal was made thereon:—Held, sufficient. *Re Croome and City of Brantford*, 6 O. R. 188.

When the seal of a municipal corporation is wrongfully detained by the clerk of the council, a by-law removing him from office may be sealed with another seal pro hâc vice. *Village of London West* v. *Bartram*, 26 O. R. 161.

See Canada Atlantic R. W. Co. v. *City of Ottawa*, 12 A. R. 234; *In re Croft and Township of Brooke*, 17 U. C. R. 269; *In re Mottashed and County of Prince Edward*, 30 U. C. R. 74.

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9. *Submission to Electors.*

Approval by Electors—*Rejection by Council—Publication—Final Passing—Signing and Sealing—Taking Effect.*]—Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law may be confirmed or rejected irrespective of a favourable vote. A by-law of the defendant corporation, providing for the delivery of debentures to a railway company represented by the plaintiffs, as a bonus to aid them in constructing their railway, having been adopted by a vote of the ratepayers on the 16th October, 1877, was read a second and third time and passed by the council on the 20th October, but was neither signed nor sealed, because a month had not elapsed from its first publication, the notice required by 36 Vict. c. 48, s. 231, s.s. 3, to be appended to the copy of the by-law as published, having stated that the by-law would be taken into consideration after a month. On the 5th November, 1873, a motion made in the council to read the by-law a second and third time and pass it, was lost. On the 7th April, 1874, after the election of a new council, it was finally passed, signed, and sealed:—Semble, that the acts of signing and sealing are formalities which s. 248 makes essential to a by-law for contracting a debt, and those acts should be done at the meeting at which the by-law has been passed, or at all events during the tenure of office of the member of the council who presides. The direction in s. 236 that a by-law carried by a majority of voters shall, within six weeks thereafter, be passed by the council which submitted the same, refers to the council of the year in which the by-law was submitted, and not merely to the council of the same municipality; it is not intended by s. 236 that the passing by the council should be a mere formality, such as would be satisfied by the irregular passing on 20th October, 1873. (But see R. S. O. 1897 c. 223, s. 327.) Semble, that the by-law was not legally passed, and did not acquire a legal existence until 7th April, 1874. It was subject to the provisions of 36 Vict. c. 48, s. 248 (O.), and was invalid under that section, because it did not name a day in the financial year in which it was passed on which it was to take effect. *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 12 A. R. 234, 12 S. C. R. 365.

Held, following Canada Atlantic R. W. Co. v. City of Ottawa, 12 A. R. 234, 12 S. C. R. 365, that the by-law was bad for non-compliance with s. 330 of the Municipal Act, R. S. O. 1877 c. 174, the section corresponding with s. 248 of 36 Vict. c. 48. Semble, that the provisions of sec. 248 of the Municipal Act of 1873 (36 Vict. c. 48) do not apply to by-laws for granting bonuses to railways, and the judgment in 12 S. C. R. 365 does not so decide. *Canada Atlantic R. W. Co.* v. *Township of Cambridge*, 14 A. R. 299. *S. C.*, 15 S. C. R. 219.

Bribery—*Notice as to—Failure to Post.*]—In giving notice of submitting a by-law granting aid to a railway company for the approval of the ratepayers, the officers whose duty it was to give such notice had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act:—Held, no ground for quashing the by-law. *West Gwillimbury* v. *Simcoe*, 20 Gr. 211.

Bribery of Electors.]—Refusal of council to finally pass a by-law, the votes of the electors for passing the same having been procured by bribery. *In re Langdon and Arthur Junction R. W. Co. and Township of Arthur*, 45 U. C. R. 47.

Casting Vote—*Nullity—Defect—Promulgation.*]—In 1880, before the passing of 46 Vict. c. 18 (O.), a municipal council, with the view of granting a bonus to a railway company, caused to be submitted to the vote of the ratepayers a by-law to raise money for that purpose. At the voting thereon the votes for and against it were equal, and the clerk of the municipality, who also acted as returning officer, orally gave a casting vote in favour of the by-law:—Held, reversing the judgment in 11 O. R. 392, that s. 152 of the Municipal Act, R. S. O. 1877 c. 174, is not applicable to the case of voting on a by-law, and therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. 1877 c. 174, s. 317, as such a defect could not be cured by promulgation of the by-law. *Canada Atlantic R. W. Co.* v. *Township of Cambridge*, 14 A. R. 299, 15 S. C. R. 219.

Day for Voting—*Publication.*]—Semble, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to s. 293, s.s. 1, of the Municipal Act R. S. O. 1887 c. 184. *Re Armstrong and Township of Toronto*, 17 O. R. 766.

Disfranchisement of Class of Voters.]—A local option by-law, carried by a vote of seventy-one to fifteen, was quashed where it appeared that the returning officer had refused to accept the votes of tenant voters, seventy-four of whom were on the list and had the right to vote, though it was not shewn that more than a very small number of these voters had made any attempt to vote, or had expressed any intention of voting, or had heard of the returning officer's refusal. The election doctrine that irregularities should not be held fatal unless they actually affect the result, does not apply where a class is disfranchised in a by-law contest. In re Croft and Peterborough, 17 A. R. 21, applied. Woodward v. Sarsons, L. R. 10 C. P. 733, considered. *In re Pounder and Village of Winchester*, 19 A. R. 684.

Future Liability—*Necessity for Submission—Deficiency—Appropriation.*]—Held, that a by-law creating a future indefinite and contingent liability, if valid at all, ought to have been submitted to the vote of the ratepayers. The municipality derived income from certain sources independent of taxes, but

this income with the taxes levied left a deficiency, which had been met by borrowing money, which was still unpaid, and no appropriation had been made for the payment of $5,000:—Held, that this did not validate the by-law without submission to the people. *In re Carpenter and Township of Barton*, 15 O. R. 55.

Injunction—*Illegality of By-law.*]—The court has jurisdiction to restrain a municipal corporation from obtaining the vote of the ratepayers in favour of a by-law, which if passed would be illegal without legislative sanction, and which sanction such vote was intended to aid in obtaining in an informal and unauthorized manner. Where, therefore, the corporation of a town were about to submit to the vote of the ratepayers a by-law authorizing the harbour commissioners of that town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the court restrained the corporation from proceeding to take such vote. *Helm* v. *Town of Port Hope*, 22 Gr. 273.

———*Legality of By-law.*]—Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the municipality from submitting the by-law to the ratepayers, as they might refuse to approve of the by-law. The previous case distinguished. *Vickers* v. *Municipality of Shuniah*, 22 Gr. 410.

——— *Right of Council to Pass By-law—Absence of Legislative Prohibition.*]—The defendants' council passed through two readings by-laws for the limitation of the number of tavern and shop licences, under R. S. O. 1877 c. 181, ss. 17 and 24. Before the third reading the council passed a resolution authorizing the submission to the electors, contemporaneously with the general municipal elections, of the question whether such limitation was desirable or not, reserving, however, to the council the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of $300 out of municipal funds in advertising the vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other ratepayers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an interim injunction was moved for to restrain the defendants from submitting the question to the electors, and from printing ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions:—Held, that, in so far as the application depended upon the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial. 2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction, should not be restrained, there being no express legislative prohibition, and the council having acted bonâ fide, unless some good reason were shewn for the conclusion that the result would be injurious or unjust to the corporation or some of its members, which was not shewn in this case. Semble, that if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law to the vote of the electors would have been illegal and ultra vires, and would have been restrained. Helm v. Town of Port Hope, 22 Gr. 273, distinguished. *Davies* v. *City of Toronto*, 15 O. R. 33.

Licensing Billiard Tables—*Necessity for Submitting By-law.*]—A by-law fixed the sum to be paid for a license for billiard tables in a town at $300, and enacted that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold:—Held, that such a by-law was properly submitted to the electors under 37 Vict. c. 32, s. 23 (O.), which was not confined to tavern licenses. *In re Scully and Town of Owen Sound*, 37 U. C. R. 289.

Meeting of Electors—*Majority—Improper Proceeding—Quashing By-law.*]—By-laws for prohibiting the sale of spirituous liquors, &c., which, under 16 Vict. c. 184, s. 4, are required to be submitted to the electors, must be adopted and approved of by a majority of all the qualified municipal electors of the municipality, not merely by a majority of those who may attend at the meeting called to consider such by-law. [See on this point, as to by-laws to aid railways, Jenkins v. County of Elgin, 21 C. P. 325; Erwin v. Township of Townsend, ib. 330.] Where the by-law which provided for calling such meeting assumed that the approval of the majority of the voters present would be sufficient:—Held, that it was nevertheless proper to move against the then proposed by-law after it had been passed on such approval, and not against that which laid down the improper course of proceeding. *In re McIvroy and Municipality of Sarnia*, 12 U. C. R. 99.

Necessity for Submission—*Contract—Expenditure—Resolutions.*]—A municipal corporation has no power, without a by-law assented to by the electors, to enter into contracts involving expenditure not payable out of the ordinary rates of the current financial year, and resolutions for the execution of contracts for the building of a bridge, payment for which was to be made partly in the current financial year and partly in the next, were quashed, as being a contravention of ss. 344, 357, and 359 of the Municipal Act. *In re Olver and City of Ottawa*, 20 A. R. 529.

——— *Money By-law—Majority of Landowners.*]—Under the provisions of art. 4529 of the Revised Statutes of Quebec money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls. *Town of Chicoutimi* v. *Price*, 29 S. C. R. 135.

Publication—*Insufficiency—Refusal to Quash.*]—Held, that in every case in which

it is necessary to submit a by-law to the electors for assent, the requirements of s. 196 of 29 & 30 Vict. c. 51, as regards notice, must be followed, and that s. 228 only applies where county councils can raise money by by-law without submitting the same to the electors. In this case the publication of the by-law was objected to as insufficient under s.-s. 2 of s. 196, the first publication being on the 8th, and the last on 29th October; but it was subsequently inserted on the 19th and 26th November, and also on the 3rd December, and every effort appeared to have been made to give the by-law publication. The court, in its discretion, refused to quash the by-law on this ground. *In re Gibson and County of Bruce*, 20 C. P. 398.

——— *Omission—Effect.*]—A by-law to change the county town of Lincoln, under 25 Vict. c. 30, was not to be valid unless assented to as in the case of a by-law to take stock in a railway company. It was published in all the local papers except one, for the proper period prescribed by C. S. U. C. c. 66:—Held, that the omission rendered it void. *Simpson v. County of Lincoln*, 13 C. P. 48.

——— *Omission to Post By-law and Notice—Irregularities—Result of Voting—Saving Clause.*]—Upon a motion to quash a municipal by-law which required the assent of the electors and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941:—Held, that the unexplained omission of the council to put up a copy of the by-law with a notice stating, inter alia, the hour, day, and places for taking the votes, in four or more of the most public places in the municipality, as required by s. 293 of the Municipal Act, 55 Vict. c. 42 (O.), or at any place therein, was fatal to the by-law; the evidence disclosing many other irregularities; and the onus which was upon the council to shew, under s. 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied. *Re Pickett and Township of Wainfleet*, 28 O. R. 464.

——— *Polling Places—Quashing—Discretion.*]—The Ontario Municipal Act, R. S. O. 1887 c. 184, requires, by s. 293, that before the final passing of a by-law requiring the assent of the ratepayers, a copy thereof shall be published in a public newspaper published either within the municipality or in the county town or in an adjoining local municipality. Notice of intention to submit a local option by-law of the township of South Norwich to the votes of the electors was given in proper form and for the requisite number of times, in a newspaper published in the village of Norwich, the bounds of which did not actually touch, though they came close to, those of the township in question. This paper was the nearest paper; it had a large circulation in the township; and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the township in question. One of the polling places was described merely as being "at or near" a certain village. It was shewn that this village was a very small one, and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shewn that the poll was held in a house close to the house in which the poll had been held in the next preceding municipal election, that house itself having been moved away. Another polling place was specifically described by place, lot, and concession, but there was an error in the number of the concession. It was shewn that all the proceedings had been taken in good faith, and that the poll was very large, and it did not appear that any one had been misled by any of these informalities:—Held, therefore, by the court of appeal, that the court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question. Held, by the supreme court of Canada, affirming that decision, that, as the village of Norwich was geographically within the adjoining municipality, the statute was sufficiently complied with by the said publication. *In re Huson and Township of South Norwich*, 19 A. R. 343, 21 S. C. R. 669.

——— *Proposed By-law—Actual By-law—Validity.*]—A by-law to raise a loan, which required the assent of the electors, was, on the 11th February, signed by the warden, and sealed with the corporate seal, but it recited that the assent of the ratepayers to it was necessary, and contained full provisions for taking their votes. It was published, with a notice, stating it to be a proposed by-law to be taken into consideration on the 15th March, and naming the times and places for voting on it. On the 15th March the council passed another by-law, reciting verbatim that of the 11th February as a by-law adopted on that day, and that it had been voted upon, and approved of, and enacting that the said by-law be finally passed, and be a by-law of the corporation:—Held, that, notwithstanding the signing and sealing, the by-law, under these circumstances, was not illegal as passed on the 11th February, before the assent of the electors, but that it should be treated as finally passed on the 15th March. Held, also, that the by-law of the 15th March did not impose a rate, but had the effect only of finally passing the previous by-law, and, therefore, did not require the assent of the electors. The introduction of the word "said" in the first by-law as recited in the second, which was not in the original, was treated as immaterial. *Re Paffard and County of Lincoln*, 24 U. C. R. 16.

Representation as to By-law — *Statute Conferring Powers on Corporation — Subsequent Refusal to Exercise—Permissive Power—Unnecessary Plebiscite.*]—Under 52 Vict c. 73, s. 14 (O.), the corporation of the city of Toronto "may by by-law intrust the management and control of the erection and completion of the proposed new combined court house and city hall, . . . to a commission consisting of three members who shall be appointed by by-law." The council previous to the submission to the vote of the electors of a by-law for the raising of money to erect such court house, published a pamphlet which contained under the heading, "Some of the reasons why the buildings should be erected," this clause, "In order that the buildings may be erected in accordance with the plans and specifications, . . . legislation has been obtained, authorizing the appointment of three commissioners, to whom will be intrusted the supervision of the work." After the by-law was approved of and passed, the council decided not to appoint commissioners. In

an action by a ratepayer to enjoin the corporation from proceeding with the work, pending the appointment of such commissioners, or for a mandamus ordering the council to make such appointment:—Held, that, as there was no person or class of persons for whose benefit the power under 52 Vict. c. 73, s. 1 (O.), was conferred, or upon whom a right was conferred to have it exercised, such power was not obligatory but only permissive:—Held, also, that, as the representation contained in the pamphlet formed no part of the by-law, and was not a representation of an existing fact, but a mere statement of intention, and formed no part of a binding bargain between the corporation and the ratepayers, there was nothing to bind the former to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course, and that the action should be dismissed; but, as the conduct of the corporation was so discreditable in the matter, their costs were refused. Remarks upon the practice of taking a plebiscite upon a subject wholly within the discretion of the corporation. *Darby* v. *City of Toronto*, 17 O. R. 554.

Sale of Liquor.] — See INTOXICATING LIQUORS.

Scrutiny of Votes—*Costs.*] — Under s. 372 of the Municipal Act, R. S. O. 1897 c. 223, a county court Judge, on a scrutiny of the ballot papers cast on the voting for a bonus by-law, cannot award costs against the corporation if it be successful in upholding the by-law. *Township of Aldborough* v. *Schmeltz*, 32 O. R. 64.

Separate By-laws—*Whether Necessary.*] —Quære, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Re Croome and City of Brantford*, 6 O. R. 188.

Voters' Lists—*Omission of Classes of Voters—Irregularity—Saving Clause.*]—Farmers' sons and income voters should be included in the voters' lists prepared for the taking of the vote upon a municipal by-law prohibiting the sale of intoxicating liquors in a township under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, and their omission is an irregularity. In re Croft and Town of Peterborough, 17 A. R. 21, and In re Pounder and Village of Winchester, 19 A. R. 684, followed. Where all such votes had been omitted from the list of the clerk of the township, under the honest supposition that they should not have been placed thereon, but the number of votes so left off was less than the majority by which the by-law was carried, and there was nothing to shew that the result of the error had in any way affected the votes that were cast, or that persons who would otherwise have voted had abstained from doing so on account of the error, or that there was any other good ground for believing that the result might probably have been different had the list been properly prepared, and it appearing that the election had been conducted in accordance with the principles laid down in the Municipal Act, in that the directions of the Act had not been intentionally violated, the court refused to quash the by-law. Woodward v. Sarsons, L. R. 10 C. P. 733, followed. *Re Young and Township of Binbrook*, 31 O. R. 108.

——— *Qualification.*]—The list with which 29 & 30 Vict. c. 51, s. 196, s.-s. 7, requires the clerk of the municipality to furnish the returning officer, is a list containing the names of all freeholders and tenants of realty assessed on the roll to an amount sufficient to entitle them to vote at any municipal election. *Erwin* v. *Township of Townsend*, 21 C. P. 330.

See Brunker v. *Township of Mariposa*, 22 O. R. 120; *Adamson* v. *Township of Etobicoke*, 22 O. R. 341.

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10. *Uncertainty.*

Day—*Ambiguity.*] — A by-law against preaching in public parks is not void for uncertainty as to the day of the week intended by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

Description of Land—*Ambiguity.*]—In describing lands for assessment, "the north-east part," even with the addition of the acreage, is an ambiguous description; and quære as to the effect upon the validity of a by-law. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

——— *Clerical Error—Publication—Semi-monthly Newspaper.*] — A municipal by-law establishing a public highway is not void for uncertainty when the boundaries of the land so declared are described in the by-law with sufficient precision to enable them to be traced upon the ground, and if so properly described, it is not necessary when private ground has been taken to distinguish it as such. The fact that one of two parallel courses in a description has by obvious clerical error been incorrectly given in the published notice is not a valid objection to such a by-law. Where there is no paper published in the township weekly or oftener, it is not obligatory to publish the required statutory notice of the by-law in a paper issued therein semi-monthly. *Re Chambers and Township of Burford*, 25 O. R. 276.

Early Closing By-law — *Excepted Times.*]—A by-law providing for the closing of shops for the sale of watches and jewellery at a certain time every day, "excepting . . the days during which the Central Canada Exhibition Association is being held, . . ." such days being fixed by by-law of the association pursuant to statute, is not invalid for uncertainty. *Regina* v. *McMillan*, 28 O. R. 172.

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11. *Other Cases.*

Compliance with By-law — *Permission of Engineer—Resolution of Council.*]—Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection on terms which were complied with and the connection made, was a sufficient compliance with said by-law. *Lewis* v. *Alexander*, 24 S. C. R. 551.

Construction — *Public Morals — By-law against Swearing in Street or Public Place—Private Office in Custom House.*] — A city

by-law enacted that no person should make use of any profane swearing, obscene, blasphemous, or grossly insulting language, or be guilty of any other immorality or indecency in any street or public place:—Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street or public place ejusdem generis with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

Discriminating By-laws.]—See *Jonas* v. *Gilbert*, 5 S. C. R. 356; *Regina* v. *Pipe*, 1 O. R. 43; *Re People's Milling Co. and Council of Meaford*, 10 O. R. 405; *In re Clark and Township of Howard*, 14 O. R. 508, 16 A. R. 72; *Regina* v. *Flory*, 17 O. R. 715.

Licensing Powers—*Transfer to Commissioners—Effect on Former By-laws.*]—Since 31 Vict. c. 30, s. 33 (O.), as amended by 32 Vict. c. 43, s. 22, transferring the power of regulating and licensing livery stables, &c., in cities, to the board of commissioners of police, and 36 Vict. c. 48, s. 335 (R. S. O. 1877 c. 174 s. 415), making it their duty to exercise their power, and repealing all Acts inconsistent therewith, by-laws previously passed by corporations for the purpose have been rendered inoperative, and a conviction under such a by-law was therefore quashed. *Regina* v. *Hiscox*, 44 U. C. R. 214.

Necessity for By-law—*Court of Revision—Petition—Remission of Taxes.*]—The court of revision of a municipality is obliged to receive and decide upon a petition for remission of taxes, presented under s. 67 of 55 Vict. c. 48 (O.), notwithstanding that the municipality has not passed any by-law on the subject. *Re Norris*, 28 O. R. 636.

Notice of Intention to Pass—*Date of Council Meeting.*]—See *Re Campbell and Village of Southampton*, 18 C. L. T. Occ. N. 119, *post* WAY.

Offences against By-laws—*Summons against Company—Service.*]—Section 705 of the Municipal Act, R. S. O. 1897 c. 223, as to summary prosecution before a justice of the peace for offences against municipal by-laws, applies to incorporated companies as well as to individuals, as do also ss. 562, 853, and 858 of the criminal code, 1892, as to service of summonses. *In re Regina* v. *Toronto R. W. Co.*, 30 O. R. 214.

Petition for By-law—*Qualifications of Petitioners—"Freeholder."*]—By the term "freeholder," as used in R. S. O. 1887 c. 184, s. 9, which enables a county council to pass a by-law constituting a village corporation, upon the petition of a certain number of freeholders, is meant a person actually seised of an estate of freehold, legal or equitable; and it does not include persons in possession of lands under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions. *In re Flatt and Counties of Prescott and Russell*, 18 A. R. 1.

Production of By-laws—*Examination of Servant of Corporation.*]—A clerk in the office of the treasurer of a municipal corporation, not being the custodian of the by-laws of the corporation, is not compellable to produce any of them upon his cross-examination on an affidavit made by him on behalf of the corporation for use on a motion to which the corporation is a party. *Wilson* v. *Fleming*, 19 P. R. 203.

Publication.]—Two of the days of publication of a by-law were Christmas and New Year:—Held, that the fact of publication on the days named did not render the publication invalid; publication not being a judicial act so as to prevent publication on those days. *Brunker* v. *Township of Mariposa*, 22 O. R. 120.

——— See *In re Huson and Township of South Norwich*, 19 A. R. 343, 21 S. C. R. 669; *Village of Georgetown* v. *Stimson*, 23 O. R. 33; *Re Chambers and Township of Burford*, 25 O. R. 276.

Resolutions of Council.]—See *In re Oliver and City of Ottawa*, 20 A. R. 529.

Street Railway—*Limits of Municipality—Validating Act.*]—See *Dwyer* v. *Town of Port Arthur*, 19 A. R. 555, 22 S. C. R. 241.

Summary Conviction—*Show or Exhibition.*]—See *Regina* v. *Whitaker*, 24 O. R. 437.

Validating Act—*Erroneous Recital.*]—The corporation of the town of Port Arthur passed a by-law intituled "a by-law to raise the sum of $75,000 for street railway purposes and to authorize the issue of debentures therefor," which recited, inter alia, that it was necessary to raise said sum for the purpose of building, &c., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the legislature of Ontario in respect to the said by-law, which enacted that the same "is hereby confirmed and declared to be valid, legal, and binding on the town . . . and for all purposes, &c., relating to or affecting the said by-law, and any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with:"—Held, reversing the decision in 19 A. R. 555, that the said Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law. Held, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer* v. *Town of Port Arthur*, 22 S. C. R. 241.

Vehicles—*Bicycles.*]—See *Regina* v. *Justin*, 24 O. R. 327.

Void By-law—*Declaration—Action.*]—See *Alexander* v. *Township of Howard*, 14 O. R. 22.

Water Rates—*Discount—Public Buildings.*]—See *Attorney-General* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514.

See, also, cases under IV., VI., IX., XII., XVI., XXIII.

And see SCHOOLS, COLLEGES, AND UNIVERSITIES.

IX. CONTRACTS.

1. *Absence of Seal or of By-law Authorizing.*

Hiring—*Accountant—Acceptance of Services—Resolution.*]—The financial affairs of a municipal corporation being in disorder, a commissioner was appointed by the government to investigate them, and the plaintiffs, professional accountants, were employed by the council to examine and arrange the accounts. Resolutions were passed, not under seal, recognizing that the work was being done by the plaintiffs, who reported to, and were in communication with, the council. Their report, as the Judge found at the trial, was before the commissioner, and in a by-law one of the plaintiffs was referred to as "having rewritten the books:"—Held, that the plaintiffs could recover, though there was no by-law directing the work to be done, or appointing the plaintiffs to do it. Silsby v. Village of Dunnville, 8 A. R. 524, and Young v. Corporation of Leamington, 8 App. Cas. 577, distinguished. *Robins* v. *Brockton*, 7 O. R. 481.

——— *Clerk.*]—Semble, that a municipal corporation may be liable on a parol contract to hire a clerk or servant to render services in their ordinary business. *Raines* v. *Credit Harbour Co.*, 1 U. C. R. 174. Remarked on in *Quin* v. *School Trustees*, 7 U. C. R. 130.

——— *Engineer—Committee of Council.*]—A committee of the corporation was appointed in June, 1860, with power, among other things, to treat with and recommend to the council an engineer to make the requisite surveys, &c., for supplying the city with water, and making application to the government for a site for the reservoir. The chairman of this committee employed the plaintiff to make plans which the commissioner of public works required to see, and one of the aldermen being in Quebec wrote to the plaintiff to come down and assist in pressing their application for a site, which he did, the chairman having also told him to go. The report of their proceedings there was adopted by the council:—Held, that the plaintiff was entitled to recover for his work, and the journey to Quebec, though there was no contract under seal, and no by-law relating to the matters out of which his claim arose. *Perry v. City of Ottawa*, 23 U. C. R. 391.

——— *Weigh-master — Salary.*] — The plaintiff had been appointed many years ago, by the corporation of Toronto, weigh-master and clerk of the fish market. He had been voted each year a sum for his services during the then current year. The municipal year began on the 23rd January. For 1847 the plaintiff had been voted £90 for his salary. On the 30th June, 1848, the corporation having determined to farm out the plaintiff's office, he was dismissed without notice, and without any allowance for his services between January and June of 1848. The plaintiff brought assumpsit to recover a year's salary at the same rate as the previous year. It was objected, among other things, that there was no contract under the corporate seal:—Held, that assumpsit would well lie; and that though the plaintiff, holding his office during pleasure by the Act of incorporation, could not recover the whole year's salary for 1848, still he was entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847; and that no previous demand upon the corporation to vote an allowance need be proved. *Dempsey* v. *City of Toronto*, 6 U. C. R. 1.

Lease of Tolls—*Estoppel.*]—A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to defendants the tolls authorized by law to be received upon a certain turnpike road, for one year; that the defendants covenanted to pay a certain rent therefor; and that by virtue of the said demise the defendants entered and were possessed for the term so to them granted. Breach, non-payment of the rent:—Held, on demurrer, that the defendants were estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise. Held, also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized in writing, was bad. *Counties of Frontenac, Lennox, and Addington* v. *Chestnut*, 9 U. C. R. 365.

Maintenance of Prisoners — *Intermunicipal Contract.*]—Declaration by a county against a city corporation for compensation for the care and maintenance by the plaintiffs in the county gaol of prisoners, under s. 403 and following sections of the Municipal Act of 1866, alleging an agreement made on the 6th June, 1867, by which, after deducting the amount paid from the administration of justice fund, the balance of the expenses was to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870 inclusive, amounted to $5,429; and though defendants had paid part of it and their half of the other expenses, as agreed on, yet they had not paid the residue, &c.:—Held, that the agreement was one which the defendants might enter into without deed. *County of Wentworth* v. *City of Hamilton*, 34 U. C. R. 585.

Mining—*Necessity for By-law—Resolution of Council.*]—A by-law of a village corporation authorized the raising by way of loan of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debentures therefor:—Held, having regard to s. 282 of the Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and that this by-law did not authorize it. Held, also, that a resolution of the council, though entered in the minute book and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law, because it was not signed as required by s. 288. *Wigle* v. *Village of Kingsville*, 28 O. R. 378.

Purchase of Fire Engine—*Acceptance—Urgent Requirement.*] — The defendant agreed, subject to certain tests and approval, to purchase from the plaintiffs a steam fire engine, which it appeared it was desirable the

municipality should possess; but on submitting a by-law for that purpose to the ratepayers for approval, the same was rejected, although an informal by-law had been previously approved of by them. Meanwhile the engine had been received by the defendants, and by them subjected to the necessary tests, which being satisfactory, they, by a minute in council, agreed to accept the engine, and the same was placed in their engine house, subject to the customs duties thereon. A few days later, on ascertaining the result of the voting, the defendants communicated the same to the plaintiffs, rescinded the resolution, and requested them to remove the engine, which the plaintiffs declined to do, and sued for the price of the engine:—Held, affirming the judgment in 31 C. P. 301, that the plaintiffs were not entitled to recover; the contract for the purchase of the engine not having been under seal, and there having been no formal acceptance of it under seal; and the purchase thereof not being a matter of such minor importance or daily occurrence as should be binding on the corporation without the formality of a seal. Quære, whether the defendants would necessarily be liable upon a contract not under seal even where the benefit of it had been actually enjoyed, unless in cases where the thing ordered was actually and urgently required, or "for work which if the corporation had not ordered, they would not have done their duty." Pim v. County of Ontario, 9 C. P. 304, remarked upon. *Silsby* v. *Village of Dunnville*, 8 A. R. 524.

——— *Executory Contract.*]—Section 282 of the Municipal Act, R. S. O. 1887 c. 184, enacts that the powers of municipal councils shall be exercised by by-law when not otherwise authorized or provided for. Section 480 of the Act authorizes the council to purchase fire apparatus, &c., but says nothing about passing a by-law for the purpose. The plaintiffs sued upon an alleged contract for the sale by them to the defendants, the corporation of a town, of a fire engine and hose. The alleged contract was signed by the mayor of the town and by the clerk of the council, and the seal of the corporation was attached. No by-law was, however, passed authorizing the purchase. The engine was sent by the plaintiffs to the defendants, but was not accepted by them:—Held, that the want of a by-law was fatal, and that the instrument under the seal of the corporation was invalid. Judgment in 20 O. R. 411 affirmed. *Waterous Engine Works Co.* v. *Town of Palmerston*, 19 A. R. 47. Affirmed by the supreme court of Canada. Bernardin v. Municipality of North Dufferin, 19 S. C. R. 581, distinguished. *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 S. C. R. 556.

Purchase of Hose—*Conditional Acceptance—Committee of Council.*]—The corporation of a town appointed a committee, consisting of the reeve and two others, to purchase 1,500 feet of hose for the use of the waterworks. They called for tenders, and the two plaintiffs, of whom the reeve was one, submitted a sample of hose, on which the other two members of the committee gave the plaintiffs the order. The hose was tested when it arrived, and was the same as the sample, but it was useless for the purpose required:—Held, that the corporation, on the evidence, more fully set out in the case, had not accepted the hose absolutely, but conditionally only, to keep it if they found it to answer; that they were not liable for it as being bound by the conduct of the committee, for want of an agreement under the corporate seal; and that such contract, being executed, might also be avoided because one of the plaintiffs was a member of the committee. *Brown* v. *Town of Lindsay*, 35 U. C. R. 509.

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

Work — *Acceptance.*] — An action may be sustained against a corporation for work and labour done for and accepted by them, without being supported by a contract under the seal of the company. *Pim* v. *County of Ontario*, 9 C. P. 304; *S. C., ib.* 302.

——— *Acceptance—Urgent Requirement.*]—A municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of a large amount. Robins v. Brockton, 7 O. R. 481, referred to. *Lawrence* v. *Village of Lucknow*, 13 O. R. 421.

——— *Drainage — Extra Work—Necessity for.*]—A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor, under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles, so far as laid, to be taken up and relaid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by the contract. By amendments to the Municipal Acts, councils, in the case of drainage works, are authorized to make an assessment upon the property of those benefited when the means provided are not sufficient; and any damages recovered in proceedings respecting such works are to be charged against the lands benefited. It was proved that the work done was absolutely necessary, for without it the drain would have been useless. No formal resolution of the council was passed authorizing this work to be done, nor was there any contract therefor under the corporate seal. In an action against defendants to recover the value of such work:—Held, by a divisional court, 15 O. R. 506, that the defendants were liable therefor. An appeal to the court of appeal was allowed with costs, on the ground that the work in question was work that the plaintiff was bound to perform under the contract itself. Quære,

whether the work in question was in any event "necessary" in such a sense as to impose liability for payment therefor upon a municipal corporation without an express contract. The decision of the court below upon this point, doubted. *Green* v. *Township of Orford*, 16 A. R. 4.

——— *Dredging Harbour—Committee of Council.*]—Defendants wished to dredge their harbour, and the plaintiff had a dredge, then in the state of New York, which, after negotiations with the chairman of the committee on harbour and town property, he offered to lend to the corporation on certain terms, one of which was that the corporation should pay the cost of its transport to Belleville. The committee reported and recommended this offer to the council, and it was adopted, and the chairman then told the plaintiff to bring the dredge to Belleville, which he did, at a cost of $373. The committee afterwards decided to let out the dredging by contract to another person:—Held, that the corporation were liable to the plaintiff for the cost of bringing the dredge, although there was no contract under seal. *Brown* v. *Town of Belleville*, 30 U. C. R. 373.

——— *Executed Contract.*]—A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. In s. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

——— *Executed Contract—Drainage.*]—See *Canadian Pacific R. W. Co.* v. *Township of Chatham*, 25 O. R. 465, 22 A. R. 330, 25 S. C. R. 608.

——— *Making Road—Resolution of Council.*]—The plaintiff sued for work done upon a road in the township of Russell. In June, 1851, a resolution of the municipality was passed, that the road surveyor should be associated with J. S., one of the councillors for Russell, to receive tenders and approve of contracts for opening the road from the boundary line of Cambridge and Russell to Louck's mill in Russell. The plaintiff's tender was accepted in pursuance of the resolution of June, 1851, and the work was performed, examined, and approved of by the surveyor and S., the councillor named in that resolution:—Held, that a contract under seal was unnecessary. *Fetterly* v. *Township of Russell*, 14 U. C. R. 433.

——— *Making Sidewalks—Resolution of Council—Value of Work.*]—Defendants having called for tenders for making plank sidewalks in December, 1854, the plaintiff sent in an offer, which the then council passed a resolution to accept; and several of the members pressed the plaintiff to proceed. He went on, but in January the new council refused to sanction the contract, and he then desisted, and sued the corporation:—Held, that he could recover the value of the work, but not the damages sustained from not being allowed to finish the job. *Bartlett* v. *Township of Amherstburg*, 14 U. C. R. 152.

See Cross v. *City of Ottawa*, 23 U. C. R. 288, *post* 2.

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2. *Beyond Ordinary Expenditure.*

Borrowing Money—*Ultra Vires—Repair of Bridges.*]—Defendants, through their treasurer, borrowed from plaintiff certain moneys, giving him two promissory notes therefor, one under seal, the other not. No by-law was passed for the purpose, but the money was borrowed on the authority of a resolution of the council, which was not under seal, and was expended in the repair of certain bridges belonging to defendants. The jury found that the money was borrowed, received, and used for ordinary expenditure, and that the repair of bridges was ordinary expenditure:—Held, that the plaintiff was entitled to recover. *Armstrong* v. *Township of West Garafraxa*, 44 U. C. R. 515.

Bridge — *Construction of, dehors Municipality.*]—Declaration against the corporation of the town of Peterborough for 1860, for work and materials, and for goods and money supplied "to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough." Pleas, (1) that the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed. (2) That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorised by any by-law, nor any rate provided therefor. (3) That the bridge was not on the bounds of the said town of Peterborough:—Held, on demurrer, that the first and second pleas shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not within the town, though that was not negatived by the plea. *Scott* v. *Town of Peterborough*, 19 U. C. R. 469.

Building Material—*Purchase of—Municipal Loan Fund.*]—The plaintiffs sued defendants for lumber supplied to them for building an engine house, &c. Defendants pleaded that the claim was for a debt falling due in 1874, and was not within their ordinary expenditure during that year; that no estimate was made by them, nor an assessment or levy made to pay the debt, nor any by-law passed to create such debt or to impose a rate to pay it; and defendants had not in 1874, nor at the commencement of this suit, any moneys out of which to pay the same. It appeared that by by-law passed on the 13th July, 1874, defendants appropriated $9,300 received from the municipal loan fund for certain specified works to be done in the municipality, including that for which this lumber was supplied, but the expenditure was over $12,000, and there was in that year a deficiency of $5,000, and more than two cents in the dollar would be required to meet this

debt, with the other liabilities:—Held, that the plaintiffs could not recover. *Potts* v. *Village of Dunnville*, 38 U. C. R. 96.

Debt—*Pleading.*]—A plea that a cause of action, if any, arose for and concerning a debt incurred and falling due during the preceding year to that in which action brought, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed, cannot be allowed on an application to plead several matters, with other pleas going to the merits of the cause of action. *McGinnis* v. *Village of Yorkville*, 7 L. J. 98.

Drain and Street—*Construction of—Absence of By-law.*]—The plaintiff, in December, 1860, entered into a contract under seal with the corporation of a city to construct a main drain and macadamize a street, to be completed by the 1st August, 1861, at a cost of $4,000. Having done the work he sued for the price of it, and the jury found that there was no by-law, but that the work was within the ordinary expenditure:—Held, approving Scott v. Town of Peterborough, 19 U. C. R. 469, that this was clearly a matter not within the term "ordinary expenditure" as used in the Municipal Corporations Act; that the jury should have been so directed; and that the plaintiff could not recover. Held, also, that the fact of plaintiff having been allowed to go on without any intimation that no by-law had been passed, could make no difference, for it was his part to see that defendants were duly authorized to make the contract. *Cross* v. *City of Ottawa*, 23 U. C. R. 288.

Road — *Construction of—Pleading.*]—The first count claimed the right under an implied contract to furnish the grading, grubbing, and ditching of a certain number of miles of road for the defendants in their county, alleging that defendants prevented the plaintiff from completing the same. Defendants pleaded (3), setting out the agreement between the parties and a by-law referred to therein, which authorized the issue of debentures for £50,000, and stated that work under this agreement, and extra work under the power to order extra work, was done to the extent of $200,010; that the work contracted to be done by the plaintiffs was reduced in quantity, as the contract permitted, and as reduced was permitted to be done; that the work to be done was not part of defendants' ordinary expenditure; that there was no rate or by-law authorizing the work or payment other than the one referred to in the plea; and that the debentures issued under this by-law are paid or required for the payment of work actually done. Upon demurrer, the plea was held good, as well as other pleas setting up a defence similar in substance, on the authority of Mellish v. Town of Brampton, 2 C. P. 55, and Scott v. Town of Peterborough, 19 U. C. R. 469. *Wright* v. *County of Grey*, 13 C. P. 479.

See In re Oliver and City of Ottawa, 20 A. R. 529.

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3. *With Committees of Councils.*

An action of debt held maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the district before the district was set apart: and that it was sufficient in the declaration to describe the building committee as such, without naming the persons of which it was composed. *Keating* v. *District of Simcoe*, 1 U. C. R. 28.

The municipal council for 1856 passed a resolution that certain work should be done, for which an oral tender was made by the plaintiff to the street and sidewalks committee, and accepted in writing by a majority of the committee after the last meeting of the council in 1856, and without the tender having been submitted to the council, or any written contract executed. In April, 1857, some time after the plaintiff had commenced the work, the council notified him not to proceed, but he went on and completed it, and in this action, brought for the price, a verdict was taken for the plaintiff, with leave reserved to enter a verdict for defendants, unless the whole amount claimed could be recovered:—Held, that the plaintiff could not recover. *McLean* v. *Town of Brantford*, 16 U. C. R. 347.

Where the plaintiff performed certain public work under contract, not made with the municipality, or with any of its known officers, but merely with persons in their individual capacity assuming to act as a duly appointed committee:—Held, that no action would lie against the corporation. *Stoneburgh* v. *Village of Brighton*, 8 C. P. 155.

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4. *With Magistrates in Quarter Sessions.*

The District Council Act, 4 & 5 Vict. c. 10, did not subject a district council to be sued upon an implied assumpsit by reason of any transaction between the plaintiffs and the justices in quarter sessions, or the treasurer of the district, before the existence of the council. *Law* v. *Ottawa District Council*, 4 U. C. R. 194.

The magistrates in quarter sessions have no power to order furniture for the court house, and the county council are not liable for furniture so supplied. The fact that the court house was also used as a shire hall for the sittings of the council, and the furniture made use of by them, could make no difference. *Coombs* v. *County of Middlesex*, 15 U. C. R. 367.

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5. *Other Cases.*

Bond for Erection of Mill — *Ultra Vires.*]—Defendant gave his bond to a municipality to put up a mill on his own land, and being sued upon it pleaded performance, which at the trial he failed to prove, and a verdict was rendered against him for £12 10s. The court, under the circumstances, refused to interfere. Semble, however, that if the objection had been taken in time, no action could be maintained by the municipality on such a bond, without shewing on the record something to warrant them in taking it, the contract being apparently one wholly without the scope of their charter. *Township of Kinloss* v. *Stauffer*, 15 U. C. R. 414.

Construction — *Condition — Provisional By-law—Quantum Meruit.*]—Plaintiff entered into an agreement in writing with the defendants to do certain work under a provisional by-law, which agreement contained this

clause, "Notwithstanding anything hereinbefore contained to the contrary this agreement . . . is made subject to the final passing of the said by-law . . . and in the event of the said by-law not being passed . . . then this agreement shall be null and void . . ." The by-law was never finally passed, and the agreement was produced at the trial by defendants to prevent the plaintiff from recovering as on a quantum meruit:—Held, that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction, and could only be invoked where the work was not properly performed. *Quaintance* v. *Township of Howard*, 18 O. R. 95.

——— *Dismissal of Contractor—Architect—Arbitrator—Disqualification.*]—A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractor ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and, if the contractor fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractor and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the court house committee or commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor:"—Held, that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee. *Nevlon* v. *City of Toronto*, 25 S. C. R. 579.

District Council — *Purchase of School Books.*]—The district council had no power to authorize their clerk or agent to make any contract for the purchase of books for their several common schools throughout the district, such a contract not being necessary for the exercise of their corporate functions. *Ramsay* v. *Western District Council*, 4 U. C. R. 374.

Fees of Office.] — Agreement by town council with chief of police to pay over to them fees received by him from the county for services performed by him as county constable. *Town of Stratford* v. *Wilson*, 8 O. R. 104.

Interest in Contract—*Mayor of City—Disqualification.*]—See *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Lease of Land—*Renewal—Authority.*]—To an action against a municipal corporation on their covenant to renew a lease, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *Town of Brantford*, 19 U. C. R. 207.

Railway Company — *Construction of Subway—Injury to Property—Special Statute—Principal and Agent.*]—By 45 Vict. c. 45 (O.) the municipalities of a city and a village jointly or separately, and the railway companies whose lines of railway ran into the city, were authorized to agree together for the construction of railway subways: provision was made for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act, if not mutually agreed upon. The municipalities not being able to agree, the village and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of the village and the railway companies to the privy council of Canada purporting to be made under 46 Vict. c. 24 (D.), an order of the privy council was obtained authorizing the work to be done according to the terms of such agreement. The village then contracted with one G. for the construction of the subway, and a by-law providing for the raising of its share of the cost of construction was submitted to and approved of by the ratepayers. In an action by the owner of property injured by the work:—Held, reversing the decision in 12 A. R. 393, and affirming the decision in 8 O. R. 59, which upheld the judgment in 7 O. R. 570, that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer. *West* v. *Parkdale*, 12 S. C. R. 250, 12 App. Cas. 602.

——— *Erection of Station—Condition of Receiving Bonus.*]—See *Bickford* v. *Town of Chatham*, 10 O. R. 257, 14 A. R. 32, 16 S. C. R. 236.

Reference to Engineer — *Bias.*]—See *Farquhar* v. *City of Hamilton*, 20 A. R. 86.

Reference to Superintendent of Works—*Bias.*]—See *McNamee* v. *City of Toronto*, 24 O. R. 313.

See next sub-title.

X. DEBENTURES.

Bank—*Right to Purchase.*]—The Imperial Bank of Canada, by virtue of its charter (36 Vict. c. 74 (D.)), and the general Bank

Act (34 Vict. c. 5 (D.)), has a right to purchase debentures of municipalities. *Jones* v. *Imperial Bank of Canada*, 23 Gr. 262.

Borrowing Powers — *Current Expenditure—Inquiry by Lender—Repayment.*]—Under s. 413 of the Municipal Act, 55 Vict. c. 42 (O.), as amended by 56 Vict. c. 35, s. 10, a lender is bound to inquire into the amount of taxes authorized to be levied by a municipality to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing. A municipal council may, however, with the consent of the ratepayers, raise money by debentures to repay money so unlawfully borrowed, when the expenditure, although not included in the estimates, was for purposes within the general powers of the corporation. *Fitzgerald* v. *Molsons Bank*, 29 O. R. 105.

County By-law—*Guarantee of Town Debentures—Assent of Electors—Time—Form.*]—The assent of the electors is not required to make valid a by-law of the council of a county corporation, passed under s. 511, s.-s. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county. At the time such a county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted and had received the assent of the electors, in accordance with s. 293, and the form that the guarantee of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality:—Held, that, under the circumstances, the county by-law was not prematurely passed. The by-law in question enacted: (1) that the corporation "do hereby guarantee the due payment of the debentures," &c.; (2) that upon each debenture should be written "payment hereof guaranteed by the corporation of the county," &c.; (3) that the warden and clerk should sign and seal such guarantee on each debenture; (4) that when so signed the corporation should be liable to the holders of the debentures and responsible for the due payment thereof: Held, that the by-law did not impose upon the county corporation any greater liability than that of guarantors. *Re Kerr and County of Lambton*, 27 O. R. 334.

Diversion — *Restoration—Bill of Complaint — Parties — Attorney-General.*] — A municipal corporation, after raising money on the credit of the municipal loan fund for a purpose specified in the by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of a bank:—Held, that a bill would lie, by a ratepayer on behalf of himself and all other ratepayers of the municipality, against the bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the attorney-general was not a defendant, was overruled. *Brogdin* v. *Bank of Upper Canada*, 13 Gr. 544.

Harbour Debentures — *Validity of — 22 Vict. c. 15, Effect of—Purpose for which Debentures Used—Holder for Value without Notice—Form of Debentures — Pleading.*]—See *Crawford* v. *Town of Cobourg*, 21 U. C. R. 113.

Interest—*Action for.*]—An action of debt is not maintainable for interest only on debentures, the principal not being due. *Lyall* v. *City of London*, 8 C. P. 365.

Invalidity of By-law—*Estopped.*]—A debenture under the corporate seal for payment of a debt due or loan contracted under a by-law which does not provide by special rate for the payment of such debt or loan, does not estop the council from setting up as a defence to an action on the debenture the invalidity of such by-law. *Mellish* v. *Town of Brampton*, 2 C. P. 35.

——— *Holder for Value.*]—See *Confederation Life Association* v. *Township of Howard*, 25 O. R. 197.

——— *Pleading — Fraud.*] — The fourth count stated that in consideration that the plaintiffs would grade, &c., certain roads for defendants they agreed to pay $200,000 in debentures; that although defendants did deliver to the plaintiffs certain pretended debentures, yet such debentures at the time of delivery thereof were, to the knowledge of defendants, and in fraud of the plaintiffs, illegal and void, whereby, &c. To this the defendants pleaded that the agreement was contained in the deed set out in the third plea, and the debentures were issued under the by-law set out in that plea, and were in all respects as authorized by the by-law, and were as good and valid as by law they could be made under that authority; that defendants were a municipal corporation; that the debentures were delivered to the plaintiffs in the year 1865, for work done by the plaintiffs in that year under the agreement, and were no part of the ordinary expenditure of any municipal year; that the by-law under which they were issued was the only by-law passed in respect to this matter; and no rate was imposed for the expenditure, except under that by-law; that defendants had no authority but that by-law to make the deed, and had no moneys or debentures applicable to the payment of the plaintiff for work, except the debentures issued under that by-law:—Held, bad, on demurrer, as admitting the illegality of the debentures, and not denying that they were given to the plaintiffs with full knowledge of their illegality and in fraud of the plaintiffs, for which fraud defendants would be liable. *Wright* v. *County of Grey*, 12 C. P. 479.

——— *Pleading—Holder for Value.*]—The plaintiff sued on two debentures issued by defendants. Defendants pleaded that the debentures were issued under a by-law, which was illegal for want of compliance with the directions of the statute, and that the debentures therefore were not binding on them. The plaintiff replied that he was a bonâ fide holder for value, and without notice of the illegality; and upon the issue the jury in the county court found in the plaintiff's favour. The Judge refused to grant a repleader, and upon appeal:—Held that he was right, for a repleader is granted only to advance substantial justice. *Anglin* v. *Township of Kingston*, 16 U. C. R. 121.

A plea that a debenture was not issued "under the formalities required by law," because the by-law under which it was issued did

not settle a special rate, and was therefore void:—Held, bad, for not averring distinctly that such debenture was issued in pursuance of a by-law, and for not pointing out wherein it was defective. *Trust and Loan Co. of Upper Canada* v. *City of Hamilton*, 7 C. P. 98.

Loan to Navigation Company—*Foreclosure—Receiver—Interest.*]—A municipality, being authorized to lend £40,000 to a navigation company in the debentures of the municipality, payable in twenty years, issued debentures to that extent, of which debentures to the amount of £16,500 were deposited by the navigation company in the bank. The municipality, with the consent of the navigation company, redeemed the debentures so deposited, and then instituted proceedings against the company to compel payment or foreclose the interest of the company under their Act of incorporation. The court refused this relief, but granted a receiver of the tolls, &c., of the company, which he was to apply in maintaining the works and payment of salaries of the servants of the company, and then in payment of the arrears of interest paid, and payment of interest on outstanding debentures. *Brantford* v. *Grand River Navigation Co.*, 8 Gr. 246.

Negotiation of—*Invalidity of Instrument—Liability of Negotiator—Fraud.*]—A person negotiating the sale of a municipal debenture is not answerable for payment by the municipality of the amount secured by the debenture. Where, therefore, a township municipality, in pursuance of the Municipal Corporations Act of 1849, passed a by-law for the purpose of granting a loan of money to the Bayham, Richmond, and Port Burwell Road Company, and issued debentures thereunder, which were subsequently declared to be illegal in consequence of the road company not having been properly constituted: the court, in the absence of any proof of fraud, refused to order one of the directors of the road company to refund the amount paid to him upon the sale of one of such debentures. *Secally* v. *McCallum*, 9 Gr. 434.

Non-issue of—*Debt—Special Rate—Payment.*]—By a by-law passed under the provisions of ss. 386, 694, and 696 of the Municipal Act, R. S. O. 1897 c. 223, a township corporation was authorized to raise a sum by issuing debentures, to be met by a special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed, but remained unissued in the possession and under the control of the municipality:—Held, that the rate could be levied, notwithstanding that none of the debentures had been sold. *Bogart* v. *Township of King*, 32 O. R. 135.

Payment — *Presentation — Interest — Pleading.*]—Action on a debenture, by which the defendants agreed to pay to the bearer £200 stg. at the office of a named bank and on a named day, upon presentation and surrender there of the debenture. Averment of performance of all conditions precedent. Breach, non-payment of the principal sum:—Held, that the presentation and surrender of the debenture at such place and date were conditions precedent, and the performance of such conditions having been averred in the declaration, a replication alleging presentation on a later day was a departure. (2) That it was no objection to a replication that it shewed for the first time that interest only was claimed, for that, being merely an accessory to the principal, need not be claimed as damages. Held, also, that a plea which, after traversing the presentation of the debenture modo et formâ, alleged it was afterwards paid and was then duly surrendered to the defendants, was a good plea, as the plaintiffs, by excepting to it, admitted payment of the principal sum, which would include the nominal damages, if any, alone recoverable for its detention, while the surrender of the debenture would shew that the payment was in satisfaction and discharge of the debt, if not of the damages also: that it was no answer to the plea to say that the surrender before the damages were paid was by mere oversight and inadvertence so long as it appeared to be intentional: but that it would be a good answer to say that such delivery was on the express agreement that the right to damages was reserved:—Held, also, that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. Osborne v. Preston and Berlin R. W. Co., 9 C. P. 241, and Fellowes v. Ottawa Gas Co., 19 C. P. 174, commented upon. *Montreal City and District Savings Bank* v. *County of Perth*, 32 C. P. 18.

Place of Payment—*Defunct Bank—Presentment—Pleading.*]—Where a debenture was made in 1862, payable in 1872, "at the Bank of Upper Canada," without mentioning any locality:—Held, that it was not necessary in a declaration upon it to aver or excuse presentment there, as the words did not amount to an averment of a named place, and were either meaningless, or referred to a defunct banking company in its former business name, but without any words indicating its locality, such company being declared by the public statutes to have ceased to exist. Quære, whether when a contract is to pay at a particular place named in a declaration, the general averment that the defendant did not pay, is not sufficient; and any statement as to the plaintiff not being at the place named to receive the money, or that the defendant was there ready to pay it, must not arise by way of defence. *Becher* v. *Town of Amherstburg*, 23 C. P. 602.

Signing—*Provisions of By-law.*]—A municipal by-law for issuing debentures, which had been submitted to the ratepayers and approved by them, contained a clause stating that the debentures were to be signed by the reeve:—Held, that the council had the power to appoint another person to sign the debentures in place of the reeve. *Township of Brock* v. *Toronto and Nipissing R. W. Co.*, 17 Gr. 425.

Stolen Debenture—*Holder for Value.*]—The fact that a certain municipal debenture had been stolen previously to its being regularly issued:—Held, no bar to the claim of a bonâ fide holder for valuable consideration without notice. *Trust and Loan Co. of Upper Canada* v. *City of Hamilton*, 7 C. P. 98.

Time of Payment—*Limitation.*]—A by-law passed by the municipality of a town for the construction of waterworks and gas or electric light works made the debentures to be issued thereunder payable in thirty years from

the date on which the by-law took effect:—Held, that the by-law was invalid, for under s. 340 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), the time for the payment of debentures for electric light works is limited to twenty years. *Re Hay and Town of Listowel*, 28 O. R. 352.

Validity of.]—See *County of Pontiac* v. *Ross*, 17 S. C. R. 406.

See ante VIII., IX.

XI. Dedication of Land for Public Purposes.

Engine House—*Reservation of Land for—Evidence—Attempt by Grantees to Obtain Possession — Injunction.*] — See *City of Toronto* v. *Counties of York and Peel*, 6 Gr. 525.

Highways and Lanes—*Dedication of.*]—See Way.

Market Place—*Conveyance of Land to Municipality for — Attempt to Dedicate as Highway.*]—See *City of Hamilton* v. *Morrison*, 18 C. P. 228.

——— *Conveyance of Land to Town Council for—Attempted Grant of Portion for Court House—Breach of Trust—Injunction.*] — See *Attorney-General* v. *Goderich*, 5 Gr. 402.

Market Square—*Dedication by Land Company — Evidence — Attempt to Sell—Injunction—Costs.*]—See *Town of Guelph* v. *Canada Co.*, 4 Gr. 632.

——— *Reservation of Land for—Building Leases—Renewal — Injunction.*] — See *Attorney-General* v. *Town of Brantford*, 6 Gr. 592; *Wade* v. *Town of Brantford*, 19 U. C. R. 207.

Public Park—*Evidence of Dedication—Power of Municipality to Lease.*]—See *Attorney-General* v. *City of Toronto*, 10 Gr. 436.

Public Square—*Dedication by Private Person—Survey—Plan—Attempt by Municipality to Convey Part for a Church.*]—See *In re Peck and Town of Galt*, 46 U. C. R. 211.

——— *Evidence of Dedication by Private Person—Survey — Plan — Oral Agreement — Easement—Parties—Misjoinder of Plaintiffs.*] —See *City of Toronto* v. *McGill*, 7 Gr. 462.

——— *Evidence of Dedication by Private Person—Survey—Plan — Right of Entry.*] — See *Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

School Ground — *Reservation for— Survey—Plan — Evidence of Dedication.*] — See *Corporation of Wyoming* v. *Bell*, 24 Gr. 564.

XII. Drainage.

(*See*, also, *post* XVI.—Water and Watercourses.)

1. *Actions for Damages—Liability.*

Construction of Work—*Action by Tenant.*]—A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 23 S. C. R. 429.

——— *Negligence.*]—Held, by Burton, J.A., that an action for negligence is not maintainable against a municipality unless the council has interfered in or undertaken the construction of the work; and quære whether in such a case the members of the council might not be personally liable. Held, by the supreme court of Canada, that where a scheme for drainage work to be constructed under a valid by-law proves defective, and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as tort feasors, but are liable under s. 591, Municipal Act, for damage done in construction of the work or consequent thereto. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 20 A. R. 225, 23 S. C. R. 429.

——— *Liability—Court of Revision.*]—Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work and who is assessed for part of the cost is not bound to appeal to the court of revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration of action. Hiles v. Township of Ellice, 23 S. C. R. 429, considered and distinguished. *Thackery* v. *Township of Raleigh*, 25 A. R. 226.

——— *Ratepayer—Contractor—Estoppel.*] —A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law when such ratepayer has himself been a contractor for a portion of the work and has received his share of the money voted for the work in excess of the amount expended. Judgment in 13 A. R. 53 affirmed. *Dillon* v. *Township of Raleigh*, 14 S. C. R. 739.

——— *Landowners—Parties.*]—The plaintiffs brought this action as landowners injuriously affected by certain drainage works of the defendants and the assessments made under by-laws relating to the same, seeking damages and other relief:—Held, that there was no misjoinder of plaintiffs, nor was it incumbent on the plaintiffs to sue on behalf of any others, and also that the plaintiffs had the right thus to proceed by way of action and not of arbitration. *Alexander* v. *Township of Howard*, *Galbraith* v. *Township of Harwich*, 14 O. R. 22.

——— *Negligence — Pleading.*] — Declaration, that defendants had dug a ditch in the highway near and extending across plaintiff's land, through which water flowed; and defendants so negligently constructed and continued said ditch, and permitted so much water to run in it, that it overflowed upon plaintiff's land. The plea set out a by-law passed by defendants to construct a drain through plaintiff's land, and an award of compensation, which was duly tendered, and alleged that in cutting the ditch defendants unavoidably injured and threw water on the lot, doing no unnecessary damage:—Held, on

demurrer, that the plea was no answer to the declaration, which complained of injury caused by defendants' negligence. *Stonehouse v. Township of Enniskillen*, 32 U. C. R. 562.

——— *Negligence—Act of God.*]—A drain was constructed by a municipal corporation, and, by reason, as was alleged, of the negligent construction thereof, it was not of sufficient capacity to carry away the water brought down it, as was intended, or, by reason of an obstruction negligently allowed to remain therein, the water overflowed the banks of the drain and damaged the plaintiff's premises:—Held, that the plaintiff's claim for the damage sustained was not one for compensation under the arbitration clauses of the Municipal Act; but was properly the subject of an action in which the findings of the jury should be had as to whether the damage was caused by such negligent construction, &c., or by vis major, namely, an unusual flood. *McArthur v. Town of Collingwood*, 9 O. R. 368.

——— *Lawful Act — Absence of Negligence.*]—The defendants enlarged a drain running through the plaintiff's land; the earth taken from which they deposited on either side and left it there. The plaintiff sued for damages to his land, &c., by reason of such depositing of the earth. It was admitted that the work was done under a by-law passed under s. 576 of the Municipal Act, 1883, and it was not suggested that the by-law was defective in any way. The jury found that the defendants were not guilty of any negligence, but that the plaintiff had suffered damage in consequence of the execution of the work:—Held, that upon these findings judgment should have been entered for the defendants; that a cause of action could not accrue from the doing of a lawful act, unless in a negligent manner; and that the plaintiff's remedy, if any, was by arbitration to obtain compensation under the Municipal Act of 1883, s. 91. *Preston v. Township of Camden*, 14 A. R. 85.

——— *Unlawful Act—Compensating Benefits—Declaration.*]—Where a municipality, acting under the Ontario Drainage Act, in pursuance of a scheme for the drainage of their township, constructed a system by which water was drained off into a certain drain formerly constructed through the plaintiff's land and running into a natural creek, whereby the creek, by reason of the accumulation of water caused by the new drains, though sufficient before to carry off the water brought down into it, overflowed and injured the plaintiff's lands:—Held, that the defendants were liable for any damage thus caused to the plaintiff, and there was nothing in the municipal or other legislation of this Province to change the illegal character of such an act. It appeared, however, that the plaintiff's property had been benefited by the drainage works as a whole to a greater extent than it had been injured by the overflow complained of, and the defendants acceded to the reasonableness of the plaintiff's demand for a better outlet, and were proceeding to make it:—Held, that under these circumstances it was sufficient for the present to declare the plaintiff entitled to have the creek widened and deepened to the necessary extent within a reasonable time. *Northwood v. Township of Raleigh*, 3 O. R. 347.

——— *Invalid By-law — Necessity for Quashing.*]—See *Challoner v. Township of Lobo*, 32 O. R. 247.

Want of Repair—*Act of God.*]—Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shewn that even if the drain had been in repair the same injury would have resulted. *Mackenzie v. Township of West Flamborough*, 26 A. R. 198.

——— *Failure to Carry off Water—Damages.*]—A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by failure to carry off the water which came upon the land in the course of nature. *Crawford v. Township of Eliice*, 26 A. R. 484.

——— *Notice in Writing — Mandamus—Outlet.*]—The proper construction of R. S. O. 1877 c. 33, s. 30, s.-s. 3, as also of the re-enactment in 47 Vict. c. 8 (O.), is that as a pre-requisite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default, and this requirement is not confined to the remedy by mandamus:—Held, therefore, in this action, in which the plaintiff sued a municipality for flooding his lands by not providing a proper outlet for certain drains, and also by not repairing the drains, that, inasmuch as there was no evidence of injury other than arising from the non-repair, and as to this no statutory notice had been given, the plaintiff's action must be dismissed. *Cryster v. Township of Sarnia*, 15 O. R. 180.

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2. *Added Territory.*

Adoption of Old Drain.]—Where a municipality makes an alteration in and thus adopts as part of its own drainage system a drain existing in territory acquired from another municipality, it is liable for damages caused by subsequent neglect to keep the drain in repair. Judgment in 25 O. R. 658 affirmed. *Fitzgerald v. City of Ottawa*, 22 A. R. 297.

Adoption of Old Drain as Sewer.]—*Nuisance.*]—Drains originally constructed under township authority for the drainage of surface water merely, may, after the territory has been added to a city, be adopted by the city as common sewers, after which householders using them with the consent or approval of the city are not responsible for nuisance at the outlet. *Lewis v. Alexander*, 21 A. R. 613. Affirmed, 24 S. C. R. 551.

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3. *Arbitrations under Drainage Laws.*

Award — *Damages—Evidence—Costs.*]—A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation

plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the site of the drain; (3) the building of bridges by the plaintiff to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him imposing on him a large portion of the costs:—Held, that the evidence sustained all the grounds of damage except the last, as to which the evidence was not very satisfactory. The court, instead of ascertaining the compensation, set aside the award, and intimated that unless the parties would agree on new arbitrators, a reference to the county Judge would be directed. *In re Hodgson and Township of Bosanquet*, 11 O. R. 589.

Constitution—*Informal Reference—Withdrawal of Party—Award by Two Arbitrators—Meeting—Oath of Arbitrators.*]—A township by-law, after reciting that there was a difficulty with S. "from alleged damages from water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was that "the corporation had elected that the claims made by you for damages to the east half of lot 11," &c., "on account of the construction of the drain from P. to the S. drain, or consequent thereon, shall be referred to arbitration." Before the parties had been heard on the merits, S.'s arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators, notwithstanding, proceeded with the reference and made an award:—Held, that the reference was wholly informal, the subject thereof not being properly defined; and, though the notice given by the reeve to S. would make the matter sufficiently clear, it could not affect S., for he never entered upon the arbitration, but repudiated the arbitrator's authority at the first meeting of which he had notice; but even if the reference were sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of appointment until the award has been made, and enabling the county court Judge to appoint another arbitrator in the place of one refusing or neglecting to act. Quære, whether it was in the power of either party to the reference to revoke the authority of the arbitrators. Semble, that the provision in the statute that the arbitrators must hold their first meeting within twenty days from the appointment of the last arbitrator is not imperative, but directory, merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month as required by the Act. Semble, also, that the county Judge may appoint the third arbitrator ex parte, although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefor. It was objected that the arbitrators had not taken the oath required by the statute:—Semble, this objection was not tenable, as the oath they took was substantially the same as that required. *In re Smith and Township of Plympton*, 12 O. R. 20.

——— *Municipalities Interested.*]—The township of Rochester, having determined to construct certain drainage works in the township, under ss. 447-463, inclusive, of the Municipal Act of 1873, procured plans and estimates by a surveyor, who reported that three other townships, Gosfield, Mersea, and Tilbury West, would be benefited, and assessed them for a certain amount, and that certain county roads would also be benefited, for which he assessed the county $5,000 and a railway company $200:—Held, there being several municipalities assessed for the work, that there should have been one arbitration between all interested; and an award made upon a reference between the county and the township of Rochester only was set aside. *Re County of Essex and Township of Rochester*, 42 U. C. R. 523.

A question arose under s. 590 of the Municipal Act, R. S. O. 1887 c. 184, between the townships of H. and R., whether H. caused waters to flow on R. to the detriment of R., which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H.:—Held, that T. was not "interested" within the meaning of s. 389 of the Act; and therefore that a board of three arbitrators appointed pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question; and their award was set aside. *Re Townships of Harwich and Raleigh*, 20 O. R. 154.

Where in a drainage scheme initiated by one township, assessments are made against more than one other township, each township is "interested," within the meaning of s. 389 of R. S. O. 1887 c. 184, only in the question of its own assessment; and on appeal from the assessment, the arbitration provided for by the Act is one between each appellant township and the initiating township, not a joint arbitration between the latter and all the other townships assessed. The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved, the attempted charge fails and is not to be reimposed elsewhere. Re Townships of Harwich and Raleigh, 20 O. R. 154, approved. Re County of Essex and Township of Rochester, 42 U. C. R. 523, questioned. *In re Townships of Romney and Tilbury West*, 18 A. R. 477.

See Thackery v. *Township of Raleigh*, 25 A. R. 226, *ante* 1; *Township of Thurlow* v. *Township of Sidney*, 1 O. R. 249; *Township of Chatham* v. *Township of Dover*, 12 S. C. R. 321; *In re Byrne and Township of Rochester*, 17 O. R. 354, *post* 4; *McArthur* v. *Town of Collingwood*, 9 O. R. 368; *Preston* v. *Township of Camden*, 14 A. R. 85.

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4. *Assessment of Lands.*

Compensation for Injury to Land—*Assessment on Lands Benefited.*]—The owner of certain lands in the township through which a drain had been made by the township corporation under the drainage sections of the Municipal Act, made a claim for damages, upon which an arbitration was had and compensation awarded him, it being shewn that it would be necessary to construct a bridge to

cross his farm; to put up and maintain flood gates; and that he was deprived of about three and a-half acres of land:—Held, that the case came within ss. 591 and 592 of the Municipal Act, 1887, under which he was entitled to the compensation awarded, which must be assessed on the lands liable to assessment for the drainage work. *In re Byrne and Township of Rochester*, 17 O. R. 354.

——— *Void By-law—Liability.*]—Where a by-law for the construction of drainage works is void, damages awarded to a landowner on account of injury to his crops caused by the negligent construction of the work are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality. *McCulloch* v. *Township of Caledonia*, 25 A. R. 417.

Method of Assessment—*Benefit of Part of Lot—Appeal—Reduction—By-law.*] — The engineer is the proper party to make the assessment. The principle on which the assessments were made, of assessing against a whole lot or a part of a lot owned by one person, when only some of its acreage was benefited, the value of such benefit:—Held, not erroneous; and this would at all events have formed no ground for quashing the by-law, as this was a matter of which complaint might have been made to the court of revision. On appeal to the county Judge he reduced the assessment on one lot by only half, the owner consenting, although according to the evidence it should have been further reduced. In distributing the amounts struck off among the other properties assessed, the Judge added nothing to the assessment of this lot, so fixed by consent, but he certified that the other owners were assessed for less than they would have been but for the consent:—Held, that R. S. O. 1877 c. 174, s. 530, s.-s. 13, had been practically complied with. *Re McLean and Township of Ops*, 45 U. C. R. 325.

Report of Engineer—*Appeal to Court of Revision—Question of Benefit.*] — The question whether the lands are in fact benefited is one for the court of revision, or the Judge of the county court on appeal therefrom. *In re White and Township of Sandwich East*, 1 O. R. 530.

——— *Appeal to Court of Revision—Notice to Engineer—By-law.*] — Where the engineer who made the assessment under a drainage by-law was not notified, and was not present at the court of revision, but was present on the appeals therefrom to the county Judge, which were taken by all who appealed to the court of revision:—Held, no ground for setting aside the by-law. *Re McLean and Township of Ops*, 45 U. C. R. 325.

——— *Award on Appeal—Benefit.*]—The arbitrators appointed by the plaintiff and defendant municipalities, on an appeal by the defendants from the report of the surveyor, made an award pursuant to the Municipal Act, whereby they adjudged that the deepening of a creek, &c., benefited lands in the defendant municipality, and that the latter should pay therefor $350; but the award did not specify the lands which in their opinion were so benefited, nor charge such lands with a just proportion of the cost of the works:—Held, that for this reason the award was invalid. *Township of Thurlow* v. *Township of Sidney*, 1 O. R. 249.

——— *Award on Appeal—Benefit—Lands and Roads—By-law—Petition—Court of Revision—Lands in Adjoining Township.*]—Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham, founded on the report, plans, and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having been signed by a majority of the ratepayers of the township to be benefited by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefrom. The township of Dover appealed from this report, upon several grounds, and three arbitrators were appointed under the provisions of the Act. At their last meeting they all agreed that the township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought $500 should be taken off the town line, and W. D., another of the arbitrators, held that, while the bulk sum assessed was not too great, the assessment on the respective lands and roads, and parts thereof, should be varied, but that this was a matter for the court of revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award, "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line, should be sustained and confirmed, and that the appeal should be dismissed. This award was set aside by the high court (5 O. R. 325) and upon an appeal the court of appeal was equally divided (11 A. R. 248):—Held, by the supreme court of Canada, that the award should have been set aside upon the ground that it was not shewn that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give to the corporation of Chatham jurisdiction to enter the township of Dover and do any work therein; that the arbitrators should have adjudicated, upon the merits of the appeal, against the several assessments on the lots and roads assessed, as their award was, by ss. 400 and 403 of 46 Vict. c. 18, made final, subject to appeal only to the high court of justice, and it was not a matter for the court of revision to deal with at all as held by one of the arbitrators; that the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did in point of fact charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the court of revision; that the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that their award should also have been set aside on the merits, because the evidence not only failed to shew any

benefit which the lots or roads in Dover, which were assessed, would receive from the proposed work, but the evidence of the surveyor himself shewed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute, and did not warrant their assessment. *Township of Chatham* v. *Township of Dover*, 12 S. C. R. 321

Held, upon the true construction of the drainage sections of the Municipal Act, that when drainage works are extended and continued into an adjoining township beyond the limits of the township in which they are commenced, the roads in the former township and the town line are liable to be assessed in proportion to the benefits derived by them therefrom. *S. C.*, 11 A. R. 248.

——— *Benefit—Lands and Roads—Specification of.*]—Held, that county roads, though on a higher level than the initiating township, might be charged with a proper proportion of the expense of drainage works under s. 452. Held, also, that the engineer should report definitely specifying the particular roads benefited, not stating a lump sum for roads generally; but semble, that such objection should not be entertained, not having been pressed at an arbitration between the township and the county, at which the amount assessed against roads had been reduced. Held, also, that the report must state the different lots assessed, and the sum assessed against each, and should state that these sums were in the surveyor's opinion the proportion of benefit to be derived from such drainage. Remarks as to the proper mode of proceeding in such matters. *Re County of Essex and Township of Rochester*, 42 U. C. R. 523.

——— *Roads—Lump Sum—Calculation—Delegation.*]—The allowance in the engineer's report of a lump sum as "chargeable to municipality for roads" was sufficiently definite, there being only one municipality concerned. Re County of Essex and Township of Rochester, 42 U. C. R. 523, distinguished. The engineer, having himself made an inspection of each lot and estimated how much each would be benefited by the drain, might properly delegate to an assistant the duty of making a calculation upon the basis established by him. *In re Robertson and Township of North Easthope*, 15 O. R. 423.

See In re Funston and Township of Tilbury East, 11 O. R. 74; *In re Clark and Township of Howard*, 16 A. R. 72; *Re Stephens and Township of Moore*, 25 O. R. 690; *Township of Sombra* v. *Township of Chatham*, 21 S. C. R. 305; *In re Township of Rochester and Township of Mersea*, 26 A. R. 474.

See, also, *post* 8.

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5. *By-laws.*

(a) *Notice and Publication of.*

Newspaper — *Adjoining Local Municipality.*]—A proposed by-law of the township of Rochester, in the county of Essex, relating to drainage, was published in a newspaper in Windsor, a large town, and for all other than judicial and municipal business, practically the county town, and situate two miles from Sandwich, the county town. There was no newspaper published either in Rochester or in Sandwich, or in the next adjoining municipality; but there were papers published in several small villages, somewhat nearer the township of Rochester than Windsor, but their circulation was much smaller in Rochester than that of the Windsor paper:—Held, that the publication was sufficient; since if the words "adjoining local municipality," as used in 42 Vict. c. 31, s. 27, were construed "next adjoining, &c.," it would be impossible to publish the by-law as directed by the Act; and it did not form sufficient ground of objection thereto, that there were other papers a few miles nearer to Rochester than Windsor was. *Re Gallerno and Township of Rochester*, 46 U. C. R. 279.

Omission of Words—*Changes in Assessment.*]—The omission of the words "during the term next ensuing the final passing of the by-law," from the notice with regard to a drainage by-law, under R. S. O. 1877 c. 174, s. 531, does not render the by-law invalid. Where a by-law finally passed differs from that published only in respect of changes made in the assessment by the court of revision and county Judge, it is not necessary to publish such by-law again after such changes. *Re McLean and Township of Ops*, 45 U. C. R. 325.

Posting By-law — *Knowledge of Applicant.*]—It was objected that no copies of the by-law or notices attached were posted up as required, but the applicant knew of the by-law before it passed, and appealed from his assessment to the court of revision:—Held, that the objection should not be given effect to. *In re White and Township of Sandwich East*, 1 O. R. 530.

(b) *Petitions for.*

Defective Petition — *Alteration of Report.*] — The municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, in accordance with the assessment, specifications, and estimates contained in the report, upon petition, theretofore made by their engineer. On the matter coming up before the court of revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, altered the report already made, reducing the size and cost of the work, changing the specifications, estimates, and assessments accordingly, and passed a by-law for the construction of the works, as in the altered report, in the three townships:—Held, that this by-law was void. Raleigh v. Williams, [1893] A. C. 540, at p. 550, applied. *McCulloch* v. *Township of Caledonia*, 25 A. R. 417.

Description of Lands—*Additional Lands Assessed for Benefit.*]—A petition for a drainage by-law was signed by a majority of the owners of the land designated in the petition, but the applicant was not one of the petitioners, nor was his land part, nor did he reside on any part, of the land described in the petition, but the surveyor who made the examination and prepared the estimates reported that the applicant's lands would be benefited by the works, and he was accordingly assessed, and the by-law was finally passed:—Held, that the by-law was valid. *In re White and Township of Sandwich East*, 1 O. R. 530.

——— *Benefit—Majority of Owners.*]—A by-law was passed by the township of Mersea, providing for the drainage of lands in Mersea and Romney, and assessing property owners in both townships:—Held, that the by-law was invalid because the petition therefor did not describe the property to be benefited, and the by-law itself, which did shew the property to be benefited, disclosed that the petitioners were not the majority of the owners of such property. *Re Township of Romney and Township of Mersea*, 11 A. R. 712.

Majority of Owners.] — See *In re Montgomery and Township of Raleigh*, 21 C. P. 381.

Majority of Persons Benefited—*Necessity for.*]—A petition of landowners under 46 Vict. c. 18, s. 570, R. S. O. 1887 c. 184, s. 569, for the construction of drainage works, must include a majority of all the persons found by the engineer to be benefited by the proposed works, and not merely a majority of the persons mentioned in the petition itself as being benefited. Unless the petition is signed by such majority the council has no jurisdiction, and a by-law founded on a petition not so signed is void and cannot be upheld even though valid on its face. If the petition is not signed by such majority, the opponents of the by-law are not restricted to the mode of objection given by ss. 292 and 293 of the Act of 1883 (R. S. O. 1887 c. 184, ss. 291, 292,) but are entitled to attack the validity of the by-law on this ground by an application to quash, even after an unsuccessful appeal to the council. Where the council is aware that a majority have not signed, though no evidence to prove this fact is given by the opponents of the by-law, it is just as much its duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it, and the council has no right to impose upon the opponents of the by-law, as a term of refusing to pass it, any condition as to payment of expenses theretofore incurred. Decision in 15 O. R. 423 reversed. *In re Robertson and Township of North Easthope*, 16 A. R. 214.

Necessity for—*New Work.*]—On a petition therefor a by-law was passed and the usual proceedings taken for the construction of a drain from a point in the township of C. to the town line between the townships of A. and C., where it connected with an existing drain, whereupon certain landowners on the said town line petitioned the council of C. threatening that if their lands were damaged by the said drain they would hold the township of C. liable therefor, and prayed that the council would order the surveyor to continue the drain to a sufficient outlet. Instructions were given to the surveyor, who made the necessary examination, and reported in favour of a drain along the town line; and a by-law was introduced for the construction thereof, reciting that a majority of the landowners benefited had petitioned (referring to the petition last mentioned), and assessing the cost on the lands benefited, &c., and naming the proportion thereof to be borne by the lands in A. On receiving notice of the proposed by-law the township of A. gave notice of appeal, and arbitrators were appointed. Subsequently the township of A. moved for an order of prohibition forbidding the arbitrators from further proceeding in the matter, on the ground of the absence of a proper petition for such drain:—Held, that the drain in question came within either s. 569 or 598 of the Municipal Act, R. S. O. 1887 c. 184, and not within s. 585, and that a petition was an indispensable preliminary to the passing of the by-law, whereas the alleged petition was clearly insufficient; that the mere fact of its not being quashed within the period limited by s. 572 would not prevent its being treated as invalid in other proceedings as here; and that prohibition would be granted, notwithstanding the by-law was good on its face, especially as there had been no laches. On appeal, a divisional court was equally divided, and the appeal therefore failed. *Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476.

——— *Old Drain—Deepening.*]—A by-law passed for raising the unpaid portions of the expense of cleaning out and repairing a drain, otherwise good on its face, was objected to on the ground that while the resolution and by-law authorizing the work to be done were for such cleaning and repairing only, the work actually done included deepening, which it was contended could only be done by petition therefor under s. 570 of the Municipal Act. It appeared that the deepening of the drain, if it was done, which was not free from doubt, was done accidentally, and not by design. Under the circumstances, as the objection was without merits, and as much inconvenience would ensue if the by-law was quashed, an application therefor was refused. Quære, apart from this, whether under ss. 570, 589, of the Municipal Act, 1883, and 45 Vict. c. 26, s. 17 (O.), the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state. A further objection that the assessment was altered without notice, and without affording an opportunity to appeal, was disallowed, the evidence failing to establish any such alteration. *Begg v. Township of Southwold*, 6 O. R. 184.

——— *Old Work — New Outlet.*] — A township council, finding that a government drain in the township did not carry off the water, by reason of the natural flow being in another direction, accepted a report made by their engineer and passed a by-law adopting a scheme for a new drain leading from the middle of the government drain into an adjoining township, where it was to find an outlet:—Held, that the proposed drain properly came within the description of a new outlet, although not at the end of the government drain, and although the former outlet remained to serve to carry off a part of the water; and, so long as the proposed drain was designed merely as an outlet for the water from the government drain, it might, under s. 585 of the Municipal Act of 1892, be provided for without any petition under s. 569, even although it should incidentally benefit the locality through which it ran, nothing being included in the plan beyond what was reasonably requisite for the purpose intended. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

——— *Old Drain — Maintenance and Repair.*]—A township council has power, under s. 586 (2) of 55 Vict. c. 42, to maintain and repair a beneficial drain, originally constructed out of general funds, at the expense of the local territory benefited, by passing a by-law to that effect, without a petition therefor. *Re Stephens and Township of Moore*, 25 O. R. 600.

——— —*Old Drain Extending into Adjoining Municipality—Repairs to.*]—Under s. 75 of 57 Vict. c. 56 (O.), a township municipality which has constructed a drain within its own boundaries, connecting, however, with a drain constructed as an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality for its proportion of the cost. *In re Stonehouse and Plympton*, 24 A. R. 416.

See Alexander v. *Township of Howard*, 14 O. R. 22.

Qualification of Petitioners — "*Last Revised Assessment Roll*"—*Farmers' Sons—Interest in Land—Damages.*]—The "last revised assessment roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll last revised previous to the passing of a drainage by-law. The words "exclusive of farmers' sons not actual owners" in s.-s. 1 of s. 3 of R. S. O. 1897 c. 226, do not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll. An arrangement between a farmer and his sons by which he promised to convey the farm to them, he retaining a life interest, is sufficient to give them an interest in land of a freehold nature, entitling them to be assessed as joint owners, and, so assessed, they are not "farmers' sons not actual owners." The by-law in question in this action was declared invalid, the petition therefor not having been properly signed within the meaning of s. 3; but, not having been quashed, the plaintiff was held not entitled to damages for work done under it. Connor v. Middagh, Hill v. Middagh, 16 A. R. 356, and McCulloch v. Township of Caledonia, 25 A. R. 17, followed. *Challoner* v. *Township of Lobo*, 32 O. R. 247.

Withdrawal.]—A petition was presented under s. 529 of the Municipal Act, 1877, for the draining of certain lands, by constructing a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefited by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream and some by informing the council that they would dig their own drains themselves. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of the six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council, having procured a second estimate, shewing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law: —Held, that the by-law should be quashed: for (1) the council had no power to authorize the undertaking of any work other than that petitioned for, and if that was impracticable or too costly they should have refused the petition; (2) the petitioners had the right to withdraw at any time after subscribing the petition, and before the contracts were let or the debentures negotiated, while the council had control of the matters, the preliminary surveys and estimates being as much for the information of the petitioners as of the council; (3) a sufficient number of petitioners having withdrawn to reduce the number below the majority of those so to be benefited, the by-law untruly recited that a majority, &c., had petitioned. *Re Misener* v. *Township of Wainfleet*, 46 U. C. R. 457.

The plaintiff in 1884, after signing a petition for the construction of a drain, wrote to the council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law and issued debentures. Subsequently the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889 he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal:—Held, per Hagarty, C.J.O., that before 53 Vict. c. 50, s. 35 (O.), a petitioner could not withdraw. Per Burton, J.A., that there was no power of withdrawal, and that in any event the question whether there had been withdrawal or not, was for the council. Per Osler and Maclennan, JJ.A., that there was a power of withdrawal, but that there had in fact been no withdrawal, and that, even if there had, the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that its jurisdiction was not contested. *Gibson* v. *Township of North Easthope*, 21 A. R. 504. Affirmed by the supreme court of Canada, 24 S. C. R. 707.

See Canadian Pacific R. W. Co. v. *Township of Chatham*, 22 A. R. 330, 25 S. C. R. 608.

(c) *Other Cases.*

Amending By-law — *Extra Work — Power to Pass.*]—A by-law amending a drainage by-law under s. 573 of the Consolidated Municipal Act, 1892, "in order to fully carry out the intention thereof," where sufficient funds have not been authorized by the original by-law, is one which provides for the completion of the work so as to make it efficient, although there may be some deviations and variations, or even additions to the work as originally planned. During the construction of a drain, it was found that stone portals were needed for the work, and that the outlet to the lake had to be deepened, and certain other extra work and necessities were recommended by the engineer:—Held, that the by-law providing for them was an amending by-law, under s. 573 of the Consolidated Municipal Act, 1892, and that the township council had power to pass it under that section. *Re Suskey and Township of Romney*, 22 O. R. 664.

Construction By-law — *Ordinary Expenditure—Submission to Ratepayers—Extra-territorial Limits.*] — The construction of a drain being necessary both from a sanitary point of view and for the purpose of keeping in repair the highway under which a portion of it passed, the defendants resolved to construct it, if necessary, as part of the

ordinary expenditure of the current year, but, nevertheless, submitted a by-law for its construction to the electors, which was defeated. They, however, proceeded with its construction, and again, a second time in the same year, submitted the by-law to the vote, when it was carried. It appeared that the drain might have been paid for out of the ordinary expenditure of the year without exceeding the statutable limit of taxation:—Held, that the first by-law having been defeated did not prevent the submission of the second in the same year, nor did the fact of the work having been commenced as an item of ordinary expenditure for the year, after the defeat of the by-law, incapacitate the defendants from again submitting a by-law for its construction. Held, also, that the defendants had power to pass the by-law notwithstanding that part of the work was to be done on land outside the territorial limits, and without the consent of the adjacent municipality. *Kerfoot* v. *Village of Watford*, 24 O. R. 235.

Lands Benefited — *Specifying — Assessment—Petition—Majority of Owners—Special Rate.*]—To a by-law, passed under 32 Vict. c. 43 (O.), was annexed a schedule (declared to be part of the by-law), intituled, "Schedule shewing the benefit to be derived by each lot from the drainage to be performed under the by-law:"—Held, that such a by-law, containing such a schedule, sufficiently indicated that the lands so assessed were assessed as the only lands within the municipality regarded as benefited by the proposed work, and that it was not necessary that the by-law should specify the mode of ascertaining and determining the property to be benefited under s.-s. 4 of s. 2 of the said Act. Held, also, that, supposing the question open for the consideration of the court whether or not the lands assessed were the only lands benefited, which it was objected the by-law did not shew, the onus of proving that other lands were also benefited, which should have been assessed, lay upon the applicants against the by-law, and that in this they had failed. But held, that the objection that all the lands which would be benefited had not been assessed, or that the assessments upon the respective lots were overcharges, or that the by-law did not provide properly for determining what lands were benefited, were not grounds for moving to quash the same, as by s.-s. 4 an appellate tribunal is appointed. Held, also, that an objection that the petition mentioned in the by-law was not signed by a majority of the resident owners of property assessed, &c., was not open to the applicants upon the motion, but, if it were, the onus of proof was upon them, and in this also they had failed. Held, also, that the 3rd section of the by-law, set out in the case, was not open to the objection that it did not properly provide for a special rate sufficient to include a sinking fund for payment of the debentures therein mentioned, but provided for levying and raising certain instalments, with interest. Held, also, that the by-law need not name a day in the financial year from which it was to take effect, as this was not required by the statute which authorized it. *In re Montgomery and Township of Raleigh*, 21 C. P. 381.

Maintenance and Repair—*Absence of Petition — Invalidity of By-law — Declaration.*]—Section 580 of the Consolidated Municipal Act, 1883, 46 Vict. c. 18 (O.), does not authorize the passing of a by-law for cleaning out or improving a drain without the due observance of the formalities mentioned or referred to in s. 584. It must be read in conjunction with the respective sections mentioned in it. Where the defendants purported to pass and act upon a by-law for the cleaning out or improvement of the McG. drain, and the assessment of certain persons for the necessary cost, and this without any petition being presented therefor, or any assessment of an engineer, or any statement by an engineer of the proportion of benefit to be derived from the work by any lot or part of a lot of land, and without publishing the by-law or assessment, or the holding of any court of revision to which appeals from the proposed assessment might be made:—Held, that such by-law was unauthorized and illegal, and that being a void proceeding an attack upon it was not prevented by ss. 333, 335, or 340 of 46 Vict. c. 18 (O.), as to quashing by-laws; and also that, though the plaintiffs in this action were not moving to quash the by-law or suing for damages under it, but only asking for a declaration that it was illegal, and an order restraining the defendants from collecting from them the assessment thereunder, and compelling them to remove the charge thereunder upon the plaintiffs' lands, they were entitled to have it declared that they were not liable to pay the assessments against them under the by-law in question, on the ground that the same was illegal and a void proceeding. *Alexander* v. *Township of Howard, Galbraith* v. *Township of Harwich*, 14 O. R. 22.

——— *Assessment of Lands Benefited — Intra Vires — Notice — Irregularities.*] — A township council has power under s. 586 (2) of the Consolidated Municipal Act, 55 Vict. c. 42, to maintain and repair a beneficial drain, originally constructed out of general funds, at the expense of the local territory benefited, by passing a by-law to that effect, without a petition therefor. And, although such a by-law refers to lots "to be benefited," it does not bring the work within the category of drains to be constructed under s. 569 of the Act. Application to quash the by-law in question being made by several persons, who among them owned one of the lots assessed, alleging that they were not benefited by the original drain and could not be by its continuance and repair, and that the amount charged against their lot was not duly apportioned among them:—Held, that they should have applied to the court of revision for relief; and not having done so, and the work having all been done and the benefit of it enjoyed, this court would not interfere to declare the by-law invalid. Held, also, having regard to s. 571 (2), that the applicants had sufficient notice of the by-law, service having been effected upon a grown-up person at the house where they all lived as members of one family. Held, also, that upon this application the court would not inquire what other persons were not served who were not seeking relief, nor consider irregularities or errors in the assessment of such others. It appeared on the face of the by-law that the drain in question was an old one, constructed out of general funds, and out of repair; and, although the assessment was referred to as on the property "to be benefited," yet the same clause spoke of it as "upon the property benefited:"—Held, that the by-law was not bad on its face. In drainage matters the policy of the legislature is to leave the management largely in the

hands of the localities, and the court should refrain from interference, unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights. *Re Stephens and Township of Moore*, 25 O. R. 600.

——— *Special Rate — Debenture — Ultra Vires.*]—Action to recover the amount of a debenture, one of a series issued by the defendants pursuant to their by-law passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain:—Held, following Alexander v. Township of Howard, 14 O. R. 22, and In re Clark and Township of Howard, 16 A. R. 72, that the by-law was void, the defendants having no power to pass it for such a purpose. The debenture was silent as to the purposes for which it was issued, but referred to the by-law, which disclosed such purposes. There was no representation by the defendants that it was good:—Held, that, although the plaintiffs were innocent holders and had paid the full value of the debenture, they could not recover upon it, because the defendants had no power to make the contract professedly made by it. Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642, distinguished. Marsh v. Fulton County, 10 Wall. 676, specially referred to. Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover for money received by the defendants. *Confederation Life Association* v. *Township of Howard*, 25 O. R. 197.

——— *Void By-law—Assessment—Statute—Retroactivity.*]—On the 21st September, 1868, a by-law was passed by the township council under the provisions of the Municipal Act of 1866—29 & 30 Vict. c. 51, ss. 281 and 282—for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the township council passed a by-law for repairing and cleaning this drain, and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1886, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain so as to enable the assessment for repairing and cleaning the drain to be made more equitably, and a new assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it:—Held, that the provisions of the Act of 1869—32 Vict. c. 43, s. 17—as to maintenance and repair (R. S. O. 1887 c. 184, s. 583 (1)) are not retroactive, and do not apply to drains constructed before the date of that enactment; and that therefore the township council had no power to pass the by-law in question. Decision in 14 O. R. 508 affirmed. *In re Clark and Township of Howard*, 16 A. R. 72.

Motion to Quash — *Applicant — Locus Standi.*]—See *In re Funston and Township of Tilbury East*, 11 O. R. 74.

——— *Notice.*]—See *Re McCormick and Township of Howard*, 18 O. R. 260.

Necessity for By-law — *Old Work — New Culvert.*] — Where a municipal by-law authorized the construction of a drain, benefiting lands in an adjoining municipality, which was to pass under a railway, where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity:—Held, that the construction of such culvert was a matter within the provisions of s. 573 of the Municipal Act, R. S. O. 1887 c. 184, and and a new by-law authorizing it was not necessary. Judgments below, 22 A. R. 330, 25 O. R. 465, reversed. *Canadian Pacific R. W. Co.* v. *Township of Chatham*, 25 S. C. R. 608.

Obstruction of Drains — *Cost of Removal—Collector's Roll—Appeal.*]—A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law, therefore, defining the duties of inspectors of drains and enacting: (1) that obstructions wilfully placed in drains should be removed by the persons placing them there or at their expense, without regard to whether such persons owned the lands through or between which such drains were situate; (2) that if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the person chargeable with the obstruction failing to do so; (3) that if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the person chargeable, instead of only against the person himself, because no appeal was provided for against such charging of such cost upon the collector's roll: was quashed with costs. *In re Clark and Township of Howard*, 9 O. R. 576.

Report of Engineer—*Erroneous Basis of Fact.*]—A township by-law for repairing and deepening a drain extending through three municipalities set out the report of the engineer recommending the work and assessing the cost in different proportions against them, respectively, but he based his report upon the assumption that the drain had been originally constructed as one drain, whereas it consisted of at least two drains built at different times and for different purposes:—Held, that the by-law must be quashed, for the persons affected were on being assessed entitled to have the engineer's judgment upon the true state of facts, as was also the council when acting on his report. *In re Stonehouse and Township of Plymouth*, 27 O. R. 541.

Revision of Assessment—*Court of Revision—Necessity for Alteration of By-law—Special Rate.*]—In a drainage by-law the assessments as made by the engineer, contained in the schedule to the by-law, were revised by the court of revision, and alterations made, but the by-law was not amended before being finally passed so as to correspond with such alterations as required by s. 571, s.-s. 2, of the Municipal Act of 1883, and it was impossible to discover from the alterations as made, the amount of the "total

special rate" against each lot or part of lot, and therefore the amount to be annually levied, to be ascertained by dividing such total special rate by the number of years the by-law has to run, which in this case was fifteen years: — Held, that the defect was fatal to the by-law. The locus standi of the applicant herein was objected to, but, on the evidence, the objection was overruled. *In re Funston and Township of Tilbury East*, 11 O. R. 74.

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6. *Contracts for Drainage Work.*

See ante IX.

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7. *Drainage Trials Act.*

[The provisions of the Drainage Trials Act, 1891, and subsequent amendments, are contained in the Municipal Drainage Act, 57 Vict. c. 56; R. S. O. 1897 c. 226, ss. 88 et seq.]

Appeal—*Right of—Order Referring back Report.*]—An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of Drainage Act, R. S. O. 1897 c. 226, and an appeal lies to the court of appeal against it. *Townships of Adelaide and Warwick* v. *Township of Metcalfe*, 27 A. R. 92.

——— *Time—Vacation—Motion to Confirm Proceedings—Costs.*]—The rules applicable to appeals from the high court to the court of appeal are to be applied, as far as possible, to appeals from reports of the Drainage Referee under the Drainage Act, 57 Vict. c. 56 (O.), and the Christmas vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made. Where the respondents' solicitors, by letter, insisted that the appeal was not regularly or properly brought, the appellants were justified in making a motion to extend the time for taking certain steps or to confirm the proceedings taken, and were entitled to the costs of such motion, although it was, strictly speaking, unnecessary, because the proceedings were found to be regular. *Re Township of Raleigh and Township of Harwich*, 18 P. R. 73.

Costs—*Scale of.*] — Section 113 of the Drainage Act, R. S. O. 1897 c. 226, providing that the tariff of the county courts shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the referee under s. 94 only because the court thinks they may be more conveniently disposed of by him. *McCulloch* v. *Township of Caledonia*, 19 P. R. 115.

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of s. 93 of the Drainage Act, R. S. O. 1897 c. 226, under which proceedings before the drainage referee may be taken without bringing an action, and an order is made referring the action to the referee for trial, the costs should be taxed according to the tariff of the county courts, under s. 113. *Moke* v. *Township of Osnabruck*, 19 P. R. 117.

——— *Scale of—Appeal.*]—Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R. S. O. 1897 c. 226, and no tariffs of fees having been framed thereunder, the tariff of the county courts applies, not only to proceedings before the drainage referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the court of appeal from the decision of the referee should be the county courts tariff. *Re Townships of Metcalfe and Townships of Adelaide and Warwick, Re Township of Colchester North and Township of Gosfield North*, 19 P. R. 188.

Effect on Pending Arbitrations.]—The Drainage Trials Act, 1891, 54 Vict. c. 51 (O.), has not the effect of abrogating pending proceedings before arbitrators who have previously been appointed and have proceeded to act. *Township of Caradoc* v. *Township of Metcalfe*, 21 O. R. 309.

Jurisdiction to Refer Compulsorily.]—In an action against a township corporation for damages for flooding the plaintiffs' lands, they alleged that the defendants, in executing certain works and making certain drains under the drainage clauses of the Municipal Act, had brought water down upon the lands without providing any sufficient outlet for it:—Held, that the damages complained of arose if not from the "construction," at all events from the "operation," of the drainage works of the defendants; and therefore the court or a Judge had jurisdiction under s. 11 of the Drainage Trials Act, 1891, to compulsorily refer it to the referee appointed under that Act. Semble, there was no jurisdiction to refer this case under s. 9 of the Act; for, according to the construction placed by the supreme court of Canada upon s. 591 of the Municipal Act, which is in the same words as s. 9, the damages complained of did not arise from the construction of the drain within the meaning of s. 9. Williams v. Township of Raleigh, 21 S. C. R. 103, considered. *Sage* v. *Township of West Oxford*, 22 O. R. 678.

Jurisdiction to Refer—*Local Master.*]—A local master of the high court has jurisdiction, by virtue of rules 42 and 49—see also rule 6 (a)—to make an order, under s. 94 of the Municipal Drainage Act, R. S. O. 1897 c. 226, referring an action brought in his county to the referee under the drainage laws. *McKim* v. *Township of East Luther*, 19 P. R. 248.

Powers of Referee—*Amendment—Compensation—Damages—Route Selected by Engineer.*]—Held, by the court of appeal, that under the Drainage Trials Act, 1891, 54 Vict. c. 51 (O.), the referee has power to award either damages or compensation, whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid:—Held, by the supreme court of Canada, that upon reference of an action to a referee under the Drainage Trials Act, whether under s. 11 or s. 19, the referee has full power to deal with the case as he thinks fit, and to make, of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under s. 11 into a claim for damages arising under s. 591 of the Municipal Act. Held, also, that the referee

has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 20 A. R. 225, 23 S. C. R. 429.

——— *Amendment of Engineer's Report.*]—The drainage referee cannot, under s. 89 of the Drainage Act, R. S. O. 1897 c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. *Townships of Adelaide and Warwick* v. *Township of Metcalfe*, 27 A. R. 92.

Under s.-s. 3 of s. 89 of the Municipal Drainage Act, R. S. O. 1897 c. 226, the drainage referee has jurisdiction, with the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability." *In re Township of Rochester and Township of Mersea*, 26 A. R. 474.

——— *Damages—Assessment — Set-off — Notice of Claim—Copy—Filing—Sufficiency.*]—Whether a claim for damages for injuries sustained in consequence of a drainage work by a landowner who is assessed for part of the cost, and to set off such damages against the assessment, is made by application for arbitration or by action, is immaterial; in either event the drainage referee has jurisdiction to deal with it. The provision of s.-s. 3 of s. 133 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the county court clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited but a copy of the notice is not filed. A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference, because of the drain, with access to part of the claimant's farm. *Thackery* v. *Township of Raleigh*, 25 A. R. 226.

——— *Questions Relating to Assessment.*]—See *In re Township of Harwich and Township of Raleigh*, 21 A. R. 677.

——— *Setting aside By-law.*]—The court being equally divided, the referee's judgment holding that he had jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with the portion of the expenses of repairs within their own limits, and setting aside the by-law, was affirmed. *In re Township of Mersea and Township of Rochester*, *In re Township of Gosfield North and Township of Rochester*, 22 A. R. 110.

Report of Engineer—*Failure to Take Oath—Amendment of Report.*]—Taking the oath prescribed in s. 5 of the Municipal Drainage Act, R. S. O. 1897 c. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under s. 75 of the Act. While an appeal to the drainage referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment. *Township of Colchester North* v. *Township of Gosfield North*, 27 A. R. 281.

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8. *Drains Extending through Several Municipalities.*

By-law—*Refusal of Contributory Township to Pass—Majority of Owners—County Council.*]—The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vict. c. 18, s. 570 (O.), for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the ratable division of the cost of the work was $1,345 to be paid by N., and $5,725 by D. This action was brought by N. to compel D. to pass a by-law under 46 Vict. c. 18, s. 581, to raise its portion of the fund, which it refused to do:—Held, that the case was not one contemplated by s. 570 and following sections, but fell within s. 598, and the county council was the proper authority to pass a by-law for the construction of such a drain as that proposed. Semble, that, even under s. 570, in cases where the drainage work extends beyond the limits of one township, a petition by the majority in number of the persons to be benefited in part of the townships is required, the parts of both townships being considered for the purpose of the Act as forming a quasi-municipality for the proper drainage of the particular locality, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and if the council of the originating township thinks proper, obtain the needful relief. Corporation of Dover v. Corporation of Chatham, 12 S. C. R. 321, commented on. *Township of West Nissouri* v. *Township of North Dorchester*, 14 O. R. 294.

Cost of Work—*Award—By-law—Payment—Improper Work — Remedy.*]—Where an award has been made as to drainage work under R. S. O. 1877 c. 174, ss. 535, 539, 540, the township to be benefited must pass a by-law under s. 539 to raise the sum awarded against them, and cannot refuse payment until the work is completed. There is no remedy expressly provided by the Act for the case of improperly or insufficiently executed drainage work. If not executed at all, the money may be recovered as on a failure of consideration. *Township of Chatham* v. *Township of Sombra*, 44 U. C. R. 305.

——— *Contribution.*]—The scheme of the Municipal Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved, the attempted charge fails, and is not to be reimposed elsewhere. *In re Townships of Romney and Tilbury West*, 18 A. R. 477.

——— *Contribution—Appeal.*]—An adjoining township cannot be charged under s. 576 of R. S. O. 1887 c. 184 with a proportion of the cost of drainage works which extend beyond the limits of a third township. It is only, if at all, when the works are done by

a county council, under the appropriate provisions of the Act, that an adjoining township can, under such circumstances be assessed. Objections to the legality of a drainage scheme may be taken by way of appeal under the arbitration clauses of the Act, but they need not necessarily be so taken, and it is not too late to set them up in answer to an action. *Township of Stephen* v. *Township of McGillivray*, 18 A. R. 516.

——— *Proportion—Agreement—Report of Engineer.*]—Although a township council is not powerless with regard to the drainage report of its engineer, it is contrary to the spirit and meaning of the Act that the councils of two adjoining townships should agree upon a drainage scheme, and upon the proportion of its cost to be borne by each, and that the engineer of one of them should be instructed to make a report for carrying out the scheme and charging each municipality with the sums agreed on; for such a course would interfere with the independent judgment of the engineer, and pledge each township in advance not to appeal against the share of the cost imposed upon it, to the possible detriment of the property owners assessed for the portions of that share. And where such a course was pursued, a by-law of one of the councils adopting the engineer's report was quashed. In describing lands for assessment, "the north-east part," even with the addition of the acreage, is an ambiguous description; and quære as to the effect upon the validity of a by-law. *Re Jenkins and Township of Enniskillen*, 25 O. R. 390.

Extra Cost of Work—*Repairs—Misapplication of Funds.*]—Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was misapplied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted. *Township of Sombra* v. *Township of Chatham*, 28 S. C. R. 1.

Injuring Liability — *Natural Watercourse.*]—Under s.-s. 3 of s. 3 of R. S. O. 1897 c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water. In re Orford and Howard, 18 A. R. 496, In re Harwich and Raleigh, 21 A. R. 677, and Broughton v. Township of Grey, 27 S. C. R. 495, distinguished. *Township of Orford* v. *Township of Howard*, 27 A. R. 223.

Outlet — *Assessment — By-law — Compensation—Injury to Lands in Adjoining Township.*]—In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. Stephen v. McGillivray, 18 A. R. 516, and Nissouri v. Dorchester, 14 O. R. 294, distinguished. One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law. A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 23 S. C. R. 429.

——— *Contribution — Natural Watercourse.*]—Section 590 of R. S. O. 1887 c. 184 applies only to drains strictly so called, that is, to such outlets as have been artificially constructed; and a municipality from which surface water flows, whether by drains or by natural outlets, into a natural watercourse, cannot be called on to contribute to the expense of a drainage scheme, merely because the natural watercourse is used as a connecting link between drains constructed under that scheme, and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural watercourse by the municipality in question. *In re Townships of Orford and Howard*, 18 A. R. 496.

Held, per Hagarty, C.J.O., and Burton, J.A., that where a drain constructed or improved by one municipality affords an outlet, either immediately or by means of a drain or natural watercourse flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under s. 590 of the Consolidated Municipal Act of 1892, 55 Vict. c. 42 (O.), assess the lands in the adjoining municipality for a proper share of the cost of construction of improvement, and the drainage referee has jurisdiction to decide all questions relating to the assessment. Per Osler and Maclennan, JJ.A., that the section applies only to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened and enlarged, and In re Orford and Howard, 18 A. R. 496, still governs. The court being divided in opinion, the judgment of the drainage referee upholding the right to assess was affirmed. *In re Township of Harwich and Township of Raleigh*, 21 A. R. 677.

——— *Construction — Natural Watercourse—By-laws — Injunction.*]—The provision of the Ontario Municipal Act (55 Vict. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged. If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works,

would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. Judgments below, 23 A. R. 691 and 26 O. R. 694, reversed. *Broughton* v. *Township of Grey*, 27 S. C. R. 495.

——— *Improvement—Error in Mode of Assessment—Future Maintenance.*]—Under s. 75 of the Drainage Act, 1894, 57 Vict. c. 56, s. 75 (O.), any municipality whose duty it is to maintain any part of a drainage work constructed under the provisions of any Act respecting drainage by local assessment may, without being set in motion by any complaint, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships. Where, however, the engineer of the initiating township assessed lands in the adjoining townships for improved outlet upon the principle that all lands within the drainage area were liable, no matter how remote from the improved outlet, though such outlet was unnecessary for their drainage or cultivation, the original outlet being in fact sufficient, his report was set aside. *In re Township of Caradoc and Township of Ekfrid, In re Township of Metcalfe and Township of Ekfrid*, 24 A. R. 576.

——— *Injuring Liability—Assessment for Benefit—Natural Watercourse—Construction of Statute.*]—The Ontario Act, 57 Vict. c. 56, has not abrogated the fundamental principle underlying the provisions of the previous Acts of the legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of their owners, which rests on the maxim qui sentit commodum sentire debet et onus. Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for "outlet liability" under said Act. Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the cost of the work at such outlet. Every assessment, whether for "injuring liability" or for "outlet liability," must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands, to their injury, which water is to be carried off by the proper drainage work. Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work, and other like circumstances. Section 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under s. 75, but must constitute a charge upon the general funds of the municipality. In the present case the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said s. 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited. Judgment in 26 A. R. 495 reversed in part. *Sutherland-Innes Co.* v. *Township of Romney*, 30 S. C. R. 495.

Repair—*Contribution.*]—Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits, and cannot call upon the other minor municipalities to contribute to the expense of repairs. *In re Township of Mersea and Township of Rochester, In re Township of Gosfield North and Township of Rochester*, 22 A. R. 110.

See Township of Chatham v. *Township of Dover*, 11 A. R. 248; *Township of Barton* v. *City of Hamilton*, 17 A. R. 346; *In re Township of Rochester and Township of Mersea*, 26 A. R. 474.

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9. *Injunction.*

To restrain misapplication of moneys assessed for drainage purposes. *Smith* v. *Township of Raleigh*, 3 O. R. 495.

To restrain municipalities from continuing improperly constructed drainage works. *McGarvey* v. *Town of Strathroy*, 10 A. R. 631; *Van Egmond* v. *Town of Seaforth*, 6 O. R. 599; *Malott* v. *Township of Mersea*, 9 O. R. 611.

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10. *Mandamus.*

Improper Construction of Work—*Locus Standi of Plaintiff—Estoppel.*]—On the petition of the plaintiff and other ratepayers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors as completed, a balance remained in the hands of the municipality of about $2,000, which, in compliance with a petition presented by the plaintiff and other contributories to the fund, was refunded ratably to them. The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract. Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications, and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other ratepayers to compel the municipality to complete the drain according to such plans, &c.:—Held, that the plaintiff, being himself a defaulter in the performance of his contract, and having been a party to procuring a distribution of the surplus of the fund which otherwise might have

been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for. Sections 570, 574, 584, 587, 589, 592 of the Municipal Act 46 Vict. c. 18 (O.), relating to the powers of municipal councils as to drainage, &c., considered and explained. *Dillon* v. *Township of Raleigh*, 13 A. R. 53, 14 S. C. R. 739.

Non-Completion of Works—*Misapplication of Moneys—Action—Parties—Attorney-General.*]—Where, on the petition of the plaintiff and other ratepayers, a township corporation had passed a by-law for the construction of the B. drain, and the assessment of the lands to be benefited thereby, part of which the plaintiff owned, but the drain had not been completed, though a reasonable time had elapsed, and a portion of the moneys assessed had been applied upon a certain other drain, not mentioned in the petition, the report of the public land surveyor made pursuant to R. S. O. 1877 c. 174, s. 529, or in the said by-law, and of no value to the said petitioners:—Held, that the plaintiff was entitled to an order compelling the corporation to complete the B. drain according to the by-law, to an injunction to restrain further misapplication of the moneys assessed, and to an account thereof, for that the by-law created a trust which had been violated. Held, also, that the plaintiff was entitled to maintain the action without the attorney-general. Held, also, that the fact that the moneys so assessed were so diverted pursuant to a resolution of the council, passed in accordance with a promise made to certain of the petitioners for the B. drain, who signed such petition and submitted to assessment on the faith of such promise, was no justification of such diversion. Held, lastly, that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed in that manner. *Smith* v. *Township of Raleigh*, 3 O. R. 405.

——— *Maintenance and Repair—Action—Damages—Nuisance.*]—The township of C., under the provisions of the Ontario Municipal Act, R. S. O. 1887 c. 184, relating thereto, undertook the construction of a drain along the town line between the townships of C. and S., but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township of C., in which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains, and a mandamus to compel the completion of the drain undertaken to be constructed by C., as well as damages for the injury to M.'s land and other land in S.:—Held, that M. was entitled to damages; and that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient. Held, also, that s. 583 of the Municipal Act, providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain, does not apply to this case, in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act, R. S. O. 1887 c. 44. Held, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages, even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away. Judgment in 18 A. R. 252 reversed. *Township of Sombra* v. *Township of Chatham*, 21 S. C. R. 305.

Notice in Writing—*Damages—Letter.*]—To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition, the notice required by s. 73 of the Drainage Act, R. S. O. 1897 c. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under s.-s. (a) of that section. A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient. The notice by which proceedings are initiated in court cannot be regarded as a notice under s. 73. *Crawford* v. *Township of Ellice*, 26 A. R. 484.

——— *Damages—Want of Maintenance and Repair—Remedy by Action—Negligent Construction — Remedy by Arbitration.*]—Under the Ontario Municipal Act, R. S. O. 1887 c. 184, an action for damages lies against a municipality at the suit of any person who can shew that he has sustained injury from the non-performance of the statutory duty of maintaining and repairing its drainage works:—Held, that s. 583, s.-s. 2, applies to a case which falls within s. 586, and, while prescribing a notice in writing as a condition precedent to a mandamus, does not, on its true construction, preclude an action for damages without such notice. In an action brought without notice in writing against a municipality for damages for injury caused to the plaintiffs' lands and for a mandamus to prevent the recurrence of the injury:—Held, that, so far as such injury was occasioned by the municipal drain and embankment being out of repair, or from their not being kept in such a state as to carry off, in relief of the plaintiffs' lands, all the water which the drain was capable of carrying off as originally constructed, the action was maintainable. Held, further, that, so far as the injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain, the action must be dismissed. The remedy in such case (see s. 591) was by arbitration as directed by the statute. Judgment in 21 S. C. R. 103 varied. *Corporation of Raleigh* v. *Williams*, [1893] A. C. 540.

Repairs to Drain—*Duty—Injury.*]—The defendants in 1865 passed a by-law for the construction of a drain which went through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widen-

ing and deepening this drain, which was accordingly done. In 1881 they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear:—Held, that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair, under R. S. O. 1877 c. 174, s. 543, and that a mandamus should issue to compel the defendants to make the necessary repairs. *White* v. *Township of Gosfield*, 2 O. R. 287, 10 A. R. 555.

——— "*Person Injuriously Affected.*"]—Under s. 73 of the Drainage Act, 1894, 57 Vict. c. 56 (O.), a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and he may be awarded a mandamus to compel the municipality whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can shew that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property. *Stephens* v. *Township of Moore*, 25 A. R. 42.

See Cryster v. *Towaship of Sarnia*, 15 O. R. 180.

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11. *Other Cases.*

Branch Drains — *Separate Assessment.*]—Where it is essential for the purpose of draining an area, a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary. *In re Township of Rochester and Township of Mersea*, 26 A. R. 474.

Engineer—*Jurisdiction—Failure to Take Oath.*]—See *Township of Colchester North* v. *Township of Gosfield North*, 27 A. R. 281, *ante* 7.

Outlet—*Drainage Scheme.*]—A drainage scheme under s. 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with. *In re Township of Raleigh and Township of Harwich*, 26 A. R. 313.

XIII. Expropriation of Land.

Compensation Money — *Amount of—Nominal Damages — Local Improvements.*]—The appellants, the owners of a block of land, laid it out in building lots, dedicating as a street, called D. street, a portion of the land running through it from a street on the east to within one foot of its west limit, the one foot being reserved because at that time, W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. street through to the next street to the west. Subsequently the owner of the land adjoining laid out his property in building lots, dedicating as a street, also called D. street, a portion of it running (in the same line as the portion dedicated by the appellants), through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the strip reserved by the appellants. Subsequently the appellants sold all their land except the one foot strip, and afterwards the corporation expropriated the two strips to make D. street a thoroughfare, and the appellants in an arbitration under the Municipal Act were allowed merely nominal damages for their strip:—Held, that this was right, there being no evidence that the property had any market value in the hands of the owners or was worth anything except for the purpose of opening the street or that it was capable of being put to any other use whatever. The higher price that the appellants might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be willing to give to have the obstruction removed, could not be considered as elements in fixing the damages. Decision in 16 O. R. 372 affirmed. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, approved. *In re Harvey and Town of Parkdale*, 16 A. R. 468.

——— *Amount of—Benefit to Lands not Taken — Deduction — Local Improvement Rates.*]—Under the authority of 49 Vict. c. 66 (O.), the city of Toronto expropriated the lands of private persons near the river Don, for the purposes of the "Don Improvement Scheme." By the Act the city council were to make a survey and plan of the 400 feet on each side of a certain line called the "centre line," shewing the lands taken by them, and were to apportion to each lot shewn upon the plan a due share of the whole cost of the land, works, and improvements; and by s. 4, s.-s. 3, the lands not taken within the 400 feet were to be specially assessed in respect of such improvements, but no such special assessment was to exceed the actual value of the benefit derived from the improvement. The appellants owned lands extending from the centre line to a distance exceeding 400 feet, and the city took from such lands a strip narrower than the 400 feet:—Held, that in awarding compensation to the appellants under the Municipal Act for the parts of their lands taken, the arbitrators should allow for any benefit to the parts not taken, but in estimating that benefit they should take into account, as best they could, the fact that the landowners were liable to be charged by the city to the extent of the benefit they received, by a rate as for a local improvement under s. 4, s.-s. 3. *Re Richardson and City of Toronto, Re Hospital Trust and City of Toronto*, 17 O. R. 491.

——— *Amount of — Trade—Goodwill.*]—Where the land itself upon which a trade is carried on, is expropriated, damage to the goodwill may be a proper subject of compensation. Ricket's Case, L. R. 2 H. L. 175, distinguished. *Re McCauley and City of Toronto*, 18 O. R. 416.

——— *Payment into Court—Ownership of Land Taken—Statutory Trustee—Interest—Applicant.*]—Upon the petition of the corporation of the city of Toronto, under the Consolidated Municipal Act, 1883, s. 488, to be

allowed to pay into court money awarded to the estate of B. for the expropriation of certain lands of said estate for a court house site, on the ground that the executrix and trustee could not, under the will appointing her, sell the property until her son was of age, or died, or she herself married again, and therefore had not the absolute estate; and also that one M. had a rent-charge or annuity charged on the land for her life, payable to one S:—Held, that the Act does not expressly authorize the payment into court of the amount awarded; that the section in question is imperative, and makes it obligatory on the corporation to ascertain whether the person in question is absolute owner or not; and if not, that the corporation is a statutory trustee of the money, and liable to pay six per cent. interest until the party entitled to the principal claims the same. Held, also, that it was not intended that the court should interfere at the instance of the corporation, but at that of the claimant of the money or part of it; but semble, that the court might do so at the instance of the corporation. The facts here, however, did not shew sufficient ground for it. *In re Beckett and City of Toronto*, 10 O. R. 166.

Crown Lands — *By-law — Highways.*]—A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. *Rae v. Trim*, 27 Gr. 374.

Interference with Proprietary Rights —*Abandonment of Proceedings — Damages— Servitudes Established for Public Utility— Eminent Domain.*]—See *Hollester* v. *City of Montreal*, 29 S. C. R. 402.

See, also, *City of Montreal* v. *Ramsay*, 29 S. C. R. 298; *City of Montreal* v. *Bélanger*, 30 S. C. R. 574.

Powers of Expropriation—*Extent of— Payment — Condition Precedent — Bill to Set aside Proceedings—Costs.*]—There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. Upon a construction of ss. 373 and 456 of the Municipal Act, R. S. O. 1877 c. 174, a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner, who is not entitled to insist upon payment as a condition precedent to the entry of the corporation. Where a municipal corporation had so entered, and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed, the court, on dismissing the bill, ordered the plaintiff to pay all costs, as the corporation had properly exercised their statutory rights. The question involved being of a public nature, the fact that the award was for an amount which in other cases would be beneath the dignity of the court, was not any reason why the court should not entertain the suit. *Harding* v. *Township of Cardiff*, 29 Gr. 308.

See Re Beaty and City of Toronto, 13 P. R. 316; *Re Smith and City of Toronto*, 13 P. R. 479; *In re Prittie and Toronto*, 19 A. R. 503; *Re Macpherson and City of Toronto*, 26 O. R. 558; *In re McColl and City of Toronto*, 21 A. R. 256; *McVicar* v. *Town of Port Arthur*, 26 O. R. 391; *Re Davis and City of Toronto*, 21 O. R. 243; *Re Caldwell and Town of Galt*, 30 O. R. 378.

See, also, *ante* IV., *post* XVI.

XIV. Extension and Separation of Municipalities.

Census.]—Semble, that a by-law incorporating a village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council. But where the census was shewn to be wholly unreliable, and untrue in fact, effect was given to this objection. *Re Fenton* v. *County of Simcoe*, 10 O. R. 27.

Debts and Liabilities.]—The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating, and that both parties accepted such settlement as a final settlement between them, and acted thereupon:—Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law; although, semble, at the hearing it might be necessary to establish that such was the fact. *Village of Gravenhurst* v. *Township of Muskoka*, 29 Gr. 439.

The council of the plaintiffs in 1873 passed a by-law for issuing debentures to raise $6,000 for the purposes of a certain school section, in part comprised in it, and in part in another township, and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate on the property of the school section. In 1874 the defendant village was incorporated out of a portion of the plaintiff township, being a portion of the school section referred to, and during the currency of the debentures the defendants collected their share of the moneys, on the requisition of the secretary-treasurer of the school board, and paid over the same to that official, instead of to the treasurer of the plaintiffs; the latter never made any requisition on the defendants to collect the moneys, and paid over the moneys collected to the secretary-treasurer of the school board. In 1883 the secretary-treasurer died, and it was found that he had converted the sinking fund money to his own uses, and had left no assets wherefrom it might be made good. In the same year the debentures fell due, and the plaintiffs paid them:—Held, that, having regard to 36 Vict. c. 48, s. 56 (O.) (R. S. O. 1877 c. 174, s. 55), the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs; and even if there had been a positive agreement by and with the plaintiffs that the money should be paid to the secretary-treasurer of the school board, this would have made no difference; for such an agreement would have been ultra vires the plaintiffs, and void as contrary

to the statute law, while the sections of 36 Vict. c. 48 (O.) relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying. Held, also, that, even if it was impossible to make the judgment productive on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment. County of Frontenac v. City of Kingston, 30 U. C. R. 584, distinguished. *Township of Elderslie* v. *Village of Paisley*, 8 O. R. 270.

On the erection of two village municipalities out of a township: — Held, that the moneys derived from "the Ontario Municipalities Fund," which had some years previously been appropriated by by-law to the school purposes of the township, were assets properly divisible between the township and the new village municipalities. Re Albemarle and Eastnor, 45 U. C. R. 133, distinguished. *Village of East Toronto* v. *Township of York*, 16 O. R. 566.

——— *Division of County—Debentures—Local Municipalities—Account.*]—See *Township of Ascot* v. *County of Compton*, *Village of Lennoxville* v. *County of Compton*, 29 S. C. R. 228.

Voters in Added Territory.]—Where a city made additions to its territory, and thereby included within its corporate limits a portion of an outlying township:—Held, that, regard being had to the provisions of the Municipal Act, R. S. O. 1887 c. 184, ss. 84, 89, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before such addition. *Regina ex rel. Tavernor* v. *Wilson*, 12 P. R. 546.

XV. Fines and Penalties.

By-law—*Amount of Penalty.*] — Where a corporation is empowered by statute to enact by-laws and to enforce a penalty for their infraction, not exceeding a certain amount, a by-law is bad which annexes a penalty to an offence, but does not declare its amount. *Peters* v. *Board of Police of London*, 2 U. C. R. 543.

——— *Amount of Penalty—Discretion of Magistrate.*]—A by-law for the regulation of markets, &c., provided that any person breaking any of the provisions should, upon conviction before the mayor or any other magistrate of the town, forfeit and pay a fine not exceeding $50, nor less than $1 and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days:—Quære, taking together s. 243, s.-ss. 6, 7, 8, and ss. 286, 297, 360, 366, of C. S. U. C. c. 54, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or whether it must not be fixed by the by-law. *In re Pennell and Town of Guelph*, 24 U. C. R. 238.

——— *Amount of Penalty—Discretion of Magistrate—Informer — Moiety of Fine.*]—A similar by-law provided that persons offending against the by-law should, on conviction by a magistrate, be fined not less than $1 nor more than $20, and in default of payment be imprisoned for not less than two nor more than twenty days, which fines should be applied to the uses of the municipality:—Held, that leaving the fine in the magistrates' discretion was clearly authorized by s. 209 of the Act of 1866; but that it was invalid for not awarding a moiety of the fine to the informer, under s. 211. *Re Snell and Town of Belleville*, 30 U. C. R. 81.

——— *Distress—No Provision for.*]—A by-law enacting that persons wilfully neglecting, refusing, or failing to comply with its provisions, should be liable to a fine of £5, or failing to pay the same to twenty days' imprisonment, without providing for any attempt to levy by distress:—Held, bad. *In re Greystock and Municipality of Otonabee*, 12 U. C. R. 458.

——— *Distress—Provision for—Collection of Fine.*]—Held, that a provision for distress in default of payment of the fine and costs imposed, did not constitute a part of the penalty or punishment imposed by the by-law, but was merely a means of collecting the penalty as authorized by s. 2 s.-s. 14, of 39 Vict. c. 33 (O.), and s. 421 of the Municipal Act, R. S. O. 1887 c. 184. *Regina* v. *Flory*, 17 O. R. 715.

——— *Imprisonment—Duration.*]—A provision that any person incumbering, injuring, or fouling any public wharf, should be liable to a penalty named, and in default of payment or sufficient distress to imprisonment "for not less than ten nor more than thirty days:"—Held, bad, twenty-one days being the limit authorized by s. 372, s.-s. 13, of the Act of 1873. *In re McLeod and Town of Kincardine*, 38 U. C. R. 617.

——— *Imprisonment—Duration.*] — A by-law of a city enacted that any person found drunk on any of the public streets, &c., thereof, should be subject to the penalty thereby imposed, namely, to a fine not exceeding $50, inclusive of costs, and in default of payment forthwith of the fine and costs, distress, and in default of sufficient distress, imprisonment in the common gaol for a term not exceeding six months, &c., unless the fine and costs were sooner paid:—Held, that under s.-s. 19 of s. 479, R. S. O. 1887 c. 184, there was power to authorize imprisonment for the period mentioned. *Regina* v. *Grant*, 18 O. R. 169.

——— *Monthly Penalty—Imprisonment—Sewers.*]—The 6th section of a by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week: the 7th section imposed a penalty of not less than $1 nor more than $10 for each month on any one who should omit to do so; and the 8th provided for enforcing payment by distress or imprisonment not exceeding thirty-one days: — Held, that these sections must be quashed, for s.-s. 18 of s. 200 of 22 Vict. c. 99 shewed how the parties should be compelled to drain, i. e., by the council doing the work and assessing them for the cost; and the infliction of a penalty for each

month, and imprisonment for thirty-one days, were wholly unauthorized. A subsequent by-law added to the 8th section above mentioned a proviso that any person thereby required to construct a drain, who should not do so, but should be willing to pay the same rent as if he did use the sewer, should be exempt from the penalties:—Held, that, as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed. *In re McCutcheon and City of Toronto*, 22 U. C. R. 613.

Police Magistrate—*Ratepayer—Pecuniary Interest in Fines.*]—See *Regina* v. *Fleming*, 27 O. R. 122.

XVI. Local Improvements and Sewers.

1. *By-laws for, Validity of.*

Assessment—*Agreement with Owners of Property—Construction of Subway—Benefit to Lands.*]—An agreement was entered into by a city corporation with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east to the limit of the subway, the street being lowered in front of the company's lands, which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway:—Held, that, to the extent to which the lands of the company were cut off from abutting on the street as before, the work was an injury and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement. Held, further, that, as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable. Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. Judgment in 23 A. R. 270 affirmed. *City of Toronto* v. *Canadian Pacific R. W. Co.*, 26 S. C. R. 682.

——— *Arbitrary Rate.*]—Under 12 Vict. c. 81 and 16 Vict. c. 181, a by-law imposing one uniform rate for draining into the common sewers of a city, of 5*s.* per foot frontage, to be charged upon the proprietors of real property for each and every foot frontage of property draining into the said sewers:—Held, invalid as being an arbitrary rate, not fixed in proportion to the assessed value of the property, and not maintainable under 16 Vict. c. 181, s. 15. *Ex parte Aldwell* v. *City of Toronto*, 7 C. P. 104.

——— *Notice—Variance.*]—In carrying out a local improvement the council may either ascertain and provide for the cost of the work before it is actually commenced, by imposing and confirming the assessment necessary for that purpose, or they may do the work first and make the special assessment after its completion. A by-law imposing assessments for local improvements initiated by the city was quashed where the work done and the times of payment therefor were different from those set out in the notice of intention to do the work. Semble, that the by-law was bad on the further grounds: (1) that the notice given to the ratepayers was of an improvement costing the sums named therein, to be provided for by an assessment to be made and confirmed before the commencement of the work, while the by-law imposed an assessment for the cost of construction as ascertained after its execution; and (2) that a petition duly signed objecting to the performance of the work had been, within the proper time, delivered to the council. *In re Gillespie and City of Toronto*, 19 A. R. 713.

——— *Previous Year.*]—Replevin. Defendants avowed under a by-law of the city of London, passed under 19 & 20 Vict. c. 97, on the 11th January, 1858, averring that the amount of real property benefited by certain sewers mentioned in the by-law and statute was £29,508, "according to the assessment returns for the same and the said by-law;" that a rate was directed to be levied on the proprietors, of whom the plaintiff was one, and that for it the plaintiff's goods were seized. The plaintiff demurred, on the ground that the rate imposed by the by-law was for 1858 upon the assessment returns of 1857, whereas it should have been upon the assessment of 1858:—Held, that the plea was good. *McCormick* v. *Oakley*, 17 U. C. R. 345.

——— *Previous Year—Rate—Repeal—Grouping of Streets—Benefit—Part of Property.*]—A by-law passed in 1865 to levy a rate for certain local improvements in the pavement of sidewalks—after reciting a previous resolution accepting a tender for the work, and authorizing a by-law to levy a certain rate per foot frontage on the owners of real estate on the parts of several streets named, and that the required sum should be raised by local taxation upon the proprietors of the several lots of land adjoining said sidewalks immediately benefited thereby, "except that part of James street opposite the market place, and those parts of Church street opposite the several churches and school-houses;" and that the persons named in the first column of the schedule annexed to the by-law were proprietors of the lands adjoining said sidewalks, not before excepted, and were immediately benefited thereby; and that the whole of the said property so benefited was by the assessment roll of 1865 rated at $12,554, &c.—provided that there should be raised from said proprietors 22½ cents in the $, and that the collector for 1865 should collect the rate in the usual way. It then repealed a by-law of

1864 authorizing the levying of the frontage rate above referred to. The work in question had been begun, finished, and paid for in 1864, with the exception of $659, which was paid before the passage of the by-law of 1865. It further appeared that persons were rated as proprietors whose names did not appear on the assessment roll: that all the streets affected were grouped together and rated at the said sum, instead of being assessed separately: and that the whole of plaintiff's property at the corner of two streets was assessed, whereas the flagging extended over only a portion of it:—Held, that replevin would not lie against defendants (the collector and his bailiff) for enforcing the rate: that, assuming the by-law to be defective in providing for a debt of the previous year, it was merely providing in 1865 for a debt contracted and provided for by the by-law of 1864, but provided for imperfectly, which, semble, was not a violation of the rule against retrospective debts, but a mere repeal of a defective, doubtful, or invalid rate, imposed within the jurisdiction of the council, and the substitution of another free from all objection. Held, also, that it was no objection to the by-law that certain proprietors were rated for the special rate who were not on the general assessment roll; nor that the assessment value of 1864 was taken instead of that of 1865, as this did not appear on the face of the by-law, and could not therefore be taken in this action; and that the grouping the streets was legal, and was at all events no objection on motion to quash the by-law, and not open to plaintiff in this action. Held, also, that the whole of the plaintiff's property, as assessed, was liable, though the flagging extended over a portion only, as no doubt the whole was benefited by the partial improvement. *Haynes* v. *Copeland*, 18 C. P. 150.

——— *Second Assessment—Increase of Cost—Notice.*]—The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the council and a by-law passed for the purpose, the cost being estimated at $14,500, an assessment for that sum being adopted by the court of revision after notice to the persons interested. After some delay the council purchased the land required at a price much greater than the estimate, and passed a by-law levying over $36,000 for the work. No work was done on the ground and no notice of the second assessment was given:—Held, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid. *Potman* v. *City of Toronto*, 24 A. R. 53.

——— *Sewer—Appeal—Court of Revision—Registration.*]—In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing, and then, if necessary, make a further assessment to be confirmed by the court of revision in the same manner as the first, or they must defer the actual assessment until after the completion of the work, the ratepayers then having the right to appeal. They cannot proceed partly in one way and partly in another, without giving any opportunity of appealing from a definite assessment. A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to contract a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the court of revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the court of revision:—Held, that the assessment was invalid and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment. The provisions of s. 351 of the Municipal Act, R. S. O. 1887 c. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax. Re Farlinger and Morrisburg, 16 O. R. 722, distinguished. *Sweeny* v. *Corporation of Smith's Falls*, 22 A. R. 429.

——— *Watering Part of Street—Day of Taking Effect—Special Rate.*]—Sub-section 2 of s. 340 of the Municipal Act, 1866, authorizes a by-law to water a portion of a street only. Such by-law need not name a day when it shall take effect. Where such a by-law provided that a special rate should be levied to be estimated on the contract price for such watering, without naming the sum to be raised, but the work had been done, the court refused, in its discretion, to quash the by-law. Where the by-law ordered a special rate on a portion of a street to pay for watering "said street:"—Held, that "said street" referred to only said portion of that street. *Re Platt and City of Toronto*, 33 U. C. R. 53.

——— *Watering Streets — Resolution.*]—There must be a by-law for the necessary assessment for the watering of a street, passed subsequently to and consequent upon the presentation of the required petition therefor, and after the fullest opportunity given to any ratepayer to object to its passage; and a resolution for that purpose, passed by a municipal corporation under a by-law antecedently made, which authorized this mode of proceeding, instead of by by-law, was therefore quashed, but without costs, as the applicant had been one of the petitioners, was well aware of its object, had enjoyed the benefit of the resolution, and had been dilatory in complaining. *In re Morrell and City of Toronto*, 22 C. P. 323.

**Connection with Existing Sewers — "*Property*" — *Rent* — *Commutation* — *Enforcement of Payment.*] — Held, that 22 Vict. c. 99, s. 290, s.-ss. 18, 20, giving power to municipal corporations relating to sewers, applied to sewers already constructed by general taxation, not to those only which might afterwards be built. Sub-section 18 authorizes a by-law to compel the draining "of any grounds, yards, vacant lots, cellars, private drains, sinks, cess-pools, and privies," and to assess the owners with the cost thereof if done by the council on their default; and s.-s. 20 "for charging all persons who own or occupy property which is drained," or required to be drained, into a common sewer, with a reasonable rent for the use of the same. The by-law in question enacted that "all grounds, yards, vacant lots, or other properties abutting on any street," should be drained, and fixed the rent to be paid:—Held, not objectionable, as including other properties than

those mentioned in the statute, for if the word "property" in s.-s. 20 could include only the kinds of property mentioned in s.-s. 18, it might receive the same construction in the by-law. The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorizing such an arrangement. The sewer rent not being a charge upon the land:—Held, that payment of it could not be enforced by the same means as the ordinary assessments. *In re McCutcheon and City of Toronto*, 22 U. C. R. 613.

See, also, *Moore* v. *Hynes*, 22 U. C. R. 107.

——— *Right to Use—Board of Health.*]—A municipal corporation passed a by-law for the construction of a sewer without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some water-closets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege:—Held, that the sewer was constructed for general drainage purposes, including that of water-closets; but that the permission given to the applicant so to use it did not bind the council, which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate fixed by the by-law; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first:—Semble, that, even if he had the legal right to use the sewer, either the corporation or the local board of health could, upon the facts stated in the report, under 47 Vict. c. 32, s. 13, and c. 38, s. 12 (O.), have passed a by-law compelling him to cut off his connection. Quære, whether, after the formation of the local board of health, the by-laws provided for by 47 Vict. c. 32, s. 13, should be passed by the corporation or by the board of health under c. 38, s. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation. *In re Workman and Town of Lindsay*, 7 O. R. 425.

Expropriation of Easement.]—Section 479, s.-s. 15, of the Municipal Act, R. S. O. 1887 c. 184, which gives power to a municipal corporation to pass by-laws "... for entering upon, breaking up, taking or using any land ..." for drainage purposes, does not authorize a by-law which, while not assuming to take land required for the purpose of a sewer, attempts to expropriate the easement for the construction thereof. 52 Vict. c. 73, s. 11 (O.), does not provide for the compulsory acquisition of such an easement. The sewer in question was part of a system, but the upper end thereof, and not an outlet for any part already constructed:—Held, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed. *Re Davis and City of Toronto*, 21 O. R. 243.

Necessity for—*General—Special.*]—The council of a city, by a resolution confirming the report of the committee on works, authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their rails on a certain street—whereby the corporation were to build as a local improvement two new bridges over said rails at an approximate cost of $75,000, $20,000 thereof to be paid by the railway companies in full of all liability, $30,000 by the corporation as their respective shares, and $25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current year for the payment by the corporation of the amount to be paid by them:—Held, that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality; and that the fact of there being a general by-law passed under s. 612, s.-s. 1 (a), for determining property to be benefited by a proposed local improvement was not sufficient; but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what proportion of the cost was to be imposed on the property to be locally assessed. An interim injunction was granted restraining the corporation from acting under the agreement. Held, by the court of appeal, affirming this decision, that a general by-law may be passed providing the means of ascertaining and determining what real property will be immediately benefited by any proposed work or assessment the whole cost of which is to be assessed upon that property, but such a general by-law is not sufficient in the case of local improvements or construction of bridges, the whole cost of which the council deem it inequitable to raise by local special assessment. *Fleming* v. *City of Toronto*, 20 O. R. 547, 19 A. R. 318.

Petition for—*Necessity of*—*Application of Statutes.*]—Section 464, s.-s. 2, of 36 Vict. c. 48, enacts that the council of every city, town, and incorporated village, shall have power to pass by-laws for assessing upon the real property to be immediately benefited by the making, &c., of any common sewer, &c., "on the petition of at least two-thirds in number and one-half in value of the owners of such real property, a special rate," &c. The sub-section is amended so far as the same relates to the city of Toronto, by 40 Vict. c. 39, s. 2, by inserting after the words "owners of such real property" the words "or where the same is in the opinion of the said council necessary for sanitary or drainage purposes," 40 Vict. c. 6, respecting the revised statutes, passed in the same session, repealed 36 Vict. c. 48; and R. S. O. 1877 c. 174, s. 551, s.-s. 2 corresponds with the repealed s. 464, s.-s. 2:—Held, that under 40 Vict. c. 6, s. 10, the statutes contained in R. S. O. 1877 were substituted for the repealed Acts, and the amending Act applied to R. S. O. 1877 c. 174. 2. The amendment in 40 Vict. c. 39 was a reference in a former Act, remaining in force, to an enactment repealed, and so a reference to the enactment in the revised

statutes, corresponding to s. 464, s.-s. 2, within s. 11 of 40 Vict. c. 6, s. 3. That the city of Toronto, therefore, could pass a by-law in 1879 to construct a sewer, when necessary in their opinion for sanitary or drainage purposes, without any petition therefor. *In re Brock and City of Toronto*, 45 U. C. R. 53.

——— *Sufficiency — Certificate of Clerk.*] —The Municipal Act, C. S. U. C. c. 54, authorizes the clerk of the council to "examine and finally determine" whether petitions are signed by the requisite number of owners of property to be benefited by the improvements asked for, and, a certificate being given by the clerk, the court has no power, except in a case of fraud or mala fides, to interfere. *In re Michie and City of Toronto*, 11 C. P. 379.

Sidewalk—*Construction of — Desirable in the Public Interest — Notice.*] — Persons who will be affected by proceedings under s. 623b of the Consolidated Municipal Act, 1892, for the construction of sidewalks, are entitled to actual notice thereof, and to be permitted to shew, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice had not been given, except by advertisement in a newspaper, which had not come to the attention of the applicant, the by-law for the construction of the sidewalk was quashed, so far as it purported to affect his property. Affirmed by the court of appeal, and the procedure to be observed in passing by-laws for the construction of sidewalks considered. *In re Hodgins and City of Toronto*, 26 O. R. 480, 23 A. R. 80.

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2. *Sewers and Drains in Towns and Cities—Injuries Caused by.*

Act of God.]—Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rainfall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes. An extraordinary rainfall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence. *Garfield v. City of Toronto*, 22 A. R. 128.

Independent Contractors — *Transfer of Work.*]—The defendants contracted with B. and A. for the construction of a brick sewer under a contract which provided that the work should be done according to the directions and to the satisfaction of defendants' engineer, who had power, if the contractors should not proceed according to the contract or to his satisfaction, to complete the work at their expense. During the work the city engineer visited it frequently, superintending, and two inspectors for defendants were there constantly, to see that the specifications were carried out. In order to get rid of the water coming down, it was dammed back to raise it to the level of another sewer which was used as an outlet, and in consequence of heavy falls of rain the water thus penned back overflowed into the plaintiffs' cellar. It was contended that, as the work was being carried on by independent contractors, defendants were not liable:—Held, otherwise, for the work was done under defendants' control and supervision; and quære, whether the defendants could transfer such a work, so as to escape liability. *Grassick v. City of Toronto*, 39 U. C. R. 306.

Insufficient Fall.]—A municipal corporation, having properly constructed a sewer in a street in the municipality according to a general plan of drainage adopted by them, are not liable to the owner of houses subsequently erected on the street, because the sewer has not been constructed sufficiently deep to allow a proper fall to the drains from the houses. *Johnston v. City of Toronto*, 25 O. R. 312.

Negligence—*Contributory Negligence.*]—The plaintiff was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corporation, who paid half the cost of constructing it. The corporation used it with the landlord's consent as part of the drainage system of the city, and connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, and the plaintiff's cellar was flooded and his goods damaged:—Held, that defendants were guilty of negligence; and that the plaintiff's contributory negligence in not using sufficient exertions to save his goods, could at most only affect the quantum of damages. *Coghlan v. City of Ottawa*, 1 A. R. 54.

——— *Liability of Third Person.*] — The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into plaintiffs' cellar, and damaged their goods there. The jury found, upon the evidence set out in the case, which was held by the court to warrant their finding, that the defendant had reason to believe the drains might be choked, and remained negligently ignorant of their condition; and a verdict for the plaintiffs was therefore sustained. There were gratings and trap-doors in the sidewalk opening into the cellars of one P., whose premises adjoined the plaintiffs', which the jury found had been placed there many years before without defendants' permission:—Semble, that if the water had got into the plaintiffs' premises through the plaintiffs' own gratings, defendants would not have been liable; but that as between them and the plaintiffs they were responsible, as they would be if any one had been injured by such gratings, though the person who placed them there might be liable also. *Scroggie v. Town of Guelph*, 36 U. C. R. 534.

——— *Necessity for Specific Proof.*]—The plaintiff leased premises at the corner of Queen and Bathurst streets, which ran at right angles to each other, in Toronto. There was a main sewer on Queen street, with which the plaintiff's private drain, constructed by the defendants at the expense of the plaintiff's lessor, connected, and which had been extended westward. There was therein, at or about Portland street, a wall, said to be for the purpose of dividing the water and causing it to flow eastward and westward. There was a sewer on Bathurst street, south of Queen street. Subsequently, and about four years before this action, a sewer was constructed on Bathurst

street, north of Queen street. Into this sewer a creek was turned, in which at times the water was six feet deep; and a number of cross streets drained thereinto. Within the four years before action, but never before, the plaintiff's cellar had been flooded several times, and the cause of this action was the flooding during a steady rain of eight or nine hours' duration. The plaintiff alleged originally defective construction of sewers, and negligence in not repairing, but simply proved the flooding and the above facts, and the jury found a verdict for him:—Held, that the mere proof of the flooding did not establish a primâ facie case of negligence against the defendants; a specific ground of negligence must be proved; and there was no sufficient evidence of position, connection, capacity, and levels of the sewers on Queen and Bathurst streets. New trial ordered. *Noble* v. *City of Toronto*, 46 U. C. R. 519.

Negligent Construction — *Damages — By-law.*]—In the city of Toronto the corporation take upon themselves the construction of drains required to lead from the houses into the main sewers. The plaintiff gave notice in the usual way to the committee of the council forming the board of works, that he wished a drain made, and paid the sum demanded. The drain was constructed under the superintendence of the city engineer, by the contractors with the city, but so unskilfully made that in time of flood the water and filth from the main sewer flowed back through the drain into the plaintiff's cellar, putting him to much inconvenience, which he had endured for several months without being able to obtain redress:—Held, that an action would lie against the corporation, and that $325 damages was not excessive. Held, also, that a by-law to authorize the making of the drain was unnecessary. *Reeves* v. *City of Toronto*, 21 U. C. R. 157.

——— *Pleading.*]—Held, that a municipal corporation were liable for injuries committed in the construction of a sewer under the superintendence of their engineer, the work having been accepted by them, though no authority or contract was shewn under the corporate seal:—Held, also, that the injury complained of was sufficiently alleged in the declaration to be a wrongful act. *Farrell* v. *Town of London*, 12 U. C. R. 343.

——— *Question for Jury.*]—One H. held a lease of certain premises in the city of Toronto, with a right of purchase, and assigned his interest to the defendants in trust for creditors. The plaintiff in his declaration alleged that owing to the insufficient construction of a drain built by H., and continued by the defendants and their tenants, the water and drainage escaped into the plaintiff's house adjoining, thus making it unhealthy, so that he could not lease it as he otherwise might have done:—Held, that it was properly left to the jury to say whether this did in fact occasion the injury, and that if so the defendants were liable. *Foster* v. *Cameron*, 19 U. C. R. 224.

An action lies against a municipal corporation where, by means of their works in grading their streets or otherwise, they cause surface water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper care in performing the work such injury might have been avoided. The corporation of Ottawa, in the exercise of their right to make drains and ditches to carry off surface water from several streets in the neighbourhood of the plaintiff's property, so negligently executed the work as to cause damage to the plaintiff by the overflow of the surface water upon his lands. In an action brought therefor the trial Judge nonsuited the plaintiff. The nonsuit was subsequently set aside by order of a divisional court, costs of the first trial and of the order to be costs in the cause to the plaintiff in any event. On appeal the judgment of the divisional court was affirmed with costs. *Derinzy* v. *City of Ottawa*, 15 A. R. 712.

Obstruction — *Act of Private Person — Liability of Corporation.*] — The plaintiff's house was drained by a private drain into the street drain, which was near to but did not extend as far as his house. L., who also had a house drain connected with the street drain, put a grating across it near the connection with the private drain, which obstructed the street drain, and dammed back the water and sewage through the plaintiff's private drain into his cellar and damaged the plaintiff's premises. The nature of the obstruction was known to the plaintiff but not to the defendants, and the plaintiff did not notify them thereof. There was no by-law compelling property owners to drain their premises into the street drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency or construction of the street drain. In an action by the plaintiff against the defendants for the injury sustained by him:—Held, that the defendants were not liable. *McConkey* v. *Town of Brockville*, 11 O. R. 322.

The plaintiffs owned and occupied a house and premises which had been drained by a drain running through private grounds to and under a raceway, which the owners of the lands on the other side thereof on which the water flowed had stopped up. On the east side of the street on which plaintiffs' house was there was an open ditch or drain connecting with the raceway, which at first was no higher than the street, but being afterwards banked up, the flow of the water was stopped and was spread over the adjoining lands. R., the then owner of plaintiffs' land, and others interested, petitioned the council to construct a drain under the raceway, which the corporation did by means of a well at the raceway and a five-inch pipe under it. R. then connected his private drain with the well. The defendants afterwards connected the drainage of other streets with the well, whereby more water was brought down to the well than the five-inch pipe would carry off, and it flowed back on the plaintiffs' premises, which were damaged. There was no authority given from the defendants to use the well, and the only evidence of acquiescence was the knowledge by O., defendants' street inspector, and no objection made by him:—Held, following McConkey v. Town of Brockville, 11 O. R. 322, that the defendants were not liable for the damage sustained by the plaintiffs. *Welsh* v. *City of St. Catharines*, 13 O. R. 369.

——— *Action—Limitation.*]—To a declaration charging negligence in the construction and maintenance of drains, in order to drain the street of a town, whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that

the cause of action did not accrue within three months:—Held, bad, as s. 491 of R. S. O. 1877 c. 174 did not apply. *Sullivan* v. *Town of Barrie*, 45 U. C. R. 12.

——— *Natural Watercourse.*]—In an action for negligently constructing a culvert under a public street, and altering drains, so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, &c., it appeared that the culvert, through which a natural watercourse passed, had existed for twenty years, under a public street in the city, but it was not shewn by or for whom it was made, nor when the obstruction of the culvert by mud and stones, &c., took place, nor that it had been brought to the defendants' knowledge. The plaintiff's land was above the culvert, and had a ravine passing through it, along which a watercourse ran which crossed the street by this culvert below plaintiff's land:—Held, that the plaintiff must fail. *Bateman* v. *City of Hamilton*, 3 U. C. R. 244.

Use of Drain as Sewer—*Nuisance.*]—A petition by ratepayers of a township, under s. 570 of the Municipal Act of Ontario, asked that a drain should be constructed for draining the property described therein. The township was afterwards annexed to the adjoining city, and the drain was thereafter used as a common sewer, it being, as constructed, fit for that purpose. In an action against a householder, who had connected the sewage from his house with said drain, for a nuisance occasioned thereby at its outlet:—Held, affirming the decision in 21 A. R. 613, that s. 570, in authorizing the construction of a drain "for draining the property," empowered the township to construct a drain for draining not only surface water, but sewage generally, and the householder was not responsible for the consequences of connecting his house with such drain by permission of the city. Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection, on terms which were complied with and the connection made, was a sufficient compliance with said by-law. *Lewis* v. *Alexander*, 24 S. C. R. 551.

——— *Nuisance — Private Property—Absence of By-law — Damages — Action.*]—A municipal corporation, having constructed a drain, without a by-law for the particular portion passing through private property, whereby noxious matter was brought down and deposited thereon, was held liable for damages sustained thereby, notwithstanding that there were excavations on the land but for which the noxious matter might have passed off; the owner not being bound to leave his land in a state of nature; nor was it any answer that the drain was used for similar purposes by others as well as the corporation. In such a case the remedy is by action, and not by submission to arbitration. *Close* v. *Town of Woodstock*, 23 O. R. 99.

See Duck v. *City of Toronto*, 5 O. R. 295; *Baggs* v. *City of Toronto*, 23 C. L. J. 7.

3. *Other Cases.*

Appropriation of Revenue.]—A municipal council, under 12 Vict. c. 81, s. 31, cannot appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township to the improvements of the public streets, and to other purposes within the limits of such part. *In re Richmond and Township of Front of Leeds and Lansdowne*, 8 U. C. R. 567.

Lowering Grade of Street—*Lands Injuriously Affected—Absence of By-law—Negligence—Action.*]—The Act incorporating the city of New Westminster, 51 Vict. c. 42 (B. C.), by s. 190 empowers the council of the city to order by by-law the opening or extending of streets, &c., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in s.-ss. 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land; s.-s. 13 provides for the confirmation of the appointment, and 15 for the deposit in court of said price by the council, which deposit should vest in them the title to said land. Sub-section 17 of s. 190 enacts that s.-ss. 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality. The council was authorized by by-law to raise money for improving certain streets, but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult, and, no retaining wall having been built, the soil of said lot caved and sunk, thereby weakening the supports of the building thereon:—Held, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the street, and was not obliged to seek redress under the statute; that s.-s. 17 of s. 190, which dispenses with the formalities required by prior sub-sections, only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets, the corporation must comply with the formalities prescribed by s.-ss. 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land, the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they were liable for the damage thereby caused. Held, further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been, if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained. *City of New Westminster* v. *Brighouse*, 20 S. C. R. 520.

Pavements—*Liability to Repair—Reconstruction.*]—A city corporation having, by by-law passed in 1888, adopted the local improvement system, a cedar block pavement was constructed as a local improvement in 1891, its "lifetime," as stated by the by-law for levying the assessments therefor, being ten years. Sections 664 and 665 of the Municipal Act, R. S. O. 1897 c. 223, authorize the passing of by-laws providing for the construction of local

improvements and the making of assessments therefor. Section 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repairs or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the . . city . . generally:"—Held, that what the legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the costs of doing so should be defrayed by the owners of the property benefited by the work of reconstruction. Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public. Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 Vict., sess. 2, c. 26 (O.) Semble, that if the dilapidated condition of the pavement were due to the municipality having in the past neglected the duty to repair, the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed. *Re Medland and City of Toronto*, 31 O. R. 243.

Petition to Annul Special Assessment Rolls—*Res Judicata.*]—See *Stevenson* v. *City of Montreal*, 27 S. C. R. 593.

Raising Grade of Street—*Lands Injuriously Affected — Damages—Ascertainment—Benefit — Set-off.*]—In an arbitration under the Municipal Act, R. S. O. 1887 c. 184, s. 483, it is proper to allow as against the amount of damages sustained by an owner of property by reason of the work in question, any enhancement in value to the property derived specifically from the work in question, notwithstanding that such enhancement in value is one common to all the property affected. The amount assessed against the owner as his share of the cost of the work should be added to the damages or deducted from the set-off. Judgment in 16 O. R. 726 affirmed. *In re Pryce and City of Toronto*, 20 A. R. 16.

Repair of Streets—*Pavements—Assessment of Owners—Double Taxation.*]—By s. 14 of 53 Vict. c. 60 (N.S.) the city council was authorized to borrow money for paving the sidewalks of the city, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under 24 Vict. c. 39, furnished the material to construct a brick sidewalk in front of the same property and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well:—Held, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless, and dangerous. *City of Halifax* v. *Lithgow*, 26 S. C. R. 336.

Sewer—*Construction of—Mode of Assessment—Appeal—County Court Judge—Prohibition.*]—When a sewer is being constructed by a municipal corporation under the local improvement system and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class inter se. Semble, that such an improvement and the assessment therefor must be carried out under the provisions of a special by-law, not under a general by-law passed pursuant to s. 667. Judgment in 30 O. R. 158 affirmed. But held also, reversing that judgment, that after the county court Judge had, on appeal by an owner, given his decision, on a day subsequent to the argument, it was too late to obtain an order for prohibition against him. *In re Robertson and City of Chatham*, 26 A. R. 554.

——— *Easement—Interest in Land—Registry Laws.*]—See *Jarvis* v. *City of Toronto*, 21 A. R. 395, 25 S. C. R. 237.

——— *Extension through Adjoining Municipality.*]—The "territory" of the municipality referred to in R. S. O. 1887 c. 184, s. 492, s.-s. 2, is the land comprised within the bounds and under the jurisdiction of the municipality. One municipality cannot therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands have been purchased by the former municipality from the private owners. Judgments in 18 O. R. 199 and 17 A. R. 346 affirmed. *City of Hamilton* v. *Township of Barton*, 20 S. C. R. 175.

——— *See Township of West Nissouri* v. *Township of North Dorchester*, 14 O. R. 294.

Sewer Rates—*Charge on Land.*]—Sewer rates charged under by-law 468 of the city of Toronto prior to the coming into force of 42 Vict. c. 31, s. 25 (O.), 11th March, 1879, form a personal charge only, the enactment not being retrospective. *Re Armstrong*, 12 O. R. 457.

Special Taxes for Local Improvements—*Assessment Rolls—Special Statutes—Ex post Facto Legislation—Warranty—Vendor and Purchaser—Quebec Law.*]—See *Banque Ville Marie* v. *Morrison*, 25 S. C. R. 289.

XVII. Meetings of Councils and Conduct of Business.

By-law—*Meeting—Legality of—Signing.*]—Held, upon the facts stated in the case,

that the by-law was not invalid as not having been passed at a legal meeting of the council, or signed by the reeve. *In re Slavin and Village of Orillia*, 36 U. C. R. 159.

——— *Notice of Introduction—Notice of Meeting — Reading — Adjournment—Quashing — Discretion.*] — The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was "for the consideration of a by-law relating to tavern licenses:"—Held, a sufficient notice. Remarks of Chitty, J., in Henderson v. Bank of Australasia, 45 Ch. D. at p. 337, referred to. It was objected that notice of intention to introduce the by-laws should have been given, and that they should not have received their three readings in one day, the council's rules of proceeding so providing, with the exception of cases of urgency:—Held, that these were matters of internal regulation, and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council. The Municipal Act provides s. 275, that "every council may adjourn its meetings from time to time:"—Held, that a meeting of the council might adjourn temporarily, without a formal motion to adjourn, by the consent of the majority of a quorum present; and, even if the adjournment in this case, announced by the mayor, was not by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the court should not, in its discretion, quash the by-laws passed after the adjournment. *Re Jones and City of London*, 30 O. R. 583.

——— *Passing—Method of Taking Vote.*] —Upon a motion to quash a by-law to revise the wards of a township, it appeared that at a meeting at which the by-law was passed there were present four councillors; that the motion was put by the reeve; two of the councillors voted for the by-law, the third made no objection, and the reeve declared it passed:—Held, that the passing of the by-law having been put from the chair, and no dissent expressed, that it was duly passed in accordance with 12 Vict. c. 81, s. 8. *Mailough* v. *Municipality of Ashfield*, 6 C. P. 158.

——— *Regulating Procedure—Disregard of —Injunction.*]—A by-law of a municipal corporation, passed under s. 283 of the Consolidated Municipal Act, for the purpose of regulating procedure, requiring work exceeding $200 in value to be done by contract after tenders had been called for, was, on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms. In pursuance of this stipulation, the contractors entered into other contracts with the corporation, and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:—Held, that as the applicant's legal right was not clear, and as serious loss and public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted. Validity of proceedings not taken in accordance with the provisions of a by-law for regulating the proceedings of the council or committee thereof, considered. Re Wilson and Town of Ingersoll, 25 O. R. 439, referred to. *Dwyre* v. *Ottawa*, 25 A. R. 121.

——— *Signing and Sealing—Presiding Officer.*]—The reeve, being opposed to a by-law regularly passed while he was present and presiding, refused to sign it or affix the seal. By direction of the council the deputy-reeve then took the chair, and signed and sealed the by-law:—Held, valid; and the court discharged with costs a rule obtained by the reeve to quash it. *Re Preston and Township of Manvers*, 21 U. C. R. 626.

——— *Third Reading—Two-thirds Vote.*] —A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, and that no by-law for raising money or which had a tendency to increase the burdens of the people should be finally passed on the day on which it was introduced, except by a two-thirds vote of the whole council. A by-law to fix the number of tavern licenses, which therefore required such two-thirds vote, was read three times on the same day, and was declared passed. It did not, however, receive the required two-thirds vote. A special meeting of council was then called for the following evening, when the by-law was merely read a third time, receiving the required two-thirds vote:—Held, that the by-law was bad, for, having been defeated when first introduced by reason of not having received a two-thirds vote, it was not validated by merely reading it a third time at the subsequent meeting. The by-law did not shew, as required by the Liquor License Act, the year to which it was to be applicable:—Held, that it was bad for this reason also. *Re Wilson and Town of Ingersoll*, 25 O. R. 439.

Motion—*Refusal of Chairman to Put—Voting on—Signing Debentures.*]—At a meeting of a township council the reeve, who was in the chair, refused to put a motion which had been duly made and seconded, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favour of the motion:—Held, that the reeve had no right to refuse to put the motion, and that the vote was proper and effectual. A municipal by-law for issuing debentures, which had been submitted to the ratepayers and approved by them, contained a clause stating that the debentures were to be signed by the reeve:—Held, that the council had power to appoint another person to sign the debentures in place of the reeve. *Township of Brock* v. *Toronto and Nipissing R. W. Co.*, 17 Gr. 425.

Place of Meeting.]—A county by-law was passed at St. Catharines, Niagara being the county town, but a by-law had been passed in 1862 to authorize the meetings at St. Catharines. Sections 130 and 131 of the Municipal Act, C. S. U. C. c. 54, direct the first meeting of the council to be on the fourth Tuesday in January at the county hall, and by s. 136 subsequent meetings may be held elsewhere:—Held, that the meeting was authorized. *Re Paffard and County of Lincoln*, 24 U. C. R. 16.

Special Meeting — *Calling of.*] — The court refused a rule nisi to quash by-laws of a township council on the ground that the said by-laws were passed at a special meeting called by a member of the council, and not by the town-reeve or other authorized officer. *In re Hill and Township of Walsingham*, 9 U. C. R. 310.

See next sub-title.

XVIII. Members of Councils.

1. *Acceptance and Declaration of Office.*

County Council—*Election of Warden—Certificate of Township Clerk—Costs.*]—Held, that a reeve of a township who was duly elected, and had made and subscribed the declarations of office and qualification, had not a right, under s. 67 of C. S. U. C. c. 54, to take his seat in the county council, when the certificate of the township clerk did not state that he "had made and subscribed the declarations of office and qualification," but only that he had "taken or made the declaration of office." Held, that where reeves and deputy reeves who had filed defective certificates were notwithstanding allowed by the clerk to take their seats in the county council, their votes therein could not be challenged for such defective certificates, s. 67 being only directory and not imperative; that the certificate is only evidence that what is contained in it was done; if it has not been done, or the reeve or deputy reeve has not been duly elected, the mere certificate will not give the party holding it a right to sit and vote in the council. Held, that where the clerk properly refused to allow a reeve to take his seat, but allowed several reeves and deputy reeves whose certificates were equally if not more defective to take their seats and vote, the proper course was to order a new election. Held, that no costs should be given against the sitting member, although he accepted office and was sworn in and his seat was afterwards vacated on the ground of the improper decision of the county clerk, unless shewn that he in some manner directly interfered with the decision of the clerk or otherwise misconducted himself. *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

Defective Declaration—*Unseating Candidate.*]—A defective declaration of qualification of a candidate at a municipal election is not a ground for unseating him by the summary process under the Municipal Act of 1866. *Regina ex rel. Halsted* v. *Ferris*, 5 P. R. 241.

Delay in New Election.]—Five township councillors were elected in January. At their first meeting, on the 17th, only one made the declaration of qualification, and a doubt having been raised as to the other four, in consequence of some employment held by them under the corporation, they delayed in order to consult the county court Judge. On the 19th they met again and organized themselves, but on the same day the reeve for the previous year issued his warrant to elect four other councillors, who were returned; and on the 31st these four, with the man who had first qualified, met and claimed to be the council:—Held, under 22 Vict. c. 99, that the second election was invalid, for the persons first elected not having refused to qualify, but only delayed, and having done so within the twenty days allowed, there was no ground for a new election. A mandamus was ordered to the clerk to deliver up the papers to the council first chosen. *In re Township of Asphodel and Sargant*, 17 U. C. R. 593.

Improper Declaration — *Inadvertence—Effect of.*]—Where an alderman elect made a declaration of office, inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the quo warranto summons against him, qualified in respect of other property, his election was upheld. *Regina ex rel. Hartrey* v. *Dickey*, 1 C. L. J. 190.

Neglect of—*Forfeiture—Penalty.*] — The neglect of a person elected mayor, within twenty days after knowing of his election or appointment, to make the declaration of office and qualification under s. 183 of C. S. U. C. c. 54, does not work a forfeiture of office in addition to the pecuniary penalty by that section imposed. *Regina ex rel. Forsyth* v. *Dolsen*, 7 L. J. 71.

Omission of—*Leave to Supply—Information.*] — The declaration of qualification not having been made, leave was given to the defendant to make the same within ten days, otherwise leave was granted to file an information on the ground that the defendant illegally exercised the franchises of the office. *Regina ex rel. Clancy* v. *Conway*, 46 U. C. R. 85.

Sufficiency of.]—A public declaration of acceptance of office, made in presence of the returning officer and the electors directly after the returning officer has published the result, is a sufficient acceptance under 13 & 14 Vict. c. 64, sched. A., No. 23. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18.

Sufficiency — *Informality.*] — The acceptance of office by a mayor elect referred to in R. S. O. 1877 c. 174, s. 180, within a month from which a writ of quo warranto to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification and office, and not a mere oral acceptance by speech to the electors, or such like. Regina ex rel. Linton v. Jackson, 2 C. L. Ch. 18, dissented from. *Regina ex rel. Clancy* v. *McIntosh*, 46 U. C. R. 98.

——— *Property.*] — The declaration required by the Municipal Act R. S. O. 1877 c. 174, s. 265, from every person elected under the Act to any office requiring a property qualification, is a prerequisite to the discharge of the duties of such office. Where an alderman elect did not state in his declaration the nature of his estate in, or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the municipal laws of Upper Canada:"—Held, that the declaration was insufficient. *Regina ex rel. Clancy* v. *St. Jean*, 46 U. C. R. 77.

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2. *Contracts by Members with Councils.*

Partner of Contractor — *Agreement — Enforcement—Costs.*]—A member of a muni-

cipal corporation agreed with another person to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between them:—Held, to be in contravention of the Municipal Act (16 Vict. c. 181), and the court refused to enforce the agreement for a partnership; but, defendant having denied the partnership, which was established by the evidence, the bill was dismissed without costs. *Colvins* v. *Swindle*, 6 Gr. 282.

Purchaser at Tax Sale.]—Semble, that the mayor of a town or city cannot purchase at a tax sale of lands in his municipality, his duties under the statute conflicting with his interest as an intending purchaser. *Green-street* v. *Paris*, 21 Gr. 229.

Solicitor—*Services of.*]—B., being a member of the town council and employed by them as their solicitor, sued for services rendered as such:—Held, under C. S. U. C. c. 54, s. 219, that, being a trustee for the corporation, he could not recover. *Burnham* v. *Town of Peterborough*, 12 C. P. 103.

See post 4 (a).

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3. *Personal Liability of Members.*

Committee of Council—*Expenditure by —Refusal of Council to Sanction—Liability.*]—Defendants were a committee of a city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee that there should be a ceremony on the occasion of laying the corner stone, and a luncheon; and one of the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, directing him to render his account to the board of gaol inspectors. The plaintiff sent his bill to the chamberlain's office, headed "K. T., chairman, board of gaol inspectors, bought of G. T., agent." The council, however, refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given:—Held, that they were personally liable, and that the plaintiff might sue in his own name. One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee:—Held, not sufficient to exempt him from liability with the others. *Thomas* v. *Wilson*, 20 U. C. R. 331.

Conspiracy of Councillors — *Indictment.*]—Indictment charging that defendants, H., C., and D., were township councillors of East Nissouri, and F. treasurer; and that defendants, intending to defraud the council of £300 of the money of said council, falsely, fraudulently, and unlawfully did combine and conspire unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer as aforesaid:—Held, bad, on writ of error. *Horseman* v. *Regina*, 16 U. C. R. 543.

High Schools—*Maintenance of Pupils.*]—By 60 Vict. c. 14, s. 73 (O.), it is enacted that "the municipal council . . shall pay for the maintenance of pupils . .":—Held, that the municipal corporation and not the individual members of the council are liable. *Port Arthur High School Board* v. *Town of Fort William*, 25 A. R. 522.

Members of Board of Health—*Illegal Acts—Expenditure.*]—The directions of s. 84 of the Public Health Act, R. S. O. 1887 c. 205, are imperative. Where, instead of acting as directed in that section, by isolating and taking care of a person suffering from an infectious disease, the members of a local board of health send him into an adjoining municipality, they are personally liable to repay to that municipality moneys reasonably expended in caring for him and preventing the spread of the disease. *Township of Logan* v. *Hurlburt*, 23 A. R. 628.

Misapplication of Funds — *Suit—Parties.*]—A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. The attorney-general is not a necessary party to such a suit. *Paterson* v. *Bowes*, 4 Gr. 170.

——— *Illegal by-laws — Good Faith — Costs.*]—A ratepayer filed a bill in September, 1871, complaining of certain acts of the treasurer and certain township councillors, done by them in the years 1867, 1868, 1869, and 1870, some of them under by-laws which the bill charged to be illegal, but which until the filing of this bill had never been objected to by any one. Amongst other acts complained of, the bill charged that the defendants had lent the funds of the township upon improper and insufficient securities. After the bill was filed the moneys so lent were all repaid, together with the interest, and the evidence in the master's office established that these loans were the only instances of misapplication of the funds of the municipality. The court, in view of the fact that the by-laws had never been moved against, that the defendants had not received any benefit under them peculiar to themselves, and had not been guilty of any fraud or impropriety in passing them, but, on the contrary, had acted with ordinary care and good faith, refused to make them answerable for the moneys expended under such by-laws, and directed the plaintiff to pay the defendants their costs of suit, less the sum of $150, which amount was to be borne one-half by the treasurer, the other half by the township councillors; as, on account of the nature of the questions on which the plaintiff had succeeded against them, the court could not absolve them from paying some portion of the costs. *Baxter* v. *Kerr*, 25 Gr. 367.

Refusal of Mayor to Execute Lease—*Action—Malice.*]—Case against the mayor of a municipal council, alleging that the council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the council while in

session, defendant being mayor, did instruct and order him as such mayor, on behalf and in the name of the council, to make and execute the lease, of which he had notice, but which he maliciously refused to do, though thereunto requested:—Held, action not maintainable. *Fair* v. *Moore*, 3 C. P. 484.

Refusal of Mayor to Sign Order—*Action—Notice of—Bona Fides.*]—Defendant was sued as mayor of a town for refusing to sign an order to enable plaintiff to obtain a saloon license. The notice of action was signed by plaintiff, with the name of plaintiff's attorney indorsed thereon:—Held, that, as it must be presumed that defendant in refusing to sign the order intended to act in the discharge of his official duty, he was entitled to notice. 2. That the question of the bona fides of defendant in refusing to sign the order, not having been raised at the trial, could not be raised in term. *Moran* v. *Palmer*, 13 C. P. 528.

Unauthorized Payment—*Money Had and Received—Councillors—Action against.*]—The treasurer having paid four orders on him, signed by the reeve of the municipality under the authority of resolutions passed by defendants (three out of five of the council), sitting as reeve and council:—Held, that moneys paid by the treasurer on the order of the reeve which the municipal council has no authority to direct to be paid, will be considered township money still in his hands. Held, also, that, although the debt may be one which the municipality are not liable to pay, it does not thence follow that the members of the municipal council would be personally liable to pay such debt, so that it could be said to be such a payment of their own debt out of the township funds as would enable the plaintiffs to maintain an action for money had and received. *Township of East Nissouri* v. *Horseman*, 9 C. P. 189.

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4. *Qualification and Disqualification.*

(a) *Contracts with Corporation.*

Acceptance of Tender—*Work Partly Done—Disclaimer.*]—Before the election defendant, an alderman, had tendered for some painting and glazing required for the city hospital. His tender was accepted, and he had completed a portion of the work, for which he had not been paid. A written contract had been drawn up by the city solicitor, but not signed by defendant; and he swore that before the election he informed the mayor that he did not intend to go on with the work:—Held, that defendant was disqualified; that it was immaterial whether the contract would be binding on the corporation or not; and that his disclaimer could have no effect. *Regina ex rel. Moore* v. *Miller*, 11 U. C. R. 465.

Acquittance in Equity—*Rights at Time of Election.*]—A person is not disqualified, if he be plainly acquitted in equity from the contract, and a sealed instrument is all that is required to perfect his discharge at law. The rights of the candidate must be looked upon as they are in substance and effect at the time of the election. *Regina ex rel. Hill* v. *Betts*, 4 P. R. 113.

Agent of Company—*Insurance Contract—Lease to School Trustees.*]—An agent of an insurance company paid by salary or commission, who both before and since the last municipal election in the city of Toronto had, on behalf of his company, effected insurances on several public buildings, the property of the corporation, and on several common school buildings within the city, and who at the time of the election had himself rented two tenements of his own to the board of school trustees for common school purposes:—Held, not disqualified. *Regina ex rel. Bugg* v. *Smith*, 1 C. L. J. 129.

Assignment of Claim—*Bona Fides.*]—A claim by defendant against the corporation, bonâ fide assigned to a third party, before the election, does not disqualify. *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.

Binding Contract—*Necessity for.*]—The statute disqualifying a contractor from sitting as a councillor of a municipality does not require that the contract should be binding on the corporation. *Regina ex rel. Fluett* v. *Gauthier*, 5 P. R. 24.

See Regina ex rel. Moore v. *Miller*, 11 U. C. R. 465.

Cancellation of Contract—*Resolution of Council—Unpaid Account.*]—The defendant had a contract with the corporation of the city for the supply of iron up to the end of 1890, but on the 26th November, 1890, he wrote informing the corporation that he withdrew from his contract, and inclosing his account up to date. On the 9th December, 1890, the then mayor of the city notified the defendant that he would be held responsible for any expense the corporation should be put to in consequence of his refusal to fulfil his contract. On the 15th December, 1890, the city council adopted a resolution cancelling the defendant's contract and releasing him from any further obligation in connection therewith. At the same time a notice of reconsideration was given, which by the rules of the council had the effect of staying all action on the resolution until after reconsideration. There was no reconsideration and no subsequent meeting of the council till the 7th January, 1891, previous to which the defendant had been elected mayor for 1891. At the time of his election his account above mentioned had not been paid:—Held, that the resolution had no direct effect to release the defendant from liability under his contract, either at law or in equity; and, whether or not the resolution was to be considered in force, it did not touch the account, the existence of which unpaid was sufficient to invalidate the election under the other circumstances of the case. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Claim for Goods Supplied—*Price Paid after Election before Acceptance of Office.*]—Where it was shewn that the firm of which defendant was a member dealt in coal and wood, and during 1864 supplied large quantities of both coal and wood to the corporation of the city of Toronto, without any agreement as to price or terms of payment, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city:—Held, that the defendant was disqualified. So where it was shewn that for a small portion, viz., ten tons of coal, there was a tender made

by the firm in 1864, which had been accepted by the corporation, and the coal furnished, but the price remained unpaid at the time of the election. Where it was shewn that the price was paid before defendant took his seat, he was still held to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office. *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357.

Claim for Work Done.]—Where defendant, when elected as councillor, had a claim upon the city for certain work done by him under a contract with the corporation:—Held, disqualified. *Regina ex rel. Davis* v. *Carruthers*, 1 P. R. 114.

County Council—*Deputy Reeve.*]—A township councillor being a contractor with the county, and having been elected a deputy reeve:—Held, disqualified for the county council. *Regina ex rel. Lutz* v. *Williamson*, 1 P. R. 94.

Exemption from Taxation.]—A municipality passed a by-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which defendant was a member:—Held, that there was a contract subsisting between defendant and the municipality, and that he was therefore disqualified from holding the office of reeve. *Regina ex rel. Lee* v. *Gilmour*, 8 P. R. 514.

In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years:—Held, that the exemption not being founded upon any contract, but being an exemption without a contract, as provided for by 56 Vict. c. 35, s. 4 (O.), there was no disqualification. Regina ex rel. Lee v. Gilmour, 8 P. R. 514, distinguished. The words "exempt from taxation" in 56 Vict. c. 35, s. 4, mean exempt from payment of all taxes, including school rates. *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314.

Mayor—*Interest in Contract—Partnership.*]—Held, that the mayor of a town, though not now elected by the town councillors, is equally subject with them to the disqualifications of the Act, but that under the circumstances of this case defendant could not be said to be interested by himself or partner in any contract with the corporation. *Regina ex rel. Forsyth* v. *Dolsen*, 7 L. J. 71.

Privilege—*Bridge—Agreement to Repair—Lease for Twenty-one Years.*]—The corporation by by-law granted to defendant, upon certain conditions, a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease. The dam and bridge were built and duly kept in repair by defendant: — Held, that the defendant was interested in a contract with a corporation; but that he was not disqualified as a municipal councillor, the contract amounting to a lease from the corporation of upwards of twenty-one years. *Regina ex rel. Patterson* v. *Clarke*, 5 P. R. 337.

Road Commissioner—*Commission for Services—Non-payment.*] — Where defendant had been appointed a commissioner for the expenditure of municipal funds upon roads, and a certain commission was to be paid to him for his services, of which some portion remained unpaid at the time of his election as a member of the council, he was held disqualified. *Regina ex rel. McMullen* v. *DeLisle*, 8 L. J. 291.

Defendant, when elected reeve of the township of Colchester, was a road commissioner for the township under s. 454 of the Municipal Act, R. S. O. 1877 c. 174, and entitled to a balance for commission on the money spent by the township on a certain ditch:—Held, that he was disqualified as a candidate. *Regina ex rel. Ferris* v. *Iler*, 15 C. L. J. 158.

——— *Commission for Services—Payment.*]—On 27th June, 1861, a by-law was passed by the county council of Essex appropriating $2,543 for the improvement of roads and bridges in the county, and that the defendant and C. be commissioners to expend the same, and that such commissioners should receive three per cent. upon all contracts entered into by them, under the by-law. On 1st December, 1861, defendant received all the money he was entitled to in respect of his services under the by-law:—Held, that, any contract which the corporation made with him having been fully performed by the payment of his commission in 1861, he was not disqualified. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290.

Shareholder in Contracting Company.]—A shareholder in a company in which the council held stock, and which had borrowed money from the council and secured the repayment by mortgage, was held disqualified. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

So also a stockholder in a gas company which has a contract with a municipal corporation. *Regina ex rel. Ranton* v. *Counter*, 1 L. J. 68.

But see R. S. O. 1897 c. 223, s. 80 et seq.

Sub-contractor—*Resignation.*]—The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sublet the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract, on the ground that the defendant's services would be of value in the oversight of the contract:—Held, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent. Semble, that if the sub-contract had taken effect, the defendant would have been, under s. 80 (1) of the Municipal Act, R. S. O. 1897 c. 223, disqualified. Judgment in 30 O. R. 411 reversed. *Ryan* v. *Willoughby*, 27 A. R. 135.

Supplying Goods to Contractor.]—An alderman, being a baker, supplied bread to fill a gaol contract held by another person in his own name and for his own benefit:—Held, not disqualified. *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.

Supplying Goods to School Trustees —*Set-off against Taxes.*]—The trustees of a common school in a town being about to erect a school house, the defendant offered to supply a certain quantity of brick to them for that purpose. They told him that if the town council would agree to pay him for the bricks they would take them. He then said that he would take payment for them by letting the amount go against his taxes in each year, with interest at eight per cent. upon the whole amount unpaid. This proposition was made by defendant in person to the town council, and was accepted by them, and defendant furnished the bricks:—Held, that defendant was disqualified. *Regina ex rel. Fluett* v. *Gauthier*, 5 P. R. 24.

Sureties for Corporation—*Costs of Appeal.*]—Defendants were, at the time of their election as reeves, sureties in a bond given by their respective townships for security for the costs of an appeal:—Held, that they had an "interest in a contract with or on behalf of the corporation," within R. S. O. 1877 c. 174, s. 74, and their election was set aside. *Regina ex rel. Haner* v. *Roberts*, *Regina ex rel. Taylor* v. *Stevens*, 7 P. R. 315.

Surety for Officer.]—Where defendant at the time of his election to the office of mayor for a town was shewn to be a party, as surety, to a bond given to the corporation for the due performance of his duties by one of its officers, he was held disqualified. *Regina ex rel. McLean* v. *Watson*, 1 C. L. J. 71.

——— *Solicitor for Corporation.*] — A surety by bond to a corporation for their treasurer, and to the treasurer for the collector of taxes, is disqualified, as is also a person who is acting as their solicitor in the defence of suits. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

Surety for Treasurer—*Acceptance of New Bonds.*]—Where defendant was surety for the treasurer for the municipality for 1858, and the same treasurer was reappointed from year to year during 1859 and 1860, the acceptance of fresh bonds by the municipal corporation for the latter years did not release the sureties to the bond of 1858, and, being a continuing security, it was not necessarily released by the acceptance of new bonds. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.

——— *Continuing Security—Reappointment.*]—The treasurer of a township was appointed by annual by-laws, which were silent as to time, in 1859, 1860, and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same treasurer was also appointed by a similar by-law. In 1864 the by-law limited his liability to the year 1864. Thence to 1868 no time was specified, but his term was then limited to that year. In 1869 the treasurer's accounts were audited and found correct:—Held, that this bond was only a continuing security until the expiration of the treasurer's term of office, and that the liability ceased on his reappointment in 1863, and that therefore the defendant had not a contract with the corporation so as to disqualify him as a councillor. *Regina ex rel. Ford* v. *McRae*, 5 P. R. 309.

Treasurer—*Dismissal—Dispute as to Payments—Bond.*]—A dispute arose between a township council and the treasurer, who was paid by salary in lieu of perquisites of office, as to his duty to fund certain percentages for seven years, for the benefit of the township, during which he held office. He paid the percentages for two years under protest, and refusing to pay more was dismissed, and afterwards was elected councillor, and became reeve. Having, while in office, given a bond to the corporation, as treasurer, for the due performance of his duties:—Held, that the dispute was a matter of contract in the legal sense of the term. 2. That, although defendant was not treasurer at the time of the election, there then being a dispute in good faith between him and the council, arising out of matters connected with the administration of that office, he was disqualified. *Regina ex rel. Bland* v. *Figg*, 6 L. J. 44.

(b) *Innkeepers and License Holders.*

Lease of Inn before Election—*Bona Fides.*]—Defendant, being an innkeeper, on the eve of the election leased the inn to a person who was formerly his barkeeper, and notwithstanding the lease he and his family continued to live in the inn, he occasionally attending bar as before the lease:—Held, that if the transfer of the business was in good faith, it was no valid objection that the object of it was to enable defendant to be legally elected town councillor. 2. The parties to the transaction having expressly negatived collusion or want of good faith, the boarders in the house, and those who had dealings with defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been any change in the business, having expressed their belief under oath that defendant had nothing to do with the business of the inn, that the transaction must be taken to have been bonâ fide, and the defendant, therefore, was entitled to his seat. *Regina ex rel. Crozier* v. *Taylor*, 6 L. J. 60.

License—*Inn without—Sale of Interest—Possession.*]—Held, not necessary under C. S. U. C. c. 54, s. 73, to constitute an innkeeper that he should be licensed:—Held, also, that where a candidate for councillor was an innkeeper, but sold his interest as such the day on which the election took place, but there was no actual change of possession, he was still an innkeeper, and as such disqualified. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.

——— *Transfer of — Invalidity — Partnership.*]—The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before:—Held, affirming the decision in 9 P. R. 452, that a license cannot lawfully be transferred

except in the cases mentioned in R. S. O. 1877 c. 181, s. 28, none of which had occurred here; that the consent of the commissioners did not validate the transfer; and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor. *Regina ex rel. Brine* v. *Booth*, 3 O. R. 144.

License in Name of Another—*Fraud.*]—A man may be an innkeeper, though he take out a license in the name of another, and if he does so fraudulently he is disqualified to be a municipal councillor. *McKay* v. *Brown*, 5 L. J. 91.

——— *Liquor License Act—Penalty.*]—An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under s. 74 of the Municipal Act, 1877, from holding the office of alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Acts. *Regina ex rel. Clancy* v. *Conway*, 46 U. C. R. 85.

Shop License — *District of Algoma — R. S. O. 1877 c. 175.*]—See *Regina ex rel. Londry* v. *Plummer*, 15 C. L. J. 138.

(c) *Lessee or Lessor of the Corporation.*

Contract for Lease.]—A lessee of a municipal council was disqualified from sitting in such council; so a person holding a contract for a lease, though executed only by himself, and not by the corporation. *Regina ex rel. Stock* v. *Davis*, 3 L. J. 128.

[But a lessee for twenty-one years or upwards is not disqualified under R. S. O. 1897 c. 223, s. 80 et seq.]

Lease to Corporation—*Conditional Assignment.*]—Defendant granted a lease to the corporation for five years, which lease, with the premises therein mentioned, and the benefit therefrom, he conveyed to R. a few days before the election. The assignment was, however, incumbered with a condition to refund the consideration money on certain contingencies, and no reversion was conveyed by the assignment: — Held, that defendant was disqualified. *Regina ex rel. Ross* v. *Rastal*, 2 C. L. J. 160.

Lease for Twenty-one Years—*Surrender—New Lease.*]—Where a lease for twenty-one years was originally made to a third person for the benefit of the beneficial lessee, and afterwards, during the term, it was surrendered, and a new lease made directly to the beneficial lessee for the remainder of the term, which was for less than twenty-one years:—Held, looking at the real nature of the transaction, that the lessee was not disqualified. *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.

See also *Regina ex rel. Patterson* v. *Clarke*, 5 P. R. 337; *Regina ex rel. Bugg* v. *Smith*, 1 C. L. J. 129.

(d) *Officers of Corporations.*

[By C. S. U. C. c. 54, s. 73, "no officer of any municipality" was qualified to be a member of the council. By the Act of 1873, s. 75 (R. S. O. 1897 c. 223, s. 80 et seq.) the particular officers disqualified are specified, as they were also by the Act of 1866, s. 73.]

County Clerk.]—A county clerk:—Held, disqualified under s. 73 of 29 & 30 Vict. c. 51, from sitting as mayor of the same or any other municipality. *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195.

Mayor.]—The mayor of a town for the year 1858 is not ineligible for mayor for 1859. A mayor is not an officer of the municipality within the meaning of 22 Vict. c. 99, s. 73. *In re Sawers* v. *Stevenson*, 5 L. J. 42.

Overseer of Highways.]—Held, disqualified. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 128.

Road Commissioner.] — Proof of the mere fact of defendant being a road commissioner appointed by county by-law, to expend moneys raised in and for 1861, for the improvement of roads and bridges:—Held, not necessarily to imply that he was an "officer" of the corporation, so as to make him ineligible to be elected in 1862, unless clearly shewn that his duties continued. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290.

School Superintendent.]—Under the old law a local superintendent of schools, entitled to a salary to be paid by the county treasurer, was not disqualified. *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 189.

Solicitor.]—A solicitor who is acting in defence of suits for a corporation is disqualified for a seat in the corporation. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

(e) *Property Qualification.*

Actual Assessment — *Necessity for.*]—Under 12 Vict. c. 81, s. 65, as amended by 14 & 15 Vict. c. 109, candidates for town councillors must be not only assessable but assessed for the necessary amount of property. *Regina ex rel. Metcalfe* v. *Smart*, 10 U. C. R. 89; *S. C.*, 2 C. L. Ch. 114.

But see *Regina ex rel. Laughton* v. *Baby*, 2 C. L. Ch. 130.

Administrator — *Estate Assessment.*]—An administrator cannot qualify on real estate assessed in his own name but belonging to deceased. *Regina ex rel. Stock* v. *Davis*, 3 L. J. 128.

Alderman—*Change in Law.*]—On an application to unseat one E., sitting as an alderman for a city, it appeared that E. was only rated in the last revised assessment roll as householder to the extent of $160. It was, however, contended that no qualification at all was necessary, but, even if so, it was sufficient that the qualification should be that of a councilman under the former Act:—Held, that it was necessary that candidates for the office of alderman should, at the time of the election for cities in 1867, have had the qualification required by C. S. U. C. c. 54, notwithstanding 29 & 30 Vict. cc. 51, 52, and that a qualification as councilman under the old law was insufficient for an alderman under the new Act. *Regina ex rel. Tinning* v. *Edgar*, 4 P. R. 36.

Assessment — *Necessity for.*]—Property owned by a candidate, but not mentioned in the assessment roll, cannot be made available as a qualification. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

Assessment Roll—*Conclusiveness.*]—The assessment roll is conclusive as to the rating of those mentioned in it. *Regina ex rel. Fluett* v. *Semandie*, 5 P. R. 19.

——— *Conclusiveness—Change by Court of Revision—Notice.*]—E. P., being the lessee of certain premises, assigned his interest to H. P. after the assessment roll for that year had been returned with E. P. assessed for the property. No notice of appeal against the assessment was served until several days after the time limited for so doing had expired. The court of revision, on appeal, substituted H. P. for E. P. on the roll. On an application to set aside the election of H. P. as an alderman, on the ground that the defendant was not rated on the roll when it was made out, and that he was not sufficiently qualified:—Held, that the assessment roll was absolutely binding; and that its correctness could not be tried upon such an application; and that the want of notice was cured by R. S. O. 1877 c. 180, s. 53. *Regina ex rel. Hamilton* v. *Piper*, 8 P. R. 225.

——— *Conclusiveness — Freeholders—Locatees of Crown.*]—Where more than two persons were rated on the collector's roll above $100 as freeholders, (and therefore qualified for township councillors), but it appeared that they were not freeholders, but holders of location tickets from the Crown, and further that there were not in fact two persons qualified to be elected:—Held, that the roll was not conclusive; but, as it was shewn that there were not two persons in the township qualified, the relator was precluded from objecting to the qualification of those elected. *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214.

——— *"Estate"—Value—Incumbrances.*]—Notwithstanding the use of the word "estate," in the declaration of a candidate under the Consolidated Municipal Act, 1873, he is, nevertheless, qualified, if the rating of the value on the roll is sufficient in amount. No change has been made in the law that incumbrances are not to be considered in ascertaining the amount of qualification. *Regina ex rel. Bole* v. *McLean*, 6 P. R. 249.

——— *Last Revised Assessment—Date of Nomination.*] — The defendant was not assessed for the year 1880, but in that year was assessed, on the 3rd September, for the year 1881, upon unincumbered leasehold property of the value of $4,100. By by-law of a city this assessment was revised before the 14th November, and returned before the 31st December as and for the assessment roll for the year 1881. No appeal was had therefrom. The nomination took place on the 27th December, 1880, and the defendant was elected mayor on the 3rd January, 1881:—Held, that the election commenced on the nomination day; and the assessment roll mentioned, which was to take effect in 1881, and not before, was not the last revised assessment at that time, within the meaning of the by-law and R. S. O. 1877 c. 180, s. 44, and the defendant could not qualify thereon. *Regina ex rel. Clancy* v. *McIntosh*, 46 U. C. R. 98.

——— *Omission in.*]—14 & 15 Vict. c. 109, sched. A., 16, which requires the assessor to state in the roll how much of the amount assessed to each person is freehold and how much household property, is directory only; and the omission to comply with it is not necessarily a fatal objection. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

——— *Person Assessed — Ambiguity.*]—A lot was assessed thus: "No. 25, H. B. Yeoman, &c.," under the head "name of taxable party," and then under the heading "name and address of the owner, where the party named in column 2 is not the owner," appeared the name of the respondent. His name was not bracketed with that of H. B., neither was it stated in any way to be a separate assessment:—Held, that the roll shewed that the respondent was assessed for this lot, and could qualify upon it. *Regina ex rel. Lachford* v. *Frizell*, 6 P. R. 12.

——— *Persons Assessed — Partnership—Joint Assessment.*]—Where, on the assessment roll, under the general heading "names of taxable parties" were entered the names of "Ker, William and Henry" for two separate parcels of land, in the proper columns were the letters "F." and "H.," and in the column headed "owners and address" was entered, opposite to the parcels of land and the names in the first column, "William Ker & Bros.;"—Held, that "William Ker and Henry Ker," and not "William Ker & Bros.," were the persons in whose names the properties were rated. 2. That s. 80 of the Municipal Institutions Act, C. S. U. C. c. 54, as to joint assessments, though placed in the Act under the head "Electors," extends as well to candidates as to electors. *Regina ex rel. McGregor* v. *Kerr*, 7 L. J. 67.

Business Premises — *Partnership—Dissolution—Surrender.*]—B. and A. were partners occupying premises as co-tenants under a yearly tenancy, on the terms of an expired lease. Before the nomination day they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from the same landlord:—Held, that B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.

——— *Partnership — Joint Owners.*] — Held, that the respondent was entitled to qualify upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of $10,000: 55 Vict. c. 42, ss. 73 and 86 (O.) *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314.

——— *Partnership—Joint Owners—Actual Occupation.*]—Held, that "actual occupation" in s. 73 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), which provides, with regard to the property qualification of candidates, that where there is actual occupation of a freehold rated at not less than $2,000, the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that when two partners were in occupation of partnership property, each should be deemed in

actual occupation of his interest in the property within the meaning of the above enactment. Regina ex rel. Harding v. Bennett, 27 O. R. 314, followed as to the latter point. *Regina ex rel. Joanisse* v. *Mason*, 28 O. R. 495.

Equitable Estate—*Incumbrances.*]—The real property in respect of which a candidate for the office of alderman in a city qualifies, may be of an estate either legal or equitable, and it need not be free from incumbrances. *Regina ex rel. Blakeley* v. *Canavan*, 1 C. L. J. 188.

——— *Repurchase of Property.*]—Where defendant in November, 1858, conveyed the real estate which formed his qualification, to his father for £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes, though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment "an equitable estate," within the meaning of s. 70 of the Municipal Institutions Act. *Regina ex rel. Tilt* v. *Cheyne*, 7 L. J. 99.

Incumbrances.]—The fact of a property on which a candidate seeks to qualify being incumbered cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification. The distinction between real and personal property discussed. *Regina ex rel. Flater* v. *VanVelsor*, 5 P. R. 319; *Regina ex rel. Philbrick* v. *Smart*, 5 P. R. 323.

——— *Deduction—Assessed Value.*]—Under 43 Vict. c. 24, s. 3 (O.), in estimating the defendant's property qualification, the amount of the mortgages upon the property must be deducted from the assessment, and not from the real value. *Regina ex rel. Kelly* v. *Ion*, 8 P. R. 432.

——— *Registry — Reduction.*] — On the books of the registry office the respondent's freehold property appeared incumbered to nearly its assessed value. It was shewn that the mortgages had been reduced, so as to leave the property worth, according to the assessed value, $963 over and above incumbrances:—Held, that the property qualification was sufficient. *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452.

Inhabitant Householder.]—The qualification necessary for a town councillor for Bytown at an election held in January, 1851, is that set forth in 10 & 11 Vict. c. 43, s. 5. He must be an inhabitant householder. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88.

Leasehold—*Cesser of Interest—Alienation by Operation of Law.*]—A town councillor, when nominated, was possessed of a sufficient leasehold qualification, the term of which, however, expired before the election; in the meanwhile he had acquired another leasehold property on which he sought to qualify:—Held, on quo warranto proceedings, that he could do so under R. S. O. 1887 c. 184, s. 73, as amended by 51 Vict. c. 28, s. 9, since the cesser of the term of the first leasehold, amounted to an alienation by operation of law within the meaning of the statute. *Regina ex rel. Chick* v. *Smith*, 22 O. R. 279.

——— *Cesser of Interest before Election.*]—An alderman elect, though rated for 1863 to the amount of $344 on leasehold property, yet since May, 1863, had ceased to hold part of the property to the value of $109 per annum:—Quære, whether the qualification set out was sufficient, Regina ex rel. Dexter v. Gowan, 1 P. R. 104, being opposed to such a conclusion. *In re Kelly* v. *Macarow*, 14 C. P. 457.

——— *Cesser of Interest before Election.*] *Interest Acquired—Business Premises—Partnership.*]—The defendant, having been elected alderman of a ward in Toronto, relied for his qualification, under 16 Vict. c. 181, s. 18, upon three leasehold properties. The first was a house for which he had been rated in the collector's roll for the preceding year at £35 annual value, but in which he had ceased to have any interest since the June before the election:—Held, not available, for the qualification must be held at the time of election. The second was a house which he had taken after giving up the first, and for which he was assessed as occupant at £45 annual value:—Held, a good qualification to that amount; and that it was no objection that the defendant had not held this property for a year when elected, for the statute refers to the extent of the interest, and not to the time for which it must have been held. Quære, whether there must be a year of the term yet to run at the time of election. The third property consisted of rooms in the second storey of a house, with a separate entrance from the street, rented by the defendant and one T. as partners, and occupied by them as a printing establishment, and for which they were rated as occupants at £65 annual value. It was sworn that by an agreement between defendant and T., made in November before the election, the whole assessment was allowed to be charged to defendant's account, and that he had assumed and was ready to pay it:—Held, that if defendant could be treated as separately rated at all, it could only be for half the annual value—and as this, added to the first property, would not make up the £80 required by the statute, he was disqualified. It was therefore unnecessary to determine whether the last mentioned property was of such a nature as to afford a qualification within the terms of the Act. *Regina ex rel. Dexter* v. *Gowan*, 1 P. R. 104.

——— *Incumbrance on Freehold—Effect of—Marshalling.*]—The respondent was rated as lessee of land assessed for $800, which, with other land, worth at least $1,100, was mortgaged by the landlord for $800 in priority to the lease:—Held, that the respondent was duly qualified as a candidate for the office of councillor of an incorporated village, as, under 55 Vict. c. 42, s. 73 (O.), the mortgage was not to be taken into account in diminution of the value, not being on his leasehold interest. Semble, also, that, in qualifying, the respondent would be entitled to have the mortgage marshalled so that recourse should be first had to the other lands included in it, and that it should be apportioned according to the respective values of the different properties, and so the qualification was sufficient. *Regina ex rel. Ferris* v. *Speck*, 28 O. R. 486.

——— *Parol Assignment of Term—Assessment of Assignor.*]—On 1st May, 1859, J. D.

leased certain premises to E. B. D. for five years, with a covenant that the lessee should not assign without leave. The lessee, with the assent of the lessor, assigned the lease to defendant for the remainder of the term. Defendant then orally assigned his right to the term, and sublet to one P., who entered into possession:—Held, that the assignment of and by defendant to P. being by parol, and being without the knowledge of the lessor J. D., defendant was notwithstanding it properly assessed in respect of the demised premises. *Regina ex rel. Northwood* v. *Askin*, 7 L. J. 130.

——— *Partly Freehold.*] — The qualification which by 76 of the Municipal Act, R. S. O. 1897 c. 223, is allowed to be "partly freehold and partly leasehold," is satisfied by half the amount being freehold and half leasehold. *Regina ex rel. Burnham* v. *Hagerman*, 31 O. R. 636.

Mayor—*Qualification of—Special Circumstances—Electors.*]—The town of Clifton was incorporated by special Act (19 & 20 Vict. c. 63). It was subsequently divided into three wards; thus entitling the town to nine councillors and a mayor. At a certain election there were not more than seventeen persons in the town qualified under s. 70 of the Municipal Act, C. S. U. C. c. 54, for councillors, so that there were not, in the language of s. 72, "at least two persons qualified to be elected for each seat in the council,'" though there were more than two persons qualified under s. 70 to be elected mayor: —Held, that the mayor holds a seat in the council. Held, also, that no greater qualification is required for mayor than for a councillor. Held, also, that the only qualification requisite for a person to be elected councillor, owing to the peculiar circumstances of the place, being that of elector, a person elected mayor, and possessing the last mentioned qualification, was sufficiently qualified under s. 72. *Regina ex rel. Bender* v. *Preston*, 7 L. J. 100.

Personal Property.] — A person cannot qualify as town councillor on personal property. When a candidate was assessed on the roll for real property to $750 ($50 less than the qualification required):—Held, that he could not supplement it by an addition of $400 assessed to him on personal property. *Regina ex rel. Fluett* v. *Semandie*, 5 P. R. 19.

Possession of Crown Lot—*Estate—Assessment.*]—On quo warranto, to test defendant's right to the office of reeve:—Held, that a person having the mere possession of a lot vested in the Crown, determinable at any moment, has not such an estate in it as will qualify him under the Municipal Act; but he is, nevertheless, rightly assessed under 32 Vict. c. 36, s. 9, s.-s. 2 (O.). *Regina ex rel. Lachford* v. *Frizell*, 6 P. R. 12.

Several Properties—*Assessment of Tenants—Aggregate Value.*]—It is not necessary under 9 Vict. c. 75, s. 13, that the property on which an alderman qualifies should be assessed in the name of one person possessed of it to his own use. A landlord is so possessed whose tenants occupy the premises, and he may put together real properties, some occupied by himself and some by tenants, to make up the assessed value required. *Regina ex rel. Shaw* v. *McKenzie*, 2 C. L. Ch. 36.

Undisputed Possession for Long Period.]—Property which had been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, was held to constitute a sufficient qualification. *Regina ex rel. Burnham* v. *Hagerman*, 31 O. R. 636.

Wife's Leasehold—*Estate in.*]—The respondent was rated on an assessment roll in respect of a leasehold property, sufficient in value to qualify him for office, but the property of his wife, to whom he was married in 1872, and who acquired the property in 1884:—Held, that the respondent had no estate or interest in the property, and therefore was not qualified for office under s. 73 of the Municipal Act, 1883. *Regina ex rel. Feldtz* v. *Howland*, 11 P. R. 264. But see R. S. O. 1887 c. 184, s. 73.

(f) *Other Cases.*

Alienage.]—Held, that the objection of alienage taken to the relator in this case, was not sustained. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

Assessment Roll—*Conclusiveness of—Number of Freeholders and Householders.*]—Whether, in disputing the validity of an election of a deputy reeve of a village, on the ground that the village did not contain the requisite number of freeholders and householders, they could go behind the assessment, was not determined; but the court granted a quo warranto that the question might be formally raised. *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51.

Bribery by Agents at Former Election—*Effect of—Relator—Claim to Seat.*]—The respondent, who had been returned as reeve at a previous election for 1874, upon a trial on a writ of quo warranto, was found guilty of bribery indirectly, by other persons on his behalf, within the meaning of s. 153 of 36 Vict. c. 48 (O.), and his election was declared void. He was again elected, the relator being the opposing candidate. The relator sought to have the election of the respondent declared void, and to have himself declared to be duly elected:—Held, that indirect bribery was within the meaning of s. 157 of the Act, and that in consequence the respondent was rendered ineligible by the finding at the first trial as a candidate for two years. 2. That the respondent being ineligible, the fact being well known to the electors, all votes given for him were thrown away, and the relator, having the next highest number of votes, was duly elected. *Booth* v. *Sutherland*, 10 C. L. J. 287.

Defective Declaration.]—A defective declaration of qualification of a candidate at an election is not a ground for unseating him by the summary process under the Municipal Act. *Regina ex rel. Halsted* v. *Ferris*, 6 C. L. J. 266.

Disqualification—*Meaning of—Statute.*]—Section 73 of the Act of 1866 provided for the "disqualification" of members; other sections for their "qualification." The Act

was to take effect on the 1st January, 1867, except, among other things, so much as relates to the qualifications of electors and candidates, which was postponed till 1st September:—Held, that s. 73 came into force on the 1st January—"disqualification" not being included in "qualification." *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.

Diversion of Sinking Fund.]—No special appropriation is necessary in order to create a special rate applicable to payment of principal and interest of a municipal debt; if the provisions of the Municipal Act are observed, such separate rate, and the sinking fund as part of it, arise as the taxes are collected; and where, no such appropriation having been made, one of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to that fund, his subsequent election as reeve was set aside, and he was declared disqualified from any municipal office for a period of two years, pursuant to 55 Vict. c. 42, s. 373 (O.) When, without any such appropriation, so much of the year's income of the municipality has been expended as to leave no more than sufficient to cover such sinking fund, the balance is impressed with that character, and to apply it otherwise is a diversion within the meaning of the above enactment. *Regina ex rel. Cavanagh* v. *Smith*, 26 O. R. 632.

Indian—*Reeve of Township.*]—An Indian who is a British subject, and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount), has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving, as an Indian, a portion of the annual payments from the common property of his tribe. *Regina ex rel. Gibb* v. *White*, 5 P. R. 315.

Non-payment of Taxes.]—The non-payment of taxes by a candidate before the election disqualified him, under 29 & 30 Vict. c. 52, s. 73. *Regina ex rel. Adamson* v. *Boud*, 4 P. R. 204. But see R. S. O. 1897 c. 223, s. 89.

Residence of Candidate.]—Section 70 of the Municipal Act of 1859 required that a person, to be qualified to be elected a member of a city council, must be a resident within the city limits:—Held, that a person whose family resided without the city limits, and with whom for weeks continuously he lived, could not, although occasionally boarding with an inhabitant of the city, be deemed a resident of the city. *Regina ex rel. Blasdell* v. *Rochester*, 7 L. J. 102; *Regina ex rel. Fleming* v. *Smith*, 7 L. J. 66.

[By R. S. O. 1897 c. 223, s. 76, it is sufficient to reside within two miles of the municipality.]

Vacating Office by Non-attendance—*Resolution—Injunction.*]—The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns* v. *Town of Petrolia*, 28 Gr. 98.

Vote of Councillor—*Interest—Disqualification.*]—A by-law to grant a bonus of $10,000 to a manufacturing company was proposed by a council consisting of five members, of whom four were shareholders in the company. The by-law provided for raising that sum on debentures, but that the company should get nothing until they furnished evidence to the satisfaction of the council of being in bonâ fide working operation, and an institution otherwise worthy of the bonus, and that they had a bonâ fide paid up capital of at least $5,000. The votes of the electors were taken on it on the 21st October, 1876, when it was carried by a majority of 23. On the 26th February, 1877, a motion was made to quash it, no debentures or money having yet been delivered. Three of the members for 1876 were again in the council for 1877, all being shareholders, and two of them directors of the company:—Held, that the by-law must be quashed: that under s. 75 of the Municipal Act, 36 Vict. c. 48 (O.), a councillor cannot vote on any question affecting a company of which he is a shareholder, even though at the time of election he was not disqualified under that clause, so that here there was no competent quorum to submit or pass the by-law; and that the vote of the majority of the electors could not be treated as a ratification, even if they were shewn to have been aware of the illegality. *Re Baird and Village of Almonte*, 41 U. C. R. 415.

——— *Interest as Ratepayer—Attempted Disqualification.*]—It was alleged that one member of the council was largely interested in the property to be drained under a certain by-law:—Held, that no interest which springs solely from his being a ratepayer, can disqualify a councillor or a member of a court of revision from performing his duties as such. *Re McLean and Township of Ops*, 45 U. C. R. 325.

See Re Vashon and Township of East Hawkesbury, 30 C. P. 194.

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5. *Remuneration and Indemnity.*

County Councillors—*Travelling Expenses.*]—Under 22 Vict. c. 99, s. 262, municipal corporations could not remunerate their members for travelling expenses in attending the council; but only for attendance in council. *In re Patterson and County of Grey*, 18 U. C. R. 189.

Mayor—*By-law—Expenditure.*]—The corporation of a town, at their last meeting in the year, passed a resolution to present a

complimentary address to the mayor, who had held the position for several years, and was about to retire, and to grant him $1,600 as a small token of their appreciation of his long and faithful services, and authorizing the chairman to sign an order upon the treasurer for that sum. On the same day they passed a by-law for the payment of accounts passed for the year, giving a list of them, which the treasurer was directed to pay, and including this sum to be paid to the mayor, "as per order of council." It appeared that the whole taxes of the town for the year amounted only to $3,324:—Held, that the by-law and resolution, so far as regarded the said payment, were beyond the power of the corporation, and must be quashed. *Re McLean and Town of Cornwall*, 31 U. C. R. 314.

Township Councillors.] — Under 12 Vict. c. 81, township councils could not provide for the remuneration of their own members, they not being "township officers." *In re Wright and Township of Cornwall*, 9 U. C. R. 442; *Daniels* v. *Township of Burford*, 10 U. C. C. R. 478.

——— *Indemnity — Costs.*]—A by-law to indemnify a councillor for the costs of a contested election: — Held, illegal, and quashed with costs. *In re Bell* v. *Township of Manvers*, 2 C. P. 507, 3 C. P. 400.

——— *Payment—Recovery back—Previous Payments.*]—On a bill by a ratepayer, filed in the same year that the by-law in the last case was quashed, the court ordered the members who were defendants, to repay to the corporation the $10 a year they had respectively received:—Held, that the ratepayers were not entitled to a decree restoring the sums actually paid for the years between 1859 and 1865, under similar by-laws, except to the extent that such payments exceeded the statutory limit. *Blaikie* v. *Staples*, 13 Gr. 67.

——— *Payment—Recovery back—Treasurer—Indictment.*]—At a meeting of a council in 1856, defendant being in the chair, it was resolved that the treasurer should pay defendant a specified sum for salary as councillor for 1856, and for other things:—Held, that any payment to defendant for such attendance was clearly illegal, and could be recovered from him in an action for money had and received by the council for the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. *Township of East Nissouri* v. *Horseman*, 16 U. C. R. 576.

——— *Per Diem Allowance — Overpayments—Recovery back — Moneys Advanced.*]—A councillor or reeve of a township is entitled as compensation for his services to the per diem allowance provided for by the statute only; and any overpayments may be recovered back by the municipality; the word "officer" used in the statute not applying to the reeve or a councillor. He will be entitled, however, to receive from the municipality payment for moneys out of pocket, advanced by him on account of the business of the municipality. *Corporation of St. Vincent* v. *Grier*, 13 Gr. 173.

——— *Services.*]—A by-law directing payment of $30 to each councillor, "being $20 for services as councillor, and $10 for services for letting and superintending repairs of roads:"—Held, bad, as not within the power given by C. S. U. C. c. 54, s. 269. *Re Blaikie and Township of Hamilton*, 25 U. C. R. 469.

Warden—*By-law.*] — Semble, that under 4 & 5 Vict. c. 10, and 9 Vict. c. 40, a salary might be granted to the warden of a district council as warden, but by a by-law only, not by a vote or resolution merely. *Regina* v. *District of Gore*, 5 U. C. R. 357.

XIX. Municipal Elections.

1. *Generally.*

Commencement — *Nomination—Poll.*]—An election under the Municipal Act is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded. *Regina* v. *Cowan*, 24 U. C. R. 606.

Municipal elections commence with the nomination day, and the disqualification of a candidate has reference to that day. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.

Township Meeting.]—At a township meeting for the election of township officers, the first duty of the meeting is to elect a district councillor, and the town clerk ex officio may preside as chairman of the meeting until such councillor be chosen. *Small ex rel. Walker* v. *Biggar*, 4 U. C. R. 497; *In re Biggar*, 3 U. C. R. 144.

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2. *Assessors and Collectors' Rolls.*

Errors or Omissions in—*Effect of.*]—Held, that under 12 Vict. c. 81, persons on the collector's roll, though omitted accidentally or otherwise from the verified copy of the roll required to be furnished to the returning officer at the opening of the election, are legally entitled to vote. Held, also, that persons in the copy of the roll, though not on the roll, are not entitled. *Regina ex rel. Helliwell* v. *Stephenson*, 1 C. L. Ch. 270.

Where the returning officer was not furnished with a copy of the collector's roll, as required by 14 & 15 Vict. c. 109, sched. A., No. 12:—Held, an irregularity for which the election might be avoided, when the objection was taken by one qualified to urge it, although it might not ipso facto render the election void. *In re Charles* v. *Lewis*, 2 C. L. Ch. 171.

Where the returning officer used the original collector's roll instead of a copy, as directed by the Act, having first announced that he intended to do so, and no one having objected:—Held, that the election was valid. *Regina ex rel. Hall* v. *Grey*, 15 U. C. R. 257.

16 Vict. c. 181, s. 10, enacts that the returning officer of each township or ward shall procure a true copy of the collector's roll for the year preceding the election, verified by the affidavit of such collector, and of the returning officer, to be taken before any justice of the peace for the county, &c. In

this case the roll used by the returning officer was a true copy of and taken from the assessor's roll, not from the collector's, but it was sworn that the collector's roll itself was a true copy of the assessor's roll:—Held, sufficient. Held, that an election cannot be set aside because the returning officer had no copy, or an incorrect copy, of the roll, unless it be shewn that the absence or inaccuracy of such roll has prejudiced the election, or that some candidate or voter refused on that ground to proceed, and relied upon the objection. It must perhaps also be shewn that the candidates returned were not all eligible, or that they had not in fact a majority of legal votes. Neither is it any objection that the copy of the roll was not verified, as required, at least unless the exception be taken before or during the election, or some variance be shewn between the copy used and the original. *Regina ex rel. Ritson* v. *Perry*, 1 P. R. 237.

Previous to 14 & 15 Vict. c. 109, it need not appear on the collector's roll whether the persons therein named were freeholders or householders. *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Ch. 182.

A village was incorporated by proclamation in September 1853, and for that year the property in the village was assessed in the roll for the township of which it formed part. 14 & 15 Vict. c. 109, sched. A, part 11, repeals 12 Vict. c. 81, s. 57, and requires that the returning officer shall procure a correct copy of the collector's roll for the village for the year next preceding the election; making no provision, as the repealed clause did, for the case of villages incorporated after the rolls have been made up. In this case the roll of the township for the preceding year was used at the election. The want of a village roll was objected to and discussed on the hearing of a quo warranto application, but it was not set forth in the statement as an objection, and was therefore not entertained:—Quære, as to the effect of such objection if properly taken. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

Held, that reading 16 Vict. c. 182, s. 17, in connection with the Municipal Act, non-resident freeholders whose names do not appear on the last revised assessment roll, are not entitled to vote. *Regina ex rel. Johnston* v. *Murney*, 5 L. J. 87.

Held, where a township councillor was unseated, a new election ordered, and the returning officer supplied, for the purposes of the new election by the township clerk, with a second copy of the assessment roll of the township, that the returning officer was at liberty to use the copy of the roll supplied to him for the purposes of the first election. *Regina ex rel. McVean* v. *Graham*, 7 L. J. 125.

A court of revision has no power by mere motion, at the instance of a member of the court, to order any names that they think are omitted or wrongly inserted to be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try. Names improperly added to an assessment roll by a court of revision will, in the event of a scrutiny after an election, be struck off. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.

The franchise ought not to be lost to any one really entitled to vote, if it can be sustained on a reasonable view of the requirements of the statute. The rating of electors under C. S. U. C. c. 54, s. 75, is sufficient if in the surnames of the electors, although the Christian names be erroneous. Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified. So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified. "Thomas Sanderson" was held to be idem sonans with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating. Held, that the assessment roll as to the qualification of municipal electors is conclusive. *Regina ex rel. Chambers* v. *Allison*, 1 C. L. J. 244.

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3. *Ballot Papers.*

Inspection.]—Upon an application for a Judge's order for the inspection and production of ballot papers used in the election of a reeve, such application being made under s. 28 of 38 Vict. c. 28 (O.), and neither a prosecution for an offence in relation to ballot papers nor proceedings for the purpose of questioning the election on return having been instituted:—Held, that the order could not be granted. *In re Election for Reeve of Township of Edwardsburgh*, 13 C. L. J. 44.

See McMonagle v. *Coons*, 17 C. L. J. 158.

Recount.]—A mandamus was refused to compel a county Judge to proceed with a recount, where the ballot papers cast at a municipal election were not sealed up as provided by s. 155 of 55 Vict. c. 42 (O.). *Re Ottawa Municipal Election, By Ward, Rideau Ward*, 26 O. R. 396.

Refusal to give Ballot Paper to Voter.]—See *Johnson* v. *Allen*, 26 O. R. 550; *Wilson* v. *Manes*, 28 O. R. 419, 26 A. R. 398.

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4. *Candidates, Nomination of.*

Meeting for Nomination — *Keeping Open after Lapse of Hour.*]—The provision in s.-s. 2 of s. 128 of the Municipal Act, R. S. O. 1897 c. 223, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour, only applies where no more than one candidate is proposed; s.-s. 3 applying where more than one candidate is proposed, in which case no time limit is imposed. *Re Parke*, 30 O. R. 498.

Omission of Name from List.]—In the list of candidates for election as township councillors given to one returning officer out of five for the township, previous to the election, the name of A. H., a candidate who had been duly nominated, was accidentally omitted, and was not inserted until half-past one o'clock of the first day of the polling, whereby he certainly lost six votes, and possibly more. The relator and one Stubbs being equal, the returning officer voted for Stubbs, who, with two other candidates, having

a larger number of votes, were declared elected as the three councillors. The relator and A. H. protested against the election, contending that the whole result of the election had been affected injuriously to one or both of them by the omission of the name. Upon an application to set aside the election, it was held, that it is not every irregularity that will vitiate an election, and that in this case the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had upon the final result; and that, as it did not appear that the result would have been different if the name of A. H. had been properly entered on the list, the election should not be set aside. Quære, as to the right of the returning officer to add the omitted name to the list of candidates. *Regina ex rel. Walker* v. *Mitchell*, 4 P. R. 218.

Withdrawal.]—A candidate for reeve, who is proposed and seconded at the nomination, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature. A voter who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection, cannot afterwards insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book. *Regina ex rel. Coyne* v. *Chisholm*, 5 P. R. 328.

The name of a candidate who has been nominated, but who withdraws (with the consent of the electors) before the close of the nomination, need not be placed upon the ballot paper. The omission of the name of a candidate from the ballot paper is not per se a ground for setting aside an election, if it is not shewn that it has in some manner affected the result of the election. *Regina ex rel. Harris* v. *Bradburn*, 6 P. R. 308.

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5. *Controverted Elections.*

(a) *Claim to Seat for Relator or Candidate.*

Notice to Electors.]—Where it does not appear that the voters at an election had notice of any objection to the candidate for whom they voted, though a valid one existed, a new election will be granted; but the relator, though next in order to him, will not be seated. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88.

Held, that notice of the disqualification having been given to the electors at the time of the election, the relator, who claimed the seat, was entitled to be seated. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 328.

Held, that to entitle a relator (who was a candidate) to a seat declared vacant, he must have notified the electors that the defendant was disqualified, and the grounds of such disqualification. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.

In this case the next candidate could not be declared duly elected, as the notice to the electors of defendant's want of qualification was not sufficiently explicit. *Regina ex rel. Dexter* v. *Gowan*, 1 P. R. 104.

On application to set aside an election, it is no answer to say that the relator did not object at the election to the qualification of the person elected; this is only necessary to entitle the relator, if a candidate, to the vacant seat. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

A candidate claiming to be seated at the nomination, owing to his opponent's disqualification, should, besides claiming a seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.

To entitle a candidate to the seat claimed by him on the ground of his opponent's disqualification, it must be shewn that the qualification was objected to at the nomination, so that the electors might have an opportunity of nominating another candidate. *Regina ex rel. Ford* v. *McRae*, 5 P. R. 309.

On an application to unseat an alderman, elected in 1866, as not being qualified, and to seat another candidate in his place:—Held, that notice of the disqualification should have been given at the nomination, as under s. 101, s.-s. 6, of 29 & 30 Vict. c. 51, no candidates could be voted for who had not been proposed and seconded at the nomination; that an exception taken to the qualification should be of such a plain character that the electors can easily form an opinion as to its correctness. *Regina ex rel. Tinning* v. *Edgar*, 4 P. R. 36.

The election was set aside; but, although the relator had notified the electors of the objection to the defendant's qualification, the seat was not awarded to the candidate having the next largest vote, on account of a resolution of the council, which taught the electors to disregard the relator's warning; and a new election was ordered. *Regina ex rel. McIntire* v. *Birkett*, 21 O. R. 162.

Other Cases.]—Semble, that whether the court or a Judge will go further than declare the election void, or will also seat the relator, is a matter of discretion not to be interfered with on appeal. *Regina ex rel. Clark* v. *McMullen*, 9 U. C. R. 467.

Where a relator, who was himself a candidate, alleges, not only that the person declared elected was illegally elected, but that he, the relator, was duly elected, the latter cannot be deprived of his seat by the resignation of the former. *Regina ex rel. Johnston* v. *Murney*, 5 L. J. 87.

Held, that when a voter having an interest in an election is the relator, claiming the seat for an opposing candidate, and after a scrutiny it is found that the opposing candidate has a clear majority of the legal votes polled, the seat will be awarded to such candidate, notwithstanding that he voted for the defendant whose right to the seat is disputed. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.

Twenty-six persons voted twice for defendant. The Judge subtracted twenty-six from the gross amount of votes recorded for defendant, whereby the relator had a majority of nine, and he was accordingly declared entitled to the seat. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.

When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right. When voters perversely throw away their votes, the minority candidate has a right to the seat. *Regina ex rel. Forward* v. *Dellor*, 4 P. R. 198.

(b) *Costs.*

To or Against Returning Officers.]—The returning officer having by order of a Judge become a party, but being acquitted and discharged, and the relator's statement not being strictly correct:—Held, that the relator should pay the officer his costs. *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Ch. 182.

Held, that, although the conduct of a returning officer in some particulars be irregular, in consequence of which he is made a party to a quo warranto summons, yet if his motives were pure, and his conduct free from corruption or partiality, he is entitled to his costs. *Regina ex rel. McVean* v. *Graham*, 7 L. J. 125.

A returning officer having acted bonâ fide, and defendant having procured a written legal opinion to be sent to him, by which means he obtained his seat:—Held, that defendant must pay the costs of making the returning officer a party to the suit. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.

The returning officer in ignorance of his duty closed the poll, there being an equal number of votes for each candidate. On the subsequent day he gave a casting vote for one of the candidates. The election was held void, but as he appeared to have acted in good faith costs were not given against him. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89. See *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 189.

A returning officer who receives illegal votes not on the assessment roll may be made to pay costs. *Regina ex rel. Johnston* v. *Murney*, 5 L. J. 87.

Where in the county court the returning officer was ordered to pay the costs, and it appeared by affidavits filed on appeal that he was insolvent, and had acted at defendant's instance, the judgment below was altered so as to make the defendant also liable for costs. *Regina ex rel. Acheson* v. *Donoghue*, 15 U. C. R. 454.

Other Cases.]—Where a new election is ordered, the relator must recover his costs. *Regina ex rel. Kirk* v. *Asselstine*, 1 L. J. 49.

Defendant filed a disclaimer, but a day too late:—Held, that he must pay the relator's costs. *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Ch. 182.

Defendant having duly disclaimed, and not in any manner taken his seat, costs were not imposed upon him. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89.

A by-law passed by a township council levying money to pay the costs of a contested election is illegal, and will be quashed with costs. *In re Bell* v. *Township of Manvers*, 2 C. P. 507, 3 C. P. 400.

The power of a Judge, under 13 & 14 Vict. c. 68 sched. A., No. 23, to award costs for or against the relator or defendant, or returning officer, "in disposing of" every case, extends only to the final determination of each case. *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 167.

The tendency of modern decisions is not to compel a party to pay costs unless it be shewn that he participated in the improper conduct for which the election is set aside. *Regina ex rel. Davis* v. *Wilson*, 3 L. J. 165.

Held, that under 16 Vict. c. 181, s. 27, the Judge might in his discretion withhold costs altogether from either side. *Regina ex rel. Swan* v. *Rowat*, 13 U. C. R. 340.

Or might order each to pay his own costs. *Regina ex rel. Gordanier* v. *Perry*, 3 L. J. 90.

Held, that a candidate who consented to his nomination, and was illegally declared elected, and who afterwards sat and voted as a councillor and was elected reeve, may be made liable for costs. *Regina ex rel. Johnston* v. *Murney*, 5 L. J. 87.

A relator having acted in good faith in bringing forward the matter was not amerced in costs, though unsuccessful. *Regina ex rel. Crozier* v. *Taylor*, 6 L. J. 60.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to lose the costs necessarily incurred. Therefore, where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him. *Regina ex rel Rollo* v. *Beard*, 3 P. R. 357; *In re Charles* v. *Lewis*, 2 C. L. Ch. 171, 177.

The master on taxing costs to the successful party should consider whether he produced affidavits unnecessarily numerous or diffuse, and act accordingly. *Regina ex rel. Walker* v. *Hall*, 6 L. J. 138.

Notice of disqualification having been given to the electors at the time of the election, and defendant having declared that he would run his risk and if the election was declared invalid would pay the costs, the relator was held entitled to be seated, and was allowed costs as against defendant. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 128.

Where defendant, while denying any interest in the contract with the road company by which he was alleged to be disqualified, admitted that he was employed as a salaried agent for the contractor, costs were refused to him. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290.

It it not desirable that the clerks of municipal councils having the custody of papers of the corporation, should be relators in quo warranto cases to unseat members of the councils to which they are clerks. In this case, in order to discountenance such a practice, costs were refused to relator, clerk of the county council, to which defendant had been elected a member, although the application to

unseat defendant was successful. *Regina ex rel. McMullen* v. *DeLisle*, 8 L. J. 291.

As this case presented very strong presumptions against defendant in the absence of explanation, costs were not given. *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.

A municipal election set aside, but without costs to the relator, on the ground that he was a confidential officer (auditor), of the corporation, following Regina ex rel. McMullen v. DeLisle, 8 L. J. 291. *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452.

(c) County Court Judge—Powers of.

A county court Judge has power to grant a fiat in term time for the issue of a writ of quo warranto to try a contested municipal election:—Held, that rule 1, M. T. 14 Vict., has become inoperative by the effect of subsequent statutory enactments, to which it is repugnant. *Regina ex rel. McDonald* v. *Anderson*, 8 P. R. 241.

A writ of summons in the nature of a quo warranto having been issued under R. S. O. 1877 c. 174, s. 179, on the fiat of a county court Judge, returnable before himself, to try the validity of the election of an alderman of one of the wards of a city, the county court Judge, before appearance entered, made an order setting aside his fiat and the writ with costs, for irregularity in the proceedings. An appeal from the decision of a Judge, 8 P. R. 497, discharging a summons to set aside such order, the court being equally divided as to the powers of the Judge to make the order, was dropped. *Regina ex rel. O'Dwyer* v. *Lewis*, 32 C. P. 104.

The Judge of a county court ordered a writ of quo warranto to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in chambers for a mandamus to compel the county Judge to try the case, which was refused, 8 P. R. 497, and the refusal affirmed, 46 U. C. R. 175. An appeal was dismissed, but without costs, on the ground that the order of the county Judge, if he had authority to make it, was not subject to review; and if it could be reviewed the application should have been to the court, not to a Judge in chambers. The writ of quo warranto having been issued and served, the county court Judge had not power to set it aside. *Regina ex rel. Grant* v. *Coleman*, 7 A. R. 619.

Notwithstanding the provisions of R. S. O. 1887 c. 184, ss. 187 to 208, a county Judge has now no authority, as such, to give leave under con. rule 1038 to serve a notice of motion to initiate quo warranto proceedings under the Municipal Act; and he has no authority at all to act in proceedings of that nature as a local Judge of the high court, that power being expressly excepted from the powers conferred upon him as a local Judge by con. rule 41. A county Judge assumed to act in such proceedings, which were styled in the high court of justice:—Held, that he must be taken to have acted in his capacity as local Judge of the high court, and objection to the proceedings was properly taken by motion to set them aside. *Regina ex rel. Dougherty* v. *McClay*, 13 P. R. 56.

By s. 219 of the Municipal Act, R. S. O. 1897 c. 223, jurisdiction is given respectively to a Judge of the high court, the senior or officiating Judge of the county court, and the master in chambers, to try the validity of a municipal election, and, by s. 227, when there are more motions than one, all the motions shall be made returnable before the Judge who is to hear the first of them. Two motions by different relators to try the validity of the same election were made returnable, the first of them before the master in chambers and the other before the county Judge, who, notwithstanding objections, proceeded with the motion before him and decided that the proceedings before the master in chambers were collusive, when the county Judge was prohibited from further proceeding by an order made by a Judge of the high court sitting in chambers:—Held, that the county court Judge having equal and concurrent jurisdiction in respect of the matter with the other named officials, a Judge of the high court sitting in chambers could not under the circumstances prohibit him from proceeding with the trial. Semble, the county court Judge who, without knowledge of the prior proceedings, had granted a fiat for like proceedings, had jurisdiction on the return thereof to inquire whether such prior proceedings were collusive, and if so to disregard them. *In re Regina ex rel. Hall* v. *Gowanlock*, 29 O. R. 435.

See Regina ex rel. Whyte v. *McClay*, 13 P. R. 96; *Regina ex rel. Gleeson* v. *Horsman*, 13 U. C. R. 140; *Regina ex rel. Londry* v. *Plummer*, 15 C. L. J. 138.

See, also, *post* (f.)

(d) Disclaimer.

Effect of—*Award of Seat—Injunction—Costs.*]—Section 195 of R. S. O. 1877 c. 174 provides that the effect of a party disclaiming the office to which he has been elected, shall be to give the same to the candidate having the next highest number of votes:—Held, that this meant the candidate having such number of votes who has been elected to the council. Therefore, where the plaintiff was the candidate who was fourth in that order, the three highest on the list having been declared elected, and one at the head of the poll resigned his seat, an injunction was granted to restrain the reeve and councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office. The notice of the party resigning the office stated that he resigned his "seat" in the council:—Held, sufficient; and that the plaintiff was entitled to his costs, although the Act requires notice of a resignation of the "office" to be given. *Smith* v. *Petersville*, 28 Gr. 599.

——— *Award of Seat—New Election.*]—On the 4th March the relator obtained a summons, and the writ and statement were served on that day. On the 9th defendant sent a written disclaimer to the Judge in chambers, which was received on the 10th, and on the 13th the relator's affidavit was filed, stating that the defendant consented to his own nomination and had taken his seat, &c. No proof of the ground taken in the statement was

ever filed, and the case was then allowed to drop. On the 27th April the relator filed a further affidavit, stating that after the disclaimer the reeve had ordered a new election, at which he (the relator) was duly elected, but that defendant persisted in retaining his seat, contending that it had not become vacant by his disclaimer. The chief justice, under these circumstances, refused to give judgment as if the matter were still pending on the summons, there being no proof of any of the objections taken; but held that the disclaimer could not nullify the election, as the parties seemed to have supposed; and that if the council should support the relator in his suit, defendant or some one else must move against his election on the ground that it was illegally ordered; or that the Judge who was in chambers at the return of the summons might perhaps enter an adjournment to a certain day, and call for proofs as to the first election, and give judgment. *Regina ex rel. Freeman* v. *Jones*, 1 P. R. 306.

At an election under the Municipal Act, 55 Vict. c. 42 (O.), for a deputy reeve of a town, there were three candidates, and after the election and before the first meeting of the council, the two who had received the highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office and took his seat. On a motion in the nature of a quo warranto made by the candidate who had received the highest number of votes to have it declared that there was no election and that the seat was vacant:—Held, that what took place constituted an election of the respondent and entitled him to the seat. *Regina ex rel. Percy* v. *Worth*, 23 O. R. 688.

——— *Costs.*]—Where the defendant personally contested the election, but on its being moved against sent in a disclaimer, praying to be relieved from costs, because being duly elected he was obliged to accept the office under a penalty:—Held, no ground for such relief. *Regina ex rel. Featherstone* v. *McMonies*, 2 C. L. Ch. 137.

——— *Costs — Form.*]—Defendant was elected to the office of councillor for a town, and accepted the office. Subsequently, and before the issue of the writ of quo warranto, the defendant, knowing that his election was to be contested, sent the following instrument to the council: "Palmerston, February 7th, 1881. To the mayor and council of the town of Palmerston: Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson:"—Held, that the above disclaimer, not being in the form prescribed by R. S. O. 1877 c. 174, s. 194, was not sufficient to relieve the defendant from costs. *Regina ex rel. Mitchell* v. *Davidson*, 8 P. R. 434.

——— *Pending Proceeding.*]—The effect of filing the disclaimer after the issue of the writ is much the same as doing so before its issue, notwithstanding 3 Vict. c. 36 (O.), and so operates as a resignation and puts an end to the suit, and defendant avoids the reference to the county Judge and the penalties under the Act. *Regina ex rel. Hannah* v. *Paul*, 9 C. L. J. 238.

(e) *Evidence.*

Disqualification—*Notice*—*New Evidence on Appeal.*]—If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election. No new evidence will be received by the court on the examination of a decision of a Judge in chambers as to a contested election. *Regina ex rel. Clark* v. *McMullen*, 9 U. C. R. 467.

Interest of Relator—*Onus.*]—A relator is not necessarily bound to prove his interest, unless defendant question it by denying it, and shewing, or at least alleging, some ground for his denial. *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 U. C. R. 617.

Oral Examination of Parties Refused.]—*Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.

Witness—*Defendant.*]—A defendant named in a quo warranto summons is an interested party trying an issue, and therefore was not competent to give evidence on his own behalf. *Regina ex rel. McGregor* v. *Ker*, 7 L. J. 67.

——— *Relator.*]—The affidavit of the relator in support of the objections may be sufficient to obtain the writ, but he is incompetent as a witness under 16 Vict. c. 19, s. 1, and therefore, to establish the case at the trial, some other evidence is required. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

See Regina ex rel. Acheson v. *Donoghue*, 15 U. C. R. 454.

See also (h).

(f) *Master in Chambers—Powers of.*

The jurisdiction of the master in chambers to grant a quo warranto summons under the Municipal Act, 1883 (O.), is established by s. 13 of the A. J. Act, 1885. *Regina ex rel. Felitz* v. *Howland*, 11 P. R. 264.

The master in chambers is not, in any sense, by delegation or otherwise, a Judge of the high court of justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections: nor can such power be given him by the acquiescence of the parties. *Regina ex rel. Wilson* v. *Duncan*, 11 P. R. 379.

Section 212 of the Municipal Act, R. S. O. 1887 c. 184, has not been affected by the consolidated rules, and under it a reference may be directed to a county court Judge to take evidence where in a quo warranto application a violation of s. 209 or 210 is charged; and, as by con. rule 30 the master in chambers has in quo warranto matters the jurisdiction of a Judge of the high court, he has power to direct a reference under s. 212 to a county court Judge. *Regina ex rel. Whyte* v. *McClay*, 13 P. R. 96.

Held, that the master in chambers had, by the combined effect of rule 30 and 51 Vict. c. 2, s. 4 (O.), all the powers of a Judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the master with such powers. Held, by a divisional court on appeal, following the principle of the decision in Re Wilson v. McGuire, 2 O. R. 118, that

the provincial legislature had power to invest the master with authority to try controverted municipal election cases. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

See, ante (c).

(g) *Relator.*

Acquiescence in Election—*Disqualification.*] — Acquiescence of a candidate in an irregular election, how far it disqualifies him from becoming a relator. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Ch. 203.

The court will not set aside an election on the relation of a party who concurred in it, and voted for the person elected. *Regina ex rel. Rosebush* v. *Parker*, 2 C. P. 15.

Held, that the acquiescence of the candidates in the election being proceeded with where the returning officer was not furnished with a proper roll, though it might not preclude them from disputing the election on that ground, could not affect the right of a voter who was no party to such acquiescence. *In re Charles* v. *Lewis*, 2 C. L. Ch. 171.

Held, that the relator's conduct, in stating that if the voter objected to would swear that he was a resident his vote would be accepted, could not estop him from afterward objecting to the vote. *Regina ex rel. Taylor* v. *Cæsar*, 11 U. C. R. 461.

An elector who takes part in an election will not be allowed afterwards, if dissatisfied with the result, to say that the election was wholly void. *Regina ex rel. McLaughlin* v. *Hicks*, 5 L. J. 89.

A party cannot complain of the election of a candidate whom he has himself voted for, unless he can shew that he was ignorant of the objections which he desires to urge. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

A defendant having acquiesced in an irregular election cannot afterwards be permitted to object to it on that ground. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.

An elector who, at a nomination meeting, acquiesces in a statement of fact by the returning officer, which, if true, would entitle the defendants to sit, and himself becomes a candidate on the strength of that statement, will not, when defeated at the polls, be heard, as relator, to object that in fact the statement was incorrect, and that the defendants were therefore disentitled. *Regina ex rel. Regis* v. *Cusac*, 6 P. R. 303. Followed in *Regina ex rel. Harris* v. *Bradburn*, 6 P. R. 308.

The court refused leave to file an information to disturb a person in the exercise of an office to which he was elected for one year, without opposition; the applicant having been present at such election, and made no objection, and this application being after the time prescribed by the Municipal Act. C. S. U. C. c. 54, s. 127, has rather limited than increased the number of persons allowed to be relators by 12 Vict. c. 81, s. 146. *In re Kelly* v. *Macarow*, 14 C. P. 313, 457.

Alien.]—An alien cannot be a relator in a quo warranto proceeding under the Municipal Act. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

Clerk of Council.]—It is not desirable that clerks of municipal councils, having the custody of papers of the corporation, should be relators to unseat members of the council, of which they are clerks. *Regina ex rel. McMullen* v. *DeLisle*, 8 L. J. 291. See also *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452.

Interest in Election.]—Held, under 22 Vict. c. 99, that the reeve of the gore of Toronto, being a member of the county council of Peel, to which the village of Brampton sent members, had sufficient interest in the election of a deputy reeve for that village to enable him to question it. *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51.

——— *Affidavit—Amendment.*]—The relation in a contested municipal election case, omitted to state that the relator was a candidate or voter, but the fact was stated in one of the affidavits filed:—Held, amendable under the Administration of Justice Act, 1873. *Regina ex rel. O'Reilly* v. *Charlton*, 10 C. L. J. 105.

The notice of motion did not shew any interest in the relator, as required by s. 187 of the Act; but it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under con. rule 444. *Regina* v. *Worth*, 23 O. R. 688.

——— *Candidate.*] — Where, through the improper conduct of the returning officer, a candidate was not nominated at an election, and did not vote, and other persons had been declared elected by acclamation:—Held, that he was nevertheless a candidate and voter, within the meaning of s. 130 of the Municipal Act of 1866, and therefore qualified to be a relator. *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41.

——— *Ratepayer—Voter—Quo Warranto.*] —Held, that an alderman's right to the office on the ground of an insufficient declaration of qualification and for the want of qualification at the time of his election, might be questioned by a quo warranto at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. Regina ex rel. White v. Roach, 18 U. C. R. 226, and In re Kelly v. Macarow, 14 C. P. 457, distinguished. *Regina ex rel. Clancy* v. *St. Jean*, 46 U. C. R. 77.

Withdrawal of Relator——*Intervention—Substitution.*]—Where the relator in a proceeding in the nature of a quo warranto under the Municipal Act, 1892, desires to withdraw, the court has no power, under the statute or otherwise, to compel him to go on against his will, nor to substitute a new relator. The power given by s. 196 is to substitute a new defendant, not a relator. *Regina ex rel. Masson* v. *Butler*, 17 P. R. 382.

(h) *Statement, Affidavit, and Recognizance.*

Acceptance of Office.]—The affidavits sustaining the relator's case need not state that defendants had either accepted or acted in the office. *Regina ex rel. Helliwell* v. *Stephenson*, 1 C. L. Ch. 370.

Alienage — *General Statement.*]—Where alienage is taken as an objection, it must be shewn particularly how the parties complained of are aliens; a general affidavit of the fact is insufficient. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

Allowance of Recognizance.]—A distinct rule or order for the allowance of the recognizance is unnecessary. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18.

——— *Appeal—Signature—Commissioner.*]—Where the Judge of a county court has allowed the relator's recognizance and the sureties as sufficient, pursuant to s. 188 of R. S. O. 1887 c. 184, a Judge of the high court cannot interfere upon an appeal. There is no necessity for the signatures to the recognizance of the persons to be bound by it. Although s. 188 directs that the recognizance shall be entered into before the Judge or a commissioner for taking affidavits, a recognizance appearing on its face to have been entered into before a commissioner for taking bail, is good; for all commissioners for taking bail are also commissioners for taking affidavits. *Regina ex rel. Mangan* v. *Fleming*, 14 P. R. 458.

Commissioner for Taking Affidavit.]—Semble, that the relator's attorney may act as commissioner to take the recognizance and affidavit. *Regina ex rel. Blaisdell* v. *Rochester*, 12 U. C. R. 630.

Declaration of Qualification—*Attacking—Ground for Summons.*]—The power of a Judge under C. S. U. C. c. 54, s. 128, as to the issue of a quo warranto summons, is to be exercised upon a relator shewing reasonable grounds for supposing that the election was not legal, or that the person elected thereat was not duly elected, but where the relator admitted a qualification in fact, and made no complaint as to the legality of the election, contenting himself with attacking the declaration of qualification subsequently made by the candidate, the writ was refused. *Regina ex rel. Grayson* v. *Bell*, 1 C. L. J. 130.

Grounds of Attack.]—The statement of facts placed before a Judge when a municipal election is questioned, need not contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside. *Regina ex rel. Clark* v. *McMullen*, 9 U. C. R. 467.

Interest of Relator—*Candidate—Voter.*]—The relator must shew clearly that he was a candidate, or voted. Semble, it is insufficient to state "that he protested and voted against" the election of the person chosen. *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226.

——— *Candidate — Voter — Allowance of Recognizance — Affidavit — Insufficiency.*]—Upon an application for a fiat for the issue of a summons in the nature of a quo warranto under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not shew that he was a candidate or an elector who voted or who tendered his vote at the election, as required by s. 185 of the Act; and his recognizance filed by the relator was not entered into before a Judge or commissioner for taking affidavits, nor allowed by a Judge, in the manner prescribed by s. 186, nor was it conditioned to prosecute the writ with effect; and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by rule 2, M. T. 14 Vict.:—Held, that these were defects in the material necessary to found the application, not mere irregularities which could be amended at a later stage, and the fiat, the writ, and all proceedings were set aside with costs. *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

——— *Municipal Voter—Proof of—Issue of Writ.*]—Where a relator declares that he has an interest in the election as "a voter for said ward," this, coupled with a previous complaint that defendant was unduly elected alderman, &c., sufficiently identifies him as declaring himself to be a municipal voter, though he does not use the precise term "municipal voter," required by 12 Vict. c. 81, s. 146. An objection that, though the relator's interest is sufficiently alleged, there is no sufficient proof of it to authorize the issue of the writ, cannot be urged on the return of the writ, where such allegation is not denied, and no proof offered to shew that relator had not the interest claimed. The interest of the relator is not established by the ordering of the writ. *Regina ex rel. Shaw* v. *McKenzie*, 2 C. L. Ch. 36.

——— *Production of Roll.*] — Held, that the proper proof of the right of an elector to be a relator is the production of the roll, or an authenticated copy. His own statement on oath is insufficient. *Regina ex rel. Campbell* v. *O'Malley*, 10 C. L. J. 250.

——— *Statement of.*]—The statement of a relator in a quo warranto matter alleged that he had "an interest in the said election as a voter," and his affidavit stated that he had voted "at said election, but not for said William Rastal:"—Held, that his interest sufficiently appeared. *Regina ex rel. Ross* v. *Rastal*, 2 C. L. J. 160.

——— *Statement—Amendment.*]—The relator in his relation failed to state that he was a candidate or a voter, as required by 36 Vict. c. 48, s. 131, but the fact that he was so appeared in one of the affidavits:—Held, that, as the fact was before the court, an amendment of the relation, under s. 50 of A. J. Act, 1873, might be allowed. *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254.

Intituling.]—The affidavit of the relator, though not intituled in any court, followed and referred to his statement, which was properly intituled:—Held, sufficient. An objection that the recognizance was not intituled in any court was allowed upon similar grounds. Semble, mere formal objections such as that the recognizance was not intituled in any court, cannot be urged by defendant after appearance. To raise them he should move. *Regina ex rel. Bland* v. *Figg*, 6 L. J. 44.

Motion Paper.]—See *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214.

Necessity for Affidavit.] — A relator's statement that "he has an interest in the election as a municipal voter," need not be verified by affidavit. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.

Notice of Motion — *Amendment.*]—The notice of motion did not shew any interest in the relator, as required by s. 187 of the Act; but, it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under con. rule 444. *Regina ex rel. Percy* v. *Worth*, 23 O. R. 688.

——— *Affidavits — Filing — Omission.*]—In a proceeding in the nature of quo warranto under the Municipal Act, it is necessary, upon the true construction of rule 1041, for the relator to file the affidavits and material to be used in support of his motion before serving the notice of motion, even in a case where viva voce evidence is to be taken under s. 212 of R. S. O. 1887 c. 184; but the omission to file such affidavits and material does not constitute a good reason for setting aside the service of the notice of motion; the effect simply is, that the relator cannot read affidavits or material not so filed in support of his motion; and mentioning an affidavit or other material in the notice of motion, when there is none such filed, does not vitiate the motion. *Regina ex rel. Mangan* v. *Fleming*,14 P. R. 458.

Objection — *Admission of.*]—A relator's statement of an objection, supported by his affidavit, is looked upon as a material traversable allegation in a declaration; and if defendant omit to answer it, he admits its truth. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88.

Qualification of Relator.]—A relator, who is a candidate, need not shew in his application to oust the defendant that he himself was qualified for the office. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Ch. 203.

Signature to Statement — *Affidavit.*]—The signature to the statement was held not to be dispensed with by the affidavit of the relator indorsed, that he believed the objections stated within to be well founded. *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214.

(i) *Summary Procedure—When Applicable.*

Acclamation — *Election by.*]—Where a candidate is declared elected on the nomination day, as being the only candidate proposed, his election cannot be questioned on a quo warranto summons under 29 & 30 Vict. c. 51, s. 130, there being no other "candidate at the election, or any elector who gave or tendered his vote thereat," who could be a relator. *Regina ex rel. Bugg* v. *Bell*, 4 P. R. 226.

Appointment where no Election.]—Held, that the legality of an appointment of aldermen and councillors for a ward in which there had been no election owing to a riot, made by the aldermen and councillors chosen for the other wards, could not be tried under 12 Vict. c. 81, s. 146. *Regina ex rel. Beaty* v. *O'Donaghue*, 3 L. J. 75.

Attack on whole Council—*Dissolution —Private Relator.*]—A private relator, under 12 Vict. c. 81, could not either attack by writ of summons the township council by name, upon grounds which, if sustained, must necessarily lead to a dissolution of the body, or attack the whole council in one proceeding, through the individual names of every member of it. *Regina ex rel. Lawrence* v. *Woodruff*, 1 C. L. Ch. 119, 8 U. C. R. 336.

But see R. S. O. 1897 c. 223, ss. 225, 234.

Complaint by Voter in Another Ward.]—Elections can only be contested in the summary way provided by 12 Vict. c. 81, as amended by 13 & 14 Vict. c. 64, by a candidate or person having a right to vote at such election. A voter of another ward, if he desires to complain, must apply for a quo warranto as in ordinary cases. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.

See, also, *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51; *Regina ex rel Clancy* v. *St. Jean*, 46 U. C. R. 77.

Necessity for Adopting.]—The legislature having provided a cheap, speedy, and convenient procedure to try contested elections, the court will not, in general, allow parties to resort to the more expensive one by quo warranto; the general practice is to confine parties aggrieved to the relief to be obtained under the statute. *In re Kelly* v. *Macarow*, 14 C. P. 313, 457; *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226.

All proceedings taken to contest the validity of any election mentioned in s. 187 of the Municipal Act, R. S. O. 1887 c. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a quo warranto, as provided by s. 188, and not by information in the nature of a quo warranto, or otherwise. *Regina ex rel. Johns* v. *Stewart*, 16 O. R. 5.

Subsequent Forfeiture of Seat.]—A summons under the Municipal Act is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal. *Regina ex rel. McGouverin* v. *Lawlor*, 5 P. R. 208.

(j) *Summons or Writ.*

Abandonment of—*Right to Apply again.*]—A summons having been obtained, the relator, finding his proceedings irregular, notified defendant not to appear, and that it was his intention to proceed de novo:—Held, the objection urged being material, that the relator was not precluded from a second application by his first ineffectual proceeding. *Regina ex rel. Metcalfe* v. *Smart*, 10 U. C. R. 89; *S. C.*, 2 C. L. Ch. 114.

Description of Defendant — *Warden— Amendment — Irregularity — Appearance.*]—Held, (1) that the proper designation of a warden in a quo warranto summons, is "warden of the corporation of the county of——;" (2) that "warden of the county of——," is not improper, as there is no particular name or designation in the Municipal Institutions Act; (3) that "warden of the county council of the county of Simcoe" might, if deemed necessary, be amended by striking out the words, "of the county council" after the word "warden," in the writs to be issued in pursuance of the judgment in a quo warranto matter; (4) that after appearance by defendant, the 18th rule of court applicable to such proceedings is against holding any proceeding irregular or void, which does not interfere with the just trial of the matter on the merits. *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

Filing Papers — *Date of — Fiat.*] — A county Judge issued his fiat for a quo warranto, and the papers remained with him, but

were handed to defendant's solicitor, before the return day, for perusal:—Held, sufficient, and that it was not necessary that they should have been filed with the deputy clerk of the Crown before the summons issued. *Regina ex rel. Blaisdell* v. *Rochester*, 12 U. C. R. 630.

Issue of—*Proper Officer.*]—Held, that the writ of summons, signed by the clerk of the process, and under the process seal, though in fact issued by the clerk of the Crown in the court of Queen's bench, was sufficiently issued by the clerk of the process under C. S. U. C. c. 54, s. 128, s-s. 5. *Regina ex rel. Blasdell* v. *Rochester*, 7 L. J. 101.

Place of Return.]—A county court Judge may direct the writ to be made returnable before the Judge in chambers at Toronto, and in that case the relator must see that the papers are transmitted. *Regina ex rel. Lutz* v. *Williamson*, 1 P. R. 94.

Rights under—*Extent of.*]—Semble, that it was no part of the design of 12 Vict. c. 81 to give any greater or more extensive right to parties suing out under it a writ of summons, than they before possessed at common law or under the British statute. *Regina ex rel. Lawrence* v. *Woodruff*, 1 C. L. Ch. 119.

Service.]—Personal service of the writ cannot be dispensed with, except when provided for by 12 Vict. c. 81, s. 148. *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 167.

Teste—*Omission—Appearance—Waiver—Terms—Fiat.*]—A summons not tested on the day it is issued, is waived by appearance. Semble, that 12 Vict. c. 81, s. 146, as amended by 13 & 14 Vict. c. 64, sched. A, No. 23, did not require the writ ordered by the court to be sued out in term time; but that if the application was made in term the court should give the order for the writ; if in vacation a fiat should be given by a Judge. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18.

(k) *Time for Moving.*

Before Swearing in.]—An application may be made to unseat a person elected as mayor, though he be not sworn into office. *In re Sawers* v. *Stevenson*, 5 L. J. 42.

Commencement of Statutory Period—*Declaration of Office.*]—Where one of three candidates, of whom two were to be elected, announced on the second day between 10 and 1 o'clock his retirement from the contest, whereupon the returning officer immediately closed the poll, and declared the others elected, one of whom then thanked the electors and declared his acceptance of office, and afterwards at the first meeting of the council made the declaration of office; and a writ of summons was issued, not within six weeks after the election, or within one month after the declaration at the close of the poll by the defendant of his acceptance, but within one month after making the declaration of office:—Held, it not being shewn that the relator was present at the close of the poll, or had ever learned what then took place, that the application for the writ had been made in time. *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114.

A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declarations. *Regina ex rel. Felitz* v. *Howland*, 11 P. R. 264.

Ineffective Application — *Unsigned Statement—Expiry of Period.*]—The writ of summons must be applied for as the practice directs, within six weeks, and therefore, where there was no written motion paper, and the statement was not signed, as required by the rules of court, the application was held too late. *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214.

Quo Warranto—*Term.*]—Held, that the relator in this case was not too late, having applied in the next term after the election, and only one day after the time for moving under the statute. *Regina ex rel. Clancy* v. *St. Jean*, 46 U. C. R. 77.

(l) *Other Cases*

Appeal — *Conflicting Evidence—Bribery.*]—The judgment of a county Judge in a contested election, upon a question of fact depending on conflicting testimony, will not be overruled. The intention of the statute was not to allow this, but to provide an appeal upon any legal question on which the case may have turned. Quære, as to the effect of bribery at municipal elections. *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140.

Appearance — *Effect of—Irregularity.*]—After appearance by defendant in a quo warranto matter, the 18th rule of court applicable to such proceedings is against holding any proceeding irregular and void which does not interfere with the just trial of the matter on the merits. *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

By-law — *Validity—Incidental Determination.*]—A Judge of a county court cannot, in determining the validity of a contested election, decide incidentally the validity or invalidity of a township by-law abolishing wards. The by-law, if illegal, must be quashed by the superior courts. *Regina ex rel. McLaughlin* v. *Hicks*, 5 L. J. 89.

Collusion—*Prior Relation.*]—The Judge declined to withhold his judgment, upon the allegation that there was a prior relation at the instance of a different relator against the same defendant for the same cause pending before a county Judge, which relation, it was sworn, was collusive, and intended to protect defendant in the enjoyment of his office, contrary to law. *Regina ex rel. McLean* v. *Watson*, 1 C. L. J. 71.

See, also, *Re Regina ex rel. Hall* v. *Gowanlock*, 29 O. R. 435, *ante* (c).

——— *Attack by Stranger.*] — A stranger to the proceedings may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with defendant, but he cannot set up irregularities, as such, unless indeed the relator has committed them purposely, as, for example, to secure the failure

of his own proceedings. *Regina ex rel. Patterson* v. *Vance*, 5 P. R. 334.

Irregularity at Polls — *Effect on Election.*]—It is not every irregularity that will vitiate an election; and where it was objected that in the list of candidates, given to one out of five returning officers for the township, the name of one candidate, H., was omitted and not inserted until past one on the first day of polling:—Held, that the question to be decided was not as to the abstract effect of the omission of the name, but the effect on the final result of the election. *Regina ex rel. Walker* v. *Mitchell*, 4 P. R. 218.

See, also, *Regina ex rel. Preston* v. *Touchburn*, 6 P. R. 344.

Judgment—*Mode of Enforcing under 12 Vict. c. 81.*]—*See Regina ex rel. Gibbons* v. *McLellan*, 1 C. L. Ch. 125.

Mandamus — *Contested Election—Proper Remedy.*]—Where a mandamus was applied for, to be directed to the warden of the London district, to swear in a person who claimed to be duly elected a councillor, under the Municipal Council Act, the court discharged the rule, it appearing that a councillor had been returned and sworn in for the township, which return had been contested; the proper remedy in such case being by quo warranto. *In re Brennan*, 6 O. S. 336.

Order—*New Election.*]—The Judge's order is not defective because it does not award that a new election be held. *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 U. C. R. 617.

Quo Warranto — *Rule Nisi—Attorney-General.*]—Where an information in the nature of a quo warranto is asked for on behalf of an individual, it must be exhibited, if allowed, in the name of the master of the Crown office; but where the rule in such a case was to shew cause why the attorney-general should not be allowed to file the information:—Held, that the mistake was not fatal. *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. R. 51.

——— *When Issued.*]—An information in the nature of a quo warranto may issue to shew cause by what authority a municipal councillor for any district in the Province claims to be a member of such council. *In re Biggar*, 3 U. C. R. 144.

Refusal of Voters to Take the Oaths.]—The refusal of voters to take the oaths required by the returning officer, and the reception of such votes notwithstanding, is a good ground for setting aside an election, if the relator would otherwise have had the majority. *Regina ex rel. Dillon* v. *McNeil*, 5 C. P. 137.

Relator's Election — *Inquiry—Jurisdiction.*]—Where the summons under 12 Vict. c. 81, s. 146, was to shew cause wherefore defendant had usurped the office of councillor, &c.:—Held, that the authority of a Judge in chambers extended only to an adjudication of the validity of the election complained of, and that he could not further decide upon the validity of the relator's election. *Regina ex rel. Gibbons* v. *McLellan*, 1 C. L. Ch. 125.

Several Respondents — *Separate Objections—Joinder.*] — In quo warranto proceedings under the Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both. Where, therefore, the ground of objection was as to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper. *Regina ex rel. Burnham* v. *Hagerman*, 31 O. R. 636.

Trial—*Combination.*]—The meaning of 55 Vict. c. 42, s. 191 (O.), is that cases which have so much in common that they can conveniently be tried together, may be combined in one proceeding. *Regina ex rel. St. Louis* v. *Reaume*, 26 O. R. 460.

Vote — *Disallowance—Grounds.*] — When a vote had been rejected by the Judge who decided the case, upon erroneous grounds, but upon further inquiry by the court it was found to be a bad vote on other grounds, they refused to allow it. *Regina ex rel. Forward* v. *Bartels*, 7 C. P. 533.

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6. *Corrupt Practices.*

Bribery.]—Quære, as to the effect of bribery at municipal elections. *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140.

——— *By Agents.*]—A person cannot be found guilty of bribery under ss. 209-13 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), unless the evidence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a quasi criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate. Municipal elections are not avoided for bribery of agents without authority, where the candidate has a majority of votes cast. *Regina ex rel. Thornton* v. *Dewar*, 26 O. R. 512.

——— *Indirect — Subsequent Election — Disqualification.*] — The respondent, who had been previously elected reeve, was found guilty of indirect bribery under 36 Vict. c. 48, s. 153. He was re-elected, the relator being the opposing candidate:—Held, under s. 157, that he was ineligible as a candidate for two years, and the relator was entitled to the seat. *Booth* v. *Sutherland*, 10 C. L. J. 287.

——— *Personally and by Agents—Payments—Gifts.*]—A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, and spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. And where money given to agents by the candidate was in fact used in bribery:—Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part. Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation, such gifts

must be regarded as having been made for the purpose of securing or making more secure the friendship and influence of the donee. In the election in question every member of certain committees was paid a uniform sum of $2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all:—Held, that these payments were corruptly made and constituted the offence of bribery as defined by s.-s. 2 of s. 209 of the Municipal Act. Under the circumstances above referred to and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of a city. *Regina ex rel. Johns* v. *Stewart*, 16 O. R. 583.

Hiring Vehicles—*Agency—Evidence.*]—The respondent on the polling day was invited by K., a supporter of his, to take a drive in his sleigh. When passing a cab-stand (after respondent had left the sleigh) K. called out to the cabmen, "Boys, follow me:" and some six of the cabs did so, and were said to have been employed during the remainder of the day in taking voters to the poll. They never received anything, and the respondent denied K.'s agency, and disavowed any knowledge of his act:—Held, that there was not sufficient evidence of agency on the part of K. to affect respondent with his acts. *Regina ex rel. Thompson* v. *Medcalf*, 11 C. L. J. 248.

Inquiry as to—*Summons—Particulars.*]—Held, that an application under 35 Vict. c. 36, s. 14 (O.), for an inquiry as to corrupt practices in procuring the passage of a by-law, must be by summons, and if an order be obtained in the first instance, it will be set aside. The inquiry must be confined to the particulars finally given by applicant. *Re Credit Valley Railway and County of Peel Bonus*, 6 P. R. 62.

Personation—*Penalty—Mode of Enforcing.*]—The penalty for personation imposed by the Municipal Act of 1892, s. 210 (2), is recoverable by civil action only, and not by proceedings on summary conviction. *Regina* v. *Strong*, 33 C. L. J. 203.

Voting More than Once—*Penalty—Inspection of Ballot Papers.*]—Action to recover two several penalties of $50 each for having, at an election for the mayoralty of Prescott, after having already voted, voted twice at other polling places. Upon an application for inspection of ballot papers, &c.:—Held, that this was a prosecution for an offence in relation to ballot papers, and that the order for inspection could be made under s. 158 of the Municipal Act. 2. That such inspection was inadmissible to obtain information as to votes given by any person other than the defendant, no prosecution having been instituted against such person. 3. That, even if this prosecution did not fall within the terms of s. 158, inspection of the voters' list and other papers mentioned in s.-s. (g) to s. 150 of the Municipal Act, could be ordered by the county Judge. *McMonagle* v. *Coons*, 17 C. L. J. 158.

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7. Disturbance or Misconduct at Polls.

Where there was great noise and confusion at the polling place, but no personal violence offered to the voter, the allegation of intimidation was held to have failed in the proof. *Anonymous*, 8 L. J. 76.

Where there was a great riot and disturbance at an election so that defendant's voters could not get to the poll:—Held, that there ought to be a new election. *Regina ex rel. Kirk* v. *Asselstine*, 1 L. J. 49.

Where it was sworn that intending voters for an unsuccessful candidate were obstructed in approaching the polling place by a crowd controlled by one of the successful candidates, and this was not unequivocally denied by that candidate, the election was set aside as to him, with costs. *Regina ex rel. Gibbs* v. *Branighan*, 3 L. J. 127.

The electors must have full access to the polling place. The fact that a large number could not cast their votes is a sufficient reason for setting aside an election, if the result would have been affected by the unpolled votes. *Regina ex rel. Davis* v. *Wilson*, 3 L. J. 165.

A municipal election will not be set aside on account of an official having disregarded or neglected some direction of the Ballot Act, if the election has been conducted in a manner substantially fair, and the mistake or misconduct has not affected the result of the election. The objection that persons were improperly allowed to enter and remain in the polling booth was held not fatal to the election, under the circumstances. *Regina ex rel. Preston* v. *Touchburn*, 6 P. R. 344.

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8. Mayors, Wardens, and Reeves—Election of.

Mayor of Town—*Ineligibility as Reeve.*]—The mayor of a town not withdrawn from the jurisdiction of the county or united counties within which it was situated, though the head of the council and chief executive officer of the corporation, is not a member of the council within the meaning of s. 135 of the Municipal Institutions Act, so as to be eligible, if chosen, to hold the office of reeve; in other words, the offices of mayor and reeve cannot in such case be holden by one and the same person. *Regina ex rel. Doran* v. *Haggart*, 1 C. L. J. 74.

Reeve of Township—*Councillor Excluded from Voting—Invalid Election.*]—The person who acted as returning officer for one of the five wards in a township was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, without taking the oath of office, proceeded to elect the reeve:—Held, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election. Held, also, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being within the meaning of the Municipal Council Act, an "entry upon their duties." A mandamus applied for by the reeve thus elected was therefore refused. *In re Hawk and Ballard*, 3 C. P. 241.

Reeve of Village—*Day of Holding Election—Absence of Councillors—Fraud.*]—Section 130 of the Municipal Act, C. S. U. C. c.

54, enacts that the members of every municipal council (except county councils), shall hold their first meeting at noon on the third Monday of the same January in which they are elected, or on some day thereafter at noon. Section 132 enacts that the members elect of every council (except a city or town council) being at least a majority of the whole number of the council when full, shall at their first meeting after the yearly elections, and after making the declarations of office and qualification when required to be taken, organize themselves as a council by electing one of themselves to be the warden or reeve of the corporation. The incorporated village of Streetsville is represented by a council of five members. On the 21st January (being the third Monday of January) two members of the council met at the town hall and qualified, but in the absence of the three remaining members of the council were unable to proceed to business. On the 23rd January the three remaining members met, and having qualified organized themselves as a council, in the absence of the other two of the council, by electing one of themselves to be reeve:—Held, that the election was legal, and in the absence of proof of fraud could not be set aside. *Regina ex rel. Hyde* v. *Barnhart*, 7 L. J. 126.

——— *Resolution—Valid Election—Hour of Meeting.*]—Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held duly elected. Though C. S. U. C. c. 54, s. 130, declares that the members of every municipal council shall hold the first meeting at noon, and at such meeting organize themselves as a council by electing one of themselves as a reeve, an election at six o'clock p.m. on the same day is sufficient. *Regina ex rel. Heenan* v. *Murray*, 3 P. R. 345.

Reeves and Deputy Reeves in Towns—*Election by Councillors—22 Vict. c. 99.*]—*See Regina ex rel. Pollard* v. *Prosser*, 2 P. R. 330; *Regina ex rel. Hume* v. *Lutz*, 7 L. J. 103.

[By R. S. O. 1897 c. 223, s. 119, these officers are elected by vote of the people.]

Warden of County—*Improper Rejection of Vote—New Election.*]—Held, that where a vote is improperly rejected in a county council on the election of warden, and it does not appear that the reeve or deputy reeve whose vote was rejected tendered it for the complaining candidate, though his vote if recorded might and probably would have influenced the result of the election, the proper course is to order a new election instead of seating the complaining candidate. *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

——— *Majority.*]—A majority of the whole number forming the provisional municipal council of a county must vote at the election of warden. *Regina ex rel. Evans* v. *Starratt*, 7 C. P. 487.

9. *Oaths.*

Agent of Candidate—*Requiring Voter to Take Oath.*]—An agent of a candidate at an election, though not an elector himself, may object to voters and require the returning officers to administer the qualification oaths. *Regina ex rel. Gordanier* v. *Perry*, 3 L. J. 90.

False Swearing—*Perjury.*]—The swearing falsely by a voter, at an election of aldermen or common councilmen for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification, to a declaration on the case for imputing perjury to the plaintiff, on the ground of such false swearing, is bad on demurrer. *Thomas* v. *Platt*, 1 U. C. R. 217.

Refusal of Oath—*Voiding Election.*]—The refusal of voters to take the oaths required by the returning officer, and the reception of such votes notwithstanding, is a good ground for setting aside an election if the relator would otherwise have had the majority. *Regina ex rel. Dillon* v. *McNeil*, 5 C. P. 137.

See Wilson v. *Mances*, 28 O. R. 419, *post* 11.

10. *Opening and Closing Poll.*

Improper Closing—*No Votes Tendered.*]—At a township election, after the nomination of several candidates, the returning officer adjourned to another room to receive votes. No votes were tendered for any one, all parties holding back from some unexplained reason, and he therefore closed the election at about three o'clock, and declared the defendants elected by acclamation:—Held, that the election was void. *Regina ex rel. Smith* v. *Brouse*, 1 P. R. 180.

——— *Subsequent Tender of Vote—New Election.*]—Where the returning officer improperly closed the poll, both candidates being then equal; and when in the act of recording his own vote a vote was tendered by an elector, who had been present a long time without voting, for the candidate against whom the returning officer voted, which he refused to record:—Held, that there should be a new election, and that the returning officer should pay the relator's costs, and also defendant's, if he chose to exact them. Quære, whether a Judge in chambers, under the above circumstances, should have ordered the name of the voter rejected to be entered on the poll-books, instead of ordering a new election. *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 189.

Nomination of Candidates—*Method of Conducting—Refusal to Receive—New Election.*]—At a meeting called to receive nominations for councillors, one party, as they alleged, made their nominations at twelve, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. He did not enter the names of the candidates in his book, and gave evasive answers to some

of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At one o'clock, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates, he declared the persons nominated at the opening of the meeting duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested, and desired to nominate the opposition candidates (of whom the relator was one), which the returning officer, however, refused to receive as being late:—Held, that the election must be set aside, and a new election ordered. 2. That the relator was a candidate and voter within the meaning of s. 130 of the Municipal Act, although he had not been nominated or voted, for the returning officer could not by his illegal acts divest him of his rights in that respect. 3. That the names of the candidates should have been submitted to the meeting seriatim after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation. 4. That the returning officer had acted improperly; and he was therefore ordered to pay the costs. *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41.

Retirement of Candidates after Poll Opened.]—Semble, that where more persons are proposed than are to be elected, and all afterwards retire but the members to be elected, polling having begun, the returning officer cannot close the poll unless under the circumstances stated in s. 97 of the Municipal Act, C. S. U. C. c. 54. *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114.

Second Day of Polling—*No Votes Tendered.*]—The meaning of 12 Vict. c. 81, s. 159, was that the poll should be kept open on the first day till four, and if no votes came up for an hour after the last vote on that day, and if the returning officer saw that all the electors had had a fair opportunity of voting, the election might then be closed. *Regina ex rel. Greely* v. *Gilbert*, 16 U. C. R. 263. See, also, *Regina ex rel. Lawrence* v. *Woodruff*, 1 C. L. Ch. 119.

Voter Present in Time to Vote—*Obstruction—Delay—Ascertainment of Time.*]—If a voter in good time present himself at the poll to vote, he has a right to have his vote recorded, though by the delay of the opposite party in obstructing his purpose it may be a minute after the hour appointed for the close of the poll when the vote is recorded. Where the watch of the returning officer was used on the first day to open and close the poll, and again to open it on the second day, without objection as to its correctness, the time marked by his watch may be properly taken as correct at the close of the poll. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.

See INTOXICATING LIQUORS.

See next sub-head.

11. *Returning Officers.*

(*See*, also, preceding sub-head).

Altering Vote Erroneously Entered.]—A vote which the returning officer received and entered in the poll book appeared subsequently to have been wrongly received, and he struck it out, which produced an equality of votes, and gave the casting vote. It appeared that other votes had been improperly received, which being struck out, the candidates would still be equal:—Held, that he had no right to strike out a vote he had entered; that there should be a new election; and that the returning officer should pay the relator his costs. *Regina ex rel. Mitchell* v. *Rankin*, 2 C. L. Ch. 161.

At the close of the poll the returning officer declared the relator duly elected, but afterwards he received an affidavit from one M. that his vote had been entered by mistake for the relator, on which he altered this vote in the poll-book; and the numbers being then equal, he added his own casting vote for defendant, and returned that he was duly elected:—Held, that the returning officer had no power thus to alter the poll-book; that the defendant's election was illegal; and that the relator should be seated. Held, also, that the evidence of the defendant and of the returning officer was properly rejected. *Regina ex rel. Acheson* v. *Donoghue*, 15 U. C. R. 454.

If a returning officer, upon discovering an error in the entry of a vote, has the power to make the necessary correction, he must make it promptly, and only where the mistake is beyond a doubt. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.

Casting Vote.]—A returning officer cannot, after the close of the poll, add his vote for a candidate, although he then for the first time discovers a tie between some of them. *Regina ex rel. Bulger* v. *Smith*, 4 L. J. 18.

It is his duty at the close of the election, to declare publicly that the candidate standing highest on the roll is duly elected. If there be an equality of votes, he ought there and then to give his casting vote. Where, in ignorance of his duty, on the second day of the election he closed the poll, and on a subsequent day gave his casting vote in favour of one of the candidates, the election was held to be void. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89.

See, also, *Regina ex rel. Lutzer* v. *Hopkins*, 7 L. J. 152.

A returning officer accepting a vote which he knows to be bad, in order to create an apparent equality of votes so as to give a casting vote, may be rendered liable to costs. *Regina ex rel. Totten* v. *Benn*, 4 L. J. 262.

See Regina ex rel. Arnott v. Marchant, 2 C. L. Ch. 189.

[By R. S. O. 1897 c. 223, s. 179, the clerk of the municipality has the casting vote.]

Conduct of.]—Duty of the returning officer respecting the votes received and recorded considered, and his conduct in this case strongly censured. *Regina ex rel. Dundas* v. *Niles*, 1 C. L. Ch. 198.

——— *Charges against.*]—The courts will presume that a returning officer acts properly and honestly until the contrary is shewn, and where it is intended to charge that officer with unfairness and partiality, the case should be plainly stated and clearly made out. In this case it was held that the charges made, which were general, were met as broadly as they were made. *Regina ex rel. Walker* v. *Hall*, 6 L. J. 138.

Deputy Returning Officer — *Absence during Part of Polling Day—Irregularity—Saving Clause.*]—At an election of county councillors one of the deputy returning officers for a town in the county was absent from his booth on three separate occasions, during polling day. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place. The first absence was for about ten minutes, during which the booth was locked up, with the poll-clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole the respondent had two more votes than the relator, and by s. 13 of the County Councils Act, 1896, there being two county councillors to be elected, a voter could give both his votes to one candidate. There was no suggestion of bad faith:—Held, that the absences and what was done during the absences did not affect the result of the election, and, applying the saving provisions of s. 175 of the Consolidated Municipal Act, 1892, that it should not be declared invalid. *Regina ex rel. Watterworth* v. *Buchanan*, 28 O. R. 352.

——— *Penalty—Person Aggrieved — Candidate.*]—The plaintiff was a ratepayer of the township and a candidate for the office of reeve, but was not elected. He brought this action under s. 167 of the Consolidated Municipal Act, 1883, against a deputy returning officer, who was also clerk of the township, to recover the penalty for a contravention of *ss.* 154, 142, and 245 of the Act. There was no allegation that the plaintiff lost his election, or any votes, or suffered any personal grievance by the acts complained of:—Held, on demurrer to the statement of claim, that the plaintiff was not, by reason only of his being a candidate, a "person aggrieved" within s. 167, and that he was therefore not entitled to recover. Held, also, that an action for the penalty under that section lies only for a breach of ss. 118 to 166, inclusive, of the Act. *Atkins* v. *Ptolemy*, 5 O. R. 366.

Keeping Poll Book.]—The returning officer should literally observe the directions of the statute as to keeping a poll book, though his failing to do so will not in all cases vitiate the election. *Regina ex rel. Bulger* v. *Smith*, 4 L. J. 18.

Nomination Meeting—*Duration of.*]—See *Re Parke*, 30 O. R. 498.

Refusal of Ballot Paper — *Malice — Penalty—Damages.*] — The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to a vote at a municipal election under Consolidated Municipal Act, 1892, s. 80, and was entered on the voters' list, but after the final revision thereof, he ceased to be the tenant and to occupy the property, although he continued to reside in the municipality and was the owner of real property, as a freeholder, of the value entitling him to vote, and was such freeholder at the time of an election. At such election he demanded a ballot paper, and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants:—Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election, and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty given by s. 168, and also to damages at common law. *Wilson* v. *Manes*, 28 O. R. 419. Affirmed, 26 A. R. 398.

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12. *Time and Place for Holding Polls.*

By-law Appointing — *Publication.*] — 12 Vict. c. 81, ss. 6, 7, as to by-laws dividing townships and wards, applied only to by-laws of district or county councils. It was therefore not necessary to publish a township by-law dividing the township into wards, and appointing polling places. *Regina ex rel. Woodward* v. *Ostrom*, 2 C. L. Ch. 47.

Change of Place—*By-law — Necessity for.*]—A municipal council by by-law, under 12 Vict. c. 81, s. 5, appointed a place for holding the election of township councillors, and afterwards by resolution appointed another place. An election held there was set aside, as the change could be made only by by-law. *Regina ex rel. Allemaing* v. *Zoeger*, 1 P. R. 219.

Place outside of Ward—*Relator—Acquiescence.*]—One Robert Gillis had a farm, through which ran the division line between wards 2 and 3; his house was in ward 2, but his barn in ward 3. The township municipality passed a by-law that the election of township councillors for 1852 for ward No. 3 should be held at Robert Gillis's:—Held, that the by-law must be read as meaning on some part of his property in ward 3, as otherwise it would be void. 2. That, as the election took place in the house, it was null, being out of the ward. 3. That the relator was not by his quasi acquiescence precluded from subsequently raising the objection. *Regina ex rel. Preston* v. *Preston*, 2 C. L. Ch. 178.

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13. *Vacancies in Council.*

Excluding Councillor—*Injunction.*] — See *Smith* v. *Petersville*, 28 Gr. 599.

Execution against Reeve — *Quo Warranto — Affidavit — Sufficiency — Return to*

Writ.]—An application for an injunction in the nature of a quo warranto against a reeve for usurping the office, on the ground that a fi. fa. against him had been returned nulla bona, was founded only on an affidavit that one D. had recovered a judgment against him on which a fi. fa. issued, and was placed in the sheriff's hands, and returned by him nulla bona:—Held, insufficient; for it should have been shewn how and to whom the return had been made, and the writ and return should have been produced or proved. The rule nisi was, therefore, discharged with costs. *In re Wood*, 26 U. C. R. 513.

Non-attendance of Members — *Computation of Time—Resolution of Council—Injunction.*]—The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the council on the 5th April. They were absent at the next meeting called for and held on the 31st May, and thenceforward, without authorization, till the 7th July, when, at a meeting of the council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost, whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:—Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties, and that the injunction might be awarded upon an interlocutory application. *Mearns* v. *Town of Petrolia*, 28 Gr. 98.

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14. *Voters—Qualification of.*

Aliens.]—A person born in New York in 1830, whose father, a British subject, had emigrated from Ireland a short time previous, and who a year or two after his birth came to this Province when he was only about two years old, and had ever since lived here, is himself a British subject within the meaning of s. 75 of the Municipal Act, C. S. U. C. c. 54. *Regina ex rel. McVean* v. *Graham*, 7 L. J. 125.

Where alienage is taken as an objection in proceedings on a contested municipal election, it must be shewn particularly how the parties complained of are aliens; a general affidavit of the fact is insufficient. *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

Assessment Roll—*Conclusiveness.*]—The assessment roll as to the qualification of electors held conclusive. *Regina ex rel. Ford* v. *Cottingham*, 1 C. L. J. 214; *Regina ex rel. Chambers* v. *Allison*, *ib.* 244; *Anonymous*, 8 L. J. 76.

[It has since been expressly made so. See R. S. O. 1897 c. 223, s. 89.]

By-law Declaring — *Invalidity.*] — A township council has no authority to declare the qualification of voters. A by-law enacted by them for such a purpose must be quashed with costs. *In re Bell and Township of Manvers*, 3 C. P. 349.

Collector's Roll — *Conclusiveness of.*] — The mere entry of a person's name on the assessor's and collector's roll, with F. or H. set opposite, does not entitle such person to vote. Besides being properly rated on the roll, a person to be entitled to vote must be in fact a freeholder or a householder, and also living in the ward at the time of election. *Regina ex rel. Totten* v. *Benn*, 4 L. J. 262.

——— *Conclusiveness of—Householder.*]—The copy of the collector's roll which by 14 & 15 Vict. c. 109, sched. A., No. 12, should be furnished to the returning officer, is not conclusive upon a Judge when objections are made to the qualification of voters. A person (the gaoler) who lived in apartments in the county gaol, paying no rent, and being lessee of land rated at the annual value of £10 4s.:—Held, not entitled to vote, as not being a householder within 14 & 15 Vict. c. 109, sched. A., No. 12. *In re Charles* v. *Lewis*, 2 C. L. Ch. 171.

Division into Wards — *Addition of Names to Roll—Final Revision.*]—In a municipality divided into wards, a voter cannot vote in a ward in which he is not assessed for real property lying in the ward. A municipal council has no authority to place names on the assessment roll, after it is finally passed by the revising tribunal. It is wrong in a municipal clerk to add a name, after the commencement of an election, to the copy of the roll furnished by him to the returning officer. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.

Parting with Property.] — Where a voter had parted with the property in respect to which he voted before the time of the election:—Held, that he had no legal vote. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.

Residence—*Change of — Householders—Tenants.*]—A person otherwise duly qualified to vote at a municipal election is not disqualified by the simple fact of a change of residence from one ward to another in the same township. Quære, as to the distinction between mere "householders" and "tenants," for the purpose of voting at a municipal election. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.

——— *Determination of—Dwelling-house—Business.*] — A. had his dwelling-house at Bowmanville, where his wife and family resided, but he had a saw-mill and store and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. After voting at Bowmanville he went down to Cartwright, and voted there also at the election of a township councillor, which was being held at the same time. It appeared that the relator, one of the candidates for Cartwright, objected to A.'s vote there, but said that it should be accepted if he would swear that he was a resident; and that A. took such oath, and his vote was thereupon recorded:—Held, that A.'s vote should have been rejected, for he was a resident of Bowmanville, and entitled to vote there only, and his conduct in voting there first shewed that he regarded that as his home. *Regina ex rel. Taylor* v. *Cæsar*, 11 U. C. R. 461.

Held, that where a person slept and lived during the week days with other persons in a house having one common entrance, while his wife and family resided at a village a few miles distant, he was entitled, under the Municipal Act of 1849, to vote as a resident householder in the village where he lived during the week. *Regina ex rel. Forward* v. *Bartels*, 7 C. P. 533.

——— *Division by Wards—Householder—Time of Residence—Property.*]—In the case of a city divided into wards, where a voter is entitled to vote in the ward in which he resides, he is not entitled to vote in any other ward. In the case of a householder, residence for one month next before the election is an essential to qualification as a voter. It is necessary that a voter, whether freeholder or householder, should not only be rated as such, but at the time of the election hold the property in respect of which he is rated. *Anonymous*, 8 L. J. 76.

[The law has been changed. See R. S. O. 1897 c. 223, s. 58.]

——— *Proof of.*]—The inclination of the courts is to favour the franchise. Where the votes of householders were attacked as not being householders resident for one month next before the election, and the fact of non-residence was not clearly shewn, the votes were sustained. *Regina ex rel. Ford* v. *Cottingham*, 1 C. L. J. 214.

Several Rating on Roll—*Householder—Residence—Ward—Interest in Land.*]—Held, that under an assessment of "Thomas Burrell & Sons," the returning officer did wrong in receiving the votes of the father and the three sons, as the latter could not be said to be "severally rated" on the roll within the meaning of C. S. U. C. c. 54, s. 75. Held, also, that the returning officer did wrong in receiving the vote of Thomas Burrell, who at the time of the election was not either a freeholder of the municipality or a householder resident therein for one month next before the election. Held, also, that in the case of a householder, residence in the particular ward where he tenders his vote is not essential — residence in any part of the township being for the purpose of voting sufficient. Held, also, also, that a person living with his father on the land of his father, having no interest of any kind in the land, is not entitled to be assessed in respect of the land either as a freeholder or householder. *Regina ex rel. McVean* v. *Graham*, 7 L. J. 125.

Voters' Lists—*Finality of.*]—Voters' lists are final as to the qualification to vote at a municipal election in the Province of Ontario. *Regina ex rel. McKenzie* v. *Martin*, 28 O. R. 523.

——— *Irregularities—Result.*] — An election, though by a majority of sixty-six votes, of a deputy reeve of a municipality, who had participated in a transaction by which before polling day some eighty names were added to the voters' list, over and above those certified by the Judge to be properly there, was voided, although only some thirty-one of those illegally added cast votes, notwithstanding 55 Vict. c. 42, s. 175 (O.), which provides that no election shall be invalid for want of compliance with the principles of the Act, when the result is not affected. *Regina ex rel. St. Louis* v. *Reaume*, 26 O. R. 460.

XX. Municipal Loan Fund.

Town—*Liability for County Debentures.*]—See *Town of Port Hope* v. *Counties of Northumberland and Durham*, 7 L. J. 20.

Township—*Loan to Railway Company—Release of Shareholders — Liability to Crown.*]—See *Norwich* v. *Attorney-General*, 2 E. & A. 541.

See, also, *In re Albemarle and Eastnor*, 45 U. C. R. 133; *Brogdin* v. *Bank of Upper Canada*, 13 Gr. 544.

XXI. Negligence.

Building—*Non-repair—Licensee — Knowledge.*]—A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to want of repair of the building, at all events where knowledge of the want of repair is not shewn. *Schmidt* v. *Town of Berlin*, 26 O. R. 54.

Carter — *Independent Contractor.*] — The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place. Judgment in 29 O. R. 273 reversed. *Saunders* v. *City of Toronto*, 26 A. R. 265.

Damage to Land Adjoining Highway —*Water—Culvert.*]—See *Bryce* v. *Loutit*, 21 A. R. 100.

——— *Water — Milldam—Licensee.*] — See *Ward* v. *Caledon*, *Algie* v. *Caledon*, 19 A. R. 69.

——— *Lowering Grade — Unskilful Execution.*] — See *City of New Westminster* v. *Brighouse*, 20 S. C. R. 520.

Evidence — *Action under Lord Campbell's Act.*]—See *Erdman* v. *Town of Walkerton*, 22 O. R. 636, 20 A. R. 444, 23 S. C. R. 352.

Ferry Boat — *Negligence of Servants.*]—The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N.B., entitled him to cross the St. John harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John:—Held, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage. The approaches of the ferry to the wharf were guarded by a chain extending from side to side of the boat at a distance of about one and a-half feet from the end. On approaching the wharf the man whose duty it was to

moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed towards the floats, and M., seeing the chain down and thinking it safe to land, followed them and fell through a space between the boat and the wharf and was injured. When this happened the boat was not moored:—Held, that the corporation of the city were liable to M. for the injuries sustained by the negligent manner of mooring the boat, and that he was not guilty of such contributory negligence as would avoid that liability. *City of St. John* v. *MacDonald*, 14 S. C. R. 1.

Fire Department — *Negligence of Servants.*]—Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties. Seymour v. Township of Maidstone, 24 A. R. 370, distinguished. *Hesketh* v. *City of Toronto*, 25 A. R. 449.

Injury through Horses Frightened by Noise — *Proximate Cause.*] — See *Connell* v. *Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147.

Liability for Acts of Servants.]—An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto. A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such. *City of Montreal* v. *Mulcair*, 28 S. C. R. 458.

Relief over—*Building—Owner—Sidewalk—Tenant.*]—In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made defendants under s. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of the building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time:—Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

Relief over—*Accident—Building — Contractors.*]—Before a building which was being erected by competent contractors for a municipal corporation of a city had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person in the street below. The trap door was necessary under the contract, which required all work to be done in a good and workmanlike manner, and imposed responsibility on the contractors for all accidents which might have been prevented by them. Damages were recovered against the corporation on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings, and the corporation, on the same evidence, sought to recover over against the contractors, brought in as third party defendants, on the terms that the findings in the action should be binding on them only as to the amount of damages, and that the question of their liability should be afterwards tried:—Held, that, under the circumstances, the corporation could not recover over against the contractors. *McCann* v. *City of Toronto*, 28 O. R. 650.

——— *Obstruction of Highways.*] — See WAY.

——— *Practice—Defendant—Third Party.*]—A third party is "a party to the action" within the meaning of s. 531, s.-s. 5, of the Municipal Act, 55 Vict. c. 42; and where a defendant municipal corporation, under that enactment, seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person or corporation should be made a third party and not a defendant, unless the plaintiff seeks some relief against such added party; and it is improper to add such party both as a defendant and a third party. *Erdman* v. *Town of Walkerton*, 15 P. R. 12. See, also, *S. C.*, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352.

——— *Practice.*]—See *Ferguson* v. *City of Toronto*, 14 P. R. 358; *Christie* v. *City of Toronto*, 15 P. R. 415; *Gibb* v. *Township of Camden*, 16 P. R. 316.

For other cases of negligence on the part of municipal corporations, see *ante* XII., XVI., *post* XXII., and titles NEGLIGENCE and WAY.

XXII. NUISANCE.

Building on Road Allowance—*Pulling Down—Necessity for By-law.*]—Where a mill, erected with the permission of a township council, partly on an unused road allowance in the occupation of the Midland Railway Company, in lieu of which they had given another piece of land for a road, was afterwards pulled down by the orders of the council, because the terms upon which its erection had been consented to had not been complied with, no by-law for its removal being passed, the owner was held entitled to damages. The pulling down of the building would, under the circumstances, if justifiable at all, be so only if authorized by by-law. *McNab* v. *Township of Dysart*, 22 A. R. 508.

Building on Street—*Obstruction of Window—Nonfeasance.*]—An action does not lie against a municipal corporation for damages in respect of mere nonfeasance, unless there has been a breach of some duty imposed by law upon the corporation. Municipality of Pictou v. Geldert, [1893] A. C. 524, and Municipal Council of Sydney v. Bourke, [1895] A. C. 433, followed. The claim against the city corporation was for negligence and misfeasance in permitting a nuisance to be created, to the injury of the respondents' property, by knowingly allowing a building on the adjoining land to be constructed so as to project

about ten or twelve inches beyond the homologated street line and obstruct the view of a shop window in the respondents' building subsequently constructed upon the proper street line. *City of Montreal* v. *Mulcair*, 28 S. C. R. 458.

By-law—*Beating Drums—Unusual Noise.*]—47 Vict. c. 32, s. 13, s.-s. 12 (O.), enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noises, or noises calculated to disturb the inhabitants," &c. Section 2 of by-law No. 179 of the city of London, passed under that Act, is as follows: "No person shall, in any of the streets or in the market place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make or assist in making any unusual noise, or noise calculated to disturb the inhabitants of the said city, Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada." The prisoner was convicted under the by-law of beating a drum on a public street in the city of London:—Held, that the by-law, so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb, was ultra vires and invalid; and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge. Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina* v. *Nunn*, 10 P. R. 395.

——— *Lawful Calling—Interference with.*]—16 Vict. c. 35 (O.) does not authorize the passing a by-law to prevent a nuisance not in itself unlawful, e. g., to prevent persons called runners or guides from exercising their calling in a town. *In re Davis and Municipality of Clifton*, 8 C. P. 236.

——— *Pigs and Cattle—General Prohibition—Regulations as to Houses in City.*]—The defendants passed a by-law pursuant to R. S. O. 1877 c. 174, s. 466, s.-s. 17, as amended by 44 Vict. c. 24, s. 12, which by-law, by s. 12, provided that "No person shall keep, nor shall there be kept, within the city of Toronto any pig or swine or any piggery:"—Held, that the by-law was ultra vires, as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances. By s. 3, s.-s. 2, the by-law provided that no cow should be kept in any stable, &c., situate at a less distance than forty feet from the nearest dwelling-house, and where two cows were kept that the stable should not be less than eighty feet from the nearest dwelling-house:—Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration that the distances prescribed were reasonable, and the by-law as to that was unobjectionable. Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling-house; and held, that this objection, not being clear, should not at any rate be allowed to prevail in favour of the appellant, whose case was not shewn to be within the terms of the objection. *McKnight* v. *City of Toronto*, 3 O. R. 284.

——— *Private Rights—Public Health.*]—A municipality, under 29 & 30 Vict. c. 51, s. 296, s.-ss. 20, 21, may pass by-laws relating to nuisances not of a public character. By-law No. 502 of the city of Toronto relative to the public health of the city, ss. 10, 12, 27, 28, 29, 30:—Held, valid. *Regina* v. *Osler*, 32 U. C. R. 324.

——— *Slaughter Houses—Special Resolution—Discrimination.*]—A by-law that "no person shall keep a slaughter house within the city, without a special resolution of the council;"—Held, not within the power given to the corporation by the Municipal Act of 1866, s. 296, s.-s. 23, which was to prevent or regulate the erection or continuance of slaughter houses, &c., which might prove to be a nuisance; because it permitted favouritism by the council, and might be exercised in restraint of trade or used to grant a monopoly; and all persons who followed or desired to follow the said trade, therefore, were not placed, or might not be placed, or were liable to be not placed, on the same footing. *In re Nash and McCracken*, 33 U. C. R. 181.

Non-Repair of Street—*Indictment.*]—Proceedings against the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment. Prohibition granted to restrain a preliminary investigation of such a charge before a police magistrate, and an order nisi to set aside the order granting prohibition refused by a divisional court. *Regina* v. *City of London*, 32 O. R. 326.

XXIII. Officers of Corporations.

1. *Tenure of Office.*

Held, that a new county council may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary. *Hickey* v. *County of Renfrew*, 20 C. P. 429.

Municipal officers appointed by the council hold office during the pleasure of the council and may be removed without notice and without cause. *Willson* v. *York*, 46 U. C. R. 289. [*See* R. S. O. 1897 c. 223, s. 321.]

Under R. S. O. 1887 c. 184, s. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council. *Vernon* v. *Corporation of Smith's Falls*, 21 O. R. 331.

The effect of s. 279 of the Consolidated Municipal Act, 55 Vict. c. 42 (O.), which enacts that officers appointed by a municipal council shall hold office until removed by the council, is that all such officers hold office during the pleasure of the council, and may be removed at any time without notice or cause shewn therefor, and without the council incurring any liability thereby. *Hellems* v. *City of St. Catharines*, 25 O. R. 583.

The removal of a clerk of a municipal corporation may be by a resolution, it not being essential that a by-law should be passed for such a purpose. Vernon v. Corporation of Smith's Falls, 21 O. R. 331, followed. *Village of London West* v. *Bartraw*, 26 O. R. 161.

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2. *Treasurer and his Sureties.*

(a) *Liability of Sureties.*

A. became surety to B., the treasurer of the united counties of Essex, &c., for the due accounting, &c., by C., as deputy treasurer, while he, B., continued in his office. C. received moneys for which he did not account, and B. sued A. upon the bond. B. held his commission as treasurer from the government, from the execution of the bond to the 10th October, 1846; and from that time to the 16th August, 1849, in consequence of a change made in the mode of appointment, he held his office under an election of the municipal council of the western district:—Held, upon these facts, that B. could sustain his action against the surety, A., without proof in the first instance that he had actually paid the money himself which his deputy, C., had misspent; and that the surety was liable during the whole time the deputy was serving in the treasurer's office, without reference to the mode of the treasurer's appointment. *Baby* v. *Baby*, 8 U. C. R. 76.

Declaration, that the defendants became bound to the plaintiffs by the name of "the Beverley Municipal Council," conditioned that B., who had been chosen the plaintiffs' treasurer, should duly account, &c. Plea, that the appointment was an annual one, terminating at the end of the year, and that B. duly accounted for the year. On demurrer to the plea and exceptions to the declaration:—Held, that defendants, by not pleading non est factum, admitted that they made the bond to the plaintiffs, and therefore could not object that there was no such corporation; and that the plea was bad, for, under 12 Vict. c. 81, the appointment of B. as treasurer was not annual, but during pleasure, and the condition covered the whole period of his holding office. Held, also, that the imposition of additional taxes to those assessed at the time of taking the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties, and payment of all moneys. *Township of Beverley* v. *Barlow*, 10 C. P. 178.

A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On motion to retain moneys in the sheriff's hands which had been made on the confession, it was ordered that the whole amount be paid into court, and that the subsequent judgment creditors should wait. *Leonard* v. *Black*, 4 L. J. 260.

A treasurer having been duly appointed for three counties (while united), upon the separation of one from the other two counties:—Held, that a new appointment was not necessary under C. S. U. C. c. 54. An action being brought by a corporation against the sureties of their treasurer, defendants contended that, because money which had been collected by the treasurer and fraudulently charged as paid by him was not demanded by the parties (the government) entitled thereto, they were not responsible therefor:—Held, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money. *County of Essex* v. *Park*, 11 C. P. 473.

In an action upon the covenants contained in a mortgage of land executed to the municipal corporation by a surety of their treasurer, to secure payment of a judgment recovered against such surety, for the treasurer's liability:—Held, on demurrer, that there was nothing to prevent the plaintiff from giving time to defendant for payment, or from taking from him a covenant to pay at the expiration of that time. *Town of Belleville* v. *Judd*, 16 C. P. 397.

A township treasurer had in his hands a large balance belonging to the township, when he gave to the corporation new sureties:—Held, that subsequent payments by the treasurer were applicable first to the discharge of that balance. A township council tacitly permitted the treasurer of the township to mix the township money with his own:—Held, that this conduct was wrong, but did not discharge the treasurer's sureties. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way. In this state of things he had occasion to give to the corporation a new bond with two new sureties, shortly after giving which it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct, and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the court, being of the opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, held the bond to be valid. *Peers* v. *Oxford*, 17 Gr. 472.

One of the sureties for the treasurer of a municipal corporation desiring to be relieved from his suretyship, the treasurer offered a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds the withdrawing surety should be relieved. No further act took place on the part of the council, but the treasurer and his new surety, omitting the second surety, joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect. The clerk, on receiving these, gave up to the treasurer the old bond, which the treasurer destroyed. Eight years afterwards a false charge was discovered in the accounts of the treasurer of a date prior to these transactions:—Held, that the sureties on the first bond were responsible for

it. The mortgage was on property which the treasurer had previously mortgaged to the sureties for their indemnification. The mortgage to the sureties had not been registered, but had been left with the clerk of the council for safe keeping. On receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both:—Held, that the old sureties were entitled to a first charge on the property for their indemnification in respect of the newly discovered defalcation. A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts. The fact of the treasurer having become reduced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety. *County of Frontenac* v. *Breden*, 17 Gr. 645.

A treasurer was appointed by the plaintiffs under R. S. O. 1877 c. 174, by s. 274 of which all officers appointed by a council shall hold office until removed by such council. He furnished a bond dated the 1st November, 1880, conditioned that if he should "well and truly discharge the duties of township treasurer so long as he shall remain in the said office, and shall render just and true accounts of all moneys, &c., as shall come and have come into his hands during his continuance in said office, and hand the same promptly into the hands of his successor in office, then, &c." He was reappointed annually for several years:—Held, that the reappointments were not equivalent to removals and reappointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged. The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on the 27th February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle, and the council did not carry out their threat. In 1883 the council, again becoming dissatisfied with the treasurer, passed a resolution that no further payment should be made to him, but all moneys should be paid into a certain bank. In 1884 the council for that year rescinded this resolution, and permitted the treasurer to receive the accumulated funds. No notice of any kind was given to the sureties:—Held, that the plaintiffs had failed to perform their duty by retaining the treasurer in office after they had become aware of his defalcations and continued default: and that their failure to do so was a breach of duty towards the sureties, which released the latter from all liability after the 27th February, 1882. A reference was granted at the plaintiff's election to take an account of the amount due under the bond to that date, and in default of such election, the action was dismissed with costs. *Township of Adjala* v. *McElroy*, 9 O. R. 580.

See also, *Town of Meaford* v. *Lang*, 20 O. R. 42, 541.

By R. S. O. 1877 c. 180, s. 10, as amended by 44 Vict. c. 25, s. 12 (O.), no assessor or collector shall hold the office of clerk or treasurer. The treasurer of plaintiffs, who was also clerk, was in that capacity permitted by resolution of the council to retain the collector's roll for three months, and he was granted a percentage on money received by him for taxes. In an action against him and his surety:—Held, that that temporary function was not of such a nature as to terminate his duties as treasurer by necessary implication, and that when the money came to his hands with which he charged himself as treasurer, the responsibility of the surety began, but that the latter should not be charged with any sums which did not appear in the books of the former as treasurer, and which were referable to taxes otherwise received by him. *Village of Weston* v. *Conron*, 15 O. R. 595.

See Township of East Zorra v. *Douglas*, 17 Gr. 462, *post* (b).

(b) *Other Cases.*

Account—*Bill for.*]—A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *Township of East Zorra* v. *Douglas*, 17 Gr. 462.

Accounts — *Mixing.*] — County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money. *Peers* v. *Oxford*, 17 Gr. 472.

—— *Separation of.*]—It is culpable neglect of duty on the part of municipal officers not to see that separate accounts for special rate, sinking fund, and assessments for general purposes, are kept as directed by the statute. *Wilkie* v. *Village of Clinton*, 18 Gr. 557.

Bond of Treasurer—*Condition — Construction.*]—The condition was, that a treasurer, his executors or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, and should pay and deliver all balances due:—Held, that the words "upon request to him or them made" applied both to the giving an account and to the paying over. *County of Bruce* v. *Cromar*, 22 U. C. R. 321.

—— *Execution of, before Appointment—Wild Land Tax.*]—A municipal council elected B. as their treasurer on the 25th January, and by a by-law passed on the 28th appointed him, and directed that he should enter on his duties as soon as he should have executed the necessary bond. On the same day they passed a resolution accepting his bond, which was dated on the 26th:—Held, that no objection would lie to such a bond, as having been executed before his appointment. Held, also, that the treasurer was clearly liable for defalcations in the wild land tax, being the proper person to receive it. *County of Essex* v. *Strong*, 21 U. C. R. 149.

—— *Operation of — School Moneys.*]—Where a township treasurer was by his bond, dated 6th October, 1874, bound to duly account for all moneys coming into his hands and applicable to the general uses of the municipality:—Held, that clergy reserve moneys and money derived from the distribution of the provincial surplus which had by by-law been specifically appropriated to educational purposes, were not within the condition of the bond, and that the operation of

this bond was not extended to school moneys by R. S. O. 1877 c. 180, s. 213, and R. S. O. 1877 c. 204, s. 221. *Township of Oakland* v. *Proper*, 1 O. R. 330.

Collector's Bond.]—The Municipal Council Act, 4 & 5 Vict. c. 10, does not enable the municipal councils of districts to sue upon bonds given by collectors of assessments to the treasurer of the district after that Act was passed, but the treasurer can sue in his own name. *O'Connor* v. *Clements*, 1 U. C. R. 386.

It invests in the municipal council of each district the power of suing on a bond given to the treasurer of the district for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the moneys collected are due and payable to the treasurer. *Eastern District Council* v. *Hutchins*, 1 U. C. R. 321.

A bond by a collector to the "treasurer of a town and his successors in office:"—Held, valid, without naming any individual therein. *Judd* v. *Read*, 6 C. P. 362.

In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of F., for the performance by defendant P. of his duties as collector:—Held, approving Judd v. Read, 6 C. P. 312, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality. *Todd* v. *Perry*, 20 U. C. R. 649.

Contract Moneys—*Promissory Notes—Discount by Treasurer—Agent of Bank—Account—Audit—Pleading—Resolution—Council of Following Year.*]—In an action by a municipal corporation against their treasurer on his bond, charging him with not having paid over moneys received, it appeared that the corporation had a contract with one E. to build bridges for them; and that E., wanting money, got the reeve to indorse his note for $600, which was discounted by defendant at the Niagara District Bank, of which he was agent, as well as treasurer of the municipality. A few days afterwards another note for $400, made by E. and indorsed by others, one a member of the council, was discounted at the same bank. When these notes were about to fall due, a meeting of the council took place, at which defendant was present, and the reeve swore that it was then understood that the council should assume these two notes, and he thought defendant was authorized to charge them to the corporation; but other councillors did not agree with the reeve in their recollection of what took place, and the only resolution or minute in writing was that the council should give their note for $700, to be used in the Niagara District Bank by defendant. This note was accordingly made by the reeve, and indorsed by the other members:—Held, that, under these facts, the treasurer had no right to charge the council with the remaining $300. In an account rendered to the council by defendant, this $1,000 was charged as paid to E., and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew this to be the case; but semble, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited. A treasurer of a municipality should not be permitted to act also as agent of a bank. *Village of Ingersoll* v. *Chadwick*, 19 U. C. R. 278.

The first count was upon the bond given by the treasurer, alleging moneys received and not paid over; the second count for money had and received. Defendant pleaded, on equitable grounds, to the first count, that while he was treasurer the corporation owed one E. a large sum of money, and thereupon, at a meeting of the council duly held, the reeve, in the presence and hearing of the council, and without objection, and with the oral assent of the councillors, or a majority of them, gave defendant, as treasurer, oral orders to pay E. £250 on account of said debt, which defendant thereupon paid; that afterwards the council ordered defendant to render them an account of moneys paid and received by him for the corporation, which he did, charging the corporation in it with the money so paid to E.; that said council, being aware of such account and of said payment, charged the said sum against E., and afterwards by resolution directed the reeve to pay E. $112.35 on account of their debt due to him, after crediting themselves with such payment; and the reeve thereupon required defendant in writing to pay said $112.35, which defendant accordingly paid; and defendant alleged that the money claimed in said count as received by him and not paid over, was the sum so paid by him to said E. as aforesaid. To the second count the same facts were pleaded, but the allegation at the end of this plea was, that the money so paid to E. as first aforesaid was the money in the count and in the introductory part of this plea mentioned:—Held, on demurrer, first plea good, being an averment that the money sued for was the $112.35 paid by defendant on the resolution. Second plea, bad, for the money there alleged to be sued for was the $1,000, for the payment of which no sufficient authority was shewn. Quære, this action being by the council of the year after that in which the payment pleaded was made, whether the facts would have afforded any defence against the council who thus sanctioned the payment. *Village of Ingersoll* v. *Chadwick*, 19 U. C. R. 286.

Destruction of Money by Fire — *Liability.*]—Defendant, being treasurer of a municipality, kept his moneys in his house, there being no proper place for depositing the same provided by the municipality, and there being no bank in the county within a distance of thirty-five miles:—Held, that under these circumstances he was not liable to make good to the corporation the amount of loss sustained by the accidental burning of his house, and the destruction therein of the moneys of the municipality; and that his own statements under oath, which appeared satisfactory to the court, were sufficient evidence to exonerate him from liability. *Corporation of Houghton* v. *Freeland*, 26 Gr. 500.

District Councillor — *Ineligibility as Treasurer—De Facto Officer—Mandamus.*]—At a session, in October, 1846, A. was elected by the district council treasurer of the midland district, being then himself a district councillor. B. then was holding the same office of treasurer of the district, having been long previously appointed by royal commission. A. requested B. to give him the books, &c., of the office, and on his refusal applied for a mandamus:—Held, (1) that A. had been elected at the proper time; (2) that the two offices of district councillor and treasurer were

incompatible; (3) that A. was ineligible for election, the council having no power to receive his resignation as councillor; (4) that, nevertheless, he, as treasurer de facto, under 9 Vict. c. 40, had a legal right to the books, &c., of his office, and that a mandamus might go to B. for the delivery of the books, &c., to A., he being since A.'s election under the Act a mere stranger to that office. *Regina* v. *Smith*, 4 U. C. R. 322.

See, also, *Re Brenan*, 6 O. S. 330; *Regina* v. *Mayor of Town of Cornwall*, 25 U. C. R. 293.

License Fees—*Receipt of, by Reeve—Action—Evidence.*] — The reeve of a township received moneys for license fees which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash, and a note for the balance. The treasurer denied having received the note or balance, and at his instance the municipality by resolution allowed an action to be brought for it in their name against the reeve. They afterwards rescinded this resolution, but the action went on, and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his accounts for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer:—Held, that the action could not be maintained by the municipality, and that, if it could, the treasurer would not have been admissible as a witness. *Township of King* v. *Hughes*, 17 U. C. R. 253.

Misappropriation—*Order of Reeve—Action.*]—Semble, that moneys paid by a treasurer on the order of the reeve, which the municipal council had no authority to direct to be paid, will be considered township moneys still in his hands. *Township of East Nissouri* v. *Horseman*, 9 C. P. 189.

——— *Resolution—Indictment.*]—Semble, that a treasurer may be indicted for making any payment which is a clear misappropriation of the public money, though sanctioned by resolution of the council. *Township of East Nissouri* v. *Horseman*, 10 U. C. R. 576; *Daniels* v. *Township of Burford*, 10 U. C. R. 478.

Money Borrowed—*Purpose—Application—Good Faith—Approval of Council.*]—Where a by-law was passed by a township council for raising a loan for a special purpose, it was held to be contrary to the duty of the township treasurer to apply the money to any other corporate purpose. But where, before the filing of a bill by a ratepayer complaining of the application, such application had been made in good faith, in discharge of a legal liability of the township, and the council approved of and adopted the payment, a bill to compel the treasurer to pay the amount and personally bear the loss, was dismissed. *Grier* v. *Plunkett*, 15 Gr. 152.

Release — *Validity of.*]—Quære, whether the release given by the warden to the principal and one of the sureties, as stated in this case, was binding at law. *Municipal Council of Essex* v. *Baby*, 9 U. C. R. 34.

Removal — *Reappointment—Implication.*] —To determine a man's office as treasurer under the statute, there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. Mere implication arising from formal reappointment should not be deemed equivalent to such act of removal. *Township of Adjala* v. *McElroy*, 9 O. R. 580.

School Teacher's Salary — *Order for—Acceptance.*] — The Municipal Act does not authorize the acceptance by the treasurer of orders for a school teacher's salary, although he is permitted to pay such orders on presentation, nor can the treasurer bind the corporation by his acceptance of orders. *Munson* v. *Municipality of Collingwood*, 9 C. P. 497.

Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favour for his salary, the treasurer having no power to bind the corporation by such acceptance. *Smith* v. *Village of Collingwood*, 19 U. C. R. 259.

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3. *Other Officers.*

Assessor — *Appointment — Resolution—Rescission—Quo Warranto.*]—The council by resolution appointed an assessor, who was sworn into office, and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances, the court granted a quo warranto to determine the validity of the last appointment. *In re McPherson and Beeman*, 17 U. C. R. 99.

Assessor—*Omission—Loss—Liability.*] — Where assessors or other officers of municipalities omit to follow the plain directions in Acts of Parliament, and any loss thereby arises to the municipality, it would seem that the party causing such loss would be answerable therefor to the municipality. *Christie* v. *Johnston*, 12 Gr. 534.

Chief Constable — *Appointment — Commissioners of Police.*] — Powers of commissioners of police of a town to appoint chief of police with a stipulation that he should act as county constable and a further stipulation as to fees. *Town of Stratford* v. *Wilson*, 8 O. R. 104.

——— *Salary — Commissioners.*] — Under C. S. U. C. c. 54, s. 402, it is for the city council, not for the commissioners of police, to determine the remuneration to be paid to the police force. Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it. *In re Prince and City of Toronto*, 25 U. C. R. 175.

Clerk of County—*Mayor of Town.*]—A county clerk is disqualified, under s. 73 of 29 & 30 Vict. c. 51, from sitting as mayor of any other municipality. *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195.

Clerk of District Council — *Liability for Acts of.*]—The clerk of a district council can only charge the council by acts within the scope of his general authority, or by such as

they directed beforehand, or sanctioned afterwards, either expressly or by availing themselves of such acts to their advantage. *Ramsay* v. *Western District Council*, 4 U. C. R. 374.

Clerk of Market — *Bond—Fees.*] — A., upon being appointed clerk of the market to the board of police of London, entered into a bond for the payment of a certain sum of money in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for the non-payment of the money, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws repecting fees to be taken thereat;" he then averred that the plaintiffs had no such authority, and that on this account the bond was void:—Held, plea bad in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *Board of Police of London* v. *Talbot*, 3 U. C. R. 311.

Clerk of Town—*Collector's Roll—Omissions — Negligence — Fraud — Action.*]—A declaration, after setting out the defendant's duty as town clerk, under the Assessment Act, R. S. O. 1877 c. 180, in the preparation of the collector's roll, alleged that he omitted and neglected in certain years, to set down in said collector's rolls for the said years a large number of persons who appeared by the assessment rolls liable to assessment, &c. A further breach was that the defendant, in breach of his said duty, did not in said collector's rolls, &c., set down the assessed value of all property liable to assessment of a large number of persons whose names were set down in said rolls, whereby the plaintiffs lost large sums of money, payable to them as taxes, and they claimed $2,000:—Held, declaration bad; for that the first breach did not aver that the omission was made negligently, falsely, or dishonestly, but merely by mistake, which would not render defendant civilly liable; while the second breach did not contain any allegation of negligence, bad faith, or even carelessness. Held, also, that the period for bringing the action was not limited to two years under R. S. O. 1877 c. 61, s. 1. Quere, whether the defendant is only liable to conviction under s. 189 of the Assessment Act, at the suit or upon complaint of the Crown, or to a civil action by the plaintiffs as well. *Town of Peterborough* v. *Edwards*, 31 C. P. 231.

——— *Fraud — Liability of Corporation for.*] — Liability of corporation for fraudulent act of its clerk and treasurer acting within the scope of his authority, the corporation having received the benefit of the fraud. *Molsons Bank* v. *Town of Brockville*, 31 C. P. 174.

Clerk of Township — *Illiteracy — Quo Warranto.*]—The court refused an information in the nature of a quo warranto with a view of placing a person in the office of township clerk, who, in making his application, shewed that he could not write. *Regina* v. *Ryan*, 6 U. C. R. 296.

Collector of Taxes — *Wild Land Tax — Moneys Received in Previous Years.*] — The testator having been appointed by the finance committee of the district council to collect the wild land tax:—Held, that his representatives were liable to the council of 1850 for money received in 1847-8-9, by their authority, and not paid over. *Municipal Council of Lincoln* v. *Thompson*, 8 U. C. R. 615.

Engineer—*Contract—Reference — Bias.*] —See *Farquhar* v. *City of Hamilton*, 20 A. R. 86.

Health Officer—*Liability for Acts of.*] —Held, that the medical health officer of a municipal corporation, appointed under R. S. O. 1887 c. 205, s. 37, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties. *Forsyth* v. *Canniff*, 20 O. R. 478.

——— *Salary.*] — In December, 1884, B. was by by-law appointed health officer of the township of Seymour, but the by-law did not fix any salary, as might have been done under 47 Vict. c. 38, s. 20 (O.):—Held, on action brought by B. for remuneration, that the law would fix the salary at a reasonable sum, regard being had to the services performed, and to be performed by the plaintiff. *Bogart* v. *Township of Seymour*, 10 O. R. 322.

——— *Salary — Attachment.*]—A medical health officer is not an employee of the municipal corporation within the meaning of R. S. O. 1877 c. 47, s. 125, and his salary is not exempt from attachment. *Re Macfie* v. *Hutchinson*, 12 P. R. 167.

License Officer—*Appointment—By-law.*] —A by-law, passed on the 21st July, 1874, appointed an officer, under 36 Vict. c. 34, s. 8 (O.), to enforce the provisions of said Act, and the Acts therein recited, and the by-laws of the corporation respecting shop and tavern licenses. This by-law was passed to fill a vacancy in the office, caused by the resignation of the person appointed under a by-law passed in February previous. 36 Vict. c. 34 had been repealed when the by-law was passed, by 37 Vict. c. 32, which gave power to fill a vacancy in such office:—Held, that the by-law was not invalid, because not passed in February, under s. 9 of the last mentioned Act, nor for not defining the duties, &c., of the officer appointed, which might be done by another by-law. *In re Slavin and Village of Orillia*, 36 U. C. R. 159.

Manager of Business Conducted by Corporation—*Appointment—Dismissal.*] — The property of a navigation company having passed to defendants, a municipal corporation, plaintiff was appointed manager thereof under their common seal, at an annual salary from 1st January, 1866, an appointment to which he had been previously recommended in a report of a committee of council, and by a resolution the mayor was authorized to execute the necessary bonds between plaintiff and defendants:—Held, a valid appointment, and not necessary to have been made by by-law. Defendants having dismissed the plaintiff in September, 1867:—Held, that such dismissal, before the end of the year, was wrongful, defendants having recognized plaintiff as their officer after and during the second year; and until removed he was to be considered as in office under his original appointment under the corporate seal, and that he was entitled to compensation in like manner as if employed by an individual. Held, also, that the plaintiff was an officer of the corporation under the Municipal Act. *Broughton* v. *Corporation of Brantford*, 19 C. P. 434.

Mayor—*Profit from Sale of Debentures—Trustee.*]—The mayor of Toronto secretly contracted to purchase at a discount (from persons to whom the debentures were to be assigned by the railway company in whose favour they were to be issued) a large amount of the debentures of the city, which were expected to be issued under a future by-law of the city council; and was himself an active party afterwards in procuring and giving effect to the by-law, which was subsequently passed:—Held, that he was a trustee for the city of the profit he derived from the transaction. *City of Toronto* v. *Bowes*, 4 Gr. 489. Affirmed, *Bowes* v. *City of Toronto*, 6 Gr. 1, 11 Moo. P. C. 463.

See Scully v. *McCallum*, 9 Gr. 434.

——— *Refusal to Execute Lease.*]—Case against the mayor of a municipal council, alleging that the council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the council while in session, defendant being mayor, did instruct and order him as such mayor, on behalf and in the name of the council, to make and execute the lease, of which he had notice, but which he maliciously refused to do, though thereunto requested:—Held, action not maintainable. *Fair* v. *Moore*, 3 C. P. 484.

Members of Board of Police—*Election of—Mandamus—Quo Warranto.*]—The court will not grant a mandamus to try an election of corporate officers chosen under the Brockville Police Act, but will leave the parties contesting the validity of such election to their remedy by information in the nature of a quo warranto. *Re Election of Members of Board of Police of Town of Brockville*, 3 O. S. 173.

Overseer—*Inspector.*]—See *Osborne* v. *City of Kingston*, 23 O. R. 382.

Pathmaster—*Liability of Corporation for Acts of.*]—A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O. 1877 c. 73, s. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual. And where a pathmaster of a township in the course of his employment so acted as to disentitle himself to the protection of the statute and thereby caused damage to the plaintiff:—Held, that the township corporation as well as the pathmaster was liable; and even if not originally so the corporation made itself liable by sanctioning what was done and refusing to amend it after notice. *Stalker* v. *Township of Dunwich*, 15 O. R. 342.

See McDonald v. *Dickenson*, 25 O. R. 45, 21 A. R. 485.

——— *Liability of Corporation for Acts of—Ratepayer—Statute Labour.*]—In an action against a municipal corporation for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour had been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster, or by a ratepayer engaged in the performance of statute labour:—Held, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible. Quære: Is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer in performance of statute labour? *McGregor* v. *Township of Harwich*, 29 S. C. R. 443.

Police Magistrate—*Salary—Reduction.*]—In 1892 the plaintiff was appointed by the Provincial government, of its own motion, police magistrate, without salary, under R. S. O. 1887 c. 72, s. 5, of a town whose population exceeded 5,000. The plaintiff then demanded a salary of $800 as his right under s. 2 (b), which was for a time conceded, but, in 1894, reduced to $400, and by resolution in 1896 withdrawn altogether by the council:—Held, that the council had a right so to do, and R. S. O. 1887 c. 72, s. 28, did not apply. *Ellis* v. *Town of Toronto Junction*, 28 O. R. 55. Affirmed, 24 A. R. 192.

——— *Salary—Statute—By-law.*]—Held, that 12 Vict. c. 81 makes it not only the duty of a town council to pay their police magistrate, but creates a debt the payment of which the magistrate may enforce in an action of debt, not as founded upon a contract express or implied, but on the statute and the right which it confers. Held, also, that under the statute the action may be maintained without the aid of a by-law of the municipality to confer it. Quære: Is debt the only remedy? *Wilkes* v. *Town of Brantford*, 3 C. P. 470.

Police Magistrate and Clerk—*Fees.*]—See *Town of Peterborough* v. *Hutton*, 30 C. P. 455.

Police Officers—*Liability for Acts of—Ratification.*]—A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts, does not constitute a ratification thereof by the city, so as to make it liable in damages for such acts. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608, 22 A. R. 522.

Treasurer—*Illegal Conduct—Liability of Corporation for—Taxes.*]—A municipality is responsible for the acts of its officers in illegally placing arrears of taxes on the roll of a collector and subsequent distress therefor. *Caston* v. *City of Toronto*, 30 O. R. 16.

See City of Montreal v. *Mulcair*, 28 S. C. R. 458.

XXIV. Organization.

1. *Corporate Name.*

[The proper description (except in the case of a provisional corporation) is the corporation of the county, city, town, village,

township, or united counties, or united townships (as the case may be) of (naming the same). R. S. O. 1897 c. 223, c. 7.]

Bond.] — "The provisional municipal county council of" &c., "The provisional corporation of" being the proper corporate name:—Held, sufficient in a bond. *County of Bruce* v. *Cromar*, 22 U. C. R. 321.

By-law.]—The "municipal council of the district of Wellington:"—Held, sufficient. *Flewellyn* v. *Webster*, 6 O. S. 586.

So "The warden and county council of the united counties of," &c. *In re Hawkins* v. *Municipal Council of Huron, Perth, and Bruce*, 2 C. P. 72.

It was objected that a by-law was expressed on the face of it to be passed by the "municipality of Vaughan," there being no such corporate body:—Held, not a valid objection; and semble, if it were, that the applicant recognized the by-law as one passed by the corporation intended, by moving against it as a by-law passed by that body. *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. R. 492.

Held, that the description of defendants in a by-law as the corporation of the county of Prince Edward was right, the objection being that it should have been the council thereof. *In re Lake and County of Prince Edward*, 26 C. P. 173.

Judgment — *Execution — Mandamus.*]—Upon an application for a mandamus to a railway company to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen, and commonalty of the city of Ottawa," as the corporation was then designated, and by C. S. U. C. c. 54, the name was changed to "the corporation of the city of Ottawa." The court, upon the objection of informality in the name:—Held, that the execution properly followed the judgment, under C. S. U. C. c. 1, s. 7, and was sufficient. *In re Geodwin and Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Pleading.]—Held, that the misdescription of the garnishees as "the City of Toronto," in the pleadings, could not be taken advantage of under the circumstances; but semble, that it might be waived or amended. *Gwynne* v. *Rees*, 2 P. R. 282.

Held, that the municipal council was sufficiently designated in a plea as "the municipality." *Johnston* v. *Recsor*, 10 U. C. R. 101.

Inaccuracy in the corporate name in the declaration, &c., is immaterial after verdict, when the identity of the corporate body is clear. *Farrell* v. *Town of London*, 12 U. C. R. 343.

Declaration, that B. became bound to the plaintiffs, by the name of "the Beverley municipal council," conditioned, &c.:—Held, on demurrer to the plea, that defendants by not pleading non est factum admitted that they made the bond to the plaintiffs, and therefore could not object that there was no such corporation. *Township of Beverley* v. *Barlow*, 10 C. P. 178.

Rule.] — "Corporation of Toronto:"—Held, insufficient in a rule nisi, to designate the corporation of the city of Toronto. *In re Sams* v. *Corporation of Toronto*, 9 U. C. R. 181.

A rule nisi intituled as against "the municipal council" of a township, instead of "the municipality:"—Held, sufficient. *In re Barclay and Municipal Council of Darlington*, 11 U. C. R. 470.

The misnomer of the corporation in the rule to quash a by-law as "the municipality of the incorporated village of Gananoque," was held immaterial. *Re Brophy and Village of Gananoque*, 26 C. P. 290.

See Rolph v. *Cahoon*, 2 Gr. 623; *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19.

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2. *Formation of New Corporations.*

(a) *Debts and Liabilities, How Affected.*

Assets of United Counties — *Action after Dissolution.*]—Quære, as to the proper party to sue in the case of assets belonging to a union of counties, and to recover which no suit is brought till after the dissolution of the union. *County of Frontenac* v. *City of Kingston*, 20 C. P. 40.

Building Road—*Separation of Counties.*]—The plaintiff contracted under seal with the united counties of Huron and Bruce, to construct a gravel road in Bruce. The counties were separated on the 1st January, 1867:—Held, that the plaintiff could not afterwards sue the county of Bruce alone for work done in making the road. *Ekins* v. *County of Bruce*, 30 U. C. R. 48.

——— *Separation of Townships—By-law—Contract—Liability.*]—Action for work done upon a road in the township of Russell. Clarence, Cumberland, Cambridge, and Russell, had been united; Cumberland was separated in 1850, and Clarence in 1853. In January, 1851, the municipality (then consisting of Clarence, Russell, and Cambridge) passed a by-law enacting that their treasurer should receive from the county treasurer all moneys received by him as tilled lands assessment money due those townships; that the council for each township should decide where such moneys should be expended therein respectively, and should expend the same, making proper returns to the treasurer; and that on completion of such jobs the road surveyor should be associated with the councillor for examining the same, and, if approved of, the persons performing the work should be entitled to payment. In June, 1851, a resolution of the same municipality was passed, that the road surveyor should be associated with J. S., one of the councillors for Russell, to make contracts for opening the road from the boundary line of Cambridge and Russell to Louck's mill in Russell. In January, 1854, another by-law was passed by the municipality (then including only Cambridge and Russell) authorizing the treasurer to accept all orders drawn by the late municipality upon the late treasurer, that is, the treasurer of Clarence, Russell, and Cambridge. The plaintiff's tender was accepted in pursuance of the resolution of June, 1851, and the work

was performed, examined, and approved of by the surveyor and J. S.; and under the by-law of January, 1851, Stewart gave an order for the sum agreed upon in favour of the plaintiff on the treasurer of Clarence, Russell, and Cambridge:—Held, that under the by-law of 1854 the defendants (the municipality of Russell and Cambridge) had adopted the order on the treasurer of the former union, and therefore no difficulty was caused by the fact that the municipality sued was not that contracted with. 2. That it was no objection that H., the other councillor for Russell, had not acted with S., and if it were, his dissent was not sufficiently shewn. *Fetterly* v. *Municipality of Russell and Cambridge*, 14 U. C. R. 433.

——— *Township Rate—Arbitration—Interest.*]—Held, that the township of Waterloo was liable, under 14 & 15 Vict. c. 5, for its share of the debts of the Guelph and Dundas road incurred by the county of Waterloo, (of which it formed one township), while that county was united to the counties of Wellington and Grey; notwithstanding, too, that an arbitration took place between those counties upon their separation, by which it was determined that Wellington should assume the liability of the former joint counties. Held, also, that interest on the ascertained debt was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for defendants. *County of Wellington* v. *Township of Waterloo*, 8 C. P. 358.

———*Township Rate—Assignment of Debt —Pleading.*]—Held, that under 14 & 15 Vict. c. 5, s. 8, and 12 Vict. c. 78, s. 15, the county of Wellington might maintain actions against the townships of Wilmot and Wellesley respectively for moneys paid on account of the Guelph and Dundas road, as well by the united counties of Wellington and Grey before the dissolution as by Wellington afterwards. As to the first mentioned payments, 12 Vict. c. 78, s. 15, must be taken to allow such recovery notwithstanding the technical rule of law against assignment of debts. Held, also, that on the special count any part of the debt actually due for such roads might be recovered, though it had not yet been paid. Quære, whether the county could have enforced payment by levying a rate on these townships. *County of Wellington* v. *Township of Wilmot, County of Wellington* v. *Township of Wellesley*, 17 U. C. R. 82.

——— *Township Rate — Construction of Statute.*]—By 14 & 15 Vict. c. 5, the county of Waterloo is made to consist of certain townships, including North Dumfries, which before formed part of the county of Halton. Section 8 provides that certain townships named, in which North Dumfries is not included, shall be responsible for their share of the debt for building the Guelph and Dundas road. This debt had been incurred by the former district of Wellington, which embraced all the townships mentioned in s. 8, except Dumfries:—Held, that the municipal council of Waterloo could not impose a rate on Dumfries to pay such debt, the omission of that township in the statute shewing clearly that it was not intended to be liable. *In re Municipality of North Dumfries and County of Waterloo*, 12 U. C. R. 507.

Expropriation of Land—*Compensation —Pleading.*]—Where the plaintiff brought an action on the common counts, against the Huron district council, for compensation awarded to him by a jury for making a road across his premises before the formation of the Huron district, and while the land formed part of the district of London; and the Huron district had, after its erection, assumed the payment of the sum awarded:—Held, that the action would not lie against defendants at all; and if it would the declaration should have been special. *McKee* v. *Huron District Council*, 1 U. C. R. 368.

Railway Bonus — *Separation of Village from Township— By-law—Award—Consent.*]—On the separation of the village of Norwich from the township of North Norwich, in which it was situate, an arbitration took place under the Municipal Act, 36 Vict. c. 48, ss. 9, 25 (O.) A by-law had been passed by the county granting a bonus of $50,000 to the Port Dover and Lake Huron Railway Company, and authorizing debentures of the county to be issued therefor, to be provided for by a rate levied upon the town of Woodstock and the township of North Norwich. This by-law was legalized by 37 Vict. c. 57, s. 26 (O.), which provided that the company should indemnify the township to the extent of $10,000 against any excess above two-fifths of the said debentures, and should give a bond securing such indemnity, which bond had been given:—Held, that the liability of the township under this by-law was a debt of the township, although secured by debentures of the county and within the power of the arbitrators to dispose of, as well as the bond. It was awarded as to the bond, that the village should be interested in it to the extent of $1,008, and the township to the extent of $8,991 for each $10,000 thereof, and so in like proportion for any greater or less amount payable in respect thereof; and as to the money payable under the by-law, that the village should pay $1 and the township $8 for each $9 thereof:—Held, that this mode of disposition was authorized, and unobjectionable. The award purported to be made "with the consent of the parties:"—Held, that such consent referred to the matter being disposed of, and not to the mode of disposition. *Re Township of North Norwich and Village of Norwich*, 44 U. C. R. 34.

Registrar of Deeds — *Services of — Separation of Counties.*]—Under the Registry and Municipal Acts, 29 Vict. c. 24, and 29 & 30 Vict. c. 51:—Held, that the counties of York and Peel were jointly liable to the registrar of Peel for services rendered by him, under ss. 26 and 33 of the Registry Act, before the separation of these counties. *Campbell* v. *Corporation of York and Peel*, 26 U. C. R. 635, 27 U. C. R. 138.

Taxes Collected — *Action before Separation.*]—The testator having been appointed by the finance committee of the district council to collect the wild land tax:—Held, that his representatives were liable to the council for money received by their authority and not paid over. Where, subsequently to the commencement of the action, one of the three united counties had been set off from the other two:—Held, that the suit was properly continued in the name of the three counties. *Municipal Council of Lincoln, Welland, and Haldimand* v. *Thompson*, 8 U. C. R. 615.

Use of Court House—*Law Reform Act —City and County.*]—In consequence of the separation of the city of Toronto from the

county of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to the use of the gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act, which came into force in February, 1889, the city was re-united to the county for judicial purposes, and on 21st March, 1889, the city gave the county the stipulated notice as to intended discontinuance of the use of the gaol, stating that as to the court house the action of the Legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half-year's rent which would have become due on 21st March following. *County of York* v. *City of Toronto*, 21 C. P. 95.

Since the passing of the Law Reform Act, 32 Vict. c. 6, s. 22 (O.), re-uniting the city of Toronto to the county of York for judicial purposes, the city is not liable to pay the county any compensation for the use of the court house. *County of York* v. *City of Toronto*, 22 C. P. 514.

(b) *Officials and their Sureties. How Affected.*

Bond—*Action on—Division of Township.*]—A bond was taken to "The municipality of the township of Whitby," and afterwards the township was divided, by 20 Vict. c. 113, into Whitby and East Whitby:—Held, that the bond was properly sued upon in the name of the corporation of Whitby. *Township of Whitby* v. *Harrison*, 18 U. C. R. 603.

Sheriff—*United Counties—Dissolution.*]—Held, that the sureties for a sheriff of the united counties of Middlesex and Elgin, were not liable for him as sheriff of Middlesex only, after the union had been dissolved. *Thompson* v. *McLean*, 17 U. C. R. 495.

Treasurer — *Provisional Corporation — Appointment for New County.*] — 12 Vict. c. 78, which provided for the separation of a junior county from a union of counties, also provided for the formation of provisional counties in the junior county until the separation should be perfected, and empowered the provisional council to raise moneys for certain limited purposes, namely, the erection of a court house and gaol, and to appoint a provisional treasurer, whose duties were limited to the levying, collecting, and paying over such moneys. By 13 & 14 Vict. c. 24, it was provided that on the dissolution being perfected, and the new county formed, all the provisional officers were to continue the officers of the new county until their successors were appointed, and all the by-laws were to remain in force until altered, amended, or repealed. Under the first named Act, the provisional corporation passed a by-law appointing one P. treasurer, and defendants became his sureties for the faithful execution of his office. On the formation of the new county a by-law was passed repealing the by-law of the provisional corporation, under which P. had been appointed treasurer, and they thereafter appointed him treasurer of the new county:—Held, that defendants were not liable for P.'s acts as treasurer under such last-named appointment. Quære, whether, if the by-law had not been repealed, and P. had continued treasurer of the new county, defendants would have been liable. *County of Ontario* v. *Paxton*, 27 C. P. 104.

(c) *Other Matters.*

Abolition of Districts—*Name of Company.*]—Held, that the Act abolishing districts did not take away from defendants the name given to them by their charter. *Hughes* v. *Mutual Fire Ins. Co. of Newcastle*, 9 U. C. R. 387.

Dissolution of United Counties — *Action—Venue.*]—A summons was sued out before the separation of Ontario from York and Peel, directing defendants to appear in the united counties of York, Ontario, and Peel: it was not served until after the separation, and the venue in the declaration was laid in the three united counties. The defendant demurred for this cause:—Held, not a frivolous demurrer. *Plaxton* v. *Smith*, 1 P. R. 228.

——— *Tax Sale.*] — Where taxes had accrued due on certain lands in the county of Bruce, before separation from Huron, which took place on 1st January, 1867:—Held, that the treasurer of Huron, after the separation, could not advertise and sell such lands for these taxes. Held, also, that the sale was not made valid by 32 Vict. c. 36, s. 155 (O.), for it only applies to deeds given by the sheriff or treasurer authorized to sell. *Canada Permanent B. and S. Society* v. *Agnew*, 23 C. P. 200.

Dissolution of United Townships—*By-law—Motion to Quash.*]—A by-law was passed by the united townships of Smith and Harvey to levy a certain sum on lands in H. to defray the expense of a resurvey of that township. The union having been dissolved:—Held, that an application to quash was properly made by a rule calling on the corporation of Harvey upon a certified copy obtained from the clerk of Smith, the senior township. *In re Scott and Township of Harvey*, 26 U. C. R. 32.

Division of District—*Tax Sale.*]—A sale of lands made before 8 Vict. c. 22, in the district of Colborne, for arrears of taxes, part of which had accrued due before the division of the distict of Newcastle (of which Colborne was formerly a part), was held legal. *Doe d. Earl of Mountcashel* v. *Grover*, 4 U. C. R. 23. Followed in *Cotter* v. *Sutherland*, 18 C. P. 357.

Election of Councillors.]—The town of Sandwich, incorporated under 20 Vict. c. 94, is only entitled to elect three councillors in addition to a mayor and reeve, to be elected by the people. *Regina ex rel. Arnold* v. *Wilkinson*, 5 P. R. 20.

See IV. 3.

XXV. Parks.

Building in Public Park—*Liability for Non-repair.*]—See *Schmidt* v. *Town of Berlin*, 26 O. R. 54.

By-law—*Sunday Preaching.*]—It is provided by R. S. O. 1887 c. 184, s. 504, s.-s. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, &c.:—Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, &c., in the city, publicly preach, lecture, or declaim. Held, also, that the by-law violated no constitutional right, and was not unreasonable. Bailey v. Williamson, L. R. 8 Q. B. 118, followed. Held, also, that the by-law was not bad for uncertainty as to the day of the week intended, by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

Public Parks Act—*Land Taken — Purchase Money.*]—Where a municipality adopts the Public Parks Act, R. S. O. 1887 c. 190, and proceedings are regularly taken thereunder for the formation of the board of park management, and for the doing of the various matters authorized to be done thereby, including the purchase by the board of lands needful for park purposes, such board becomes the statutory agent of the municipality for such purchase, and the municipality, and not the board, is liable to pay for the lands. The purchase money may be raised by a special issue of debentures under s. 17, s.-s. 4, of the Act, or may be paid out of the general funds of the municipality, which is liable to pay whether the debentures specially issued have been sold or not. *McVicar* v. *Town of Port Arthur*, 26 O. R. 391.

——— *Purchase by Park Commissioners.*]—A city adopted the Public Parks Act, R. S. O. 1887 c. 190, and park commissioners were appointed, who entered into contracts with the defendants to purchase lands for park purposes, and made a requisition on the city for the purchase money. The city refused to recognize the contracts, and brought these actions for a declaration that they were invalid:—Held, per Hagarty, C.J.O., and Burton, J.A., that the park commissioners had in the bonâ fide exercise of their discretion, the right to enter into the contracts, and that the city, so long as the statutory limit was not exceeded, was bound to provide the purchase money. Per Osler and Maclennan, JJ.A., that the city council had a discretion whether or not to adopt the contracts and provide the purchase money. In the result the judgment dismissing the actions, was affirmed. *City of Ottawa* v. *Keefer, City of Ottawa* v. *Clark*, 23 A. R. 386.

XXVI. Public Buildings and Offices.

Court House—*City and County—Compensation for Use — Law Reform Act.*] — See *County of York* v. *City of Toronto*, 21 C. P. 95; *S. C.*, 22 C. P. 514, *ante* XXIV. 2 (a).

——— *Control of — Sheriff — Municipal Council.*]—Upon ejectment brought to try the question whether the sheriff or the municipal council were entitled to the control of the court house, and the appointment of a custodian of it:—Held, that the title of the plaintiffs by virtue of a deed from the town council of Goderich being admitted, the defence must fail, the question in dispute not being decided. *Municipal Council of Huron and Bruce* v. *Macdonald*, 7 C. P. 278.

——— *Erection—Mandamus.*]—The court refused a rule nisi for a mandamus, at the instance of the justices of the Huron district, to compel the Huron district council to build a court house. *Justices of District of Huron* v. *Huron District Council*, 5 U. C. R. 574.

——— *Furniture—Justices of the Peace—Quarter Sessions.*]—The magistrates in quarter sessions have no power to order furniture for the court house, and the county council are not liable for furniture so supplied. The fact that the court house was also used as a shire hall for the sittings of the council, and the furniture made use of by them, could make no difference. *Coombs* v. *Municipal Council of Middlesex*, 15 U. C. R. 367.

——— *Non-repair—Injury to Person—By-law.*]—Under 10 & 11 Vict. c. 6, a district council cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the court house steps, which had been allowed to fall into an unsafe and dangerous condition. The council was charged in this declaration as having the court house under their control, and as bound by law to keep it in repair, and judgment was arrested on this averment, as 4 & 5 Vict. c. 10, s. 46, throws the responsibility on the district surveyor, upon whose report in the first instance, as to the necessity of the repair and the expense, the council have to pass a by-law. Quære: Would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted? *Hawkeshaw* v. *District of Dalhousie*, 7 U. C. R. 590.

——— *Use and Occupation of Room as.*]—The plaintiff brought an action for the use and occupation of a room in his hotel as a court room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges:—Held, not recoverable. *Dark* v. *Municipal Council of Huron and Bruce*, 7 C. P. 378.

Court House and Gaol — *City and County — Compensation for Use — Maintenance of Prisoners.*] — No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol, unless the question is specifically referred to them by a by-law of each municipality. A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol. The right to, and mode of arriving at the amount of, compensation for the use of the court house and gaol considered. County of York v. City of Toronto, 21 C. P. 95, considered. *In re County of Carleton and City of Ottawa*, 24 A. R. 409. Affirmed, 28 S. C. R. 606.

——— *Erection of — Contract—Cancellation—Injunction.*]—The town of St. Catharines was authorized by statute to issue debentures to £45,248, for which a special rate was directed, the proceeds to form a sinking fund. By the same Act the town was prohibited from passing any by-law to create any new

debt extending beyond the year in which such by-law was passed, until the debt was reduced to £25,000. The special rate authorized had been duly levied, but it was alleged that it had been applied to the general purposes of the town, and the debt had not been reduced. Defendants denied the misapplication of the fund, but did not shew how it had been applied; and with a view of inducing the county council to remove the county town to St. Catharines, the town council of St. Catharines, without any by-law, contracted with certain builders to erect a gaol and court house for the county at an outlay of £3,000, to be completed in two years. Upon an application, at the instance of certain of the holders of said debentures, the court restrained the town from proceeding with the buildings. On appeal to the full court, the injunction was dissolved, it appearing that the contract had been cancelled, and no liability incurred extending beyond the year. On production of the contract, it appeared that the rescission had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. *Edinburgh Life Assurance Co.* v. *Town of St. Catharines*, 10 Gr. 379.

——— *Erection of—District Funds.*]—The justices of the peace cannot apply the district funds to building a new gaol and court house without an Act of Parliament specially conferring that authority. *Rex* v. *Justices of Newcastle*, Dra. 204.

——— *Removal—Injunction.*] — By R. S. N. S., 5th ser., c. 20, s. 1, as amended by 49 Vict. c. 11, "county or district gaols, court houses, and sessions houses, may be established, erected, and repaired by order of the municipal councils in the respective municipalities." In 1891 an Act was passed empowering a county municipality to borrow a sum not exceeding $20,000 for the purpose of erecting and furnishing a court house and gaol for the county or repairing and improving the present court house, provision being made for the two separate corporations in the county respectively contributing towards payments of said loan. One of these was the shire town of the county, where the sittings of the supreme court were held as required by statute, and where the county court house and gaol had always been situated. In pursuance of the authority to borrow, the county council, by resolution, proposed to build a court house and gaol at another town in the county, intending after they were built to petition the legislature to transfer thither the sittings of the supreme court:—Held, that the county could not, under statutory authority to establish and erect a court house and gaol, remove these buildings from the shire town, and so repeal and annul the statutes of the legislature which had established them there. Without direct legislative authority therefor, the county buildings could only be erected in the shire town. *Town of Lunenburg* v. *Attorney-General for Nova Scotia*, 20 S. C. R. 596.

Gaol—*Maintenance of Prisoners—City and County.*]—Declaration by a county against a city corporation, for compensation for the care and maintenance, by the plaintiffs, in the county gaol, of prisoners, under s. 463 and following sections of the Municipal Act of 1886, alleging an agreement made on the 6th June, 1867, by which, after deducting the amount paid from the administration of justice fund, the balance of the expenses was to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870, inclusive, amounted to $5,429, and, though defendants had paid part of it, and their half of the other expenses, as agreed on, yet they had not paid the residue, although they had in each of said years sufficient money belonging to the city applicable to municipal purposes generally, and still hold moneys not specially appropriated to other purposes more than enough to meet plaintiffs' demand, and although defendants levied in each of said years for the purposes of said demand moneys out of which they might and ought to have satisfied it. A common count was asked for food furnished by plaintiffs at defendants' request to the prisoners sent to said gaol from defendants' municipality. Defendants pleaded to each count, that the alleged agreement was not under their seal; and to the whole declaration, that the claim under both counts was the same, and that said cause of action, if any, arose for a debt alleged to be incurred and falling due during the said years, which was not within the ordinary expenditure of defendants during said years, and for which no estimate was made by defendants, nor any by-law passed for the creation of such debt, nor for imposing a special rate for payment of it. On demurrer:—Held, (1) that the first two pleas were bad, because the agreement was one which defendants might enter into without deed; and the sixth plea, that the contracts alleged were not under defendants' seal, was bad, because the common counts cannot be founded upon a deed, and the plea was therefore inappropriate. (2) That the declaration was good; that it was unnecessary to allege defendants' contract to be by deed, and that it was not requisite that the sum payable should be a fixed annual amount. (3) That the last plea was bad; that the plaintiffs' inability to enforce payment was no reason why they should not recover a judgment; and that the claim for support and maintenance of the prisoners was within defendants' ordinary expenditure; that no estimate, by-law, or rate might have been necessary, for there might have been other means for satisfying the demand; the averment that defendants had sufficient money applicable to general purposes, and not specially appropriated, was not denied; and the allegation that defendants levied in each year for the demand moneys out of which they should have paid it, was a sufficient averment that the demand was, in each year, specially provided for, so that the fund could not rightfully be devoted to other purposes. The first count referred in two places to prisoners committed to the gaol by competent authority, "within" instead of "of" the city, but, this not being a ground of demurrer, an amendment was allowed, and judgment given for plaintiffs. *County of Wentworth* v. *City of Hamilton*, 34 U. C. R. 585.

——— *Maintenance of Prisoners—City and County—Arbitration.*] — See *Re City of St. Catharines and County of Lincoln*, 46 U. C. R. 425.

Market House—*Erection—Levy of Rate—Injunction.*] — Where for the purpose of erecting a market house, a municipal council would require to levy a rate exceeding the

two cents in the dollar allowed by statute to be imposed, it was held that a ratepayer was entitled to an injunction restraining the erection of the building by the council. *Wilkie v. Village of Clinton*, 18 Gr. 557.

Offices — *County Attorney and Clerk of Peace—Obligation of Municipality to Provide Offices for.*] — *See Re Lees and County of Carleton*, 33 U. C. R. 469.

——— *Division Court Clerk—Obligation to Provide Offices for.*]—*See Griffin v. City of Hamilton*, 37 U. C. R. 519.

——— *Local Officers of Court — "Furniture" — Stationery — Liability — Authority —County Council.*]—By s. 466 of the Municipal Act, R. S. O. 1887 c. 184, it was enacted that the county council shall "provide proper offices, together with fuel, light, and furniture, for all officers connected with the courts of justice," &c.:—Held, that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the courts. Ex p. Turquand, 14 Q. B. D. 643, followed. Held, also, upon the facts of this case, that a local officer of the courts, who had ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so, pursuant to the provisions of s. 470 of R. S. O. 1887 c. 184. *Newsome v. County of Oxford*, 28 O. R. 442.

——— *"Police Court"—Accommodation—Stationery.*]—The police magistrate of a town cannot require the municipal corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber), although by doing so the hours for the transaction of police business may be limited. A municipal corporation is liable to a police magistrate for a claim for stationery, although extending beyond a year. *Mitchell v. Town of Pembroke*, 31 O. R. 348.

Registry Office — *By-law—United Counties—Separation.*]—The municipal council of Prescott and Russell passed a by-law to raise money for building a registry office in Russell, and enacted that the rate should be levied only on the townships in that county. This by-law was quashed, on the ground that, as the office when built would continue the property of the united counties until a separation, the expense of erecting it must be borne by both counties. *Smith v. United Counties of Prescott and Russell*, 10 U. C. R. 282.

Town Hall—*Erection of—By-law—Site.*] —The court, under the circumstances of this case, refused to quash a by-law for the erection of a town hall, the objection being that they had already by previous by-laws selected another site, and contracted to build it there. *Re Forester and Township of Ross*, 24 U. C. R. 588.

——— *Erection of — Change of Site—Injunction—By-law.*] — The court has not the power of restraining councillors of an incorporated village, in the due exercise of their constitutional power, from changing the site of a proposed town hall and market, although the site first selected had been acquired by the corporation for the purpose, it not being shewn that any change of circumstances had been made on the faith of it, or that any corrupt or improper motive actuated the members of the council in making such change. A by-law to raise money wherewith to build a town hall and market, approved of by the vote of the ratepayers, did not specify any site on which the buildings were to be erected:—Held, that this left the councillors unfettered in their choice of site, although at the time there was a resolution on the minutes of the council adopting a particular one, and which had been purchased by and conveyed to the corporation for the purpose. *Little v. Wallaceburgh*, 23 Gr. 540.

——— *Purchase of Site — Erection—By-law.*]—The corporation of a village, on the 5th August, 1861, passed two by-laws. The first provided that the corporation should purchase a site for a town hall for $250, and that the reeve should issue his draft for said sum, payable 1st November, 1861. The second, after reciting that the inhabitants were desirous of erecting a town hall, and that there would be a large surplus in hand after paying for the site, and the ordinary expenses of the village for the year, enacted that $750 be appropriated for the erection, and that the reeve should issue his drafts, payable 1st November, 1861. A by-law authorizing a loan for the same purpose, payable in fourteen years, had been submitted to the electors in June previous, and rejected by a large majority, and when these by-laws were passed there had been no by-law passed to provide for the ordinary expenditure of the year, and no existing surplus was shewn:—Held, that no by-law should be passed authorizing an expenditure for extraordinary purposes, unless out of unappropriated money in hand, or unless the by-law provides expressly for raising the necessary money, or is not to come into effect until some other by-law is passed for the purpose. Both by-laws were therefore quashed. *McMaster v. Corporation of Newmarket*, 11 C. P. 398.

——— *Sale of—Expenses of New Hall—By-law—Rate.*]—The municipality of a township can dispose of the town hall when they think another situation would be more convenient. The by-law provided that any money above the proceeds of the old hall required for the erection of the new one, should be levied on the ratable property of the township, half in the present and the other half in the next year, but it did not fix the amount or the rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad. *In re Hawke and Municipality of Wellesley*, 13 U. C. R. 636.

See IV. 3, XXIV. 2.

XXVII. Particular Corporations—Special Statutes.

Albion (Township of)—*Survey—Double Fronts—Running Side Lines.*]—*See McLachlin v. Dixon*, 4 C. P. 307; *ib.* 71.

——— *Tolls—9 Vict. c. 88, s. 33—Plank Road.*]—*See Regina v. Haystead*, 7 U. C. R. 9.

Algoma (District of)—*District Judge—Commission.*]—Held, that the Crown, by prerogative right, could issue a commission to the Judge of the provisional judicial district of Algoma to hold a court of oyer and terminer and general gaol delivery for trial of felonies, &c. Semble, that such Judge having, by s. 94 of C. S. U. C. c. 128, the same powers and duties as a county Judge in Upper Canada, he might have been appointed under C. S. U. C. c. 11, s. 2, to act as commissioner. *Regina* v. *Amer*, 42 U. C. R. 391.

Binbrook (Township of) — *Survey—Arbitration—Husband and Wife—1 Wm. IV. c. 8—7 Wm. IV, c. 59.*]—See *Doe d. Crooks* v. *Ten Eyck*, *Doe d. Crooks* v. *Calder*, 7 U. C. R. 581.

Cumberland (Township of)—*Survey—20 Vict. c. 78—23 Vict. c. 101—Running Side Lines.*]—See *Smith* v. *Sparrow*, 21 U. C. R. 323; *Holmes* v. *McKechnie*, 23 U. C. R. 52, 321.

Emily (Township of)—*36 Vict. c. 60, s. 1 (O.)—C. S. U. C. c. 93, ss. 28-31—Double Fronts—Running Side Lines.*]—See *Dyell* v. *Millage*, 27 C. P. 347.

Fredericksburgh (Township of)—*Survey—7 Geo. IV. c. 6.*]—See *Doe d. Clapp* v. *Huffman*, M. T. 5 Vict. R. & J. Dig. col. 1620.

Glengarry (County of).] — Dickinson's Island, in Lake St. Francis, is part of the county of Glengarry. *Regina* v. *Duquette*, 9 P. R. 29.

Humphrey (Township of).]—The township of Humphrey is within the territorial limit of the county of Simcoe, and forms also part of the district of Parry Sound for certain judicial purposes. *Regina* v. *Monteith*, 15 O. R. 291.

Kingston (Township of)—*Boundary—Award.*]—See *Marney* v. *Markland*, 6 O. S. 220.

——— *59 Geo. III. c. 14—Survey—Running Side Lines.*]—See *Doe d. Stuart* v. *Forsyth*, 1 U. C. R. 324.

London (Town of) — *Market By-law—Clerk of Market—Road—Fees.*]—The corporation of London, under 3 Vict. c. 31, had the power to make a by-law prohibiting the sale of butchers' meat within certain hours, except at the public market. *Peters* v. *Board of Police of London*, 2 U. C. R. 543.

Quere: Does that Act give the board of police of London power to establish and regulate a market and appoint fees to be taken thereat? A., upon being appointed clerk of the market to the board of police of London, entered into a bond for the payment of a certain sum of money in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for the non-payment of the money, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat." He then averred that the plaintiffs had no such authority, and that on this account the bond was void:—Held, plea bad, in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *Board of Police of London* v. *Talbot*, 3 U. C. R. 311.

——— *By-law — Billiard Tables—License—Penalty.*]—See *Church q. t.* v. *Richards*, 6 U. C. R. 562, *post* XXIX. 3.

——— *Councillors.*]—Held, that under 10 & 11 Vict. c. 48, the corporation of London were the sole judges of the return and qualifications of candidates for seats in the common council, and that their decision was final. *Re Balkwell*, 5 U. C. R. 624.

——— *Limits—Survey—Toll-gate.*] — The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto, lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch of the river:—Held, that the city limits extended to the middle of the river; and that a conviction by a county magistrate for passing the toll-gate on the city side of the river was therefore bad, as the offence was out of his jurisdiction. Where two properties or municipalities are divided by a river or highway, the limit of each is primâ facie the centre of the river or road. *In re McDonough*, 30 U. C. R. 288.

Loughborough (Township of)—*Survey — Running Concession Lines — Subsequent Survey.*]—See *Keeley* v. *Harrigan*, 3 C. P. 173. Approved, *Baile* v. *Cronson*, 9 C. P. 9.

Monaghan (Township of) — *Survey—Road Allowance—16 Vict. c. 228, s. 1—18 Vict. c. 15½.*]—See *Otty* v. *Davis*, 12 U. C. R. 454.

Niagara (Township of)—*Boundary—18 Vict. c. 156.*]—See *Clement* v. *Clement*, 14 C. P. 146.

Ottawa (City of)—*Boundary.*]—See *Regina* v. *County of Carleton*, 1 O. R. 277.

——— *Councillors—Qualification—10 & 11 Vict. c. 43, s. 5.*]—See *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88.

——— *Water Commissioners — Contract.*] —35 Vict. c. 80, s. 14, incorporating the defendants, as amended by 36 Vict. c. 104, s. 17 (O.), provides that "all work under the said commissioners shall be performed by contract, excepting the laying of the water pipes, and such other works as in the opinion of the engineer of the said commissioners can be more profitably performed by day work;"—Held, that the words "by contract" did not necessarily mean by contract under seal, so as to relieve the defendants from liability for work done upon an executed parol contract. *McBrien* v. *Water Commissioners for City of Ottawa*, 40 U. C. R. 80.

——— *Water Commissioners — Statutory Protection—Limitation of Actions.*]—Action by an administratrix against defendants for an alleged breach of their statutory powers in digging and opening a drain in one of the highways of the city of Ottawa, and leaving it at night uncovered, without any fencing, guard, or light, whereby the deceased, passing along the street at night, was injured, and in consequence died. Defendants pleaded the

general issue by statute, 35 Vict. c. 80, s. 28 (O.), their Act of incorporation, which gave them the same protection as justices:—Held, that they were entitled so to plead, for the act complained of was something done by them, i. e., digging the drain without protecting it properly, not for a mere omission. A plea of the general issue by statute, where no statute is applicable, is not demurrable; but the reference to the statute may be struck out on motion. Held, also, that the administratrix was limited to six months from the cause of action accruing within which to sue, that being the period limited by defendants' charter, 35 Vict. c. 80, s. 35 (O.), for, although under C. S. C. c. 78, s. 4, the administratrix is allowed twelve months after the death of the deceased to bring her action, this does not apply where there is a special provision, as here, for a more limited period. *Cairns* v. *Water Commissioners for City of Ottawa*, 25 C. P. 551.

Peel (County of)—*Selection of County Town—Resolution—By-law—19 Vict. c. 66.*]—See *Re Ibson and County of Peel*, 19 U. C. R. 174.

Peterborough (Town of)—*Commissioners—Corporation—24 Vict. c. 61—Action—Misnomer.*]—See *Commissioners of Peterborough Town Trust* v. *Cochrane*, 13 C. P. 111.

Port Hope (Town of)—*Regulations as to Animals — 4 Wm. IV. c. 26.*]—See *Smith* v. *Riordan*, 5 O. S. 647.

Sandwich (Town of)—*Councillors—20 Vict. c. 94—31 Vict. c. 30, s. 6.*]—See *Regina ex rel. Arnold* v. *Wilkinson*, 5 P. R. 20.

Toronto (City of)—*Esplanade—Loan—By-law—20 Vict. c. 80.*]—See *Ex parte Hayes* v. *City of Toronto*, 7 C. P. 255.

——— *Esplanade—16 Vict. c. 219—Entry on Water Lots.*]—See *Small* v. *Grand Trunk R. W. Co.*, 7 C. P. 287.

——— *Esplanade — Construction of, by Owners of Water Lots—Payment for.*]—See *City of Toronto* v. *Mowat*, 16 Gr. 355.

——— *Esplanade — Debentures—By-law.*]—16 Vict. c. 219 authorizes the issuing by the city of Toronto of $120,000 of debentures for esplanade purposes. A by-law having been passed on the 7th May, 1860, intituled, "To provide for the issue of additional debentures for $54,000 for esplanade purposes," upon an application to quash the by-law on the ground that on its face it did not shew any authority in law for raising the sum:—Held, that, inasmuch as the by-law in its recital referred to the statute, which was a public Act, it could not be said that it shewed no authority for raising the sum; and a primâ facie case of an excess of authority in the amount authorized by statute not being proved, the court refused a rule. *In re Grand and City of Toronto*, 12 C. P. 357.

——— *Esplanade—Expropriation of Land.*]—Under the Acts relating to the Toronto esplanade, 16 Vict. c. 219, 20 Vict. c. 80, the owners of land taken by the city have no right to claim the expense incurred by them in constructing the esplanade as an addition to the value of such land. *In re City of Toronto and Leak*, 23 U. C. R. 223.

——— *Esplanade—Valuation by City Surveyor—Right of City to Arbitration.*]—*Mowat* v. *City of Toronto*, 12 Gr. 267.

——— *Esplanade—Valuation by Arbitrators—Method to be Adopted—Interest—Form of Award.*]—*Brooke* v. *City of Toronto*, 14 Gr. 258.

——— *Separation from County—Selection of Jurors—24 Vict. c. 53.*]—See *In re Sheriff of Toronto and Recorder*, 26 U. C. R. 346.

——— *Separation from County—Reunion with County under Law Reform Act, 1869—Effect of, on Liability to Pay for Use of the Court House.*]—See *County of York* v. *City of Toronto*, 21 C. P. 95, 22 C. P. 514.

Tuscarora (Township of)—*Indians.*]—Semble, that R. S. O. 1887 c. 5, s. 1, is to be interpreted as meaning that the townships named shall be townships for municipal purposes when it becomes possible to make them such. *Re Metcalfe*, 17 O. R. 357.

XXVIII. TOLLS AND HARBOUR DUES—POWER TO IMPOSE.

Held, that under 12 Vict. c. 81, s. 60, s.-s. 7, a town corporation had power to impose a tax on timber and sawlogs, in order to pay the salary of the harbour master, and to fine or imprison the owners in default of payment. Quære, as to their power to detain the timber therefor; but the court refused to quash that part of the by-law, under the circumstances. *Bogart* v. *Town of Belleville*, 6 C. P. 425.

A municipal corporation by by-law authorized individuals to erect wharves, and to remunerate themselves by charging tolls on goods, part of which were directed to be paid to the treasurer of the municipality. The harbour master was empowered to detain any vessel having on board any goods on which these tolls were unpaid, or any such goods; and a fine of not less than $1 nor more than $50, was imposed on any master or owner of a vessel refusing to comply with these conditions, to be enforced by distress and sale:—Held, that the by-law was illegal. *In re Hagaman and Town of Owen Sound*, 20 U. C. R. 583. But see 24 Vict. c. 63.

Held, that a clause in a by-law which imposed tonnage due on scows, craft, rafts, railway cars, &c., coming into the city of Kingston, containing firewood, to be exposed or offered for sale, or marketed for consumption within the city, was illegal, and not authorized by s.-s. 15 of s. 294 of the Municipal Act, C. S. U. C. c. 54; the toll or duty must be imposed upon the vehicle in which anything is exposed for sale in any street or public place. Sub-section 4 of the same section only authorizes the imposition of reasonable tolls on vessels and other craft, for the purpose of cleaning and repairing harbours, and paying a harbour master, and does not sanction the levying such dues for the revenue purposes of the municipality to which the harbour belongs. *In re Campbell and City of Kingston*, 14 C. P. 285.

The corporation of a town has, under 36 Vict. c. 48, s. 378, s.-ss. 1, 3, 4 (O.), no power to impose harbour dues on the shippers

or consignees of goods shipped or landed at the harbour, but only on vessels. Clauses of a by-law authorizing such charges, and the seizure and sale of goods therefor, the recovery thereof by action, and the punishment of persons evading them, were therefore quashed. *Re McLeod and Town of Kincardine*, 38 U. C. R. 617.

XXIX. Trade Regulations.

1. *Assize of Bread.*

By-law—*Weight of Loaves.*]—By-law 1128 of the city of Toronto declared what the weight of loaves should be, and enacted that the weight of each loaf sold or offered for sale should be stamped thereon, and that all bread, offered for sale of any less weight than the weight fixed by the by-law should be seized and forfeited:—Held, that the by-law was intra vires and not unreasonable. *In re Nasmith and City of Toronto*, 2 O. R. 192.

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2. *Auctions.*

By-law—*License—Sale of Lands.*]—The defendant, having sold land by auction under a decree of the high court, was convicted of a breach of a by-law of the county of Huron, passed pursuant to the Municipal Act, R. S. O. 1877 c. 174, s. 465, s.-s. 2, providing that it should not be lawful for any person to sell by public auction any wares, goods, or merchandise of any kind, without a license:—Held, that the conviction was clearly bad, for the by-law did not refer to lands; nor would the statute have authorized such a by-law. *Regina* v. *Chapman*, 1 O. R. 582.

——— *Sale by Agent of Assignee in Insolvency.*]—A by-law of a county municipality passed under s.-s. 2 of s. 495 of the Municipal Act, R. S. O. 1887 c. 184, enacted that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, &c., "by public auction," unless duly licensed:—Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

License—*Character of Licensees.*]—Held, that s. 495, s.-s. 2, of the Municipal Act, R. S. O. 1887 c. 184, which empowers any city, &c., to pass by-laws for the "licensing, regulating, and governing of auctioneers," &c., is only for the purpose of raising a revenue, and does not confer any right of prohibition so long as the applicant is willing to pay the sum fixed for the license. Where, therefore, a city refused to license the plaintiff as an auctioneer on the ground that he was a person of a notoriously bad character and ill-repute, a mandamus was granted compelling the issue of the license to him. Held, that before the amending Act of 1894, 57 Vict. c. 50, s. 8 (O.), a municipal corporation could not, on the ground of the applicant's bad character, refuse to grant him an auctioneer's license. *Merritt* v. *City of Toronto*, 25 O. R. 256, 22 A. R. 205.

See Bollander v. *City of Ottawa*, 30 O. R. 7, 27 A. R. 335, *post* 6.

3. *Billiard Tables.*

City Corporation—*Right to Suppress.*]—Semble, that the corporation of the city of Toronto has a right to suppress all billiard tables within its jurisdiction. *Rex* v. *Inspector of Licenses of Home District*, 4 O. S. 9.

——— *License Fee—Right to Impose—Abrogation of Statutory Duty—Penalty—Debt.*]—Held, that a by-law of the corporation of London, passed under 10 & 11 Vict. c. 48, providing that the owner of a billiard table shall pay £10 per annum for a license to keep the same, had not the effect of abrogating the duty imposed on billiard tables by the provincial Act 50 Geo. III. c. 6, but must be considered as a regulation superadded for the purposes of the town of London. Held, that an action of debt would lie for the penalty, under 50 Geo. III. c. 6, for keeping a table without license, and that after verdict it need not be averred that the defendant had not paid the penalty. Application of 3 Vict. c. 9, s. 9, and 3 Vict. c. 20, s. 10. *Church q. t.* v. *Richards*, 6 U. C. R. 562.

License Fee—*By-law—Communication with Bar-room.*]—A by-law fixing the sum to be paid for a license for billiard tables in a town at $300, and enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold:—Held, valid; that the sum charged was not excessive; that such a by-law was properly submitted to the electors under 37 Vict. c. 32, s. 23 (O.), which was not confined to tavern licenses; and that the enactment as to means of communication was within the power to regulate and govern, and was not unreasonable. *Re Neilly and Town of Owen Sound*, 37 U. C. R. 289.

Prohibition of, in Taverns—*By-laws.*]—A provision that no billiard table or bowling alley should be licensed or kept in any tavern, inn, or house of entertainment:—Held, authorized by the power given to the corporations to regulate billiard tables and bowling alleys; 36 Vict. c. 48, s. 379, s.-ss. 3, 35, 36 (O.) *In re Arkell and Town of St. Thomas*, 38 U. C. R. 594.

Provincial Legislature—*Powers of—Restricting Hours within which Billiard Rooms in Taverns may be Kept Open.*]—See *Regina* v. *Hodge*, 46 U. C. R. 141, 7 A. R. 246, 9 App. Cas. 117.

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4. *Cabs, Omnibuses, Waggons, and Livery Stables.*

Cabs—*License Fees—Drivers.*]—Held, that R. S. O. 1877 c. 174, s. 415, which provides that the board of commissioners of police shall in cities regulate and license the owners of cabs, &c., used for hire, does not authorize the imposition of a license fee upon the driver of such vehicle; nor does 42 Vict. c. 31, s. 23, which empowers the board to license any trade, calling, business, or profession, or the person employed in such trade, &c., give power over persons not within its jurisdiction before, so as to authorize the imposition of such a license fee. *Regina* v. *Reeves*, 1 O. R. 490.

Cab Stand—*By-law Establishing—Discretion of Council.*]—Where it was admitted that a by-law was within the power of a municipal council under s.-s. 46 of s. 496 of the Municipal Act, 1883, "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places," &c., the court refused to quash the by-law on the grounds, alleged by the applicant, that the stand interfered with the view of the Falls from the hotel in question, that the manure on the stand was offensive, and the noise of the hackmen a nuisance, these being matters of municipal regulation, and the aid of the court, if successfully invoked, being an interference with the discretion of the municipal council, and especially so as the stand in question had been there for twelve years, and maintained under successive by-laws. *Colborne* v. *Town of Niagara Falls*, 9 O. R. 168.

Carts Used for Hire — *License — By-laws.*]—The defendant was convicted of a breach of a by-law passed under s. 436 of R. S. O. 1887 c. 184, which provides that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," &c. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the day complained of:—Held, that the defendant came within the terms of the by-law, and was therefore properly convicted thereunder. *Regina* v. *Boyd*, 18 O. R. 485.

Express Waggons — *By-law — Soliciting Passengers.*] — A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in concert with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. An employee of defendants, with the consent of a railway company and under instructions from his employer, boarded an arriving passenger train at one of the outlying city stations on its way to the union station, and went through the cars calling out "baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time:—Held, that there was no breach of the by-law, but merely the carrying out of the defendant's agreement with the railway company; and further that the railway train did not come within the description of any of the places mentioned in the by-law. Semble, that if the by-law in terms had covered this case it would have been ultra vires. *Regina* v. *Verral*, 18 O. R. 117.

——— *By-law Licensing—Ultra Vires.*]—A by-law passed under s. 436 of R. S. O. 1887 c. 184, for licensing express waggons, authorized the alteration by agreement of the rates fixed thereby:—Held, beyond the powers conferred by the statute, and a conviction under the by-law for refusal to pay charges was quashed. *Regina* v. *Latham*, 24 O. R. 616.

Livery Stables—*Board of Police Commissioners — Transfer of Powers to — By-laws.*]—Since 31 Vict. c. 30, s. 33 (O.), as amended by 32 Vict. c. 43, s. 22, transferring the power of regulating and licensing livery stables, &c., in cities to the board of commissioners of police, and 36 Vict. c. 48, s. 335, making it their duty to exercise their power, and repealing all Acts inconsistent therewith, by-laws previously passed by corporations for the purpose have been rendered inoperative; and a conviction under such a by-law was therefore quashed. *Regina* v. *Hiscox*, 44 U. C. R. 214.

——— *Board of Police Commissioners — Powers of—Localities of Stables—Consent of Neighbours.*]—The board of police commissioners in cities is the body which alone has the power, under 49 Vict. c. 37, s. 9 (O.), to regulate and license livery stables, and this power includes the power to declare in what localities such stables shall be allowed; therefore, a by-law passed by the corporation of the city of Toronto, a city having a police board, assuming to declare it unlawful for any person to establish or keep such stables unless he shall have procured the consent of the majority of owners and lessees of property situate within the area of 500 feet of such stable, was held ultra vires. Even if not ultra vires the by-law would have been objectionable in requiring, as a condition precedent to the granting of the license, that an applicant should procure the consent of a number of persons in the neighbourhood. *Re Kiely*, 13 O. R. 451. See *Regina* v. *Swalwell*, 12 O. R. 391.

——— *By-law — Restrictions — Soliciting Passengers.*]—A person licensed to keep a livery stable at a particular locality under a by-law made by the board of police commissioners for a city, pursuant to s. 436 of the Municipal Act, but not having a cab license, for which under a separate by-law other and larger fees were payable, is not at liberty to stand with his cabs and solicit passengers at places, though owned by him, other than at the place mentioned in his license. *Regina* v. *Gurr*, 21 O. R. 499.

Omnibuses—*By-law — License — Owners —Drivers.*]—Section 436 of the Municipal Act, R. S. O. 1887 c. 184, empowers the police commissioners of a city to regulate and license the owners of omnibuses, &c. The commissioners of a city passed a by-law enacting that no person or persons should drive or own any omnibus without being licensed to do so:—Held, that the authority conferred on the commissioners was to license owners, and not drivers; and therefore a conviction of a driver for driving without a license was bad, and must be quashed. *Regina* v. *Butler*, 22 O. R. 462.

Waggon—*Width of Tires—By-law — Discrimination—Residents.*]—A by-law of a town provided that no one should use any waggon, &c., upon any of the streets of the town for drawing brick, stones, &c., when the weight of the load should exceed 1,500 pounds, unless the tires of the wheels were of a specified width; but the by-law was not to apply to any waggon conveying lumber or goods from the mill or manufactory thereof into the town, if distant more than two miles from the town limits, nor to any person passing through the town with vehicles loaded with the said

articles: — Held, bad, as discriminating as against residents of the town in favour of others. Held, also, that a conviction under such by-law was bad for not shewing that defendant was not a person passing through the town, and for imposing imprisonment with hard labour. *Regina* v. *Pipe*, 1 O. R. 43.

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5. Hawkers, Pedlars, and Transient Traders.

By-law—*Non-residents— Discrimination.*]—Action against the police magistrate for the city of St. John for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the magistrate, for violation of a by-law made by the common council of the city, under an alleged authority conferred on that body by 33 Vict. c. 4 (N. B.). Section 3 of the Act authorized the mayor of the city to license persons to use any art, trade, &c., within the city, on payment of such sum or sums as might from time to time be fixed and determined by the common council, &c.; and s. 4 empowered the mayor, &c., by any by-law or ordinance, to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c.; and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of $20 on the former, and $40 on the latter:—Held, that, assuming the Act to be intra vires of the Legislature of New Brunswick, the by-law made under it was invalid, because the Act in question gave no power to the common council of discrimination between residents and non-residents, such as they had exercised in this by-law. *Jonas* v. *Gilbert*, 5 S. C. R. 356.

——— *Occupation of Premises — Conviction.*]—A by-law of a city provided that "No person not entered upon the assessment roll . . or who may be entered for the first time in the said assessment roll . . and who at the time of commencing business . . has not resided continuously in said city . . at least three months shall commence business . . for the sale of goods or merchandise . . until such person has paid . . the sum of . . by way of license:"—Held, that the statute under which the by-law was framed, R. S. O. 1897 c. 223, s. 583, s.-ss. 30 and 31, relates to transient traders who occupy premises in a municipality, and that clause (b) of s.-s. 31 defining the term "transient traders" does not modify the provision as to occupation, and that the by-law was defective and invalid in being directed merely against persons not entered upon the assessment roll and who had resided continuously for three months in the municipality, and was silent as to these persons being in occupation of premises. Conviction quashed. *Regina* v. *Applebe*, 30 O. R. 623.

——— *Occupation of Premises—Conviction—Penalty—Costs—Imprisonment— Distress.*]—The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry-goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of $50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of $11.45 for his costs in that behalf; and if these sums were not paid forthwith, she was adjudged to be imprisoned. The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law, and that, in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress:—Held, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction. Regina v. Caton, 16 O. R. 11, followed. Held, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty. The conviction was quashed, and costs were given against the informant. *Regina* v. *Roche*, 32 O. R. 20.

——— *Occupation of Premises—Temporary Period.*]—The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall . . offer goods, wares, and merchandise for sale . . within the limits of the town of M., without or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandise, contrary to the by-law:—Held, that the by-law was sufficiently within the powers given by 42 Vict. c. 31, s. 22, to warrant the conviction; and that the words in the by-law, "less than one year," were but a limitation of the words "temporary periods," used in the statute, and did not vitiate the by-law. *Regina* v. *Caton*, 16 O. R. 11.

Hawkers—*By-law—Proviso — Negativing Exception — Conviction.*] — A by-law of a county council recited the provisions of s.-s. 14 of s. 583 of the Municipal Act, R. S. O. 1897 c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman, in the county, without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.-s. 14, in favour of the manufac-

turer or producer and his servants:—Held, that the by-law was ultra vires the council, and a conviction under it was bad. Held, also, following Regina v. McFarlane, 17 C. L. T. Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not the defendant's acts came within it. The conviction was therefore quashed, but costs were not given against the informant. *Regina* v. *Smith*, 31 O. R. 224.

——— *By-law — Amendment — Repugnancy.*]—A by-law of the city council provided that no license should be required from any pedlar of fish, farm and garden produce, fruit and coal oil, or other small articles that could be carried in the hand or in a small basket:—Held, affirming the decision in 20 A. R. 435, that a subsequent by-law fixing the amount of a license fee for fish hawkers and pedlars was not void for repugnancy. *In re Virgo and City of Toronto*, 22 S. C. R. 447, [1895] A. C. 88.

——— *By-law—Prohibition as to Streets.*]—Under R. S. O. 1887 c. 184, s. 495 (3), which provides that the council of any city may pass by-laws "for licensing, regulating, and governing" hawkers and pedlars, a city council passed a by-law to prevent hawkers and pedlars from prosecuting their trade in certain streets:—Held, reversing the decision in 20 A. R. 435, that the by-law was beyond the powers of the council. *In re Virgo and City of Toronto*, 22 S. C. R. 447.

Affirmed by the judicial committee of the privy council, who held, that a statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade, does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner; and this applied where, under R. S. O. 1887 c. 184, s. 495, a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, not question of apprehended nuisance having been raised. *City of Toronto* v. *Virgo*, [1896] A. C. 88.

Hawkers and Pedlars' Act—*Arrest—Pleading—Justification.*] — In an action of trespass for false imprisonment, a plea justifying the arrest, as a constable, without a warrant, under the Hawkers and Pedlars' Act, 58 Geo. III. c. 5, for peddling without license, must shew that the plaintiff was found trading at the time of the arrest, and that defendant took him before the nearest justice of the peace. *Oviatt* v. *Bell*, 1 U. C. R. 18.

License—*Servant of Licensee.*] — Quære, whether the license to a hawker and pedlar, granted under the Municipal Acts, is confined to the licensee only, or whether it extends to a servant employed by him. Semble, that it is personal only; but, the point being doubtful, a certiorari was granted to remove the conviction of the servant, in order that it might be moved against. *In re Ford* v. *McArthur*, 37 U. C. R. 542.

——— *Petty Chapman — Ultra Vires—Damages.*]—A municipal corporation, whose existence is derived solely from the statute creating it, is not liable for damages arising out of the enforcement of a by-law passed under misconstruction of its powers, unless such liability is expressly or impliedly imposed by statute. A city corporation acting in excess of its powers passed a by-law amending an existing by-law for licensing pedlars, prohibiting them from peddling on certain streets, and the officers of the corporation in carrying out the by-law declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and while attempting to peddle without a license, he was interfered with by the police, over whom the corporation had no control:—Held, that the corporation were not liable therefor. Nor does any liability arise where a licensee, who takes out a license under such a by-law, in the restricted form, is damnified by being prevented by the police from peddling on prohibited streets. *Pocock* v. *City of Toronto, Ferrier* v. *City of Toronto*, 27 O. R. 635.

Sale of Goods—*By-law—Trading Stamps—Conviction.*]—The defendant arranged with various retail merchants that each should receive from him trading stamps, the property in which, however, was to remain in him, and should pay him fifty cents per hundred stamps, and give one to each customer for every ten cents of cash purchases, while the defendant should advertise the merchants in certain directories and otherwise. A blank space was left in these directories for pasting in such stamps, and every customer who brought to the defendant one of the directories with a fixed number of stamps pasted in, was entitled to receive in exchange any article he might select out of an assortment of goods kept in stock by the defendant. Apart from this the goods were not for sale:—Held, that these transactions did not constitute a selling or offering for sale by the defendant within the meaning of a municipal by-law, passed under R. S. O. 1897 c. 223, s. 583, s.-ss. 30, 31. *Regina* v. *Langley*, 31 O. R. 295.

Sale of Goods on Commission by Consignee.]—Where goods are consigned to be sold on commission, and they are sold in the shop or premises of the consignee, and by him or on his behalf, the owner of the goods or his manager is not an occupant of such premises nor a transient trader within the Municipal Act (R. S. O. 1877 c. 174, s. 466, s.-s. 53, as amended by 42 Vict. c. 31, s. 22), merely because he accompanies the goods and assists in their sale. *Regina* v. *Cuthbert*, 45 U. C. R. 39.

Travelling Salesman—*Taking Orders—Agent—By-law.*]—The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, s. 495 (3):—Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he was "not carrying goods for sale." Held, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to

take orders from private persons for goods, and subsequently delivering the goods ordered. *Regina* v. *Coutts*, 5 O. R. 644.

——— *Taking Orders — Agent.*] — Held, that under 48 Vict. c. 40, s. 1 (O.), amending s.-s. 3 of s. 495 of the Consolidated Municipal Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, &c., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent. *Regina* v. *Marshall*, 12 O. R. 55.

The defendant, a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to the county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes consolidated in R. S. O. 1887 c. 184, s. 495, s.-s. 3 (a) and (b), for carrying on a petty trade without the necessary license therefor:—Held, that the conviction could not be sustained, and must be quashed. *Regina* v. *Henderson*, 18 O. R. 144.

——— *Taking Orders — Agent — License — Conviction — Evidence.*] — The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of s. 1 of 48 Vict. c 40 (O.) The defendant, against the protest of his counsel, was called as a witness and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W., but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, that defendant, being, under the evidence, an independent trader, and not an agent, did not come within the Municipal Act, 1883, s. 495, s.-s. 3, nor within 48 Vict. c. 40 (O.) 2. That the conviction was defective in not stating that P. W. was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina* v. *McNicol*, 11 O. R. 659.

——— *Taking Orders — "Jewellery" — Conviction.*] — The Consolidated Municipal Act, 1883, 46 Vict. c. 18, s. 495, s.-s. 3, empowered the council of any county to pass by-laws for licensing, &c., hawkers, &c., going from place to place, &c., with any goods, wares, or merchandise for sale; and by 48 Vict. c. 40, s. 1 (O.), the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods, or jewellery, or carry and expose samples of any such goods to be afterwards delivered, &c.:—Held, that electrotype ware was not jewellery within the above enactment, and a conviction for selling this without a license was therefore bad, and in this case was quashed, though the fine imposed had been paid. Held, also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina* v. *Chayter*, 11 O. R. 217.

——— *Taking Orders — Manufacturer of Goods — "Dry Goods."*]—Held, that under 48 Vict. c. 40, s. 1 (O.), amending s.-s. 3 of s. 495 of the Municipal Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders. Held, also, that the term "dry goods" in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing. *Regina* v. *Bassett*, 12 O. R. 51.

6. *Markets, Butchers, and Hucksters.*

(a) *Validity of Prohibitory By-laws.*

The corporation of the town of London has power, under their special Act, 3 Vict. c. 31, to make a by-law prohibiting the sale of butchers' meat within certain hours, except at the public market. *Peters* v. *President and Board of Police of London*, 2 U. C. R. 543.

A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city, except in the shops or stalls in the public markets, or at such places as the standing committee on public markets may appoint:"—Held, good, under C. S. U. C. c. 54, as being clearly within the powers given to the corporation. *Re Kelly and City of Toronto*, 23 U. C. R. 425.

The corporation of a town by by-law enacted that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon, as therein provided, except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market:—Held, bad, as beyond the power of the corporation. Also, that meat, fish, *poultry, eggs, cheese, grain,* hay, straw, cordwood, *shingles,* lumber, *flour, wool, meal, vegetables,* or *fruit,* except wild fruit, should not be exposed for sale within the municipality, except in the market, before twelve o'clock noon:—Held, bad, as to the articles printed in italics, power being given as to the others only, by C. S. U. C. c. 54, s. 294, s.-s. 10. Also, that before 10 a.m. during May, June, July, and August, and before 11 a.m. during the other months, no huckster, butcher, dealer, trader, runner, agent, or retailer, or any other person purchasing for export or to sell again, should buy, bargain for, engage or offer to buy, any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool:—Held, bad, except as to hucksters and runners, they only being included in s. s. 12. Also, that all persons exercising the trade of a butcher within the town should be licensed each year, as provided, the fee for each license to be 5s.:—Held, clearly bad, under ss. 217, 294, s.-s. 31. *In re Fennell and Town of Guelph*, 24 U. C. R. 238.

A by-law prohibiting any person bringing produce, articles, commodities, or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, and before offering such things for sale in the market:—Held, illegal, and quashed, as beyond the power of the corporation, under C. S. U. C. c. 54. *Re Kinghorn and City of Kingston*, 26 U. C. R. 130.

The corporation of a town by by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c., such as were usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant therefrom, between certain hours in the day:—Held, clearly unauthorized, for the power of the corporation (under 29 & 30 Vict. c. 51, s. 296, s.-s. 12, as amended by 31 Vict. c. 30, s. 32), extended only to butchers living in the town or within a mile of its limits. *Re McLean and Town of St. Catharines*, 27 U. C. R. 603.

A by-law purporting to be passed under 29 & 30 Vict. c. 51, s. 296, s.-ss. 11 and 12, and 31 Vict. c. 30, s. 32 (O.), prohibiting any huckster, butcher, or runner, from buying or contracting for any kind of fresh meat or provisions on the roads, streets, or any place within the town, on any day before the hour of 9 o'clock, a.m., between 1st April and November, or before 10 a.m., during the remainder of the year, was held bad, as not being confined to purchases, &c., in the way of their trade. *Re Wilson and Town of St. Catharines*, 21 C. P. 462.

A by-law of a town for the regulation of the market enacted: 1. That only butchers and persons occupying shops or stalls in the market, or in two specified wards of the town, for the sale of fresh meat, should sell, or expose for sale, in any less quantity than by the quarter; that such butchers and persons might so sell at these places, but not otherwise; and that no person should sell any fresh meat in the town except in the market stalls or such place as the council should appoint, not less than 400 yards from the market, and within certain specified limits in the two said wards:—Held, valid. 2. That no person should buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed in the town, until the seller had paid the market fees, or obtained a ticket from the collector of market tolls, as provided in a by-law referred to, and before a specified hour of the day; that no person should forestall, regrate, or monopolize any of the articles mentioned, within the town; and that before noon no butchers' meat, fish, hay, or straw, should be bought or sold in the town except at the market and in the shops or stalls in the two said wards:—Held, valid, under the Municipal Act, 1866, s. 296, s.-s. 9, and s.-s. 10, as amended by 33 Vict. c. 26, s. 6 (O.), and s.-s. 11. 3. That before 10 a.m., no huckster or runner within the municipality, or within one mile of its limits, should purchase any meats, fish, or fruit brought to the public market:—Held, bad, as not confined to those living within the municipality or a mile therefrom; and quære, whether it should not exclude persons buying for their own use, not to resell. 4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but no spring balance, spring scale, spring steelyards, or spring weighing machine, should be used for any market purpose:—Held, valid, under s.-s. 10, above mentioned, and C. S. U. C. c. 58. Held, also, that market regulations made by the council might be quashed as orders or resolutions, under s. 198. By these regulations it was provided that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in either of the two wards above mentioned, should apply to the market committee, stating the annual sum above $40 which he was willing to pay for a certificate authorizing him to sell for a year:—Held, bad, both by the general law, and as opposed to s. 220 of the Act of 1866. It was also provided that persons obtaining certificates should give a bond with sureties to obey the by-laws relative to the sale of fresh meat at stalls and shops where it was sold:—Held, good, for it applied of course only to valid by-laws. *Re Snell and Town of Belleville*, 30 U. C. R. 81.

By the Municipal Act (R. S. O. 1877 c. 174, s. 466, s.-s. 6) city councils may pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto:"—Held, that this enactment was not ultra vires of the provincial legislature, as being a regulation of trade and commerce, but that it was authorized as a provision of municipal government. Under the above clause a city council by by-law provided that no vendor of small ware should practise his calling in a certain market specified, or in the public streets adjacent thereto:—Held, not defective for not specifying more particularly the "small ware" intended, that being the term used in the statute; but that it was bad for uncertainty in not specifying the streets intended. "Adjacent thereto," as used in the Act, means adjacent to the public streets. *Re Harris and City of Hamilton*, 44 U. C. R. 641.

The municipal council of the city of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon, &c., otherwise than in or from a waggon of a certain capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law:—Held, that the by-law was ultra vires, for, though the council had the right under the Municipal Act, R. S. O. 1877 c. 174, s. 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon. *Regina* v. *Smith*, 4 O. R. 401.

A by-law of the city of Ottawa set apart certain sections of the city, six in number, as markets or market-places. Four of these sections were called meat, produce, and fish markets, though in the enumeration of the articles for the sale of which the markets were established fish was not named. Section 5 of art. iv. declared that all produce, provisions, or articles of any kind brought to any of the meat, fish, and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles, which should be placed upon said markets, under the direction of the market inspector. Any person refusing to comply therewith, or to remove such articles, vehicles, or boxes

after selling their contents, should be subject to the penalty imposed by the by-law, and liable to expulsion from the market. Section 1 of art. ix. declared that no person should sell any fresh fish elsewhere than in such places as should be allotted and designated by the standing committee on markets, in any of the aforesaid markets. Section 1 of article x. declared that the vendors of any articles in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully, without paying market fees, offer for sale any such articles at any place within the city except at the market-places thereof. The by-law was a consolidation of previously existing by-laws passed from time to time. It appeared that, many years before, certain stalls in each market were set apart as fish markets; that no application was ever made for standing room for carts or other vehicles from which to sell fish; and no provision made by the council for so bringing fresh fish to the market:—Held, that s. 5 of art. iv., though wide enough to cover fresh fish, would appear not to have been framed with reference to it; and that, reading s. 1 of art. ix. and s. 1 of art. x. together, they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the markets, but outside of the markets no restriction should be placed on selling. *Re Borthwick and City of Ottawa*, 9 O. R. 114.

Held, that a by-law passed pursuant to s.-s. 6 of s. 503 of the Municipal Act, 1883, for granting licenses and regulating the sale of fresh meat in quantities less than by the quarter carcase, and the convictions thereunder were not bad because the by-law did not embody or refer to the exceptional proviso as to time mentioned in s. 500; for s. 500 did not refer to the subject of s.-s. 6 of s. 503; and that, apart from that, s. 500 was expressly limited to municipalities wherein no market fees were imposed or charged, whereas here a by-law was in existence imposing such fees and charges. Held, also, that the by-law was not ultra vires, express power being given by s. 503 to pass a by-law respecting the matters mentioned in s.-s. 6; and that, as the reasonable or unreasonable exercise of the power could only be considered on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction. Held, however, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty. *Regina* v. *Gravelle*, 10 O. R. 735.

Sub-section 2 of s. 8 of 45 Vict. c. 24 (O.) subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market-place for the purpose of selling such articles," whereas s. 12 of the by-law in question was, "any person or persons who shall voluntarily come upon the said market-place, &c., for the purpose of selling," &c.:—Held, that "vendors who shall voluntarily use the market-place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market-place for the purpose of selling;" nor was the expression "use the market-place for the purpose of selling" the same as "come upon the market-place for the purpose of selling;" and that the conviction was bad on this ground. Held, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas s. 13 of the by-law applied only to cases of butchers' meat exposed for sale. *Regina* v. *Reed*, 11 O. R. 242.

Section 503, s.-s. 5, of the Municipal Act of 1883 empowers the council of a municipality to regulate the place and manner of selling meat, subject to the restrictions in the five next preceding sections. Section 497 authorizes the sale after certain hours at places other than the market of any commodity which has been offered for sale in the market:—Held, affirming the judgment in 15 A. R. 75, which affirmed the judgment in 11 O. R. 663, that by-law 629 of the city of Ottawa requiring everybody offering fresh meat for sale in the city to take out a license, and providing that no meat should be sold in any place except in the stalls of the different city markets, was a valid by-law and within the power of the city council to pass. 50 Vict. c. 29, s. 29 (O.), passed since this decision, has now settled the law on this subject. *O'Meara* v. *City of Ottawa*, 14 S. C. R. 742.

Neither under s. 580, nor under s. 583 (2), of the Municipal Act, R. S. O. 1897 c. 223, can the municipal council of a city prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment in 30 O. R. 7 affirmed. *Bollander* v. *City of Ottawa*, 27 A. R. 335.

(b) *Other Cases.*

Market Fees—*Lease of—Obstruction of Market-place—By-law.*]—Defendants leased to plaintiff the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. Twenty years previously they had passed a by-law giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to M., who obstructed a portion of the same with building materials. The plaintiff thereupon sued defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market:—Held, that such action was not maintainable: that the by-law was one which the defendants had authority with a view to public improvement and convenience to pass, and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without the license of the defendants, have occupied a reasonable portion of the highway, the by-law apparently merely restricting without expressly conferring the right of occupation: that the market being fixed on the public highway, which is prima facie for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway: that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he alleged was secured to him. *Reynolds* v. *City of Toronto*, 15 C. P. 276.

Public Market—*Nuisance — Licensing Traders and Hucksters—Obstructing Streets and Sidewalks—Loss of Rent—Damages.*]—See *Davidson* v. *City of Montreal*, 28 S. C. R. 421.

Tax on Wood.]—C. S. U. C. c. 54 does not authorize the imposition of a tax per cord upon wood brought into town and not placed in the public wood market for sale. *Farquhar* v. *City of Toronto*, 10 C. P. 379.

See Houck v. *Town of Whitby*, 14 Gr. 671.

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7. *Other Cases.*

Chimney Sweeps—*Restriction—By-law.*]—A city by-law passed on the 26th October, 1868, providing that no persons other than the chimney inspectors appointed by the municipal council (of whom there were to be three) should sweep or cause to be swept, for hire or gain, any chimney or flue in the city:—Held, beyond the power of the corporation, under the authority given to them to enforce the proper cleaning of chimneys; and a conviction under it was quashed. It is not the practice to give costs on quashing a conviction. *Regina* v. *Johnston*, 38 U. C. R. 549.

Second-hand Shops and Junk Stores—*By-law Prohibiting Dealing with Minors.*]—R. S. O. 1887 c. 184, s. 436 (R. S. O. 1897 c. 223, s. 484), which provides that "the board of commissioners of police shall in cities license and regulate second-hand shops and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store and junk store shall receive, purchase, or exchange any goods, articles, or things from any person who appears to be under the age of eighteen years." Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it, without reasonable justification. *Regina* v. *Levy*, 30 O. R. 403.

Shops.]—See INTOXICATING LIQUORS.

——— *Closing of—By-Law—Discrimination.*]—A by-law passed by the town of A, under s. 2, s.-s. 2, of the Ontario Shops Regulation Act, 51 Vict. c. 33, provided (s. 1) that all shops, &c., where goods were exposed or offered for sale by retail in the town, should be closed at 7 p. m. on each day of the week, excepting Saturday, from the 15th January to the 15th September, &c. Section 3 provided that it should not be deemed an infraction of the by-law for any shopkeeper or dealer to supply any article after 7 p. m., to mariners, owners or others of steamboats or vessels calling or staying at the port of A.:—Held, that the by-law was bad, for s. 3 was illegal in discriminating between different classes of buyers and different classes of tradesmen, and was in contravention of s.-s. 9 of s. 2 of the Act. A conviction of the defendant under the by-law was therefore quashed. *Regina* v. *Flory*, 17 O. R. 715.

Victualling Houses — *Forfeiture of License.*]—The power given to municipal corporations under s. 285 of R. S. O. 1887 c. 184 "to determine the time during which victualling licenses shall be in force," does not confer any power to forfeit such licenses, but merely to fix the duration of the license. The power to create a forfeiture of property is one which must be expressly given to a corporation by the legislature, and such an extraordinary power is least of all to be inferred where the legislature has provided other means of enforcing by-laws by means of fine and amerciament, as in this case. *Bannan* v. *City of Toronto*, 22 O. R. 274.

XXX. WATERWORKS.

Arbitration and Award—*Value—Notice to Mortgagees—Interest.*]—The omission to serve notice on the mortgagees of a waterworks company, of arbitration proceedings under R. S. O. 1887 c. 164, to determine the amount to be paid by a municipality for such works and property, the mortgagees not being parties thereto, and in which the award made was less than the amount of their claim, does not entitle the company to have such award referred back, and the mortgagees made parties, as their rights could not be affected thereby. In such an arbitration the arbitrators are simply to value the existing property of the company at the sum it would cost to erect the works and purchase the property, allowing for wear and tear and perhaps for outlay of a necessary experimental character, but they are not to make any allowance for future profits or for the taking away from the company the right to supply water at a profit. Interest is allowable on outlay during the construction of the works, but not on the cost of construction after completion, and while the annual revenue of the company is less than the annual expenditure. *In re Town of Cornwall and Cornwall Waterworks Co.*, 29 O. R. 350.

——— *Amount to be Paid for Property—By-law — Possession — Mortgagees.*]—Upon the making of an award fixing the amount to be paid for waterworks in an arbitration under R. S. O. 1897 c. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the amount of the award, the corporation are entitled, under s. 62, to the possession of the property; and, therefore, no action will lie against them to recover the possession so acquired, nor against their agent duly appointed to take possession. The six months provided for by s. 64, within which the amount must be paid or the company be entitled to resume possession, must have elapsed before action brought to recover possession by the company. It is not sufficient that that period should have elapsed at the time the action is tried. Mortgagees of a waterworks company, who are not parties to the arbitration, and who have taken no part in the taking of possession, are not necessary parties to an action by the waterworks company to recover possession. *Cornwall Waterworks Co.* v. *Town of Cornwall*, 29 O. R. 605.

——— *Payment into Court—Interest.*]—Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into court the amount awarded, with interest to the date of payment in, and six months' interest in advance. Judgment in 30 O. R. 81 affirmed. *In re Town of Cornwall and Cornwall Waterworks Co.*, 27 A. R. 48.

Board of Commissioners — *Contract—Breach—Statutory Restrictions—Evasion of Statute.*]—The waterworks system of the city of Windsor is, by 37 Vict. c. 79 (O.), placed under the management of a board of commissioners, who are authorized to collect the revenue, paying to the city any surplus over expenditure for maintenance, and to initiate works for the improvement of the system, the necessary funds in that event to be supplied by the city. The total expenditure is limited to $300,000, to be provided from time to time by by-law of the council, and not more than $20,000 to be expended in any one year without the assent of the ratepayers. A majority of the commissioners wished to make certain improvements, but, on finding that the cost would be over $40,000, decided to carry out at the time only one-half the proposed scheme, and they entered into a contract with the plaintiffs to do work of the value of $20,000. No by-law had been passed by the council, and at the time more than $280,000 had been expended by the city for waterworks purposes, and the plaintiffs knew these facts. After a small portion of the work had been done, a ratepayer threatened litigation, and the commissioners instructed their engineer not to issue a progress certificate, and the plaintiffs brought this action to recover the value of the work done:—Held, that the commissioners had in good faith divided the work; that there was, therefore, no illegal evasion of the statutory restrictions, and that the contract was not invalid on this ground. But held, also, that the commissioners were merely statutory agents of the city, and that, as there was no by-law of the council, and the statutory limit of expenditure was to be exceeded, the contract was not binding. *McDougall* v. *Windsor Water Commissioners*, 27 A. R. 566.

By-law — *Rates — Discount — Public Buildings.*]—By 35 Vict. c. 79 (O.), as amended by 31 Vict c. 41 (O.), the corporation of a city was empowered in regard to the city waterworks, to fix the price, rate, or rent which any owner or occupant of any house, lot, &c., in, through, or past which the water pipes should run, should pay as water-rate or rent, whether the owner or occupant should use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant, or conferred upon him or his property by the waterworks. The corporation was also empowered to fix the rate to be paid for the use of the water by public buildings. Pursuant to these powers, a by-law of the corporation was passed providing that the half-yearly rates "paid within the first two months of the half-year for which they are due, shall be subject to a reduction of fifty per cent., save and except in the case of government or other institutions which are exempt from city taxes, in which case the said provisions as to discount shall not apply:"—Held, that the post-office, customs-house, and other buildings vested in the Crown, all of which were exempt from city taxes, were "government institutions," within the meaning of the by-law. 2. Having regard to 35 Vict. c. 79, s. 12 (O.), 41 Vict. c. 41, s. 3 (O.), R. S. O. 1887 c. 192, ss. 19 and 28, that the moneys charged and paid as water-rates or rent for water were not taxes, but the price or prices paid for water upon a sale thereof to the consumers. 3. That the by-law was not invalid as discriminating against the Crown. Held, by the court of appeal, affirming the judgment, that "government institutions" in the by-law meant government buildings in which some public business is carried on, and which were "public buildings" within the meaning of the Act. Held, also, that the "price, rate, or rent" paid for the water was not a tax, but merely the price paid for the water supplied to the consumer, and that the corporation were not obliged to allow, for water supplied to public buildings, the discount allowed to taxpayers. Held, by the supreme court of Canada, reversing the judgments below, that under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, &c., supplied by the corporation with water, the rates imposed must be uniform; and the by-law in question was invalid as regards such exception. *Attorney-General for Canada* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514.

Contract — *Rescission—Notice—Misc en Demeure—Long User—Waiver.*]—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation, and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the works complained of for about nine years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works, under conditions in the contract:—Held, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract. Held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action, and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Town of Richmond* v. *Lafontaine*, 30 S. C. R. 155.

Extension of Works—*Repairs—By-law—Resolution — Agreement in Writing — Injunction.*]—See *Ville de Chicoutimi* v. *Légaré*, 27 S. C. R. 329.

Purchase of Land for Waterworks Purposes.] — See *McLean* v. *City of St. Thomas*, 23 O. R. 114.

Rate Imposed on Land — *Non-user of Water — Taxation — Exemption.*] — The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a waterworks system of their own and did not use that of the plaintiffs, though they could have done so had they wished. The commissioners imposed a water rate "for water supplied or ready to be supplied" upon all lands in the city, based upon their assessed value, irrespective of the user or non-user of water:—Held, that this rate was, under 37 Vict. c. 79, ss. 11, 12, validly imposed. The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from tax-

ation for ten years from the 1st January, 1883. In 1888 the limits of the (then) town of Windsor were, under the provisions of R. S. O. 1887 c. 184, s. 22, extended so as to embrace the lands in question. Held, that, assuming that the water rate was a species of taxation, the effect of R. S. O. c. 184, s. 54, was to put an end to the exemption. Municipality of Cornwallis v. Canadian Pacific R. W. Co., 19 S. C. R. 702, distinguished. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

Supply — *Contract — Breach—Purity—Injury to Hydraulic Elevator.*]—The plaintiffs complained that an hydraulic elevator in a building owned by them had been damaged by sand and water supplied from the city works, and claimed damages:—Held, that the city being bound by law to supply water from their system of waterworks to any inhabitant of the city who applies therefor, and complies with the statutory conditions, no contractual relationship arose between the city and the plaintiffs by reason of the application for water and the city's compliance therewith, and that the city were not liable, as upon a breach of contract to supply pure water, for injuries caused to the elevator. Judgment in 29 O. R. 459 affirmed. *Scottish Ontario and Manitoba Land Co.* v. *City of Toronto*, 26 A. R. 345.

XXXI. Miscellaneous Cases.

Administration of Justice — *Detection of Crime—Certified Account.*]—The gist of s. 12 of R. S. O. 1897 c. 101, is to empower a warden and county attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county, and so to render the county liable for the payment for such special services, and that whether the account is certified by the warden and county attorney, as required by the said section, or not. *Sills* v. *County of Lennox and Addington*, 31 O. R. 512.

Aid to Farmers—*By-law—Statute—Retroactivity.*] — Held, that a by-law of the county of Perth, passed before 22 Vict. c. 7, authorizing county councils to raise moneys to assist persons to sow their land, &c., was not ratified thereby. Said statute is not retroactive, except in the case of the by-law of the county of Bruce, thereby specially provided for. *Campbell* v. *Corporation of Elma*, 13 C. P. 296.

Alienation of Property—*Necessity for By-law.*] — To give legal authority for the alienation of the property of a municipal corporation, it is necessary that a by-law of the corporation should be passed, even though the title thereto has been obtained originally in an informal manner. *Grand Junction R. W. Co.* v. *County of Hastings*, 25 Gr. 40.

Appropriation for Expenditure—*Illegality — Annulment — Rights of Elector — Time.*]—It was enacted by s. 12 of 42 & 43 Vict. c. 53 (Q.), that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—Held, that on the expiration of the three months, upon a non-juridical day, the elector's statutory right was at an end, and could not be extended by any procedure clause (see s. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise. *Dechêne* v. *City of Montreal*, [1894] A. C. 640.

Appropriation of Revenue—*Dog Tax —Local Improvements.*]—A municipal council, under 12 Vict. c. 81, s. 31, could not appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township, to the improvement of the public streets and to other purposes within the limits of such part. *In re Richmond* v. *Township of Front of Leeds and Lansdowne*, 8 U. C. R. 567.

Commission of Inquiry into Finances —*Bar to Arbitration.*]—The authority of the executive government to appoint a commission to inquire into the financial affairs of a municipal corporation, does not prevent such corporation from suing for money due to them, or referring the claim. *In re Township of Eldon and Ferguson*, 6 L. J. 207.

——— *Petition for—Status of Petitioners.*] —Section 243 of the Municipal Institutions Act of 1866, as amended by 34 Vict. c. 30, s. 15 (O.), authorizes the governor in council to issue a commission to inquire into the financial affairs of the corporation, in case thirty duly qualified electors of the municipality petition therefor; and s. 244 enacts that the expense of the commission shall be determined and certified by the minister of finance, and shall then become a debt due to the commissioner by the corporation. In an action by the commissioner for such expenses:—Held, (1) that evidence was properly admitted to shew that the petitioners, who were described only as ratepayers, were electors as well; and (2) that defendants could not in this action dispute the validity of the commission, by shewing that one of the thirty, though on the electors' roll, was not in fact a duly qualified elector. Quære, whether, if there had been no petition, the plaintiff could have recovered. Quære, also, as to how far the roll is conclusive, beyond the right to vote, except for the purpose of an election. *Bristow* v. *Town of Cornwall*, 36 U. C. R. 225.

See Township of East Nissouri v. *Horseman*, 16 U. C. R. 556.

Compensation for Sheep — *Town Corporations.*]—Held, that 32 Vict. c. 31 (O.), which requires municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they have thereby sustained, is not confined to county municipalities and to municipalities within their jurisdiction, but applies also to towns which have withdrawn from the jurisdiction of the county. *Williams* v. *Town of Port Hope*, 27 C. P. 548.

Delegation of Powers.]—See *In re Mackenzie and City of Brantford*, 4 O. R. 382; *Regina* v. *Webster*, 16 O. R. 187.

A municipal corporation cannot delegate to a board of health power to cancel a license which it may have under 62 Vict., 2nd sess., c. 26, s. 37 (2) (O.) *Re Foster and City of Hamilton*, 31 O. R. 292.

District Council—*Assessment Rolls.*]—As to the power of district councils, under 4 & 5 Vict. c. 10, with regard to the preparation of assessment rolls and statute labour lists, See *Baby* v. *Baby*, 5 U. C. R. 510

Division of Township — *Wards — By-law.*]—Upon an application to quash a by-law dividing a township into rural wards, where neither the township sought to be divided, nor the union of townships of which it formed one, were before the by-law divided into wards, and the by-law was not passed within the first nine months of the year in which the junior township had 100 resident freeholders and householders on its collector's roll:—Held, that the by-law was invalid. *Loucks* v. *Municipality of Russell*, 7 C. P. 388.

Divisions of County—*Judicial Notice—Statute.*] — A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent that the municipality of the county of Pictou—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. ., s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council:—Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division. *Ex parte Macdonald*, 27 S. C. R. 683.

Expenditure of Public Money—*Costs of Action—Injunction.*]—A ratepayer having brought an action against a gas company on behalf of himself and all other consumers of gas for an account of moneys alleged to have been improperly obtained in the past from gas consumers and with the intent of reducing the price of gas to them, the defendants' executive committee reported in favour of authorizing the city council to grant money to carry on the action:—Held, that the plaintiff was entitled to an injunction to restrain any such payment by the defendants, the same being without consideration and not in pursuance of any prior agreement or understanding. *Jarvis* v. *Fleming*, 27 O. R. 309.

Fences.]—See *Crowe* v. *Steeper*, 46 U. C. R. 87.

Ferry.]—See *Anderson* v. *Jellet*, 9 S. C. R. 1; *City of St. John* v. *Macdonald*, 14 S. C. R. 1; *Longueuil Navigation Co.* v. *City of Montreal*, 15 S. C. R. 566.

——— *Inter-municipal River — License—By-law.*]—See *Dinner* v. *Humberstone*, 26 S. C. R. 252.

Harbour—*Statutory Powers—Building—Access to Water — Riparian Rights.*]—The Cobourg harbour company was authorized by statute to construct a harbour, and to erect all moles, piers, wharves, buildings, and erections useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering the harbour; and this right was by subsequent legislation vested in the town council of Cobourg:—Held, that this did not authorize the company or the town council to build a storehouse and fence on land formed by crib-work constructed by the company and by gradual accretions from the lake in front of the plaintiff's land, which went "to the water's edge," in such a manner as to prevent the plaintiff having free access to the waters of the lake. *Standly* v. *Perry*, 23 Gr. 507.

Interest—*Rate of.*]—Municipal corporations are not restricted, any more than individuals, as to the rate of interest to be received upon money lent by them; they may take any rate of interest agreed upon. *Corporation of North Gwillimbury* v. *Moore*, 15 C. P. 445.

Investigation of Municipal Matters before County Judge—*Scope of Inquiry—Prohibition—Persona Designata.*]—The corporation of a city passed a resolution whereby (after reciting that one of their officers had been guilty of misconduct in relation to his duties as inspector of materials furnished and work done by contractors in certain specified respects, and amongst others in permitting a certain contractor to furnish inferior material to the corporation, and in receiving from such contractor bribes, and wrongfully conveying to him information to facilitate him in securing contracts) they referred it to the county court Judge "to investigate and inquire into the several matters and things therein referred to, and every matter and thing connected therewith, and with the relations which may have existed, or do exist, between the said W. L. (the officer in question) and any contractor having, or having had, contracts with the city of T., in order that the truth or falsity of the alleged charges of malfeasance, breach of trust, gross negligence, and other misconduct made against the said W. L. may be ascertained:"—Held, that under R. S. O. 1887 c. 184, s. 477, the corporation had power to pass the resolution, specifically referring, as it did, to the officer, and the county court Judge had power to make the necessary inquiries, and for that purpose to summon witnesses, &c., and in doing so, to proceed with inquiries against other individuals, besides the contractor, so far and so far only as it might be necessary to the inquiry against such officer; but the Judge was not authorized to branch off into matters between the contractor and the corporation, in which such officer was in no manner concerned; and on the authority of Re Squier, 46 U. C. R. 474, the contractor was entitled to a writ of prohibition to prevent such investigation as to any future proceedings therein, but as to past proceedings having appeared and taken part, he could not now complain. The corporation, under the authority of the same Act, also referred it to the Judge by three resolutions to inquire generally into the relations between the corporation, its officials and contractors, tending to undue influence in favour of contractors, and as to whether contractors or other persons wrongfully obtained money from the corporation by fraudulent means, and as to the whole system of tendering, awarding, fulfilling, and inspecting contracts:—Held, that these resolutions were altogether of too general a character to authorize the Judge to proceed with any inquiry in reference to the said contractor in regard to the subjects referred to, and that he was in like manner entitled to a writ of prohibition to prevent such inquiry. The statute does not mean, or contemplate, that the corporation shall authorize in such general and undefined terms an investigation and inquiry into corporation affairs which im-

plicate individuals generally without naming the person or persons implicated, and without much greater particularity in specifying the nature of the misconduct to be investigated. Held, that, in holding an investigation under the statute, the Judge was acting in a judicial capacity and not as a mere investigator or commissioner. Semble, that if the county court Judge in the course of such investigations proceeded to the United States to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury. *Re Godson and City of Toronto*, 16 O. R. 275.

On appeal to the court of appeal:—Held, that where the county court Judge is making an investigation pursuant to the resolution of a council under R. S. O 1887 c. 184, s. 477, he is acting as persona designata, and not in a judicial capacity, and is not subject to control by a writ of prohibition. That writ is not to be applied to any proceeding of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual. Re Squier, 46 U. C. R. 474, considered. *S. C.*, 16 A. R. 452.

Jurors' Expenses as between County and City—*Proportions Payable by City and County—Assessed Value of City Property—Mode of Enforcing Payment.*]—See *County of Middlesex* v. *City of London*, 22 U. C. R. 196.

18 Vict. c. 130 enacted that any county of which a city formed a part for judicial purposes, should be entitled to demand and receive from the city a portion of the expenses incurred by the county for the payment of jurors in any year, to be determined in the manner provided, and that such portion should be payable to the county immediately after the close of each year:—Held, on demurrer to the declaration, that an action would lie by the county against the city for its portion of such expenses; and, this being so, that the plaintiffs were entitled to recover a judgment, although as to some of the years the defendants might be unable to enforce payment, because a retrospective rate would be required, which might be a conclusive objection to an application for a mandamus to levy. *County of Frontenac* v. *City of Kingston*, 30 U. C. R. 584; *S. C.*, 20 C. P. 49.

Plaintiffs sued defendants under 18 Vict. c. 130, and C. S. U. C. c. 31, ss. 155, 157, for the proportion of jury expenses payable by defendants, from 1855 to 1869, inclusive. As to 1859, an account of the sum due was made up by the plaintiffs. There was no proof that it had been demanded, but defendants had levied the sum claimed for that year in 1860:—Held, recoverable. As to 1867 and 1868, defendants in 1868 levied the sum due for 1867, but applied it to other purposes. In 1869 they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest, which the plaintiffs demanded:—Held, that such interest was recoverable. *S. C.*, 32 U. C. R. 348.

Mortmain.]—Municipal corporations are within the Statutes of Mortmain. *Brown* v. *McNab*, 20 Gr. 179.

Municipal Year.]—The municipal year, under 12 Vict. c. 81, begins on the 1st January, and ends on the 31st December, and is not to be reckoned from the day appointed for the municipal elections of one year to the same day of the next year. *Mellish* v. *Town of Brantford*, 2 C. P. 35.

Promissory Note—*Debt.*]—A promissory note, made payable to the treasurer of and indorsed by him to a municipal corporation, to secure a balance due to the corporation on a past transaction, is not void under the Municipal Acts. *Corporation of Belleville* v. *Fahey*, 5 C. L. J. 73.

Public Health—*By-law — Validity — Board of Health—Delegation of Powers.*]—The members of the council of any municipality are health officers of the municipality by virtue of the Public Health Act, R. S. O. 1877 c. 190, and as such they may enforce the provisions of ss. 3 to 7 of that Act without by-law; but if they delegate their powers to a committee, they must do so by a municipal by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act. A by-law was passed by the municipal council of the city of Brantford regulating the cleaning of privy vaults, and imposing a fine of not less than $1 nor more than $50 for a breach of its provisions:—Held, valid, as the by-law was one under the Municipal Act, and not under the Public Health Act, which restricts the penalty to $20. The by-law, as set out in the report, was objectionable, as delegating to persons not members of the council, the board of health, the powers which, as municipal matters, belonged exclusively to the council. *In re Mackenzie and City of Brantford*, 4 O. R. 382.

——— *By-law—Validity—Board of Health—Appointment of.*]—Where B. brought action against the township of S. to recover remuneration for medical services performed on the instructions of the corporation and of the board of health, and it was objected that the by-law professing to appoint the board of health was invalid by reason of the fact that it merely purported to appoint three persons to be a board of health, but did not make any mention of the officers who, by 47 Vict. c. 38, s. 12, s.-s. 2, are made ex officio members of the board of health, and because it did not specifically state the three individuals named to be ratepayers:—Held, that, looking at the provisions of the statute, and considering that the attack now made upon the by-law was not by motion to quash it or of a like character, the objections could not be allowed to prevail. *Bogart* v. *Township of Seymour*, 10 O. R. 322.

——— *Smallpox Hospital—Erection of—Foreign Municipality.*]—Held, that under 45 Vict. c. 29, s. 12 (O.), the corporation of one municipality cannot erect or establish a smallpox hospital within the limits of another, either of a temporary or permanent character, without the sanction of the corporation of the latter, and an injunction was granted to restrain the same. *Township of Elizabethtown* v. *Town of Brockville*, 10 O. R. 372.

Public Morals—*Offence—By-law.*]—The conviction was under a by-law, for writing and posting up an indecent placard, and the placard was a criminal libel. Quære, whether the municipality could thus make a new of-

fence, and award a new or additional punishment for what was already a criminal offence. *McLellan* v. *McKinnon*, 1 O. R. 219.

Purchase of Land — *Site for Dominion Building — Injunction—Estoppel—Parties.*]—On a motion for injunction by W., a ratepayer, against a town corporation to restrain them from paying money to one McA. for a site for a post office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and that, although McA. and the members of the council might not, if joined, have been considered improper parties, still they were not necessary parties; and the injunction was granted, the proposed purchase being ultra vires. *Wallace* v. *Town of Orangeville*, 5 O. R. 37.

——— *Site for Dominion Building — By-law—Ultra Vires.*]—A municipal corporation has no power to pass a by-law for the purchase of land to be presented to the Dominion Government as a site for a postoffice and custom house. "For the use of the corporation" in R. S. O. 1887 c. 184, s. 479 (1), does not mean merely "for the benefit of." *Jones* v. *Town of Port Arthur*, 16 O. R. 474.

Railway Crossings — *Maintenance of — ex — Contribution to Cost of — Railway Committee of Privy Council.*]—See *Re Canadian Pacific R. W. Co. and County and Township of York*, 27 O. R. 559, 25 A. R. 65.

Relief of Injured Person—*Duty of Municipality—Mandamus.*]—See *In re McDougall and Township of Lobo*, 21 U. C. R. 80.

Reward—*Apprehension of Horse Thief—36 Vict. c. 48, s. 396 (O.).*]—See *In re Robinson*, 7 P. R. 239.

——— *Apprehension of Felon.*]—Township municipalities have no power to expend any portion of their funds in payment of rewards for the apprehension of felons. Where, therefore, a township corporation offered and promised to pay a reward of $500 for the arrest and conviction of the persons guilty of a murder, it was held that such promise was not binding upon them. *Cornwall* v. *Township of West Nissouri*, 25 C. P. 9.

Road Allowance — *Boundaries.*] — A municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, that being then a matter in dispute. *Regina ex rel. McMullen* v. *Corporation of Caradoc*, 22 C. P. 356.

Trustees of Municipality — *Action against — Individual Defendants—Statutory Designation.*]—Held, that the commissioners for the town of Peterborough, appointed by 24 Vict. c. 61, are not a corporation, and cannot be sued as such. Upon this objection to the declaration, the action was held not sustainable, the court being of opinion that they should be sued by name, adding their statutory designation. *Re Commissioners of Peterborough Town Trust and Cochrane*, 13 C. P. 111.

——— *Compensation for Services.*]—Trustees of a municipality are entitled, under the general provisions of the Act of 1874, 37 Vict. c. 9 (O.), to a commission on moneys passing through their hands as compensation for their care and trouble in the management of the trust. The commissioners of the Cobourg town trust were, therefore, held so entitled. *In re Commissioners of Cobourg Town Trust*, 22 Gr. 377.

See NOTICE OF ACTION, I.—PARTIES, II. 11—STREET RAILWAYS, II.—WAY, III., IV., VII.

MUNICIPAL ELECTIONS.

See MANDAMUS, II. 4 (c)—MUNICIPAL CORPORATIONS, XIX.

MUNICIPAL INSTITUTIONS.

See CONSTITUTIONAL LAW, II. 19—MUNICIPAL CORPORATIONS.

MUNICIPAL LOAN FUND.

See MUNICIPAL CORPORATIONS, XX.

MUNICIPAL MATTERS.

See ESTOPPEL, III. 4.

MURDER.

See CRIMINAL LAW, IX. 36.

MUTINY ACT.

See CONSTITUTIONAL LAW, I.

MUTUAL FIRE INSURANCE.

See INSURANCE, III. 11.

END OF VOLUME II.

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